

THE MARKETPLACE OF IDEAS AT THE ANOCRATIC FORK: A PLEA FOR POSITIVE FREEDOM OF SPEECH

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INTRODUCTION

Freedom of expression under the First Amendment is perhaps the most vital freedom to democratic functionality guaranteed by our Constitution. It allows for individual self-expression, peaceful conflict resolution, advocacy for cherished causes, discussion of important topics, and the political criticism that democracy requires.¹ This Article focuses on the final two activities—often the foremost arguments for any defense of free speech—and their crucial role in democracy.

The first is the *argument from truth*, advanced most famously by English philosophers John Milton and John Stuart Mill. As its name suggests, the argument from truth defends free speech for its value in discovering truth; being free to discuss, debate, inquire, criticize, and exchange ideas is indispensable to the search for truth that guides our opinions, beliefs, and actions both as individuals and a voting public.² In the mid-17th century, Milton pointed to the English Crown's publication restrictions as stifling the public's ability to seek out truth, conveying a broader principle that an absence of government intervention was crucial to doing so.³ Over two centuries later, John Stuart Mill reinforced this principle by linking the search for truth to his broader arguments for free thought and discussion. Mill reasoned that free discussion supported the search for truth by allowing for the adversarial confrontation of ideas—or *counterspeech*—with a trinary outcome: (1) your understanding is *incorrect*, so counterspeech is needed for others to correct you; (2) your understanding is *partially incorrect*, so counterspeech is needed to improve your understanding; or (3) your understanding is *correct*, so counterspeech is needed for you to realize the strength of your understanding.⁴ In this sense, even factually inaccurate information plays a valuable role.⁵

1. NADINE STROSSEN, *FREE SPEECH: WHAT EVERYONE NEEDS TO KNOW* 14 (2024) [hereinafter STROSSEN, *FREE SPEECH*].

2. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 15–16 (1982) [hereinafter SCHAUER, *FREE SPEECH*].

3. See JOHN MILTON, *AREOPAGITICA* 68–69 (1649) (“Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties. . . . And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?”); SCHAUER, *FREE SPEECH*, *supra* note 2, at 15, 74.

4. JOHN STUART MILL, *ON LIBERTY* 95 (Lawbook Exchange 2011) (1859) (Mill's trinary outcome); SCHAUER, *FREE SPEECH*, *supra* note 2, at 15–16, 24, 27–28, 74.

5. SCHAUER, *FREE SPEECH*, *supra* note 2, at 74; see *N.Y. Times v. Sullivan*, 376 U.S. 254, 279 n.19 (1964).

Mill's approach to the search for truth is the basis of the United States Supreme Court's *marketplace of ideas* principle that has guided much of its First Amendment jurisprudence for over a century.⁶ As Justice Oliver Wendell Holmes Jr. introduced in his 1919 *Abrams v. United States* dissent, the marketplace of ideas metaphor uses Mill's adversarial conception of the search for truth to analogize the free exchange of ideas to a commercial marketplace.⁷ Holmes channeled the prevailing laissez-faire economic thought of the time, arguing that just as the competition of an unregulated commercial marketplace would yield the best products, an unregulated marketplace of ideas would yield the best ideas.⁸ Holmes's legendary *Abrams* dissent added the marketplace of ideas to the Supreme Court's lexicon and solidified governmental noninterference with the American conception of free speech.⁹ This Article will revisit the marketplace of ideas in Part II.

The second is the *argument from democracy*, most famously advanced by American philosopher Alexander Meiklejohn.¹⁰ The argument from democracy is rooted in the notion that the voting public in a democratic state is the sovereign and, as such, must be able to self-govern.¹¹ Accordingly, the argument from democracy stresses the need for freedom of speech for two reasons. First, free speech is indispensable to public deliberation because a sovereign electorate must engage in the Miltonian-Millian search for truth

6. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (first invocation of marketplace metaphor); *Whitney v. California*, 274 U.S. 357, 375, 377 (1927) (Brandeis, J., concurring) (counterspeech, or "more speech" doctrine).

7. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). For insight into Holmes's reliance on Mill, see 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916-1935 160, 187 (Mark DeWolfe Howe ed., 1953) (illustrating that Holmes read Mill's *On Liberty* in early 1919 and embraced Mill's position).

8. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); SCHAUER, FREE SPEECH, *supra* note 2, at 15-16.

9. See, e.g., *United States v. Rumely*, 345 U.S. 41, 56 (1953) (Douglas, J., concurring) (first express use of "market place of ideas"); *Sullivan*, 376 U.S. at 269 (referring to First Amendment protection for "unfettered interchange" of political speech); *Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976) (per curiam) (referring to First Amendment protection for "'uninhibited, robust, and wide-open' public debate concerning matters of public interest" (quoting *Sullivan*, 376 U.S. at 270)); *Citizens United v. FEC*, 558 U.S. 310, 354 (2010) (reaffirming commitment to the "'open marketplace' of ideas" (quoting *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008))).

10. See John M. Kang, *Against Political Speech*, 22 NEV. L.J. 803, 821-25 (2022) [hereinafter Kang, *Against Political Speech*] (describing Meiklejohn's "Argument from Self-Government," i.e., the argument from democracy).

11. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 6-9 (Lawbook Exchange 2012) (1948) [hereinafter MEIKLEJOHN, SELF-GOVERNMENT]; SCHAUER, FREE SPEECH, *supra* note 2, at 35-38.

to inform its decision-making.¹² Second, the freedom to criticize provides another means of keeping public officials accountable to the electorate, maintaining their respective roles as public servants and the sovereign.¹³ Meiklejohn rooted his conception of this argument in the idea of town meetings, particularly those historically conducted in New England small towns.¹⁴ Such meetings functioned as direct democracies for all adult residents; members would propose, debate, and decide on ideas by majority vote, limited only by a moderator ensuring orderly discussions.¹⁵ To Meiklejohn, the voting public's sovereignty was absolute in either direct or representative democracy, and therefore, the need for its informed decision-making was the same.¹⁶ By extension, Meiklejohn emphasized the importance of free speech in maximizing the overall pool of available ideas to contribute to public deliberation.¹⁷ In this sense, free speech was critical not merely for conveying information but for receiving it so that it could be taken into account in decision-making.¹⁸ Meiklejohn's conception of the argument from democracy incorporated not only free speech and expression as an individual right but also other First Amendment freedoms—such as publication and assembly—for their role in public deliberation.¹⁹ The Supreme Court has adopted the argument from democracy into its First Amendment jurisprudence, as it did the argument from truth.²⁰ Historically,

12. MEIKLEJOHN, SELF-GOVERNMENT, *supra* note 11, at 24–27; SCHAUER, FREE SPEECH, *supra* note 2, at 35–36; *see* Lyrisa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 839 (2010) [hereinafter Lidsky, *Nobody's Fools*]; *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 791–92 (1978) (reasoning informed democratic decision-making requires access to conflicting arguments).

13. SCHAUER, FREE SPEECH, *supra* note 2, at 36, 38.

14. MEIKLEJOHN, SELF-GOVERNMENT, *supra* note 11, at 22–25.

15. *Id.* at 22–27; SCHAUER, FREE SPEECH, *supra* note 2, at 37–38.

16. MEIKLEJOHN, SELF-GOVERNMENT, *supra* note 11, at 26–27; SCHAUER, FREE SPEECH, *supra* note 2, at 38; *but see* JOHN DEWEY, FREEDOM AND CULTURE 41–42 (Prometheus 1989) (1939) [hereinafter DEWEY, FREEDOM AND CULTURE]; Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 N.W. U. L. REV. 1053, 1057–58 (2016).

17. MEIKLEJOHN, SELF-GOVERNMENT, *supra* note 11, at 25–26.

18. *Id.* at 24–26; SCHAUER, FREE SPEECH, *supra* note 2, at 27–28; SOPHIA ROSENFELD, DEMOCRACY AND TRUTH 33–34 (2019).

19. *See* ROSENFELD, *supra* note 18, at 33–35.

20. *See, e.g.*, *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Red Lion Broad., Inc. v. FCC*, 395 U.S. 367, 390 (1969) (acknowledging the public's right to access information on matters of public concern); *CBS, Inc. v. FCC*, 453 U.S. 367, 395–97 (1981) (acknowledging political candidates' corresponding right to use public airwaves); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 194 (1997) (arguing “must-carry” provisions promote information circulation and broadcaster competition and diversity); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776–77 (1978) (identifying a primary value of speech is informing the audience); *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (prioritizing maximizing contributions to the marketplace of ideas).

these conceptions of our freedom of speech have, by and large, been bulwarks for American civil liberties.

Today, however, our stalwart commitment to the arguments from truth and democracy is actively undermining the very democratic functionality each was intended to serve. Each argument is exceptionally poor at contending with misinformation. In any of its forms, misinformation is harmful because it reduces one's ability, individually or collectively, to think and act in one's own interest.²¹ By extension, misinformation heavily undermines the quality of democratic deliberation and thus democratic self-government.²² In the online age, the remarkable volume and virality of misinformation in the political environment threaten catastrophe. As such, misinformation should be anathema in a democratic society and viewed as its biggest threat. Instead, in commitment to the arguments from truth and democracy, existing First Amendment jurisprudence allows misinformation to thrive functionally unchecked. Political misinformation—that is, false statements of fact about a matter of public concern—is uniquely damaging, and yet, as political speech, it receives the highest level of constitutional protection available.²³ Worse still, misinformation need not be merely inaccurate political information; misinformation may be intentional (disinformation), distributed en masse (“fake news”), or even factually accurate (propaganda).²⁴ Accordingly, the United States faces a brutal and potentially fatal state of affairs: on the one hand, the freedom of political speech is indispensable to democratic deliberation and self-government; on the other, misinformation makes that freedom easily weaponized against

21. *See* *Hustler Mag. v. Falwell*, 485 U.S. 46, 52 (1988) (“False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas”); CASS. R. SUNSTEIN, ON RUMORS 10 (2009) [hereinafter SUNSTEIN, ON RUMORS]; THOMAS RID, ACTIVE MEASURES 7–8 (2020); Hannah Arendt, *Truth and Politics*, in TRUTH: ENGAGEMENTS ACROSS PHILOSOPHICAL TRADITIONS 295, 309 (Jose Medina & David Wood eds., John Wiley & Sons 2005) (1967) [hereinafter Arendt, *Truth and Politics*].

22. SCHAUER, FREE SPEECH, *supra* note 2, at 169; Martin H. Redish & Julio Pereyra, *Resolving the First Amendment's Civil War: Political Fraud and the Democratic Goals of Free Expression*, 62 ARIZ. L. REV. 451, 454–55, 468 (2020); *see* *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 769 (1985) (White, J., concurring) (“[T]he stream of information about public officials and public affairs is polluted and often remains polluted by false information”).

23. “Political speech” is speech “relating to any matter of political, social, or other concern to the community,” or when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (citations omitted) (first quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983); and then quoting *San Diego v. Roe*, 543 U.S. 77, 83–84 (2004)); *see* *Myers*, 461 U.S. at 145 (stating political speech receives the highest First Amendment protection).

24. *Propaganda*, BLACK'S LAW DICTIONARY (11th ed. 2019); JASON STANLEY, HOW PROPAGANDA WORKS 42 (2015) [hereinafter STANLEY, PROPAGANDA] (propaganda may be factually correct).

democratic functionality and well-being.²⁵ Something has to give, and it must be drastic.

This Article is far from the first recognition of this dynamic. In his 1949 *Terminiello v. Chicago* dissent, Supreme Court Justice Robert H. Jackson famously warned against allowing the Constitution to become a “suicide pact”:

This Court has gone far toward accepting the doctrine that civil liberty means . . . that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.²⁶

Former Harvard Law dean Martha Minow arrived at a similar conclusion. In her book *Saving the News*, Professor Minow implores supportive action to protect the freedom of the press rather than continuing to suffer under a purely libertarian conception of First Amendment free press protections.²⁷ The government has a duty to adopt this understanding; it has an obligation to take affirmative steps to improve democratic deliberation.²⁸ This Article makes an analogous plea for the freedom of speech: noble and well-intended as it may be, adherence to such an intensely libertarian conception of First Amendment protections will have catastrophic and potentially fatal consequences. As such, a fundamental change in First Amendment jurisprudence and public understanding of free speech is vital.²⁹

25. Redish & Pereyra, *supra* note 22, at 468; see Philip M. Napoli, *What if More Speech is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM’N L.J. 55, 88 (2018); Frederick Schauer, *Free Speech and the Argument from Democracy*, in LIBERAL DEMOCRACY: NOMOS XXV 241, 249 (1983) [hereinafter Schauer, *Free Speech and the Argument from Democracy*].

26. 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

27. MARTHA MINOW, *SAVING THE NEWS* 98, 101–02 (2021).

28. See *id.* at 60, 75, 98–99, 101–2, 146–47; MEIKLEJOHN, *SELF-GOVERNMENT*, *supra* note 11, at 16–17; ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 233, 240, 559 (Lawbook Exchange, 2d ed. 2018) (1941) [hereinafter CHAFEE, *FREE SPEECH IN THE UNITED STATES*]; JOHN DEWEY, *LIBERALISM AND SOCIAL ACTION* 34–35 (Prometheus 2000) (1935) [hereinafter DEWEY, *LIBERALISM*]; *infra* Part IV.A.

29. Larry Kramer, *A Deliberate Leap in the Opposite Direction: The Need to Rethink Free Speech*, in *SOCIAL MEDIA, FREEDOM OF SPEECH AND THE FUTURE OF OUR DEMOCRACY* 17, 23–27 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022); see CAILIN O’CONNOR & JAMES OWEN WEATHERALL, *THE MISINFORMATION AGE* 184–86 (2019).

I. POSITIVE AND NEGATIVE FREE SPEECH

A. Positive and Negative Freedom

At its core, the issue is one of positive and negative freedom.³⁰ *Negative freedom* is the more libertarian conception of freedom, where one is free from control, obstruction, or influence by external forces and obligations, namely those caused by other people.³¹ In practice, negative freedom is generally pursued by removing obstacles and refers to freedom from government interference.³² *Positive freedom*, by contrast, is the capacity to make effective use of one's negative freedom.³³ After all, what use is freedom if one cannot make effective use of it? Or, more eloquently, "We are free to do only the things we *can* do."³⁴ Negative freedom emphasizes individual autonomy and lack of constraint, whereas positive freedom emphasizes individual agency, self-realization, and intelligent self-control.³⁵ In other words, negative freedom is freedom *from*, whereas positive freedom is freedom *to*.

Paradoxically, each of these freedoms risks devolving into tyranny if taken to an extreme, each for different reasons.³⁶ Positive freedom necessarily involves active governmental efforts to empower individuals to develop their agency. Doing so requires not only government intervention but also more governmental power over its citizens. If this power accumulates without clear checks and regulations, it risks paternalistic actions and authoritarianism.³⁷ Negative freedom, by contrast, begets oligarchy; it allows for uneven distribution and access to the resources needed for positive freedom (e.g., financial stability, social connections,

30. See Isaiah Berlin, *Two Concepts of Liberty*, in LIBERTY 166, 168–69 (Henry Hardy ed., 2d ed., 2002) (1958) [hereinafter Berlin, *Two Concepts of Liberty*]; JOHN DEWEY & JAMES HAYDEN TUFTS, ETHICS 320–22 (Jo Ann Boydston, ed., S. Ill. Univ. Press 2008) (2d ed. 1932) [hereinafter DEWEY & TUFTS, ETHICS (2d ed. 1932)]. See generally Berlin, *Two Concepts of Liberty*, *supra*, at 166–217, for an in-depth discussion on positive and negative freedom.

31. Berlin, *Two Concepts of Liberty*, *supra* note 30, at 168–174; JOHN DEWEY & JAMES HAYDEN TUFTS, ETHICS 392 (Jo Ann Boydston ed., S. Ill. Univ. Press 1978) (1908) [hereinafter DEWEY & TUFTS, ETHICS (1st ed. 1908)].

32. TIMOTHY SNYDER, ON FREEDOM 162 (Amanda Cook ed. 2024) [hereinafter SNYDER, ON FREEDOM] ("Negative freedom is the fantasy that the problem is entirely beyond us, and that we can become free simply by removing an obstacle.")

33. DEWEY & TUFTS, ETHICS (1st ed. 1908), *supra* note 31, at 392; see SNYDER, ON FREEDOM, *supra* note 32, at 209.

34. SNYDER, ON FREEDOM, *supra* note 32, at 40 (emphasis added).

35. Berlin, *Two Concepts of Liberty*, *supra* note 30, at 178–180; DEWEY & TUFTS, ETHICS (1st ed. 1908), *supra* note 31, at 392.

36. Isaiah Berlin, *Five Essays on Liberty: Introduction*, in ISAIAH BERLIN: LIBERTY 1, 37, 39 (Henry Hardy ed., 2d ed. 2002).

37. *Id.* at 39–40, 53–54.

education, time, and other needs for personal development).³⁸ Such divisions lead to large positive freedom disparities between the vast majority of the public and those better off, affording the latter a disproportionate say in public affairs and ability to maintain circumstances that benefit them.³⁹ The result is class-based political divisions, resentment, hostility, and political tension.⁴⁰ In majoritarian democratic systems, this is the Founders' dreaded *tyranny of the majority*; here, however, the tyrannical "majority" is not numerical but political—it is a small, wealthy class whose disproportionate resources translate into dominant political power over the broader public.⁴¹ However, these consequences, while valid concerns, are the result of an *excess* of their respective type of freedom. Seeing them as inevitable is fallacious "slippery slope" reasoning.⁴²

As you may surmise, the United States is enamored with the negative conception of freedom—typically at the expense of enjoying positive freedom. As a result, the United States is embroiled in a state of affairs quite similar to the pitfall of negative freedom described above. The American negative freedom obsession stems from two places. The first is the classical liberal thought that forms the bedrock of American political thought. Liberal thinkers like John Locke and John Stuart Mill viewed freedom as naturally occurring in the individual and able to be fostered by removing restrictions to promote individual growth.⁴³ While they acknowledged one's circumstances as outside forces that shape individuals, they generally considered such forces to be external factors with little bearing on one's freedom.⁴⁴ Second, this rationale has been reinforced among Americans for

38. *Id.* at 39–40; DEWEY & TUFTS, *ETHICS* (2d ed. 1932), *supra* note 30, at 349.

39. See Berlin, *Two Concepts of Liberty*, *supra* note 30, at 39–40; Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147, 151–53 (2017) [hereinafter Balkin, *Constitutional Crisis*]; Jack M. Balkin, *Constitutional Rot*, in CAN IT HAPPEN HERE? 19, 22 (Cass R. Sunstein ed., 2018); DEWEY, *LIBERALISM*, *supra* note 28, at 35, 41, 43–44, 66 (showing shift in liberalism from pursuing change fostering positive freedom to defending negative freedom as a means of preserving the status quo).

40. Balkin, *Constitutional Crisis*, *supra* note 39, at 152–53; see ROSENFELD, *supra* note 18, at 40–41 (explaining income and education inequality can incite political divisions, undermining democracy); JASON STANLEY, *HOW FASCISM WORKS* 76–77 (2018) [hereinafter STANLEY, *FASCISM*] (role of inequalities in democratic disfunction, especially in context of fascism).

41. See THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961); ROSENFELD, *supra* note 18, at 129–30; DEWEY, *LIBERALISM*, *supra* note 28, at 43–44.

42. See SNYDER, *ON FREEDOM*, *supra* note 32, at 210. "Slippery slope" reasoning assumes that an end result is inevitable as soon as any meaningful step in its direction is taken. *Slippery Slope*, BLACK'S LAW DICTIONARY (11th ed. 2019); see generally LAURA JOFFE NUMEROFF, *IF YOU GIVE A MOUSE A COOKIE* (1985) (illustration of slippery slope fallacy).

43. See DEWEY, *LIBERALISM*, *supra* note 28, at 15, 34–35, 46–47; SCHAUER, *FREE SPEECH*, *supra* note 2, at 26–27.

44. See DEWEY, *LIBERALISM*, *supra* note 28, at 34–35; SCHAUER, *FREE SPEECH*, *supra* note 2, at 26.

centuries by social and political challenges in which “freedom” meant relief from an oppressive force and achieving that relief meant preserving the autonomy of the oppressed.⁴⁵ Examples include the tyranny of the Crown in the Revolutionary War; the institution of slavery and (perceived) federal overreach in the Antebellum period and Civil War; xenophobia and government intervention during and directly following Reconstruction;⁴⁶ and communist authoritarianism during the 20th century.⁴⁷ In its short life, the United States has consistently viewed freedom as negative; this is especially clear in how controversial yet necessary American advancements in positive freedom were at the time, like the Emancipation Proclamation, trust-busting, labor standards, New Deal policies, desegregation, and the Civil Rights Movement.⁴⁸

The United States has thus far refused to acknowledge that a commitment to negative freedom betrays the goals of its liberal philosophical foundation: the common good; development of one’s capacities as a sovereign individual; and the freedom of expression, inquiry, and discussion.⁴⁹ While negative freedom is indispensable to a democratic society, it is far from the timeless end goal liberal thinkers believed it to be. A thoroughly negative freedom, once reached, quickly becomes a dead end; it leaves little to build upon, and ironically, it thwarts progress toward the common good of the individuals it is meant to serve.⁵⁰ Negative freedom alone will never suffice.⁵¹ “No man and no mind were ever emancipated merely by being left alone.”⁵² Just as children are not left to raise themselves, “[w]e need support to become autonomous people, sovereign individuals. Freedom requires a positive presence, not malign neglect.”⁵³ This is significantly attributable to the fact that the needs of positive freedom change as societal needs evolve, and oppression—rather than coming solely from the government—is a product of the unique conditions and circumstances of the

45. See DEWEY & TUFTS, *ETHICS* (2d ed. 1932), *supra* note 30, at 333.

46. See Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

47. See DEWEY, *LIBERALISM*, *supra* note 28, at 28, 43–44.

48. See Gary J. Simson, *The Roberts Court’s Overprotection of Free Speech and the Perfect Storm with Social Media*, 90 TENN. L. REV. 941, 1008 (2023).

49. See DEWEY, *LIBERALISM*, *supra* note 28, at 33, 40–41.

50. See *id.* at 40–41, 42–44, 49; DEWEY, *FREEDOM AND CULTURE*, *supra* note 16, at 14; DEWEY & TUFTS, *ETHICS* (2d ed. 1932), *supra* note 30, at 326, 329–30 (against viewing once-helpful principles as universal truths); JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY* 173 (Melvin L. Rogers ed., Ohio Univ. Press 2016) (1927) [hereinafter DEWEY, *PUBLIC AND ITS PROBLEMS*].

51. See DEWEY & TUFTS, *ETHICS* (2d ed. 1932), *supra* note 30, at 333; SNYDER, *ON FREEDOM*, *supra* note 32, at 215–16.

52. DEWEY, *PUBLIC AND ITS PROBLEMS*, *supra* note 50, at 191.

53. See SNYDER, *ON FREEDOM*, *supra* note 32, at 66.

time.⁵⁴ In its history, American freedom suffered religious persecution, tyrannical monarchy, chattel slavery, inhumane working conditions, unequal rights and treatment under the law, income inequality, and now debilitating misinformation.

Adapting to support positive freedom will require American public decision-making to balance it with negative freedom protections.⁵⁵ This is true for three reasons, each of which will inform that balancing test. First, and thankfully, balancing positive and negative freedom is not a zero-sum game, as they are not mutually exclusive and do not necessarily conflict. On the contrary, just as positive freedom is the logical (and assumed) complement of negative freedom, negative freedom is a *prerequisite* for positive freedom, since making effective use of one's freedoms requires having such freedoms in the first place.⁵⁶ Second, our individual legal rights and freedoms are social by nature and thus require us to consider their impacts on the broader public.⁵⁷ The American individualistic worldview—an outgrowth of negative freedom and personal autonomy—implies that society is merely a population of individuals, overlooking that the inverse is just as true.⁵⁸ “[T]he very concept of American individualism is itself a group norm.”⁵⁹ What benefits a community often benefits its members, and vice versa.⁶⁰ Just as we exist in the context of our communities,⁶¹ so too do our legal rights and freedoms, which are only enjoyed within the society that grants and guarantees them. Those legal rights and freedoms are meant to serve the public by way of serving individuals, not merely solely serving individuals.⁶² As such, the balance of individual and societal interests is a core component of striking the proper balance between positive and negative

54. DEWEY, LIBERALISM, *supra* note 28, at 42–43, 54 (showing how the nature of oppression has changed throughout American history and need not be by an act of government); Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 343–44, 346 (1915) [hereinafter Pound, *Interests of Personality*].

55. See Pound, *Interests of Personality*, *supra* note 54, at 347; DEWEY & TUFTS, ETHICS (2d ed. 1932), *supra* note 30, at 350; Terminiello v. Chicago, 337 U.S. 1, 31 (1949) (Jackson, J., dissenting).

56. Berlin, *Two Concepts of Liberty*, *supra* note 30, at 36; DEWEY & TUFTS, ETHICS (1st ed. 1908), *supra* note 31, at 392; Carol L. Gould, *Reframing Democracy with Positive Freedom*, in POSITIVE FREEDOM: PAST, PRESENT, FUTURE 141, 149 (John Christman ed., 2021).

57. See Pound, *Interests of Personality*, *supra* note 54, at 347, 349; ZECHARIAH CHAFEE JR., THE INQUIRING MIND 233 (1928); John Dewey, in MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 71, 76–77 (Fred B. Rothman & Co. 1987) (1941).

58. See DANNAGAL GOLDTHWAITE YOUNG, WRONG 77–78 (2023).

59. *Id.* at 79.

60. See Pound, *Interests of Personality*, *supra* note 54, at 347, 349; DEWEY & TUFTS, ETHICS (1st ed. 1908), *supra* note 31, at 431 (community benefit from individual benefit); DEWEY & TUFTS, ETHICS (2d ed. 1932), *supra* note 30, at 322–23, 324 (individual benefit from community benefit).

61. YOUNG, *supra* note 58, at 77–79.

62. Pound, *Interests of Personality*, *supra* note 54, at 346–47, 356.

freedoms.⁶³ Third and finally, as discussed above, the requirements for positive freedom are relative to the conditions of the time and must be continually adjusted and reweighed to ensure the proper support for citizens' freedoms.⁶⁴

B. Positive and Negative Free Speech

Returning to the focus of this Article, the dynamic of positive and negative freedom applies to our First Amendment protections, as does the balancing test from Part I.A.⁶⁵ First, a negative freedom of speech is a prerequisite to positive freedom of speech.⁶⁶ Second, our individual free speech rights are social by nature, existing in the context of our community.⁶⁷ Third, free speech exists in the context of the conditions of the time, particularly affected by advancements in communication technology.⁶⁸ Unfortunately, First Amendment protections are perhaps the sphere of American society most heavily bloated by an excess of negative freedom, and as such, our balancing of positive and negative freedoms of speech has been almost consistently incorrect.⁶⁹ Worse still, many will likely not see this as true because the Supreme Court's free speech and press jurisprudence *has* acknowledged exceptions to First Amendment protection based on speech's comparative harm to the broader interests of society.⁷⁰ This is problematic because those exceptions, while correctly supporting positive freedom in

63. *See id.* at 343–44, 347, 349.

64. DEWEY, LIBERALISM, *supra* note 28, at 42–43, 54; Pound, *Interests of Personality*, *supra* note 54, at 343–44, 347.

65. Pound, *Interests of Personality*, *supra* note 54, at 351–54; DEWEY, LIBERALISM, *supra* note 28, at 69–70; *see* MEIKLEJOHN, SELF-GOVERNMENT, *supra* note 11, at 18; SNYDER, ON FREEDOM, *supra* note 32, at 194.

66. *See* Kramer, *supra* note 29, at 29 (developing positive free speech still requires existing negative speech protections).

67. *See* *McCutcheon v. FEC*, 572 U.S. 185, 236, 237 (2014) (Breyer, J., dissenting). Moreover, the arguments from truth and democracy are rooted in serving the social interests of the public. *See supra* INTRODUCTION.

68. *Compare* STROSSEN, FREE SPEECH, *supra* note 1, at 64–68 (new technologies creating new free speech debates), *with* Pound, *Interests of Personality*, *supra* note 54, at 343–44, 453–56 (stating that societal progress creates new demands to support freedom, including for individual free speech, which must be weighed against society's needs).

69. *See, e.g.,* *McCutcheon*, 572 U.S. at 203.

70. *See* *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50–51 (1961); CHAFEE, FREE SPEECH IN THE UNITED STATES, *supra* note 28, at 35 (First Amendment speech protection depends on balance between “two . . . social interests, in public safety and in the search for truth.”); *see generally* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Brandenburg v. Ohio*, 395 U.S. 444, 445 (1969) (incitement of violence); *Watts v. United States*, 394 U.S. 705 (1969) (per curiam) (true threats); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978) (indecentcy).

other spheres of American life, do not serve to support a positive freedom of speech.⁷¹ Despite the early liberal thinkers' arguments for negative free speech that influenced First Amendment jurisprudence, a predominantly negative freedom of speech will never suffice, and it grows progressively more insufficient with time.⁷² Democratic deliberation requires an informed electorate, making our commitment to an intensely negative free speech anachronistic.⁷³

While the United States has historically held free speech to be an individual negative freedom in accordance with its liberal roots, its deeply problematic libertarian free-speech tradition—the focus of this Article's criticism—was invented by Harvard Law Professor Zechariah Chafee Jr., an early-20th-century progressive and civil libertarian.⁷⁴ Like many of his progressive contemporaries, Chafee emphasized the social interest of free speech protections over individual interests, stressed the need for positive free speech efforts, and recognized that meeting positive freedom of speech needs would depend upon the conditions of the time.⁷⁵ However, Chafee broke with fellow progressives in asserting that adapting to such changing conditions justified broader protection for negative free speech.⁷⁶ He insisted (ahistorically) that this degree of protectiveness over negative freedom of speech reflected longstanding traditional libertarian principles, and he misattributed this conception to progressive thought.⁷⁷ Chafee considered First Amendment speech protection to be set only by “the balancing against each other of two very important social interests, in public safety and in the search for truth.”⁷⁸ In doing this, Chafee pedestalized free-speech protection,

71. Kramer, *supra* note 29, at 26–27.

72. SCHAUER, *FREE SPEECH*, *supra* note 2, at 26–27; DEWEY, *LIBERALISM*, *supra* note 28, at 74 (“[I]ntelligence is an individualistic possession, at best enlarged by public discussion.”).

73. See MINOW, *supra* note 27, at 75, 98–99; DEWEY, *PUBLIC AND ITS PROBLEMS*, *supra* note 50, at 191.

74. Pound, *Interests of Personality*, *supra* note 54, at 453–54 (free speech has historically been a negative individual freedom); MARK A. GRABER, *TRANSFORMING FREE SPEECH* 122, 126–29 (1991) (Chafee inventing American libertarian free-speech tradition).

75. GRABER, *supra* note 74, at 12–13, 15, 125–26; see, e.g., Pound, *Interests of Personality*, *supra* note 54, at 453–56; CHAFEE, *FREE SPEECH IN THE UNITED STATES*, *supra* note 28, at 559 (need for “affirmative steps” to support free speech); see Zechariah Chafee, Jr., *Some New Ideas About Law*, 11 *IND. L.J.* 503, 508 (1936) (stating that constitutional principles are not rigid rules to be applied based on the framers' intent but instead reflect social interests and must be adapted to the times).

76. GRABER, *supra* note 74, at 4, 123.

77. *Id.* at 122–23, 125–29.

78. CHAFEE, *FREE SPEECH IN THE UNITED STATES*, *supra* note 28, at 35. This protection for free speech until it endangers the public is better known from Justice Holmes's *Schenck* and *Abrams* opinions as the clear and present danger standard, the meaning of which Chafee himself fabricated. *Schenck v. United States*, 249 U.S. 47, 52 (1919); *Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting); GRABER, *supra* note 74, at 4, 122–23, 128. Graber states:

insisting that its importance to democratic deliberation elevated it above use in the balancing of individual and societal interests.⁷⁹ Moreover, Chafee's arguments helped shift the focus of the judiciary away from "protect[ing] fundamental rights from majoritarian tyranny" to "polic[ing] the democratic process," or rather from a function needed to counteract the effects of a negative free speech excess to a function emphasizing the shielding of negative freedom of speech.⁸⁰ While this rightly took the matter of free speech away from Congress's consideration, it wrongly elevated free speech protection to its current position, where it is frequently abused with impunity.⁸¹ Chafee's libertarian conception of free speech has since found an almost mythical status among modern free-speech scholars and misleadingly framed generations of free-speech discussion by overprioritizing the protection of negative freedom of speech.⁸² To this day, we have continually adhered to Chafee's libertarian free-speech tradition despite, and not because of, the results of negative free speech protections.⁸³

II. THE MARKETPLACE OF IDEAS DEMONSTRATES THE NEED FOR POSITIVE FREEDOM OF SPEECH

Chafee's libertarian tradition led to the Supreme Court's embrace of the argument from truth—in the form of the marketplace of ideas—and, later, the argument from democracy as mainstays in its First Amendment

Chafee clearly invented history when he declared that Holmes used the phrase "clear and present danger" in *Schenck* to make "the punishment of words for their bad tendency impossible." In fact, Chafee's 1919 *Harvard Law Review* article . . . marked the first time that "clear and present danger" was used as a speech-protective standard. When Holmes and Brandeis later decided to support the claims of political dissenters, they proceeded to accept "as their own the libertarian meaning Chafee erroneously read into their [sic] words."

Id. at 128 (footnotes omitted) (first quoting *Schenck*, 249 U.S. at 52; then quoting Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 967 (1919); and then quoting David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 594 (1981)).

79. GRABER, *supra* note 74, at 125–26; see CHAFEE, FREE SPEECH IN THE UNITED STATES, *supra* note 28, at 35; SCHAUER, FREE SPEECH, *supra* note 2, at 29–30 (over-prioritization of search for truth); see, e.g., *United States v. Stevens*, 559 U.S. 460, 470–71 (2010) (speech's protection is not directly determined by its societal costs).

80. GRABER, *supra* note 74, at 125–26.

81. See *id.* at 12, 162 (Chafee's libertarian free-speech tradition problems); Kang, *Against Political Speech*, *supra* note 10, at 803–07, 856–57, 863–64 (political speech protections threaten democracy by enabling misinformation).

82. GRABER, *supra* note 74, at 1–2, 6–7, 12–13, 15, 122, 171. As Graber points out, "The central question most historical works on First Amendment doctrine ask is, *Under what conditions does a given thinker claim that government can regulate speech?* From this narrow perspective[,] all defenders of expression rights seem part of a common tradition." *Id.* at 15 (emphasis added). This framing of free-speech discussion implicitly overprioritizes protecting negative free speech.

83. See *id.* at 15; Kramer, *supra* note 29, at 24–27 (libertarian free-speech tradition problems).

jurisprudence. As they currently exist, these maladaptive doctrines continually guarantee a dangerous excess of negative free speech at the expense of the positive free speech required for functional democratic deliberation. To illustrate the danger of adhering to a libertarian conception of free speech in the age of misinformation, the centerpiece of this Article will explore the marketplace of ideas metaphor and some of the many assumptions required for it to function as intended in the context of misinformation. This Article loosely organizes the included assumptions by whether the assumption pertains to (1) counterspeech, (2) *marketgoers* (i.e., the members of the electorate participating in democratic deliberation), or (3) the marketplace metaphor generally.

A. Counterspeech Assumptions

As Justice Louis Brandeis explained in his 1927 *Whitney v. California* concurrence, “if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.”⁸⁴ This is the *counterspeech* (or “more speech”) doctrine; absent an emergency that justifies censorship as a “clear and present danger,”⁸⁵ confronting harmful or fallacious speech with accurate counterspeech is how better ideas win the day. Accordingly, a successful marketplace of ideas requires a successful use of the counterspeech doctrine. However, counterspeech carries a preliminary flaw: “more speech”—the already one-dimensional and maladaptive solution it poses—is its only means of addressing the issue of misinformation.

1. Assumption that Counterspeech Is Reliably Effective

While individual instances of counterspeech need not always be successful, as the cornerstone of the marketplace of ideas, it must be both effective enough and effective often enough to support marketplace functionality. Unfortunately, counterspeech is seldom effective. Counterspeech’s success presupposes a high level of rationality from individual marketgoers that neglects to factor in human psychosocial behaviors and biases.⁸⁶ In particular, counterspeech only works where

84. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

85. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

86. SCHAUER, FREE SPEECH, *supra* note 2, at 26–27, 30, 154–55; *Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 695 (1990) (Scalia, J., dissenting) (trusting in public’s rationality); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 259 (1961) [hereinafter Meiklejohn, *The First Amendment is an Absolute*] (“And the same principle holds good if a

marketgoers are continually willing to question their understandings in the face of contrary evidence and “update” their understandings accordingly.⁸⁷ For a number of reasons, including the following brief examples, it is not at all cynical to acknowledge that this presumption of updating is frequently mistaken. First, people commonly exhibit a *truth bias*; we tend to believe and rely upon what we hear despite good reasons not to and subsequent corrections of those statements.⁸⁸ Second, human beings have a natural *confirmation bias*, the innate desire to relieve our insecurities by seeking out reaffirmation for our understandings and avoiding challenges to them.⁸⁹ We frequently exhibit, by extension, a *disconfirmation bias*, where we become more critical of information we encounter that contradicts our understanding.⁹⁰ Third, as part of a process called *biased assimilation*, we apply our biases when interpreting new information and develop a strong emotional attachment to our (potentially erroneous) beliefs.⁹¹ This attachment is particularly strong for identity-based beliefs like religious convictions or partisan political stances.⁹² And fourth, when we face a challenge to our identity-based belief, we tend to reject the disconfirming evidence and dig in our heels, doubling down on that potentially mistaken understanding.⁹³ This *backfire effect* is especially common for issues of fact, making it a direct barrier to updating political stances required for marketplace functionality.⁹⁴ With a greater amount of misinformation in the

citizen attacks, by words of disapproval and condemnation, the policies of government, or even the structure of the Constitution. These are ‘public’ issues concerning which, *under our form of government, he has authority, and is assumed to have competence, to judge.*” (emphasis added).

87. Ronnell Andersen Jones & Lisa Grow Sun, *Freedom of the Press in Post-Truthism America*, 98 WASH. U. L. REV. 419, 435–36 (2020) (“Updating Assumption”); see YOUNG, *supra* note 58, at 104.

88. CASS R. SUNSTEIN, LIARS 73–75 (2021) [hereinafter SUNSTEIN, LIARS] (truth bias and “meta-cognitive myopia”).

89. See CASS R. SUNSTEIN, #REPUBLIC 114–21, 123, 125 (2018) [hereinafter SUNSTEIN, #REPUBLIC] (confirmation bias); LEE MCINTYRE, POST-TRUTH 40–41, 45 (2018) [hereinafter MCINTYRE, POST-TRUTH] (motivated reasoning). Confirmation bias and motivated reasoning are closely related and often used interchangeably, which also supports this understanding.

90. SUNSTEIN, ON RUMORS, *supra* note 21, at 50; Jones & Sun, *supra* note 87, at 442–43.

91. See SUNSTEIN, ON RUMORS, *supra* note 21, at 9, 18; SANDER VAN DER LINDEN, FOOLPROOF 33 (2023).

92. See NATHAN P. KALMOE & LILLIANA MASON, RADICAL AMERICAN PARTISANSHIP 30 (2022); VAN DER LINDEN, *supra* note 91, at 40–41; YOUNG, *supra* note 58, at 90–92.

93. VAN DER LINDEN, *supra* note 91, at 35–36; Jones & Sun, *supra* note 87, at 445–46; see YOUNG, *supra* note 58, at 175–76 & nn.18–19 (hostile media effect).

94. Jones & Sun, *supra* note 87, at 445–46 (“If attempts to correct people’s basic factual misperceptions on questions critical to public policy are not only sometimes unsuccessful but . . . counterproductive[.] . . . then constructive, deliberate political debate seems like a pipedream indeed.”); Thomas Wood & Ethan Porter, *The Elusive Backfire Effect: Mass Attitudes’ Steadfast Factual Adherence*, 41 POL. BEHAV. 135, 160 (2019).

marketplace of ideas, these behaviors shield a greater number of misinformed political opinions from refutation.

Marketgoers also face emotional hurdles to rational decision-making. When new information produces strong emotions—especially negative ones like anger and disgust—we are more likely to believe and share that information.⁹⁵ This process, called *emotional selection*, leads to our fixation on outrage and sensationalism at the expense of our consideration for the new information’s factual accuracy.⁹⁶ This is the mental process exploited by propaganda; the information, regardless of its factual accuracy, exploitatively solicits an emotional response to bypass one’s logical faculties.⁹⁷ In conjunction with biased assimilation and the backfire effect’s particular applicability to issues of fact, emotional selection becomes a terrifying driver of problematic forms of speech such as hate speech and conspiracy theories. Hate speech is particularly resistant to counterspeech due to its tendency to have a silencing effect on potential sources of counterspeech and the targeted groups’ “lack [of] access and resources to effectively reach all of those exposed to the initial [hateful] speech.”⁹⁸ Conspiracy theories, on the other hand, resist counterspeech by being “self-sealing”; they habitually reject disconfirming information by dismissing debunking efforts with a *that’s-what-they-want-you-to-think* rationale, and interpreting the attempted debunking as reassurance for the conspiracy theory’s correctness.⁹⁹

Human irrationalities that negate counterspeech are also not limited to individuals. As individuals, we commonly base our opinions on those of others, especially when we lack enough information to support our own.¹⁰⁰ Moreover, we often seek out like-minded groups as a source of reassurance for our beliefs; within these groups, social pressures reduce receptiveness to

95. SUNSTEIN, ON RUMORS, *supra* note 21, at 58–59 (emotional selection).

96. *Id.*; DEWEY & TUFTS, ETHICS (2d ed. 1932), *supra* note 30, at 359 (“Dispositions like love of ease, of sensational excitement, and desire to be relieved from responsibility for obtaining information, are the internal forces which reinforce the suppression of truth and the distortion of fact which come from without.”).

97. STANLEY, PROPAGANDA, *supra* note 24, at 48–49, 53 (definition of propaganda); *id.* at 42 (demonstrating that propaganda can be factually correct while still exploiting an emotional response); see Kramer, *supra* note 29, at 31.

98. Napoli, *supra* note 25, at 67; Billie Murray, *The Anti-Democratic Consequences of the “More Speech” System*, 56 COMM. & DEM. 198, 199–200 (2022).

99. YOUNG, *supra* note 58, at 44 & n.43; CASS R. SUNSTEIN, CONSPIRACY THEORIES & OTHER DANGEROUS IDEAS 1, 5–10 (2014) [hereinafter SUNSTEIN, CONSPIRACY THEORIES]; see, e.g., LEE MCINTYRE, ON DISINFORMATION 15, 22–23 (2023) [hereinafter MCINTYRE, ON DISINFORMATION] (explaining a common five-point flawed-reasoning strategy among science deniers; denialist beliefs are rooted in identity, not fact).

100. SUNSTEIN, ON RUMORS, *supra* note 21, at 9, 24 (social cascades); see SUNSTEIN, #REPUBLIC, *supra* note 89, at 57 (“cybercascades”); *Argumentum Ad Populum*, BLACK’S LAW DICTIONARY (11th ed. 2019).

new ideas and radicalize members' opinions.¹⁰¹ Like-mindedness affords members reassurance and confidence, but it frequently leads to *group polarization*. Members' newfound sense of security often leads to a stubborn willingness to double down, which in turn leads to ego-driven defenses of one's beliefs, even (and often) at the expense of factual accuracy.¹⁰² One social pressure at work here is *groupthink*, where members will conform to their group's broader beliefs, generally to protect their reputation and favorable status within the group.¹⁰³ The result is both individual radicalization and approval of the broader group's radicalization.¹⁰⁴ Deeply-held beliefs that already feed into tribalistic behavior—namely, ones regarding socio-political identities like political affiliation, religious beliefs, and race-based prejudices—only serve to bolster these effects.¹⁰⁵

2. Assumption that Counterspeech Is Available

To be effective, counterspeech needs to occur at a rate and volume that enables it to counteract problematic speech in the marketplace.¹⁰⁶ Today, counterspeech is becoming progressively less available, as a vast majority of marketplace discourse occurs online, especially through social media.¹⁰⁷ This is because social media companies use proprietary algorithms to locate and present content tailored to individual users' interests to keep them engaged and available for advertisements.¹⁰⁸ Users exhibiting emotional selection are more inclined to like, share, and subscribe to provocative content, so platforms' algorithms feed users increasingly inflammatory, outrageous, and ideologically extreme material, regardless of its factual accuracy.¹⁰⁹ These

101. SUNSTEIN, ON RUMORS, *supra* note 21, at 32 (group polarization).

102. *Id.* at 38–41 (three steps of group polarization); SUNSTEIN, #REPUBLIC, *supra* note 89, at 68; *see, e.g.*, HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 382 (Mariner 1968) (1951) [hereinafter ARENDT, TOTALITARIANISM] (“[O]ne could make people believe the most fantastic statements one day, and trust that if the next day they were given irrefutable proof of their falsehood, they would take refuge in cynicism; instead of deserting the leaders who had lied to them, they would protest that they had known all along that the statement was a lie and would admire the leaders for their superior tactical cleverness.”).

103. Solomon E. Asch, *Opinions and Social Pressure*, 193 SCI. AM. 31 (1955); SUNSTEIN, ON RUMORS, *supra* note 21, at 28–31.

104. SUNSTEIN, ON RUMORS, *supra* note 21, at 41–42; CASS R. SUNSTEIN, CONSPIRACY THEORIES AND OTHER DANGEROUS IDEAS 16–17 (2014) (“reputational cascade”).

105. YOUNG, *supra* note 58, at 92, 180–81; KALMOE & MASON, *supra* note 92, at 30; *see* MCINTYRE, ON DISINFORMATION, *supra* note 99, at 22–23.

106. *See* SCHAUER, FREE SPEECH, *supra* note 2, at 30 (stating that the Argument from Truth impliedly requires counterspeech).

107. *See* *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017).

108. BARBARA F. WALTER, HOW CIVIL WARS START 110 (2022); SUNSTEIN, ON RUMORS, *supra* note 21, at 58–59 (emotional selection).

109. *See* WALTER, *supra* note 108, at 111; MINOW, *supra* note 27, at 3, 20, 31.

individualized content rabbit holes often create digital information silos, or *filter bubbles*.¹¹⁰ The resulting informational isolation limits contact with opposing viewpoints and sources of counterspeech, exacerbates the psychosocial behaviors discussed above, and facilitates ideological radicalization.¹¹¹ Worse still, this phenomenon occurs on both the supply and demand sides of content consumption, as online content creators produce increasingly extreme content to attract viewers.¹¹² Even if counterspeech were an effective response, the proprietary nature of social media algorithms makes it impossible to determine which counterspeech to provide a user, let alone whether it will be effective.¹¹³ The final result is a marketplace that rewards radical and false ideas rather than filtering them out, the subject of Part III.

3. Assumption that Truth Will Prevail

The marketplace of ideas is a truth-seeking mechanism. It is not enough that counterspeech be successful in changing a marketgoer's mind; for the marketplace to support democratic deliberation, informed and accurate speech must prevail—or, at least, more often than not—when confronted with uninformed or inaccurate speech. Once again, this is often not the case. Mill's assumption that an absence of “persecution” would allow truth to “triumph” is simply mistaken.¹¹⁴ Human beings have no inherent ability to distinguish truth from falsity—hence the heavy emphasis that proponents of democracy have historically placed on educating the public—and truth has no inherent advantage over falsity.¹¹⁵ In fact, falsity can be much more appealing, particularly since those pushing deliberate falsehoods can account

110. WALTER, *supra* note 108, at 111; MINOW, *supra* note 27, at 19–20, 24–5, 30–31 (“digital gerrymandering”; filter bubble); see YOUNG, *supra* note 58, at 203–04 (“Monopolization—Mediated propaganda can only thrive in the absence of counterpropaganda.”).

111. See WALTER, *supra* note 108; *supra* Part II.A.1.

112. RENEE DIRESTA, INVISIBLE RULERS 168 (2024); *Algorithms and Amplification: How Social Media Platforms' Design Choices Shape Our Discourse and Our Minds*, Hearing Before S. Comm. on Judiciary Subcomm. on Priv., Tech., & L., 117th Cong. 2–3 (Apr. 27, 2021) [hereinafter *Hearings*] (endnote omitted) (statement of Joan Donovan, Ph.D., Rsch. Dir., Harvard Kennedy Sch.'s Shorenstein Ctr. on Media, Pol., & Pub. Pol'y).

113. YOUNG, *supra* note 58, at 234.

114. See SCHAUER, FREE SPEECH, *supra* note 2, at 26–27 (against the assumption that truth will prevail).

115. *Id.*; SNYDER, ON FREEDOM, *supra* note 32, at 194; ROSENFELD, *supra* note 18, at 53 (historical emphasis on education); see, e.g., CHAFEE, FREE SPEECH IN THE UNITED STATES, *supra* note 28, at 560.

for the circumstances in advance and tailor their claims accordingly.¹¹⁶ Moreover, as with conspiracy theories or religious beliefs, some truth claims are insurmountable not because of their accuracy or support but because they are unfalsifiable.¹¹⁷

Compounding this, the marketplace of ideas envisions the average marketgoer as a diligent detective of truth and a paragon of civic virtue; marketgoers must make the search for truth their top priority if the marketplace is to be a truth-seeking mechanism.¹¹⁸ This is true of neither individuals nor the public for reasons that include acting in accord with the psychosocial behaviors and biases discussed above.¹¹⁹ Individuals may not prioritize truth-seeking by, for instance, aiming only to win in debate without any willingness to “update.”¹²⁰ For the public, a truth-seeking priority may easily be overshadowed by the identity-based tribalism, which has become the hallmark of contemporary American politics.¹²¹

4. Assumption of Equal Deployability

For counterspeech to serve its intended role in the marketplace of ideas, true speech and true counterspeech must be deployable at a rate comparable to that of false speech and false counterspeech. First, if true speech were more burdensome to produce than false counterspeech, true speech would be easier to defeat with false counterspeech and thus less likely to gain traction in the marketplace. Second, if true counterspeech were more burdensome than false speech, there would be fewer instances of true counterspeech to challenge false speech. Producing true speech is more burdensome in both

116. See SCHAUER, *FREE SPEECH*, *supra* note 2, at 75; Hannah Arendt, *Lying in Politics*, in *CRISES OF THE REPUBLIC* 1, 6–7 (Harvest 1972) (1971) [hereinafter Arendt, *Lying in Politics*].

117. YOUNG, *supra* note 58, at 44; see MCINTYRE, *ON DISINFORMATION*, *supra* note 99, at 15 (common five-point flawed-reasoning in denialism, e.g., “impossible expectations for what the other side must achieve”).

118. SCHAUER, *FREE SPEECH*, *supra* note 2, at 17, 23; Jones & Sun, *supra* note 87, at 426–32 (“Truthseeking Assumption”).

119. See *supra* Part II.A.1–2.

120. See SUNSTEIN, *LIARS*, *supra* note 88, at 66 (Argument from Truth presumes genuine arguments by marketgoers); see also generally Hugo Mercier & Dan Sperber, *Why Do Humans Reason? Arguments for an Argumentative Theory*, 34 *BEHAV. & BRAIN SCI.* 57 (2011) (people often argue not to identify truth but to win and reinforce beliefs).

121. See YOUNG, *supra* note 58, at 180–81, 235; Murray, *supra* note 98, at 201–02; MCINTYRE, *ON DISINFORMATION*, *supra* note 99, at 22–23.

circumstances, of which the first will be explored in a later Part,¹²² and the second will be explored here.¹²³

According to the crass yet profound *Brandolini's Law*, “The amount of energy needed to refute bullshit is an order of magnitude bigger than that needed to produce it.”¹²⁴ The marketplace, however, erroneously assumes that truth and falsehood can be deployed at the same rate and with the same effect; truth being more difficult to deploy than falsehood necessarily occurs at the expense of the better-informed party.¹²⁵ To illustrate the point by analogy, consider the relationship between superheroes and supervillains: a supervillain is unconcerned with the damage they cause to the city as they seek to defeat the superhero, whereas the superhero must not only defeat the supervillain but do so in a way that spares their life while preventing casualties and minimizing damage. The burden on the superhero (the marketgoer producing truthful counterspeech) is thus significantly higher than the burden on the supervillain (the marketgoer producing false initial speech). This disparity in burdens—the *Superhero's Burden*—necessarily encumbers truthful counterspeech and bolsters false initial speech. Modern debate provides an excellent example of the Superhero's Burden in the form of *Gish galloping*, a bad-faith debate tactic in which one debater quickly produces a stream of silly assertions to overburden their opponent with arguments to refute; if the opponent becomes flustered and unable to respond effectively, and the audience has not caught on to the arguments' nonsensical nature, the Gish gallop has been deployed effectively.¹²⁶ Debate is already a poor fact-finding mechanism since neither argumentative skill nor audience approval requires a significant basis in fact. The added difficulty of

122. See *infra* Part II.C.1–2.

123. “Cheap speech,” by nature, necessarily confirms that false initial speech can be deployed quicker than true counterspeech. RICHARD L. HASEN, *CHEAP SPEECH* 19–20 (2022).

124. See Andrew Gelman, *The Bullshit Asymmetry Principle*, COLUM. UNIV.: STAT. MODEL., CAUSAL INFER., & SOC. SCI. (Jan. 28, 2019), <https://statmodeling.stat.columbia.edu/2019/01/28/bullshit-asymmetry-principle/> (Brandolini's Law, i.e., the “Bullshit Asymmetry Principle”); see also, e.g., Phil Williamson, *Take the Time and Effort to Correct Misinformation*, 540 *NATURE* 171, 171 (2016).

125. See SNYDER, *ON FREEDOM*, *supra* note 32, at 266 (“As Simone Weil wrote, discovering and receiving truth takes work, whereas producing and believing the false is effortless.”); SCHAUER, *FREE SPEECH*, *supra* note 2, at 74–75 (“accepting falsity requires less effort than identifying truth”); Arendt, *Lying in Politics*, *supra* note 116, at 6–7 (advantage of the liar).

126. “Gish galloping” is:

[A] fallacious debate tactic in which a person uses as many arguments as possible against their opponent without any consideration into the strength of the arguments. . . . As such, the Gish gallop fallacy only focuses on the quantity of the arguments, not the quality, in order to achieve its objective: to make it too difficult for the opponent to respond. As a result, the person committing it seemingly gains an upper hand in the debate.

Editorial Staff, *Gish Gallop (Logical Fallacy): Definition and Examples*, FINMASTERS (emphasis omitted) <https://finmasters.com/gish-gallop/#gref> (last updated May 23, 2023).

marketplace counterspeech carrying the Superhero's Burden only serves to make the various forms of misinformation all the more challenging to combat.¹²⁷

B. Marketgoer Assumptions

1. Assumption Against Ad Populum

In his legendary *Abrams* dissent, Justice Holmes opined that “[t]he ultimate good desired is better reached by free trade in ideas” and that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”¹²⁸ Justice Brandeis’s comparably famous *Whitney* concurrence develops this notion of “political truth” as the best or most beneficial idea reached through marketplace discourse.¹²⁹ But this highlights the single most critical flaw of the marketplace of ideas: it does not distinguish between that “political truth” and reality-based truth. In other words, the marketplace metaphor uses popular acceptance as its means of evaluating both matters of opinion and matters of fact. While there are few indications that the marketplace of ideas was intended to also apply to matters of fact, our adherence to the metaphor has nonetheless extended to cover matters of fact.¹³⁰ Conflating factual accuracy with popular acceptance is a terrifyingly fallacious misstep, as these two distinct concepts commonly do not overlap. Popularity alone does not make an unreasonable idea or understanding reasonable, nor does persuasiveness make an inaccurate idea or understanding accurate.¹³¹ As evidenced by the many deviations from marketplace expectations this Article presents, the assumption that an idea’s popular acceptance reflects its factual accuracy or reliability is an egregious and load-bearing error, the reliance upon which will undermine the very democratic deliberation that the First Amendment was created to facilitate.¹³²

127. See Napoli, *supra* note 25, at 70 (Fake news “do[es] not require the same rigorous research, verification processes, or trained professionals to produce.”).

128. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

129. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); see SCHAUER, *FREE SPEECH*, *supra* note 2, at 19–22 (“the consensus, or ‘survival,’ theory of truth”).

130. Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 907 (2010); Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 848; see, e.g., *N.Y. Times v. Sullivan*, 376 U.S. 254, 279–280 (1964) (protecting factually inaccurate published statements as political speech); *United States v. Alvarez*, 567 U.S. 709, 715 (2012) (plurality opinion) (providing First Amendment protection for false claims of military medals).

131. See *Argumentum Ad Populum*, *supra* note 100.

132. SCHAUER, *FREE SPEECH*, *supra* note 2, at 21–22; MORGAN MARIETTA & DAVID C. BARKER, *ONE NATION, TWO REALITIES* 294 (2019); see Napoli, *supra* note 25, at 88 (regarding the counterintuitively detrimental effect of broad political speech protections); DEWEY, *PUBLIC AND ITS*

This issue seems to stem from two places. First, *truth* as a concept has been philosophized for millennia, so much so that its countless meanings have made it so amorphous that, today, the term's intended meaning often must be specified once the word is used.¹³³ The liberal philosophical tradition that inspired the Founding Fathers and Mill—and by extension Chafee, Holmes, and Brandeis—considered truth to be a social concept, usually an instance of dependable knowledge reached in consensus, not a demonstrable fact on which to base opinions and inform democratic deliberation.¹³⁴ In this sense, “truth” would be a form of opinion, not fact.¹³⁵ Second, democratic deliberation as an institution is based not only upon consensus-building but also upon progress. To hold an opinion is to observe the same fact (or set of facts) that others do and arrive at a different (or potentially different) preference-based conclusion about that fact. Therefore, a shared reality or mutual basis in fact is a prerequisite for informed discussion and debate, and thus for democratic deliberation.¹³⁶ Contesting the shared facts required for democratic deliberation wrongly demotes indisputable (or functionally indisputable) matters of fact to disputable matters of opinion. This makes progress from democratic deliberation impossible, as Part III explains.

2. Assumption that Truth and Falsehood Are Distinguishable

Similarly to how the marketplace metaphor assumes marketgoers' rationality and value of truth, it also assumes that marketgoers can distinguish

PROBLEMS, *supra* note 50, at 199–200 (forming popular opinion requires investigation, collaboration, and reliance upon factual knowledge).

133. See, e.g., ROSENFELD, *supra* note 18, at 15, 18–19; SCHAUER, FREE SPEECH, *supra* note 2, at 22, 26–27 (stating that writers before Mill “considered [truth] self-evident, needing only to be expressed to be recognized,” and so they “simply assumed that truth would reveal itself in the interplay of competing belief”).

134. ROSENFELD, *supra* note 18, at 27–28; Arendt, *Truth and Politics*, *supra* note 21, at 305; see, e.g., GRABER, *supra* note 74, at 109 (“Truth was the majority vote of that nation that could lick all others.” (quoting OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 310 (Peter Smith 1952) (1920))).

135. See, e.g., THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (indicating, through Jefferson's language “we hold these truths to be self-evident,” a consensus-based agreement on the matter, rather than a matter of fact.); Benjamin Franklin, *An Apology for Printers*, PA. GAZETTE (Jun. 10, 1731) (“[W]hen Men differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick; and that when Truth and Error have fair Play, the former is always an overmatch for the latter: Hence they cheerfully serve all contending Writers that pay them well, without regarding on which side they are of the Question in Dispute.”), *quoted in* CHAFEE, FREE SPEECH IN THE UNITED STATES, *supra* note 28, at 298.

136. ROSENFELD, *supra* note 18, at 173–74; MARIETTA & BARKER, *supra* note 132, at 294; see DEWEY, PUBLIC AND ITS PROBLEMS, *supra* note 50, at 200; OTTO NEURATH, *Foundations of the Social Sciences*, in 2 FOUNDATIONS OF THE UNITY OF SCIENCE: TOWARD AN INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE 1, 1–5 (Otto Neurath et al. eds., 1944) (need for a “universal jargon” in unified science).

good products from bad ones.¹³⁷ Even otherwise ideal marketgoers cannot contribute to marketplace discourse unless they can properly evaluate the general quality of each competing idea. One example of this is *bothsidesism*. Contemporary demand for “balanced” reporting has led the news media—to avoid accusations of bias—to merely present competing partisan positions rather than weigh in on their respective merits.¹³⁸ In doing so, the news media present the two positions as if they are equally reasonable and supported, potentially legitimizing (at least) one poorly supported position or suggesting that a solution lies somewhere in the middle ground.¹³⁹

Misinformation, in any form, exploits this issue in two interrelated ways. First, misinformation can—and is often intended to—play on psychosocial behaviors and biases, elevating factually inaccurate ideas in the marketplace to a level of perceived (but unwarranted) viability on par with factually accurate ideas. Potentially the largest contributing factor is one of the key components of successful propaganda—the *Illusory Truth Principle*, under which we tend to believe an idea is more accurate the more often we hear it.¹⁴⁰ Repetition legitimizes: the more we hear an idea, the more familiar and safer it feels.¹⁴¹ Worse still, the Illusory Truth Principle is at play *regardless* of one’s prior knowledge of the matter involved.¹⁴² In fact, this effect of misinformation is so potent that it can significantly change our memories of situations we as individuals personally experienced, a phenomenon called the *misinformation effect*.¹⁴³ In other words, misinformation can create marketplace false positives. Second, where such false positives have made

137. SCHAUER, FREE SPEECH, *supra* note 2, at 75, 154–55; Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 833 (2008).

138. YOUNG, *supra* note 58, at 141, 152 (“bothsidesism”; “conflict framing”). As journalism professor Jonathan Foster often said to his students, “If someone says it’s raining and another person says it’s dry, it’s not your job to quote them both. Your job is to look out the f***ing window and find out which is true.” MCINTYRE, ON DISINFORMATION, *supra* note 99, at 54.

139. MCINTYRE, ON DISINFORMATION, *supra* note 99, at 53–55; *see, e.g.*, NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT 214–15 (2010).

140. Aumyo Hassan & Sarah J. Barber, *The Effects of Repetition Frequency in the Illusory Truth Effect*, 6 COGNITIVE RSCH.: PRINCIPLES & IMPLICATIONS, DEC. 2021, at 1, 1; VAN DER LINDEN, *supra* note 91, at 21–23, 172 (illusory truth effect); JONATHAN RAUCH, THE CONSTITUTION OF KNOWLEDGE 28 (2021) [hereinafter RAUCH, THE CONSTITUTION OF KNOWLEDGE] (explaining how propaganda requires extensive repetition); TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY 66–67 (2017) (“[T]he fascist style depends upon ‘endless repetition,’ designed to make the fictional plausible”); *see* MILL, *supra* note 4, at 71 (without understanding why something is true or false, people will resort to trusting repetition as an indication of truth); ARENDT, TOTALITARIANISM, *supra* note 102, at 351 (noting the use of repetition in totalitarian propaganda).

141. VAN DER LINDEN, *supra* note 91, at 23.

142. Lisa K. Fazio et al., *Knowledge Does Not Protect Against Illusory Truth*, 144 J. EXPERIMENTAL PSYCH. 993, 999–1000 (2015).

143. VAN DER LINDEN, *supra* note 91, at 24–26.

truth and falsehood indistinguishable and interchangeable, expertise and knowledge-producing institutions can no longer inform democratic deliberation.¹⁴⁴ In circumstances where ideas have been artificially made indistinguishable and without relied-upon sources of knowledge and expertise, democratic deliberation becomes directionless, emotionally driven, and vulnerable to propagandic influences.¹⁴⁵ Any resulting progress from such deliberation is either reached by coincidence or allowed by accident.¹⁴⁶ As the philosopher Hannah Arendt once said, “[T]he result of a consistent and total substitution of lies for factual truth is not that the lies will not be accepted as truth, and the truth be defamed as lies, but that sense by which we take our bearings in the real world . . . is being destroyed.”¹⁴⁷ The dangers of continued misinformed popular belief in a democracy will be explored in Part III.

3. Assumption of Equal Participation

The marketplace of ideas presupposes that marketgoers have a minimum and comparable amount of access to the marketplace. No such guarantees exist, and the primary cause of this access disparity lies in marketgoers’ material wealth. At one end of the spectrum, materially poor marketgoers cannot afford the means by which to access and contribute to today’s predominantly online marketplace; at the other, far more problematic end, materially wealthy marketgoers can afford a disproportionate volume of contributions to marketplace discourse.¹⁴⁸ By donating to political campaigns and funding advertising, wealthy individuals, corporations, unions, and political action committees have an inordinate influence on public opinion,

144. YOCHAI BENKLER ET AL., NETWORK PROPAGANDA 36–37 (2018) (disorientation); ROSENFELD, *supra* note 18, at 9, 129–30, 133–34; YOUNG, *supra* note 58, at 50–51 & nn.75–77, 119–21.

145. See BENKLER ET AL., *supra* note 144, at 36–37; MCINTYRE, POST-TRUTH, *supra* note 89, at 11–13; DIRESTA, INVISIBLE RULERS, *supra* note 112, at 227–28; SNYDER, ON FREEDOM, *supra* note 32, at 194; ARENDT, TOTALITARIANISM, *supra* note 102, at 351, 474; Lidsky, *Nobody’s Fools*, *supra* note 12, at 839.

146. See DEWEY, LIBERALISM, *supra* note 28, at 56, 74–75; SNYDER, ON FREEDOM, *supra* note 32, at 176–77, 187–88; SUNSTEIN, ON RUMORS, *supra* note 21, at 56–57; DEWEY, PUBLIC AND ITS PROBLEMS, *supra* note 50, at 191; GRABER, *supra* note 74, at 89 (“Empirical investigation would settle political disputes ‘in the interest of the widest possible contribution to the interests of all,’ rather than in the narrow interest of a particular social class.” (quoting DEWEY, LIBERALISM, *supra* note 28, at 81)).

147. Arendt, *Truth and Politics*, *supra* note 21, at 309.

148. GRABER, *supra* note 74, at 210–12, 215; *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986) (“The resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation’s political ideas. They reflect instead the economically motivated decisions of investors and customers. *The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.*” (emphasis added)).

debate, and perception relative to the average American.¹⁴⁹ By allowing this disproportionate marketplace access, freedom of speech is conflated with a freedom of reach.¹⁵⁰

While Chafee and several Supreme Court justices have acknowledged this issue, the marketplace metaphor does not account for it.¹⁵¹ In fact, the Supreme Court has determined that this problem is not a bug but a feature; its First Amendment jurisprudence insists that this flaw remain unaddressed and that it, in fact, supports democratic deliberation.¹⁵² The Court has unwisely and repeatedly maintained that the First Amendment forbids government efforts to reduce this disparity, and that any harmful consequences of this outsized influence are merely a bullet to be bitten.¹⁵³ Because this subject matter has been thoroughly covered by legal scholars since the Court issued its infamous *Citizens United v. FEC*¹⁵⁴ decision in 2010, this Article will not analyze the matter in depth. What is important is that this disparity of marketplace access results in oversized and undue influence on democratic deliberation, political corruption in service of special interests, and the undermining of democracy by reducing the electorate's ability to act in its own interest.¹⁵⁵

149. GRABER, *supra* note 74, at 210–12, 215; ROSENFELD, *supra* note 18, at 165–66. Corporations enjoy the same First Amendment political speech protections as individual citizens. *Citizens United v. FEC*, 558 U.S. 310, 342–43, 346–47, 351 (2010); *see* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460–61 (1958).

150. *See* DiRESTA, INVISIBLE RULERS, *supra* note 112, at 146–47, 332.

151. GRABER, *supra* note 74, at 137; *see, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 256–57 (1976) (Burger, C.J., concurring) (per curiam); *Citizens United*, 558 U.S. at 394, 423–424, 450 (Stevens, J., dissenting).

152. GRABER, *supra* note 74, at 189; *Buckley*, 424 U.S. at 14, 19 (per curiam); *Citizens United*, 558 U.S. at 339; *McCutcheon v. FEC*, 572 U.S. 185, 196–97 (2014).

153. *See Citizens United*, 558 U.S. at 339–41, 351–52; *Buckley*, 424 U.S. at 48–49 (per curiam); *id.* at 256–57 (Burger, C.J., concurring in part and dissenting in part) (“There are many prices we pay for the freedoms secured by the First Amendment; the risk of undue influence is one of them . . .”).

154. 558 U.S. 310.

155. Disparate marketplace access will have undue influence on democratic deliberation. GRABER, *supra* note 74, at 215, 226; *Citizens United*, 558 U.S. at 394, 423–24, 450, 472–73 (Stevens, J., dissenting). Disparate marketplace access allows for political corruption in service of special interests. *Id.* at 440–41, 447–50; *McCutcheon*, 572 U.S. at 237–39, 245–50 (Breyer, J., dissenting). Disparate marketplace access undermines the democratic process and individual agency. *See* DEWEY, PUBLIC AND ITS PROBLEMS, *supra* note 50, at 192, 199, 202–03; GRABER, *supra* note 74, at 89.

C. Metaphoric Assumptions

1. Assumption Against “Too Much Speech”

The rationale behind counterspeech, and in turn the entire marketplace metaphor, is the “more speech” doctrine: generally, confronting false or fallacious ideas with correct ones is how better ideas win the day.¹⁵⁶ However, this impliedly assigns a “the-more-the-merrier” quality to speech in the marketplace, trusting that no volume of speech contributions will meaningfully affect the marketplace’s functionality.¹⁵⁷ This is both resoundingly untrue and the apparent position of the Supreme Court.¹⁵⁸ Professor Alexander Meiklejohn tacitly acknowledged the marketplace’s finite capacity for speech when he said, “What is essential is not that everyone shall speak, but that everything worth saying shall be said.”¹⁵⁹ This distinction between marketplace speech contributions that are or are not “worth saying” encapsulates the concept of *cheap speech*: speech that is low-effort, low-value, and likely misinformation.¹⁶⁰ Even if, as Mill believed, false speech has a valuable role in the marketplace’s truth-seeking function, the presence and excess of information that does not contribute to marketplace discourse hinders productive deliberation. Cheap speech is not only speech that requires effort to refute, but its mere receipt in the marketplace contextualizes other information that marketgoers encounter, coloring their perception of its truthfulness.¹⁶¹

In the online age, even small amounts of cheap speech present an existential problem for democracy because of how easily deployable cheap speech is online. By playing on many of the psychosocial biases and behaviors discussed in this Article,¹⁶² misinformation is more likely to be shared online and travels faster online than any truthful or neutral content,

156. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); see generally *supra* Part II.A.

157. SCHAUER, *FREE SPEECH*, *supra* note 2, at 77 (“If people are suspicious of suppressed opinions, it is largely based on their belief that opinions that really are false can be allowed expression without danger.”).

158. *Citizens United*, 558 U.S. at 335–36; see *id.* at 472 (Stevens, J., dissenting).

159. MEIKLEJOHN, *SELF-GOVERNMENT*, *supra* note 11, at 25.

160. See HASEN, *supra* note 123, at 19–20 (discussing Eugene Volokh, *Cheap Speech and What it Will Do*, 104 *YALE L.J.* 1805, 1808–18, 1831 (1995)).

161. *Id.* at 21; SCHAUER, *FREE SPEECH*, *supra* note 2, at 74 (“If we are searching for truth, plain error does nothing to help the process. It reduces the proportion of true propositions among all propositions expressed thereby diluting the frequency of truth and making it harder to locate. A needle is harder to find in a haystack than in two pieces of hay.”); see SUNSTEIN, *ON RUMORS*, *supra* note 21, at 5 (stating that cheap speech can be rumors that use “where-there’s-smoke-there’s-fire” thinking to sow doubt).

162. See *supra* Part II.A.1–2.

with political misinformation traveling the fastest of all.¹⁶³ While this is already a critical problem in its own right, cheap speech poses an even greater danger because it is weaponizable. The internet is susceptible to the tactic of *flooding* (that is, *reverse censorship* or *false amplification*), wherein a high volume of information is intentionally used to “drown out disfavored speech, or at least distort[] the sense of how much support any given view has.”¹⁶⁴ Flooding allows for First Amendment speech protection to be used against itself.¹⁶⁵ Abroad, autocratic governments like China, Russia, and the Philippines already employ flooding through “listener-targeted speech control” to suppress politically unfavorable speech.¹⁶⁶ As philosopher Lee McIntyre eloquently puts it, “Who needs censorship when the truth can be buried under a pile of bullshit?”¹⁶⁷

2. Assumption of a Public Censor

By embodying the *laissez-faire* economic practices of the early 20th century—and thus the classical liberal notion that development and progress require minimizing government intervention—the marketplace of ideas implicitly assumes that the government is the agent of censorship to be guarded against. This is frequently not the case as censorship need neither be a public nor domestic practice, and it certainly is not confined to after-the-fact restrictions on speech or publication rights.¹⁶⁸ Let us address each of these three distinctions.

First, given Americans’ notorious distrust of government, it is easy to picture censorship only as the government denying citizens’ ability to speak or publish. But this is an outdated and unimaginative understanding rooted in the authoritarian tactics of the 20th century. In the same way that the needs for the enjoyment of a positive freedom change with the circumstances of the time, the means by which free speech rights may be stifled also changes.¹⁶⁹

163. Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCI. 1146, 1148 (2018).

164. Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 565 (2018) [hereinafter Wu, *Is the First Amendment Obsolete?*]; MINOW, *supra* note 27, at 21, 23, 34 (2021) (flooding tactics); see SCHAUER, *FREE SPEECH*, *supra* note 2, at 202.

165. ROSENFELD, *supra* note 18, at 156; *but see* *Packingham v. North Carolina*, 582 U.S. 98, 105 (2017) (First Amendment right to internet access).

166. Wu, *Is the First Amendment Obsolete?*, *supra* note 164, at 565 (describing flooding, reverse censorship, and use by Chinese government); MINOW, *supra* note 27, at 21, 23, 34 (compiling flooding tactics and use by Russian and Philippine governments).

167. MCINTYRE, *POST-TRUTH*, *supra* note 89, at 116.

168. GRABER, *supra* note 74, at 89.

169. See Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2297–99 (2014); DEWEY, *LIBERALISM*, *supra* note 28, at 42–43, 54; GRABER, *supra* note 74, at 169–70.

Modern disinformation tactics take advantage of the unique characteristics and properties of online media to hinder democratic deliberation. Flooding, from Part II.C.1, is one such example, as is a related technique called the *firehose of lies*, wherein someone tries to mitigate criticism by disorienting their audience with numerous contradictory explanations.¹⁷⁰

Second, disinformative practices are not exclusive to the government. *Doubt-mongering*, perhaps the best example of private disinformation campaigns, lies in corporate uses of the “Tobacco Strategy.”¹⁷¹ For over 40 years, the American tobacco industry infamously sought to suppress knowledge of the dangers of smoking cigarettes.¹⁷² Despite knowing as early as 1953 of the danger of their products, the tobacco industry continued to deny health risks and actively sow doubt among the public until the 1990s.¹⁷³ One 1969 internal memo read, “[D]oubt is our product since it is the best means of competing with the ‘body of fact’ that exists in the minds of the general public.”¹⁷⁴ Hoping to replicate the tobacco industry’s success in disinforming the public, the fossil-fuel industry employed the “tobacco road” to promote climate denialism.¹⁷⁵ Since as early as 1977, oil corporations and their financial supporters have donated millions of dollars to climate-denialist think tanks, sponsored contradictory scholarship, lobbied elected officials to take denialist positions, and pushed education officials to adopt science curricula encouraging doubt.¹⁷⁶ Despite a functionally universal scientific consensus (over 99.9%) on anthropogenic climate change and over

170. MCINTYRE, ON DISINFORMATION, *supra* note 99, at 32; *see* RAUCH, THE CONSTITUTION OF KNOWLEDGE, *supra* note 140, at 163 (describing how Steve Bannon’s strategy is to “flood the zone with shit”).

171. ORESKES & CONWAY, *supra* note 139, at 6, 34–35.

172. *Id.* at 33.

173. *Id.* at 21, 33–34; *see* United States v. Philip Morris, Inc., 449 F. Supp. 2d 1, 27–28, 146 (D.D.C. 2006) (convicting Philip Morris and other tobacco companies under RICO Act for devising and executing a scheme to defraud consumers and potential consumers about the hazards of cigarettes, of which they had known since the 1950s); MCINTYRE, POST-TRUTH, *supra* note 89, at 20–27 (tobacco strategy).

174. MCINTYRE, POST-TRUTH, *supra* note 89, at 24 (quoting Brown & Williamson, Smoking and Health Proposal 4 (1969) (transcript of presentation to the B&W Executive Committee, available at <https://www.industrydocuments.ucsf.edu/docs/psdw0147> (Bates No. 690010951-690010959))).

175. *See generally* ORESKES & CONWAY, *supra* note 139, at 35, 168–215 (discussing tobacco and fossil fuel companies’ use of doubt); *see also* MCINTYRE, POST-TRUTH, *supra* note 89, at 27–33 (using the tobacco industry’s strategy as means of perpetuating climate denialism). Dozens of cases against the oil industry are taking place nationwide. *See U.S. Climate Change Litigation*, COLUM. CLIMATE SCH. SABIN CTR. FOR CLIMATE CHANGE L., <https://www.climatecasechart.com/search> (last visited May 17, 2026) (select “Case categories” under “Filters” on the left, then check the box next to “Actions seeking money damages for losses (US)” to see pending climate litigation).

176. *See* MCINTYRE, ON DISINFORMATION, *supra* note 99, at 11 (lobbying elected officials; contradictory scholarship); MCINTYRE, POST-TRUTH, *supra* note 89, at 27–33 (think tank contributions and influence on school curricula).

a century of observations supporting that consensus, 80% of Americans are not aware of that consensus, nearly 40% still do not believe climate change is man-made, and over 25% still do not believe it is happening at all.¹⁷⁷

Third, censorship is frequently not a domestic practice. Foreign governments frequently conduct disinformation campaigns—often called *active measures*—on other countries’ citizens.¹⁷⁸ Through such targeted efforts, foreign governments intentionally influence marketplace discourse as a means of undermining enemy democratic states, reducing their ability to self-govern.¹⁷⁹ As it turns out, the marketplace of ideas does not exist in a vacuum, and malicious non-marketgoers have become quite skilled at putting their thumb on the scale. The weaponizable nature of misinformation will be discussed further in Part III.

3. Assumption of Relative Benignity

The marketplace of ideas metaphor also assumes that constitutionally protected speech is relatively harmless to marketplace discourse. The metaphor presumes that, even if some speech is damaging, the marketplace can recover through more speech—reflecting the marketplace’s institutional resilience.¹⁸⁰ This presumed elasticity can be observed in at least two interrelated forms. First, there is a presumption that constitutionally

177. Krishna Ramanujan, *More Than 99.9% of Studies Agree: Humans Caused Climate Change*, CORNELL CHRON. (Oct. 19, 2021), <https://news.cornell.edu/stories/2021/10/more-999-studies-agree-humans-caused-climate-change> (reporting 99.9% peer-reviewed scientific papers find anthropogenic climate change); *see generally* Richard P. Allan et al., U.N. Intergovernmental Panel on Climate Change (IPCC), *Summary for Policymakers*, in CLIMATE CHANGE 2021, WORKING GROUP I: THE PHYSICAL SCIENCE BASIS, CONTRIBUTION TO THE SIXTH ASSESSMENT REPORT OF THE IPCC 3 (V. Masson-Delmotte et al. eds., 2021) (showing broad and international consensus among scientific community of the existence and danger of climate change); Svante Arrhenius, *On the Influence of Carbonic Acid in the Air Upon the Temperature of the Ground*, 41 PHIL. MAG. & J. SCI. 237, 237–38 (1896) (first recorded observation of climate change); Anthony Leiserowitz et al., CLIMATE CHANGE IN THE AMERICAN MIND: BELIEFS & ATTITUDES 5, 8, 10 (2023) (statistics); Brian Kennedy & Alec Tyson, *How Americans View Climate Change and Policies to Address the Issue*, PEW RSCH. CTR. (Dec. 9, 2024), <https://www.pewresearch.org/science/2024/12/09/how-americans-view-climate-change-and-policies-to-address-the-issue/> (statistics).

178. *See* RID, *supra* note 21, at 4–5 (Soviet Cold War disinformation campaigns); NAT’L INTEL. COUNCIL, ICA 2020-00078D, INTEL. COMM’Y ASSESSMENT: FOREIGN THREATS TO THE 2020 US FEDERAL ELECTIONS 1 (2021); *see also, e.g.*, Mary Clare Jalonick & Eric Tucker, *Senate Panel Backs Assessment that Russia Interfered in 2016*, AP (Apr. 21, 2020), <https://apnews.com/article/d094918c0421b872eac7dc4b16e613c7>.

179. *See* RID, *supra* note 21, at 4–5; Renee DiResta, *Algorithms, Affordances, and Agency*, in SOCIAL MEDIA, FREEDOM OF SPEECH, AND THE FUTURE OF OUR DEMOCRACY 121, 127 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022).

180. *See* Schauer, *Free Speech and the Argument from Democracy*, *supra* note 25, at 248 (“Ratchet Fallacy”).

protected speech will not lead to the dissolution of the democracy in which the marketplace exists.¹⁸¹ This presumption is the focus of both Part II.C.5 and Part III. Second, there is a presumption that the mere presence—rather than the merits—of constitutionally protected speech supporting a minority opinion will not undermine the public’s ability to implement the majority position.¹⁸² Justice Oliver Wendell Holmes Jr. made this presumption in his free-speech opinions, basing his rationale in a strange commitment to majoritarian principles.¹⁸³ By taking the fallacious truth-as-popular-acceptance position¹⁸⁴, he tacitly took the position that speakers’ minority viewpoints should receive constitutional protection because those viewpoints posed no real risk of interfering with the majority’s ability to implement its viewpoint.¹⁸⁵

This principle of functional impotence in the marketplace is deeply misguided. In the United States, hate speech provides a clear illustration. Generally speaking, a majority of Americans value equality of opportunity, respect for human dignity, and equal treatment under the law and so want American society to reflect those values. However, where a small yet vocal minority of Americans expresses hateful positions for one or more targeted demographics, that minority of speakers reduces the dignity of that demographic and increases social tensions at that demographic’s expense.¹⁸⁶ The expression of those hateful positions by that minority of speakers thus detracts from the majority’s ability to bring about its values of equality and dignity.¹⁸⁷ Hate speech poses two additional challenges. First, it is especially resistant to counterspeech because it tends to discourage potential sources of counterspeech, and the targeted demographic often has fewer resources and marketplace access to counter the hate speech effectively.¹⁸⁸ Second, it is

181. See Kramer, *supra* note 29, at 30–31.

182. SCHAUER, FREE SPEECH, *supra* note 2, at 29–30.

183. Frederick Schauer, *Oliver Wendell Holmes, the Abrams Case, and the Origins of the Harmless Speech Tradition*, 51 SETON HALL L. REV. 205, 215–16 (2021) [hereinafter Schauer, *Harmless Speech Tradition*]; GRABER, *supra* note 74, at 109–11; compare *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (arguing that compulsory vaccination laws should be upheld because of “the right of a majority to embody their opinions in law”), with *id.* at 55–56 (majority opinion) (explaining that such laws are instead justified as valid exercises of state police power to protect public health and the common good).

184. See *supra* Part II.B.1.

185. GRABER, *supra* note 74, at 109–11; Schauer, *Harmless Speech Tradition*, *supra* note 183, at 205–06, 215–16.

186. SCHAUER, FREE SPEECH, *supra* note 2, at 29–30.

187. *Id.*; see, e.g., Ibram X. Kendi, *When Free Speech Becomes Unfree Speech*, THE EDULEDGER (Oct. 20, 2015), <https://www.diverseeducation.com/students/article/15097335/when-free-speech-becomes-unfree-speech> (exemplifying negative free speech protections coming at the expense of racial equality and dignity).

188. Napoli, *supra* note 25, at 67; see Murray, *supra* note 98, at 199–200.

“cheaper” and more easily deployable than corrective counterspeech, a frustrating complement to the first challenge.¹⁸⁹

4. Assumption of Fit

The marketplace of ideas metaphor is not a one-size-fits-all approach. Technological advancements have created new means of communication with unique properties for which the marketplace metaphor must account to adequately support First Amendment protections.¹⁹⁰ The emergence of film in the early 20th century introduced a visual dimension to communication and expression to which the Supreme Court struggled for decades to apply the First Amendment.¹⁹¹ And when broadcast media traded the physical property of print media for the same spatial dimension as the telephone, the marketplace of ideas metaphor needed to be tailored accordingly.¹⁹²

Technological advancements that create new means of communication also create new opportunities for misinformation, in any of its forms, to proliferate. Governments have struggled with this issue for hundreds of years, and the result, to put it mildly, is not a better-informed electorate.¹⁹³ For instance, the invention of the printing press helped spur the witch-hunting obsession in Europe from the 15th to the 18th centuries.¹⁹⁴ The publication and mass distribution of a 1486 how-to for witch-hunting, *The Hammer of the Witches*, led to around 300 years of witch-based conspiracies, witch-hunting institutions, and the torture or execution of over 50,000 people.¹⁹⁵

189. Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for 21st-Century Reformers*, 54 U.C. DAVIS L. REV. 1631, 1640 (2021).

190. *Red Lion Broad., Inc. v. FCC*, 395 U.S. 367, 386 (1969) (“[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them.”); see sources cited *supra* note 67; see also, e.g., *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (holding Fairness Doctrine is inapplicable to newspapers).

191. See *Mut. Film Corp. v. Indus. Comm’n. of Ohio*, 236 U.S. 230, 242, 244 (1915) (“[Films] are mere representations of events, of ideas and sentiments published and known; vivid, useful, and entertaining, no doubt, but . . . capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition.” (emphasis added)), *overruled by* *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

192. See, e.g., *Red Lion Broad.*, 395 U.S. at 387–88 (discussing the physical scarcity of the radio frequency spectrum as a justification for tailored First Amendment regulations); *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (applying a similar rationale to television broadcasting, noting that a licensee’s exclusive use of the public domain is burdened by enforceable public obligations).

193. See YUVAL NOAH HARARI, NEXUS 92–93 (2024); YASCHA MOUNK, THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER AND HOW TO SAVE IT 137–39 (2018) (explaining how the wide dissemination of information by the printing press did not lead to a better-informed public).

194. See HARARI, *supra* note 193, at 92; see generally Kerice Doten-Snitker et al., *Ideational Diffusion and the Great Witch Hunt in Central Europe*, 53 THEORY & SOC’Y 1291 (2024).

195. See HARARI, *supra* note 193, at 94–101.

The United States, too, has adjusted poorly. For instance, while First Amendment free-press protection was primarily meant for individual publishers, contemporary usage of the term “press” has questionably led to free-press coverage for virtually all books, magazines, newspapers, and news broadcasts.¹⁹⁶

As evidenced by new-age disinformation tactics like flooding, the marketplace metaphor has not been tailored to the internet and social media.¹⁹⁷ Social media’s unique properties have substantial impacts on the dissemination of misinformation. To name a few: social media platforms constantly change and add features affecting user experience; new platforms and features spur changes by other platforms; platforms commonly update their ad policies and technology in ways that affect user interaction and content creator incentives; and the international nature of the internet often leads to inconsistent and uncoordinated regulatory policies.¹⁹⁸ Nonetheless, the Supreme Court has applied the marketplace metaphor to online speech with neither the appropriate tailoring nor the appropriate adjustments to that tailoring as technology has evolved.¹⁹⁹

Poor tailoring of free-speech protections—not just the marketplace metaphor—to new channels of speech also implicates the “principle of functional impotence.”²⁰⁰ First, existing First Amendment speech doctrines like the *clear and present danger* standard already fail to account for the more indirect and attenuated harms of misinformation, which, by nature, reduces the electorate’s ability to think and act in its own interest.²⁰¹ This alone cuts against Justice Holmes’s position on free-speech protections.²⁰² Second, technological advancements allow peddlers of misinformation to reach an impossibly larger audience. As a result, doctrines that do not address

196. SCHAUER, *FREE SPEECH*, *supra* note 2, at 106–07.

197. See ROSENFELD, *supra* note 18, at 40–41, 156; BENKLER ET AL., *supra* note 144, at 20–23; STROSSEN, *FREE SPEECH*, *supra* note 1, at 142–43 (“More recently, the communications medium by which speech is transmitted has become a less significant factor in determining how much protection the speech should receive . . .”).

198. Garrett Morrow & John P. Wihbey, *Marketplace of Ideas 3.0? A Framework for the Era of Algorithms*, 29 RICH. J.L. & TECH. 52, 87–89 (2023).

199. See STROSSEN, *FREE SPEECH*, *supra* note 1, at 142–43. Note that Strossen illustrates this contention somewhat supportively, which this Article does not. Compare *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (limiting initial tailoring of the marketplace metaphor to online speech), with *Packingham v. North Carolina*, 582 U.S. 98, 104, 108 (2017) (rejecting First Amendment protections for sex offenders using social media).

200. See *supra* Part II.C.3.

201. See Kang, *Against Political Speech*, *supra* note 10, at 803–04, 856–67, 863–64 (arguing that political speech protection threatens democracy by enabling misinformation); *Hustler Mag. v. Falwell*, 485 U.S. 46, 52 (1988); Kramer, *supra* note 29, at 25–26, 30–31.

202. See sources cited *supra* note 183.

misinformation challenges become increasingly inadequate as technological innovation creates new channels by which misinformation can reach receptive audiences that were previously out of reach.²⁰³

This shortcoming culminates in previously tolerable misinformation causing intolerable harm with impunity.²⁰⁴ A prime example is the phenomenon of *stochastic terrorism*, where a public figure's demonization of an individual or group leads to violence against that individual or group by the public figure's audience.²⁰⁵ One such perpetrator is Alex Jones, the prominent political extremist and conspiracy theorist. Infamously, Jones falsely depicted mass shootings in Newtown, Connecticut (2012) and Parkland, Florida (2017) as government "false flag" operations employing child "crisis actors" to drum up support for gun control measures.²⁰⁶ His defamatory claims against the survivors and victims' families led to extended harassment campaigns, tormenting, death threats, and other forms of abuse that culminated in \$1.4 billion in defamation suit damages.²⁰⁷ On April 30, 2026, Jones announced that, due to a forced closure of his Infowars studio in Austin, Texas, "the last official Infowars show" would air that day.²⁰⁸ Unfortunately, he plans to continue to produce his disinformative, conspiracy content at a new studio.²⁰⁹ Aside from a few assertions constituting actionable defamation, Jones's decades of broadcasting fictional content and inspiring real-world crimes have generally enjoyed First Amendment protection.²¹⁰ Without online media to circulate their absurdities, bad actors like Jones would presumably be functionally impotent political speakers

203. See BENKLER ET AL., *supra* note 144, at 33–34.

204. See Kramer, *supra* note 29, at 24–27.

205. Bryn Nelson, *Weaponization of Disgust*, SCI. AM., May 2023, at 10, 10.

206. See Jim Vertuno, *Alex Jones Concedes Sandy Hook Attack was '100% Real'*, AP (Aug. 3, 2022), <https://apnews.com/article/health-us-news-shootings-texas-lawsuits-d029d6736d2ce6755c9e89e7cf9f27af>; Rachel Janik, "Crisis Actors" Conspiracy Theory Spreads Across the Radical Right, S. POVERTY L. CTR. (Feb. 23, 2018), <https://www.splcenter.org/resources/hatewatch/crisis-actors-conspiracy-theory-spreads-across-radical-right/>.

207. See Mark Sherman, *Supreme Court Rejects Alex Jones' Appeal of \$1.4 Billion Defamation Judgment in Sandy Hook Shooting*, AP (Oct. 14, 2025), <https://apnews.com/article/supreme-court-newtown-shooting-alex-jones-infowars-ddcdede90c0c8d2710c768fd0ea9946f>.

208. Tovia Smith, *The Onion's Bid to Take Over Infowars Moves to the Texas Supreme Court*, NPR, <https://www.npr.org/2026/04/30/nx-s1-5806038/the-onion-infowars-alex-jones-texas-supreme-court> (last updated Apr. 30, 2026).

209. *Id.*

210. See, e.g., Peter Fimrite, *Masked Man Enters, Attacks Bohemian Grove / 'Phantom' Expected Armed Resistance*, SFGATE (Jan. 24, 2002), <https://www.sfgate.com/bayarea/article/masked-man-enters-attacks-bohemian-grove-2881742.php> (reporting Jones's broadcast inspired an armed man to enter San Francisco-based Bohemian Club, convinced of "bizarre, Luciferian ceremonies," "child abuse," and "human sacrifice").

relegated to the political fringe, as Justice Holmes envisioned.²¹¹ This audience size issue is a frequently ignored principle in First Amendment jurisprudence and will be revisited in Part IV.

5. Assumption of Inevitability

Finally, the marketplace metaphor presupposes democracy. John Stuart Mill understood that truth would not always prevail over falsehood in the short term, but he argued that over long periods of time, truth would be rediscovered and reasserted until the conditions were right for it to achieve popular acceptance.²¹² In other words, Mill believed the marketplace of ideas would course correct and eventually arrive at truth in the long run—an idea which other contributors to the American free-speech tradition seem to have adopted.²¹³ But no matter the timeframe, truth has no inherent power to overcome falsehood and marketgoers have no inherent power to discern the two.²¹⁴ This Article has demonstrated this to be the case in the short term.²¹⁵ By any definition of *the long run*, the result is the same. In any observable length of time, history is replete with counterexamples of truth reliably overcoming falsehood; in an unlimited or indefinite timeframe, the notion that truth will eventually triumph is unfalsifiable and worthless.²¹⁶ In any case, trust that truth will inherently prevail is unjustifiable: a parallel of the misplaced trust the American free-speech tradition has in the marketplace of ideas.

But Mill was wrong for another, more important reason. As this Article has suggested several times, the marketplace metaphor presupposes the survival of the democratic system in which it exists.²¹⁷ Of the many problems with analogizing speech to economics, faith that a democratic public will inevitably find its way to truth is likely the worst; not because of some cynical view of the American public or human beings in general, but rather because democracies are notoriously fragile and not known for their longevity.²¹⁸ It must be understood that popular sovereignty is its own weakness, a double-

211. See sources cited *supra* note 183.

212. MILL, *supra* note 4, at 54; see SCHAUER, FREE SPEECH, *supra* note 2, at 26–27.

213. See, e.g., CHAFEE, FREE SPEECH IN THE UNITED STATES, *supra* note 28, at 139 (“The only tribunal which can . . . [evaluate] the menace of ideas is time.”).

214. SCHAUER, FREE SPEECH, *supra* note 2, at 26–27.

215. See *supra* Part II.A.3, II.B.2.

216. SCHAUER, FREE SPEECH, *supra* note 2, at 27.

217. See *supra* Part II.

218. See Kramer, *supra* note 29, at 25–26; O’CONNOR & WEATHERALL, *supra* note 29, at 179–80.

edged sword that has been observed for millennia.²¹⁹ As the philosopher Karl Popper once described this dynamic—sometimes called the *Paradox of Freedom* and captured in the Founding Fathers’ fear of the *tyranny of the majority*—“unlimited freedom leads to its opposite, since without its protection and restriction by law, freedom must lead to a tyranny of the strong over the weak.”²²⁰ This is the precise dynamic at play between constitutional free-speech protections and the (lack of) regulation of misinformation: if a voting majority can be convinced of dangerous fictions and cast their votes based on their misinformed understanding, the democratic public loses its ability to self-govern, and their compromised democracy begins to devolve into autocracy.²²¹ Joseph Goebbels, the Minister of Propaganda in Nazi Germany, hauntingly once said, “This will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed.”²²² Mill did not account for the notion that democracy may not survive long enough for truth to be found. As Zechariah Chafee once paraphrased his contemporary’s comments on the matter, “[I]n the long run . . . we shall all be dead – and perhaps not peacefully in our beds either.”²²³

* * *

Whether it takes the form of fake news, disinformation tactics, or propaganda, misinformation is the Achilles’ heel of democracy: it turns the

219. See Plato, Republic bk. VI, 488c–89a (“Ship of State” metaphor); *id.* bk. VIII, 562c–62e (Socrates’s criticism of democracy); George Washington, Washington’s Farewell Address to the People of the United States 12 (Sept. 19, 1796), in S. Pub. 115-5, Dec. 2017, at 1, 11–12 (stating that demagogues will exploit popular sentiment to gain power and subvert democracy); KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES 581 n.4 (Princeton 1994) (1945) (“paradox of tolerance”).

220. POPPER, *supra* note 219, at 257–58 (Paradox of Freedom); see THE FEDERALIST NO. 51, *supra* note 41, at 324–25.

221. See SCHAUER, FREE SPEECH, *supra* note 2, at 160–61; see also, e.g., GUSTAVE LE BON, THE CROWD: A STUDY OF THE POPULAR MIND 67 (Dover 2002) (1896) (“The masses have never thirsted after truth. They turn aside from evidence that is not to their taste, preferring to deify error, if error seduce them. Whoever can supply them with illusions is easily their master; whoever attempts to destroy their illusions is always their victim.”); see also BENITO MUSSOLINI, MY AUTOBIOGRAPHY 25 (Richard Washburn Child trans., Scribner ed. 1928) (“Among foreign writers, I have meditated much upon the work of the German thinkers. I have admired the French. One of the books that interested me most was the “Psychology of the Crowd” [also known as “The Crowd”] by Gustave Lebon [sic].”).

222. This quote may be misattributed, however, likely coming from an introduction to a compilation of Goebbels’s works. See DER ANGRIF: AUFSÄTZE AUS DER KAMPFZEIT [THE ATTACK: ESSAYS FROM THE FIGHTING PERIOD] 61 (Hans Schwarz van Berk ed., 1935), quoted in STANLEY, PROPAGANDA, *supra* note 24, at v.

223. CHAFEE, FREE SPEECH IN THE UNITED STATES, *supra* note 28, at 560 (paraphrasing Walter Lippmann).

popular sovereignty of the democratic public against itself. The marketplace of ideas metaphor and other free-speech doctrines, First Amendment jurisprudence, and the general American free-speech tradition do not account for this and wrongly refuse to do so. These frameworks erroneously adhere to a near-total commitment to a negative freedom of speech that cannot address the harms of misinformation until those harms, for instance, give rise to a defamation claim. For the many reasons outlined in this Part, misinformation makes the conception of free speech as a negative freedom untenable, likely catastrophic for American democracy, and progressively less viable with time.²²⁴ As Part III will explain, the consequences for failing to adopt positive free speech protections—so as not to infringe upon the enjoyment of negative free speech—will be fatal for democracy.²²⁵

III. DEMOCRATIC EROSION, THE ANOCRATIC FORK, AND THE CONSEQUENCES OF INACTION

The circumstances described above evince a natural and fatal malfunction of democracy. It is the intersection at which popular sovereignty and democratic rule come to be at odds. The democratic state that finds itself at this fork in the road faces the dilemma of making fundamental changes to preserve its democratic system or succumbing to democratic collapse from elected authoritarian rule.²²⁶ The democracy at this fork has backslid into a state of *anocracy*, a form of government between democracy and autocracy that has features of both.²²⁷ The United States presently sits at this *Anocratic Fork*—somewhere it has not been since the volatile years following independence—and we are here because of our commitment to negative freedom and especially to negative free speech.²²⁸ As a result, “We are no longer the world’s oldest continuous democracy.”²²⁹ To traverse the Anocratic Fork and reestablish democracy in the United States, we must adopt positive free-speech protections. To do so, it is paramount to

224. SUNSTEIN, ON RUMORS, *supra* note 21, at 10 (supporting the idea that disinformative political speech inhibits democratic deliberation and causes citizens to lose faith in the government, its officials, and its policies).

225. See MCINTYRE, ON DISINFORMATION, *supra* note 99, at 89 (“The biggest problem facing our nation is misinformation-at-scale. . . . The cost of doing nothing is democracy’s end.” (alteration in original) (quoting *Hearings*, *supra* note 112, at 7)).

226. See WALTER, *supra* note 108, at 89–101; see also, e.g., Jerome Kerwin, *The German Reichstag Elections of July 31, 1932*, 26 AM. POL. SCI. REV. 921, 921 (1932) (National Socialist Party wins 230 seats in German legislature); Karl Loewenstein, *Dictatorship and the German Constitution: 1933–1937*, 4 U. CHI. L. REV. 537, 545 (1937) (German legislature votes to grant dictatorial power).

227. See WALTER, *supra* note 108, at 14.

228. See *id.* at 135–38.

229. See *id.* at 138.

understand the dynamics at play: the influence of populist demagoguery, the role of misinformation, and how social media acts as an accelerant.

A. Misinformation Feedback Loops

The addition of misinformation into a democracy, intentionally or not, sets into motion two interrelated feedback loops that facilitate democratic erosion. This Article will refer to these as the *dysfunction* and *radicalization* feedback loops, respectively. This Part will briefly provide a general description of each feedback loop before exploring their key contributing factors. The first feedback loop, the *dysfunction feedback loop*, pertains to democratic erosion by way of misinformation's direct damage to democratic deliberation. Misinformation, by nature, detracts from democratic deliberation by reducing the set of mutually agreed-upon facts required for productive discussion and informed progress.²³⁰ Uninformed deliberation then produces poor decision-making by the electorate in evaluating the quality of important ideas, issues, arguments, ballot measures, and candidates for public office.²³¹ The elected government then acts either in accordance with, or in spite of, these misunderstandings and misevaluations, performing less successfully and becoming less responsive to the public's needs.²³² As a result, the government's unresponsiveness to the democratic public causes dissatisfaction, distrust, and delegitimization in the eyes of its citizens.²³³ The citizens' disconnection and distrust toward this delegitimized government builds receptiveness to misinformation.²³⁴ Both domestic populist demagogues and, as explored in Part II.C.2, malicious foreign actors exploit

230. See *supra* Part II.B.1.

231. ROSENFELD, *supra* note 18, at 129–30; Balkin, *Constitutional Crisis*, *supra* note 39, at 152–53; Redish & Pereyra, *supra* note 22, at 468.

232. Balkin, *Constitutional Crisis*, *supra* note 39, at 151; JÜRGEN HABERMAS, LEGITIMATION CRISIS 70 (Thomas McCarthy trans., Beacon Press 1975) (1973). For example, in 2024, misinformation, disinformation, and conspiracy theories about the Federal Emergency Management Agency (FEMA) led many survivors to not to seek aid or evacuate during Hurricane Helene, making disaster relief efforts harder, sowing distrust against FEMA, and leading to heavy FEMA funding cuts. David Klepper, *After the Deluge, the Lies: Misinformation and Hoaxes About Helene Cloud the Recovery*, AP, <https://apnews.com/article/hurricane-helene-trump-musk-conspiracy-theories-misinformation-fe81869765d778ac2ff3dc5f9ac18e10> (last updated Oct. 5, 2024); David Klepper, *Russia Amplified Hurricane Disinformation to Drive Americans Apart, Researchers Find*, AP, <https://apnews.com/article/russia-hurricane-disinformation-fema-9e37c73ab8ffa2a2d338797a1a827e57> (last updated Oct. 24, 2024); Jack Brook, *Loss of FEMA Program Spells Disaster for Hundreds of Communities and Their Projects*, AP, <https://apnews.com/article/fema-bric-grants-climate-resilience-cb2ead8d418e1ff4e53d95f482de3522> (last updated Apr. 28, 2025).

233. Balkin, *Constitutional Crisis*, *supra* note 39, at 152–53; HABERMAS, *supra* note 232, at 69, 72.

234. SUNSTEIN, ON RUMORS, *supra* note 21, at 56; BENKLER ET AL., *supra* note 144, at 16.

this weakness of democracy regularly and to great effect.²³⁵ The second feedback loop is the *radicalization feedback loop*, and it pertains to democratic erosion by way of populist demagoguery undermining key democratic norms. Misinformation leads to social and political polarization, creating partisan animosity, defactualization (i.e., the rejection of factual information and the formation of different political realities), and distrust that feed into one another.²³⁶ The results are twofold: (1) heavy misinformation, often taking the forms of conspiracism and denialism;²³⁷ and (2) an unmooring from reality that creates high susceptibility to propaganda.²³⁸ And, as the final section of this Part will explore, each component of this feedback loop contributes to the likelihood of political violence and civil war.²³⁹

B. Populist Demagoguery and Identity-Based Appeals

As populist demagogues, aspiring autocrats contribute to both misinformation feedback loops described above. To do so, they exploit the identity-based fears and misinformed grievances of a particular disgruntled demographic—usually the dominant socio-ethnic group, often leading that demographic to factionalize along racial, ethnic, and religious lines.²⁴⁰ Populist demagogues instill this faction with a fear that their traditional way of life is being abandoned, and thus rejected, producing feelings of loss, insult, resentment, and hostility.²⁴¹ This identity-based feeling of loss,

235. See *supra* Part II.C.2; RID, *supra* note 21, at 11, 426 (describing strategic disinformation campaigns, or “active measures”); see also, e.g., Shannon Bond, Jude Joffe-Block & Caitlin Thompson, *How Russian Operatives Covertly Hired U.S. Influencers to Create Viral Videos*, NPR (Sept. 5, 2024), <https://www.npr.org/2024/09/05/nx-s1-5100829/russia-election-influencers-youtube>.

236. See *infra* Part III.B; DIRESTA, INVISIBLE RULERS, *supra* note 112, at 230 (distrust and polarization feedback loop); YOUNG, *supra* note 58, at 59–62, 122–23 (defactualization, different political realities, affective polarization); MCINTYRE, ON DISINFORMATION, *supra* note 99, at 24–25 (defactualization); MARIETTA & BARKER, *supra* note 132, at 262–63 (polarization, defactualization, distrust feedback loop).

237. See YOUNG, *supra* note 58, at 52; SUNSTEIN, ON RUMORS, *supra* note 21, at 56–57; MCINTYRE, ON DISINFORMATION, *supra* note 99, at 26, 84–85 (denialism); ARENDT, TOTALITARIANISM, *supra* note 102, at 382 (denialism).

238. See *supra* Part II.B.2.

239. See *infra* Part III.E.

240. See WALTER, *supra* note 108, at 35–40; YOUNG, *supra* note 58, at 66, 68–69, 134–35, 180–81 (race and religion, respectively; demagogues target these overlaps); STANLEY, FASCISM, *supra* note 40, at 89–90, 98–99 (describing the same tactics as used in fascist politics).

241. WALTER, *supra* note 108, at 36–40, 42–46, 63, 65–69, 74–77 (“superfactions” and “downgrading”); YOUNG, *supra* note 58, at 66, 180–81 (identity threat); KALMOE & MASON, *supra* note 92, at 33, 69–70, 74, 78–81, 85–87, 106, 120, 162–64; STANLEY, FASCISM, *supra* note 40, at 94, 98–99 (loss of dominant status).

sometimes called a *status threat* or *identity threat*, produces tremendous emotional investment in one's partisan identity that, in turn, leads to significant ideological radicalization and hostility toward political opponents—even to a point of becoming open to political violence and the dehumanization of those opponents.²⁴² Non-faction members factionalize in response, exhibiting similar but more moderate behavior.²⁴³ Moreover, the group psychosocial behaviors discussed in Part II.A.1–2 (e.g., group polarization and groupthink) accentuate this issue, further diluting the quality of deliberation and decision-making within the groups.²⁴⁴ And because major political events like elections tend to name winners and losers and serve as predictable occasions on which factions may lose power, elections ironically become democratically *destabilizing* events rather than *restabilizing* ones.²⁴⁵

Today, both the news media and social media drastically exacerbate this issue. Where tensions escalate between competing factions, members of each faction seek out news coverage that comforts them by reaffirming the understanding that is rooted in the identity they feel is under attack.²⁴⁶ This is particularly strong among those in the first faction, whose threatened identity is likely a combination of smaller identities, such as race, ethnicity, religion, culture, or country of origin.²⁴⁷ As well, the more identities that are implicated, the stronger the feeling of status threat and thus susceptibility to demagoguery.²⁴⁸ As for-profit corporations, traditional news outlets—and the social media platforms on which their coverage appears—are incentivized to attract and maintain viewers, and they do so with sensationalized, outrageous, and analytically shallow coverage regardless of

242. YOUNG, *supra* note 58, at 60–62, 92–93, 97, 100–101 (regarding partisan identity, affective polarization, and dehumanization); KALMOE & MASON, *supra* note 92, at 69–70, 75–77 (regarding affective polarization leading to increasing openness to political violence; strong partisan social identity leads to high polarization and violent views); Robin K. Maril, *Originalism and Democratic Decline*, 88 MD. L. REV. 926, 966–67 (2025); *see, e.g.*, WALTER, *supra* note 108, at 53, 63–69, 74–77, 173–74 (regarding status threat, increased openness to political violence, dehumanization); STANLEY, *FASCISM*, *supra* note 40, at xxix–xxx, 89–90 (use of identity-based polarization to dehumanize others).

243. *See* YOUNG, *supra* note 58, at 92; STANLEY, *FASCISM*, *supra* note 40, at 96–97 (regarding counter-factionalization in the face of discrimination and oppression).

244. *See supra* Part II.A.1; YOUNG, *supra* note 58, at 108 (stating that identity-driven sociopolitical sorting leads to different understandings of the world).

245. WALTER, *supra* note 108, at 93, 95–96; KALMOE & MASON, *supra* note 92, at 33, 46, 64, 120, 126; *see, e.g.*, *Trump v. United States*, 144 S. Ct. 2312, 2324–25 (2024) (referring to the events of Jan. 6, 2021).

246. YOUNG, *supra* note 58, at 66, 180–81; *see supra* Part II.A.1 (confirmation bias and motivated reasoning).

247. YOUNG, *supra* note 58, at 183, 235; *see generally* WALTER, *supra* note 108, at 35–40 (regarding trends of factionalization and “superfactions” in anocracies).

248. WALTER, *supra* note 108, at 44–46.

its quality or accuracy.²⁴⁹ By providing sensationalized coverage of identity-reaffirming content, popular media maximizes viewership and creates a deeply problematic trust in their coverage.²⁵⁰ This trust is problematic for three reasons. First, due to something called the *Hostile Media Effect*, the more attached someone is to their partisan identity, the more hostile they become to any media coverage inconsistent with their partisan opinions.²⁵¹ Second, as those staunch partisans develop trust in the coverage, they also radicalize further and become hostile toward any supposedly like-minded sources that contradict their understanding, thus requiring a consistent flow of progressively more outrageous coverage to maintain their viewership.²⁵² Third, the greater the following this coverage attracts, the more incentive politicians and activists have to indulge and contribute to the narratives presented in the coverage, which, in turn, requires outrageous claims or actions from them to earn coverage from the outlet and trust from its audience.²⁵³ Worse still, this progressively radicalizing coverage provides the ideal opportunity for demagogues to reach “not just a receptive audience, but also a receptive medium”; the audience is seeking uncritical guidance during a (perceived) trying time, and the news outlet has substantial profit incentives to allow the demagogue to regularly indulge that audience with low-value political rhetoric.²⁵⁴ The feedback loop the news outlet has created will produce progressively more misinformation and do progressively more damage to democratic deliberation.²⁵⁵

While social media companies uncritically—but indirectly—indulge this profit-centered feedback loop by providing access to that content on their platforms, the platforms themselves spur those identity-based fears in two unique ways, which this Article will refer to as the *rabbit hole* and *sorting dynamics*, respectively.²⁵⁶

249. *Id.* at 110–11, 115–16; BENKLER ET AL., *supra* note 144, at 77–81; YOUNG, *supra* note 58, at 153, 156.

250. YOUNG, *supra* note 58, at 181–83; BENKLER ET AL., *supra* note 144, at 77–81.

251. YOUNG, *supra* note 58, at 175–76, 183; BENKLER ET AL., *supra* note 144, at 78–80.

252. YOUNG, *supra* note 58, at 175–76, 183; BENKLER ET AL., *supra* note 144, at 77–81; DIRESTA, INVISIBLE RULERS, *supra* note 112, at 168; *see, e.g.*, Will Steakin, *Trump Supporters Angry Over Justice Department’s Epstein Memo*, ABC (July 8, 2025), <https://abcnews.go.com/Politics/trump-supporters-angry-justice-departments-epstein-memo/story?id=123567461>.

253. YOUNG, *supra* note 58, at 134–35, 147, 151, 183; BENKLER ET AL., *supra* note 144, at 78–80.

254. YOUNG, *supra* note 58, at 147, 153 & n.66, 156, 194, 203–204 & nn.22–23. Extremism and feelings of disempowerment lead to greater receptiveness to rumors and outrageous beliefs, such as conspiracy theories. *See* SUNSTEIN, ON RUMORS, *supra* note 21, at 56–57; KALMOE & MASON, *supra* note 92, at 126.

255. BENKLER ET AL., *supra* note 144, at 81.

256. YOUNG, *supra* note 58, at 206; *Hearings*, *supra* note 112, at 55.

First, the rabbit hole dynamics. As a substantial amount of scholarship across disciplines has explored, and as this Article has discussed, social media platforms create a metaphorical rabbit hole of increasingly sensationalized and extreme content as a means of maximizing user engagement and thus ad revenue opportunity.²⁵⁷ In the user's individualized rabbit hole, the algorithm not only funnels increasingly inflammatory material of questionable accuracy to the user based on their views, likes, and shares, but this also causes content creators to produce increasingly sensationalized content to attract and maintain viewers.²⁵⁸ As discussed earlier in this Part, identity-based content is particularly evocative, and identity-reaffirming content is in high demand, both of which social media algorithms exploit. But unlike the news media's radicalization feedback loop, this one goes a step further in its personalized responsiveness to the individual.²⁵⁹ And in our online world, social media provides both less identity-disconfirming content and fewer real-world interactions with people of differing views, leading to information silos (filter bubbles) and ideological reinforcement.²⁶⁰

Second, the sorting dynamic. When social media algorithms recommend increasingly inflammatory content to users, they do not tailor-make new content for the individual user, but rather they recommend existing content to the user base in part on its popularity with other users with similar characteristics.²⁶¹ In doing so, social media algorithms introduce like-minded users on their interactive platforms during those users' journeys down their respective radicalization rabbit holes.²⁶² From there, the group psychosocial behaviors discussed above affect group discourse, and opportunistic propagandists and demagogues gain access to another receptive audience on a platform that incentivizes misinformation.²⁶³ Through social media, "a

257. WALTER, *supra* note 108, at 110–11; DiResta, *Algorithms, Affordances, and Agency*, *supra* note 179, at 129–30 (detailing an internal Facebook presentation, leaked to the *Wall Street Journal*, which stated: "'Our algorithms exploit the human brain's attraction to divisiveness' and promote 'more and more divisive content in an effort to gain user attention and increase time on the platform.'" (quoting Jeff Horwitz & Deepa Seetharaman, *Facebook Executives Shut Down Efforts to Make the Site Less Divisive*, WALL ST. J. (May 26, 2020), <https://www.wsj.com/articles/facebook-knows-it-encourages-division-top-executives-nixed-solutions-11590507499>)); see *supra* Part II.A.2.

258. See sources cited *supra* note 112.

259. See *Hearings*, *supra* note 112, at 5–6.

260. YOUNG, *supra* note 58, at 203–04 ("Monopolization"); WALTER, *supra* note 108, at 110–11; MINOW, *supra* note 27, at 19–20, 24–25, 30–31 ("digital gerrymandering" and the filter bubble).

261. *Hearings*, *supra* note 112, at 5–6.

262. See YOUNG, *supra* note 58, at 203–04; BENKLER ET AL., *supra* note 144, at 33–34 ("Propaganda Pipeline"); WALTER, *supra* note 108, at 111.

263. See *supra* Part II.A.1–2; YOUNG, *supra* note 58, at 147, 153, 156, 194, 203–06; *Hearings*, *supra* note 112, at 1–3.

small group of highly motivated and connected actors can manipulate public understanding of any issue simply by using these products as they are designed”; the platforms “efficiently unite monstrous errors with their defenders.”²⁶⁴

C. Negative Appeals: Negative Freedom and Individualism

In making identity-based appeals to their factionalized audiences, populist demagogues tend to base their rhetoric in individualism and negative freedom.²⁶⁵ By appealing to individualism and negative freedom, a demagogue is able to promote a lack of obligation between fellow citizens and thereby erode the faction-member audience’s solidarity with non-faction members.²⁶⁶ Fostering these sociopolitical tensions undermines the public’s capability of deliberating and organizing for social and political change—the very function a democracy is intended to facilitate.²⁶⁷ For example, authoritarians—and especially fascists—abhor labor unions for their ability to build solidarity and community among working-class faction members and working-class non-faction members.²⁶⁸ Individualism and negative freedom deployed in such ways accomplish two things. First, as employed in authoritarian regimes, it facilitates an “us” versus “them” mentality, otherizing non-faction members.²⁶⁹ Second, it instills resistance to political change, thereby preserving the status quo.²⁷⁰ In this second way, populist demagogues act in accordance with the wills of oligarchs or other elites, using negative freedom appeals as a pretext to maintain societal conditions that provide these established elites with their financial positions.²⁷¹ Since policies that support the common good (and thus positive freedom) necessarily alter such societal conditions, they undermine elites’ interests and provide them a strong financial incentive for establishing and maintaining a

264. *Hearings*, *supra* note 112, at 1; SNYDER, ON FREEDOM, *supra* note 32, at 187; *see* WALTER, *supra* note 108, at 111 (“[T]he longer a discussion continue[s], the more extreme the comments bec[o]me.”).

265. *See* STANLEY, FASCISM, *supra* note 40, at 182–83; SNYDER, ON FREEDOM, *supra* note 32, at 209–10.

266. *See* STANLEY, FASCISM, *supra* note 40, at 182–83; SNYDER, ON FREEDOM, *supra* note 32, at 209–10.

267. *See* STANLEY, FASCISM, *supra* note 40, at 182–83; SNYDER, ON FREEDOM, *supra* note 32, at 209–10 (showing solidarity as a prerequisite for democracy).

268. STANLEY, FASCISM, *supra* note 40, at 170–74, 176–77.

269. *See id.*; SNYDER, ON FREEDOM, *supra* note 32, at 209–10.

270. *See* DEWEY, LIBERALISM, *supra* note 28, at 35, 41, 43–44; DEWEY, PUBLIC AND ITS PROBLEMS, *supra* note 50, at 163–64, 192–93 (using classical liberal values to perpetuate the status quo).

271. *See* Balkin, *Constitutional Crisis*, *supra* note 39, at 151–53; DEWEY, PUBLIC AND ITS PROBLEMS, *supra* note 50, at 199, 202–03.

public fixation on negative freedom. So long as that fixation exists, the common good is not served, the status quo is perpetuated, the public grows increasingly frustrated as its needs remain unmet, and political tensions grow. An excess of negative freedom thereby exists at the expense of positive freedom and facilitates democratic decline. Concerningly, an emphasis on the value of negative freedom is a crucial element of not only American libertarian culture and its underlying liberal philosophical tradition, but also of fascist-authoritarian ideologies since the turn of the 21st century.²⁷² Rhetorical appeals to negative freedom are thus especially potent in democracies like the United States, the susceptibility of which will be explored further in Part III.D.

Negative freedom is also used for preserving a cultural and political status quo, as opposed to the socioeconomic one described above. Fascist authoritarians of the past century furnish numerous examples, as evidenced by the otherizing, “us” versus “them” mentality mentioned above.²⁷³ Such populist demagogues base their identity-based appeals in, among other things, the national identity and traditional values of their factionalized audience and a return to a corresponding (but fictional) idealized past—a tactic often referred to as “restorative nostalgia.”²⁷⁴ This restorative nostalgia has, perhaps obviously, played a central role in the past half-century of American politics, but the American legal context offers one of the best examples: constitutional originalism. While originalism as a form of constitutional interpretation is as old as the Constitution itself and has been used as one of numerous tools for interpreting its text, the contemporary originalism seen today began in the 1970s and 1980s in response to partisan dissatisfaction with rulings by the Warren and Burger Courts.²⁷⁵ Landmark mid-century rulings like *Brown v. Board of Education*,²⁷⁶ *Miranda v. Arizona*,²⁷⁷ *Roe v. Wade*,²⁷⁸ and *Griswold v. Connecticut*²⁷⁹ frustrated political conservatives, leading them to criticize the Supreme Court for

272. See STANLEY, FASCISM, *supra* note 40, at 178–79; see, e.g., *id.* at 50–51, 150 (modern autocrat tactic examples).

273. See STANLEY, FASCISM, *supra* note 40, at 11, 21, 50–52, 64, 106–08, 150–55 (Viktor Orban; Recep Erdogan; Benito Mussolini; Adolf Hitler).

274. See Maril, *supra* note 242, at 932–33, 963–64, 967–68 (“restorative nostalgia”); STANLEY, FASCISM, *supra* note 40, at 3–5, 15, 19–20 (the “mythic past”).

275. JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM 4–5 (2024); Maril, *supra* note 242, at 932, 946–51, 958.

276. 347 U.S. 483 (1954).

277. 384 U.S. 436 (1966).

278. 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

279. 381 U.S. 479 (1965).

judicial activism, “legislating from the bench,” and inventing rights not expressly found in the text of the Constitution.²⁸⁰ In line with the restorative nostalgia of the day, conservative legal scholars began calling for heavily limited judicial review and the acknowledgement of the fixed “original intent” and “original meaning” of the Constitution’s drafters, constraining judges to that understanding.²⁸¹ Out of reverence for a mythologized past, originalism’s mandate for a basis in “history and tradition” requires that modern judicial decisions be rooted in Antebellum norms and sociopolitical culture.²⁸² This mistakenly commits modern judicial decisions to outdated norms as eternal truths,²⁸³ ignores potential shifts in meaning,²⁸⁴ sidelines progress on issues of human and civil rights,²⁸⁵ and allows activist judges to cite (a)historical or (un)traditional evidence to justify their desired interpretations.²⁸⁶ In doing so, originalist jurisprudence has produced a drastic prioritization of negative freedom by heavily favoring (preferred) individual rights protections over measures supporting the common good (and thus positive freedom).²⁸⁷ Free speech jurisprudence is one such example. While our negative free-speech fixation predates the modern originalist movement by over half a century, the Supreme Court continues Chafee’s pedestalization of negative free speech by, for instance, strategically overemphasizing free speech protections to justify rulings against disapproved laws or regulations that “so much as brush up against” a First Amendment interest.²⁸⁸ As a result in line with the dysfunction feedback

280. See GIENAPP, *supra* note 275, at 4–6; Maril, *supra* note 242, at 932, 949–51.

281. See GIENAPP, *supra* note 275, at 4–6; Maril, *supra* note 242, at 932, 949–51.

282. Maril, *supra* note 242, at 961–62, 965; see, e.g., N.Y. St. Rifle & Pistol Ass’n, Inc. v. Bruen, 142 S. Ct. 2111, 2126–30 (2022) (laying out the history and tradition standard in the Second Amendment context); see also GIENAPP, *supra* note 275, at 2.

283. See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605–07 (1908) [hereinafter Pound, *Mechanical Jurisprudence*]; John Dewey, *Logical Method and Law*, 10 CORNELL L. REV. 17, 25–27 (1924) [hereinafter Dewey, *Logical Method and Law*].

284. GIENAPP, *supra* note 275, at 45 (conceptual drift).

285. Maril, *supra* note 242, at 930–31, 958, 961–64, 972–73.

286. See GIENAPP, *supra* note 275, at 1–2, 63–64; Maril, *supra* note 242, at 929–30, 958–61, 972–74.

287. See Alexander Tsesis, *The Free Speech Clause as a Deregulatory Tool*, 5 J. FREE SPEECH L. 381, 387–88, 399 (2024).

288. *Id.* at 386–87, 390, 395. For example, the Court ruled state laws unconstitutional on First Amendment free speech grounds in cases including the following: *Expressions Hair Designs v. Schneiderman*, 581 U.S. 37, 48 (2017) (holding a credit card sales law unconstitutional because it “regulat[ed] the communication of prices rather than prices themselves”); *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 585 (2011) (Breyer, J., dissenting); *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2365 (2018) (holding that a public health information disclosure law unconstitutionally required unlicensed pregnancy crisis centers to inform patients seeking family planning of their licensure status); *Am. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2389 (2021) (holding that a law unconstitutionally required charities to confidentially disclose their largest donors, violating the donors’ rights); see

loop, activist judges can “prepackage ‘justifications for particular outcomes’” while Congress and government agencies become “incapable of responding to new conditions and challenges,” and the public’s needs remain unmet.²⁸⁹ Of course, this tactic is far from limited to First Amendment claims. But by using a purely negative conception of free speech to perpetuate the status quo, courts ironically create an “inert people”—the very outcome that Justice Brandeis intended free speech to prevent.²⁹⁰ By relying on “history and tradition,” the Court weaponizes constitutional provisions against the values the Constitution was written to support, thereby participating in and contributing to the restorative nostalgia that leads to democratic decline and autocracy.²⁹¹

D. Disorientation

Populist demagogues propagandize the public through means not addressable under a tradition of purely negative free-speech conception. They anchor their identity-based appeals in negative freedom and individualism, and they frequently rely on several common tactics to undermine democratic norms and well-being. First, they foster public distrust in elites, a category from which they distinguish themselves and ideological allies.²⁹² This may take several interrelated forms, but the unifying theme is a distrustful, anti-intellectual and anti-authority sentiment in which “common sense,” everyday wisdom is asserted as preferable to expertise.²⁹³ A frustrated and resentful portion of the public—for any of the reasons discussed in this Part, be it a perceived status threat or the government’s low responsiveness to public needs—may come to see the government’s

Kim Lane Scheppelle, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 565 (2018) (“[S]peak[ing] the language of democratic constitutionalism while identifying its resonant-frequency points of tension and complexity to reverse its effects.”).

289. See Tsesis, *supra* note 287, at 382, 387, 390, 395, 400–01 (first quoting Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671 (1983); and then quoting *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2226 (2020) (Kagan, J., concurring in part and dissenting in part)); Maril, *supra* note 242, at 961, 964.

290. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); Maril, *supra* note 242, at 964, 966–67; DEWEY & TUFTS, *ETHICS* (2d ed. 1932), *supra* note 30, at 359 (misinformation worsens democratic self-government); see Murray, *supra* note 98, at 201 (hate speech context); see, e.g., *N.Y. St. Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126–30 (2022).

291. See Scheppelle, *supra* note 288, at 569–70, 579–80 (“constitutional capture”); see generally Maril, *supra* note 242, at 964–75.

292. Populist demagogues use “common sense” rhetorical appeals to play on public distrust of elites and gain trust. See ROSENFELD, *supra* note 18, at 89–91, 112–13, 125, 126–27; YOUNG, *supra* note 58, at 65–66.

293. See ROSENFELD, *supra* note 18, at 101–04, 129–30, 133–34.

legitimacy as low enough to dissuade them from giving any credence to what its subject-matter experts (or any similar or associated knowledge-producing institutions) have to say.²⁹⁴ Instead, and commonly at the direction of a populist demagogue, the public concludes that expert knowledge is no more valuable than the average citizen's "common sense."²⁹⁵ Populist demagogues earn their support by appealing to this sentiment, falsely claiming that the many issues facing the public have "simple, practical, even obvious, nonideological fixes" with "extraordinary" payoff, and that the demagogue can deliver such results to them.²⁹⁶ Second, they dismiss knowledge-producing institutions as biased or captured arms of the state, thereby defactualizing this subset of the public and fostering its own political reality.²⁹⁷ This produces something similar to the Hostile Media Effect called *Epistemic Separatism*, or the belief that only one's political faction grasps reality.²⁹⁸ Finally, the defactualized faction reaches a state of heavy susceptibility to propagandic influence, where it is essentially immune to good-faith discourse and where denialism and conspiracism run rampant.²⁹⁹ This all feeds the dysfunction feedback loop as it either serves to immunize the status quo with further political inaction or actively undermine the public

294. *Id.* at 90–91; HABERMAS, *supra* note 232, at 69, 72.

295. ROSENFELD, *supra* note 18, at 90–91, 101–04; YOUNG, *supra* note 58, at 119–20, 122; STANLEY, FASCISM, *supra* note 40, at 36, 38; *see* DiRESTA, INVISIBLE RULERS, *supra* note 112, at 227–28.

296. ROSENFELD, *supra* note 18, at 90–91, 101–02.

297. YOUNG, *supra* note 58, at 119–23, 154–55; MARIETTA & BARKER, *supra* note 132, at 262–63; STANLEY, FASCISM, *supra* note 40, at 36, 38, 50–51, 57–58; *see, e.g., id.* at 50–51 (showing authoritarian leaders Viktor Orban and Recep Erdogan delegitimizing their respective nations' universities); Paul Freking, *House Approves Trump's Request to Cut Funding for NPR, PBS and Foreign Aid*, AP (June 12, 2025), <https://apnews.com/article/trump-budget-cuts-npr-pbs-global-health-2844a884091dce5255a3f4ad70f3a1c6>.

298. *See* RAUCH, THE CONSTITUTION OF KNOWLEDGE, *supra* note 140, at 174–75; YOUNG, *supra* note 58, at 122–23; BENKLER ET AL., *supra* note 144, at 81; *see also, e.g.,* STANLEY, FASCISM, *supra* note 40, at 52 (Rush Limbaugh's "four corners of deceit: government, academia, science, and media. Those institutions are now corrupt and exist by virtue of deceit."). During his 2021 keynote address at the National Conservatism Conference, J.D. Vance, then a candidate for the U.S. Senate, explicitly framed American universities as adversaries of the nation's youth:

[W]e have to honestly and aggressively attack the universities in this country. . . . [T]he universities do not pursue knowledge and truth, they pursue deceit and lies, and it's time to be honest about that fact. . . . [A]t those universities, they are told that working with your hands is looked down upon, they are told that America is a fundamentally evil and racist country, they are taught . . . that this country, built by our fathers and grandfathers is an evil and terrible place. . . . [W]e are giving our children over to our enemies and it's time we stop doing it.

J.D. Vance, Candidate for Senate, The Universities Are the Enemy, Keynote Address at the National Conservatism Conference II (Nov. 2, 2021) (transcript available at <https://www.youtube.com/watch?v=0FR65Cifhw&t=1s>).

299. *See supra* Part II.B.2; sources cited *supra* note 99.

good with extremist political action.³⁰⁰ Social media, with its ever-expanding reach and ability to reinforce misunderstandings, makes the demagogues' job of creating this populist-expertise divide even easier.³⁰¹

E. Political Violence and Civil War

The factors presented in this Part explain the democratic erosion American society is experiencing. As part of the dysfunction feedback loop, the economic and political inequality maintained by perpetuating the status quo leads to a higher risk that those not enjoying positive freedom will resort to political violence and that the nation may even fall into civil war.³⁰² As President Kennedy famously said: "Those who make peaceful revolution impossible will make violent revolution inevitable."³⁰³ It is no coincidence and should come as no surprise that, across the globe, democratic erosion has coincided with the advent of the internet, social media use, and the need to regulate the platforms.³⁰⁴ Where online media has taken root, democracies of all forms have experienced backsliding, with a direct correlation between the extent of democratic backsliding and the presence of online media.³⁰⁵ In part, this is because online misinformation stimulates domestic terrorism and other forms of political violence. Among the greatest threats to American national security is the rising number of attacks by domestic terrorists, radicalized individually online by influences often based in ethnic, racial, or religious sentiments or "strong anti-government or anti-authority sentiments."³⁰⁶ In recent years alone, the United States has frequently seen threats of political violence, including death threats to public employees and officials,³⁰⁷ bomb

300. See ROSENFELD, *supra* note 18, at 56–57, 129–30.

301. *Id.* at 150.

302. See generally LARS-ERIK CEDERAN, KRISTIAN SKREDE GLEDITSCH, & HALVARD BUHAUG, *INEQUALITY, GRIEVANCES, AND CIVIL WAR* 93–118 (2013); see also STANLEY, *FASCISM*, *supra* note 40, at 86, 90.

303. John F. Kennedy, Remarks on the First Anniversary of the Alliance for Progress, 1962 PUB. PAPERS 220, 223 (Mar. 13, 1962).

304. WALTER, *supra* note 108, at 108.

305. *Id.* at 106–12.

306. *Oversight of the Federal Bureau of Investigation: The January 6th Insurrection, Domestic Terrorism, and Other Threats*, Hearing Before the S. Comm. on the Judiciary, 117th Cong. 1, 3 (Mar. 2, 2021) (statement of Christopher A. Wray, Director of the Fed. Bureau of Invest.); see WALTER, *supra* note 108, at 208 (discussing Wray's statement); Brian Naylor & Ryan Lucas, *Wray Stresses Role of Right-Wing Extremism in Hearing About Jan. 6 Riot*, NPR (Mar. 2, 2021), <https://www.npr.org/2021/03/02/972539274/fbi-director-wray-testifies-before-congress-for-1st-time-since-capitol-attack> (showing domestic terrorism investigations doubled between 2017 and 2020).

307. See, e.g., Christina A. Cassidy & Lindsay Whitehurst, *Election Workers Have Gotten Death Threats and Warnings They Will Be Lynched, the US Government Says*, AP, <https://apnews.com/article/election-workers-threats-justice-department-trump->

threats to public buildings and offices,³⁰⁸ attempted attacks on government offices,³⁰⁹ kidnapping and murder plots on public officials,³¹⁰ the assassination of a prominent political activist,³¹¹ two presidential assassination attempts,³¹² and other subversions of the law.³¹³ Moreover, the remote nature of the internet has given rise to stochastic terrorism.³¹⁴ One prominent example is Chaya Raichik, a political extremist and conspiracy theorist operating on social media as “Libs of TikTok.”³¹⁵ Raichik

f17df44d63156a28eaa0862b0aa08f0b (last updated Aug. 31, 2023); Nicholas Riccardi, *Rising Political Threats Take US into Uncharted Territory as 2024 Election Looms*, AP, <https://apnews.com/article/political-violence-extremism-trump-social-media-utah-9d37a5226dfc16bbf9ec910cebdaaca6> (last updated Aug. 13, 2023) (reporting that a Utah man seeking to assassinate the president was killed in standoff with FBI and that a Texas man was sentenced for death threats against Arizona election workers); *Texas Woman Accused of Threatening to Kill Judge Overseeing Trump Election Case and a Congresswoman*, AP, <https://apnews.com/article/donald-trump-tanya-chutkan-judge-threats-texas-7d90ad3c8b552b49e269a3f842a6700c> (last updated Aug. 16, 2023).

308. See, e.g., Ivana Saric, *Bomb Threats Force Evacuation of State Capitols Across U.S.*, AXIOS, <https://www.axios.com/2024/01/03/state-capitols-bomb-threats> (last updated Jan. 4, 2024); *Massachusetts Man Gets Prison for Making Bomb Threat to Arizona Election Office*, AP, <https://apnews.com/article/bomb-threat-election-office-arizona-massachusetts-7318471564eb94b7f43b822241eb550e> (last updated Mar. 13, 2024).

309. See, e.g., Tom Dreisbach, *An Attempted Attack on an FBI Office Raises Concerns About Violent Far-Right Rhetoric*, NPR (Aug. 12, 2022), <https://www.npr.org/2022/08/12/1117275044/an-attempted-attack-on-an-fbi-office-raises-concerns-about-violent-far-right-rhe>; Mike Balsamo & Samantha Hendrickson, *Ohio Gunman Appeared to Threaten FBI After Trump Home Search*, AP (Aug. 12, 2022), <https://apnews.com/article/fbi-office-shooting-suspect-killed-eb85e9faa93612fc54fb15639075d0fe>.

310. See, e.g., Joey Cappelletti & Ed White, *2 Men Convicted in Plot to Kidnap Michigan Gov. Whitmer*, AP (Aug. 23, 2022), <https://apnews.com/article/elections-presidential-michigan-gretchen-whitmer-grand-rapids-9ad8f100d32e7d5883b1be9d6c4cb8d5>; Mark Sherman et al., *Armed Man Arrested for Threat to Kill Justice Kavanaugh*, AP (June 8, 2022), <https://apnews.com/article/us-supreme-court-brett-kavanaugh-district-of-columbia-maryland-government-and-politics-179d18e7f933b3decbaddb542ceb0b29>.

311. Hannah Shoenbaum et al., *Conservative Activist Charlie Kirk Assassinated at Utah University*, AP, <https://apnews.com/article/charlie-kirk-conservative-activist-shot-546165a8151104e0938a5e085be1e8bd> (last updated Sept. 11, 2025).

312. See, e.g., *Trump Survives Assassination Attempt at Campaign Rally, As It Unfolded*, AP, <https://apnews.com/live/election-biden-trump-campaign-updates-07-13-2024> (last updated July 15, 2024); Alanna Durkin Richer et al., *Trump Was the Subject of an Apparent Assassination Attempt at His Florida Golf Club, the FBI Says*, AP, <https://apnews.com/article/trump-shooting-gunshots-florida-f62f8378d3a8ce7b2e99d6a8fb40aba9> (last updated Sept. 16, 2024).

313. See, e.g., TJ L’Heureux et al., *A Right-Wing Sheriffs Group That Challenges Federal Law Is Gaining Acceptance Around the Country*, AP, <https://apnews.com/article/constitutional-sheriffs-5568cd0b6b27680a28de8a098ed14210> (last updated Aug. 21, 2023) (“The [Constitutional Sheriffs & Peace Officers Association], known as CSPOA, teaches that elected sheriffs must ‘protect their citizens from the overreach of an out-of-control federal government’ by refusing to enforce any law they deem unconstitutional or ‘unjust.’”).

314. See *supra* notes 205–07, 210–11 and accompanying text.

315. Chaya Raichik, S. POV. L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/individual/chaya-raichik> (last visited May 17, 2026).

targets private LGBTQ individuals—often teachers and healthcare workers—across the country, posting their names, addresses, or places of employment alongside anti-LGBTQ misinformation and conspiracy theories.³¹⁶ Many of Raichik’s millions of followers then threaten and harass the individuals or their employers, aiming to get the individual fired or disrupt whatever fictional activity Raichik claims is occurring.³¹⁷ In 2021 and 2022 alone, Raichik’s posts led to bomb threat evacuations at dozens of public schools and libraries nationwide and similar threats of violence against children’s hospitals in at least five cities.³¹⁸ Raichik, however, denies accusations of wrongdoing as fake news despite knowing her content’s effects.³¹⁹

Beyond the democratic erosion the United States sees today, anocracies like the United States face a profound risk of civil war. While another conflict like the American Civil War of the 1860s is quite unlikely, we are wrong to assume that a domestic armed conflict is no longer realistic. Our accustomedness to the resiliency of our democratic institutions and lack of imagination as to what a civil war would look like in the contemporary United States have made us unjustifiably confident in our safety from violent conflict.³²⁰ Anocracies like the United States are the countries most prone to civil war, especially those with more democratic features than authoritarian ones.³²¹ Backsliding democracies, therefore, are the most at risk.³²² The hallmark of such democracies is factionalization along racial, ethnic, and religious lines.³²³ Would-be autocrats responsible for these tensions, contributing to the radicalization feedback loop, erode democratic norms and institutional legitimacy for the sake of scoring political victories.³²⁴ When

316. Will Carless, *When Libs of TikTok Tweets, Threats Increasingly Follow*, USA TODAY, <https://www.usatoday.com/story/news/investigations/2023/11/02/lib-of-tiktok-tweets-death-bomb-threats/71409213007/> (last updated Nov. 5, 2023).

317. *Id.*

318. *Id.*

319. See Matt Lavietes, *Libs of TikTok Creator Accused of Inspiring School Bomb Threats Named to Oklahoma Library Board*, NBC NEWS, <https://www.nbcnews.com/nbc-out/out-news/lib-tik-tok-bomb-threats-oklahoma-library-committee-rcna135369> (last updated Jan. 23, 2024) (Raichik denies wrongdoing); Christopher Wiggins, *Libs of TikTok Creator Seems Overjoyed at Report Highlighting Her Dangerous Posts*, ADVOCATE (Nov. 7, 2023), <https://www.advocate.com/news/lib-of-tiktok-media-attention> (reporting that Raichik posted on social media a photo of herself smiling and holding a *USA Today* article detailing her posts and her followers’ actions).

320. WALTER, *supra* note 108, at 124, 168–69.

321. *Id.* at 13, 15.

322. *Id.* at 22; Balkin, *Constitutional Crisis*, *supra* note 39, at 152–53.

323. WALTER, *supra* note 108, at 35–40; see STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 115–16 (2018).

324. See LEVITSKY & ZIBLATT, *supra* note 323, at 106–07, 111–12 (describing institutional forbearance and consequences when leaders abandon it).

not in office, they convince their factionalized audience “that democracy as it has existed will lead to more corruption, more lies, and greater bungling of economic and social policy.”³²⁵ Once an autocrat takes office, they use the ensuing political disorganization to steer into anocracy by breaking institutional norms, ignoring democratic guardrails, and “exploiting weaknesses in the constitution, electoral system, and judiciary.”³²⁶ Because other, non-autocratic officials are unable or unwilling to stop the autocrat from amassing power, the country autocratizes, coming closer to civil war.³²⁷ Unregulated social media is accelerating the process, and our commitment to a negative free-speech tradition is keeping them unregulated.³²⁸

* * *

As this Part demonstrates, the nature of democracy and the technological advancements that enable its antagonists to undermine it require a departure from the purely negative conception of free speech to which we have traditionally adhered. Over a century ago, the philosopher John Dewey explored the shortcomings of negative freedom in his explanation of positive freedom:

Effective [Positive] Freedom.—Exemption from restraint and from interference with overt action is only a condition, though an absolutely indispensable one, of effective freedom. The latter requires (1) positive control of the resources necessary to carry purposes into effect, possession of the means to satisfy desires; and (2) mental equipment with the trained powers of initiative and reflection requisite for free preference and for circumspect and far-seeing desires. *The freedom of an agent who is merely released from direct external obstructions is formal and empty. If he is without resources of personal skill, without control of the tools of achievement, he must inevitably lend himself to carrying out the directions and ideas of others. If he has not powers of deliberation and invention, he must pick up his ideas casually and superficially from the suggestions of his environment and appropriate the notions which the interests of some class insinuate into his mind. If he ha[s] not powers*

325. WALTER, *supra* note 108, at 21; see LEVITSKY & ZIBLATT, *supra* note 323, at 5 (autocrats facilitate backsliding).

326. WALTER, *supra* note 108, at 20–21.

327. *Id.* at 21.

328. *Id.* at 109.

of intelligent self-control, he will be in bondage to appetite, enslaved to routine, imprisoned within the monotonous round of an imagery flowing from illiberal interests, broken only by wild forays into the illicit.³²⁹

No democratic citizen is truly free under such circumstances. Failing to adopt a positive conception of free speech will constitute both a failure to address a central flaw of democracy and a failure to adapt to changing circumstances.³³⁰ But we have remained enamored with negative freedom, or, to use Justice Elena Kagan’s words, wedded “to a static vision of governance, [becoming] incapable of responding to new conditions and challenges.”³³¹ Thus far, few have even begun to acknowledge the negative speech problem, let alone identify solutions.³³² Inaction will be fatal to American democracy,³³³ and by all indications, conditions of polarization and defactualization will worsen.³³⁴ The *more-speech* approach that stresses education as a solution is not working; citizens are using further information to support their own narratives.³³⁵ Both the magnitude of the problem and the need for change cannot be overstated. We have unwittingly arrived at the Anocratic Fork: we must now choose to either reform our conception of free speech so as to maintain democracy or stay the course and decline into autocracy.

IV. TRAVERSING THE ANOCRATIC FORK: SOLUTIONS

Our outdated commitment to a negative free-speech conception under Chafee’s free-speech tradition has long since begun the process of

329. DEWEY & TUFTS, *ETHICS* (1st ed. 1908), *supra* note 31, at 392 (emphasis added).

330. See Redish & Pereyra, *supra* note 22, at 454–55, 468, 471–72 (noting the danger of inaction on false political speech).

331. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2226 (2020) (Kagan, J., concurring in part and dissenting in part).

332. See, e.g., David Bauder, *No More Fact-Checking for Meta. How Will This Change Media – and the Pursuit of Truth?*, AP, <https://apnews.com/article/fact-check-politics-trump-verification-misinformation-00bc57b4a3c348a1363610c1cbbfd8ca> (last updated Jan. 9, 2025) (reporting that Meta, which owns Facebook and Instagram, ends fact-checking on its platforms); Daphne Psalidakis, *US State Department Closing Office Aimed at Countering Foreign Disinformation*, REUTERS (Apr. 16, 2025), <https://www.reuters.com/business/media-telecom/us-state-department-closing-office-aimed-counter-foreign-disinformation-2025-04-16/> (Secretary of State Rubio disbands State Department unit that combats foreign disinformation, claiming it suppresses speech).

333. See MCINTYRE, ON DISINFORMATION, *supra* note 99, at 89; Kramer, *supra* note 29, at 25–26, 30–31.

334. See MARIETTA & BARKER, *supra* note 132, at 292–93.

335. See *id.* at 262–63, 294–96; YOUNG, *supra* note 58, at 194, 213.

democratic decline, and we are potentially beyond the point of no return.³³⁶ Our free-speech tradition maintains that the issues of political misinformation we face are products of the time to be dealt with independent of free-speech protections, rather than products of the tradition itself.³³⁷ There is an unequivocal need for fundamental and immediate change in free speech jurisprudence toward a positive freedom of speech.

A. Foundational Components

The key concept to be incorporated is the need for a mutual basis in fact to support democratic self-government, which entails the regulation of falsehoods.³³⁸ In the negative free-speech conception of classical liberalism, where truth as factual accuracy was not the goal, discussion and debate by the democratic electorate were thought to lead to knowledge with which to guide democratic decision-making.³³⁹ While this deliberation may be a critical component of self-government, deliberation can only lead to informed democratic decision-making when the electorate obtains and bases that deliberation upon factually accurate information.³⁴⁰ Such information supports democratic decisions and facilitates self-government in the same way that individual rungs of a ladder reliably support each step of the person climbing it. It is also the basis of opinion, where holders of different opinions on a matter must be operating on the basis of the same set of facts.

Facts and opinions do not hold the same value in the context of democratic self-government; facts exist independently, whereas opinions may be either informed by facts or uninformed. Democratic deliberation and decision-making, as a means of self-government, can only afford to incorporate *informed* opinions.³⁴¹ Uninformed opinions have little contributory value, if any, to democratic decision-making and may instead

336. See DEWEY, LIBERALISM, *supra* note 28, at 74–75 (noting that propaganda and the democratic decline it causes are the product of excessive negative freedom, and that positive freedom is required to make effective use of that negative freedom.); MARIETTA & BARKER, *supra* note 132, at 294–96 (unlikelihood of recovery).

337. Kramer, *supra* note 29, at 24–27; see STROSSEN, FREE SPEECH, *supra* note 1, at 68–71 (arguing that robust free-speech protections remain essential to addressing modern societal challenges rather than being the root cause of them); RAUCH, THE CONSTITUTION OF KNOWLEDGE, *supra* note 140, at 18–19 (stating that adhering to negative free speech protections is indispensable rather than a source of democratic struggles).

338. ROSENFELD, *supra* note 18, at 173–74 (need for mutual basis in fact); see sources cited *supra* note 136.

339. See *supra* Part II.B.1.

340. See MARIETTA & BARKER, *supra* note 132, at 294; MINOW, *supra* note 27, at 145; DEWEY, FREEDOM AND CULTURE, *supra* note 16, at 41–42; DEWEY, LIBERALISM, *supra* note 28, at 56, 74–75.

341. See DEWEY, FREEDOM AND CULTURE, *supra* note 16, at 41, 112.

hinder the process.³⁴² Negative free-speech conceptions, commonly embodied by the marketplace of ideas, foolishly treat fact, informed opinion, and uninformed opinion as being ideas of equal value and for the marketgoers to distinguish.³⁴³ As such, misinformation reduces, or even removes, the mutually accepted facts required for informed opinion, making it destructive to value fact and opinion equally in the marketplace.³⁴⁴ To extend equal First Amendment protection to political speech and political misinformation is to protect speech at the expense of mutual reality and the public interest, contravening the goals of the Constitution.³⁴⁵ In Hannah Arendt's words, "What is at stake here is a common and factual reality itself, and this is a political problem of the first order."³⁴⁶ However, "Whether the First Amendment will suffice to protect this most essential political freedom, the right to unmanipulated factual information without which all freedom of opinion becomes a cruel hoax, is another question."³⁴⁷ There must be, in some form and to some extent, a right to unadulterated, factually accurate information to support democratic self-government.³⁴⁸

Though not a substitute for some express duty to ensure a minimum basis in fact, there are two affirmative duties consistent with this need that must be used to support it. First, the press has an implied affirmative constitutional duty to inform the public.³⁴⁹ Consistent with the Enlightenment influences of its framers, the First Amendment's protection for freedom of the press has been interpreted to support informed deliberation as a means of achieving democratic self-government.³⁵⁰ And while the language of the First Amendment's Free Press Clause only forbids acts of Congress that abridge

342. See sources cited *supra* notes 21–22.

343. See sources cited *supra* note 130; see also, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) ("[U]nder the First Amendment there is no such thing as a false idea.").

344. See O'CONNOR & WEATHERALL, *supra* note 29, at 179–80, 186; *supra* Part II.B.2.

345. See Redish & Pereyra, *supra* note 22, at 454–55; Napoli, *supra* note 25, at 88; DEWEY, LIBERALISM, *supra* note 28, at 28, 35, 66 (explaining liberalism's goal of progress toward the common good).

346. Arendt, *Truth and Politics*, *supra* note 21, at 300.

347. Arendt, *Lying in Politics*, *supra* note 116, at 45.

348. See SNYDER, ON FREEDOM, *supra* note 32, at 190 ("Freedom of speech means a right to facts. Defending that right means sharing the facts about which people can speak.").

349. See RonNell Andersen Jones & Sonja R. West, *The U.S. Supreme Court's Characterizations of the Press: An Empirical Study*, 100 N.C. L. REV. 375, 383 (2021); Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729, 749–55 (2014).

350. See Meiklejohn, *The First Amendment Is an Absolute*, *supra* note 86, at 259; John M. Kang, *Why the Actual Malice Test Should Be Eliminated*, 50 FLA. ST. U. L. REV. 513, 522–24 (2023) [hereinafter Kang, *Actual Malice Test*]; sources cited *supra* note 9; see also, e.g., *N.Y. Times v. Sullivan*, 376 U.S. 254, 273–80 (1964). The *Sullivan* Court cited the Virginia and Kentucky Resolutions condemning the 1798 Sedition Act as justification for raising First Amendment free-press protections for political speech to support self-government. *Id.*

freedom of the press, the press's implied duty to inform the public is rooted in the public's interest in and need for a *free flow of information* that will inform democratic deliberation.³⁵¹ Moreover, it also follows that by allowing misinformation to proliferate through the press and pollute democratic deliberation, the central goals of free-press and free-speech protections are undermined. As such, the constitutional role of the press is not being fulfilled and must be reestablished, which will be discussed in this Part.

Second, the government has an implied duty, rooted in its own survival, to facilitate democratic self-government.³⁵² Without digressing too far into abstract political theory, a government has an inherent duty to maintain its own existence and stability; it would be pointless to establish a government to support the common good if it could not survive to do so.³⁵³ In the case of a representative democracy, it is the electorate that is sovereign; its decision-making through democratic deliberation is the ultimate basis for determining government action.³⁵⁴ As illustrated in the dysfunction feedback loop, the electorate's misinformed policy decisions cause dysfunctional government actions, reducing the electorate's (and thus, the government's) ability to act in the public interest—the antithesis of self-government.³⁵⁵ This jeopardizes the public's security from threats both foreign and domestic.³⁵⁶ To the extent that misinformation succeeds in altering public opinion, it shifts sovereignty

351. MINOW, *supra* note 27, at 98–99, 146–47; *see supra* INTRODUCTION; *see, e.g.*, Saxbe v. Wash. Post, 417 U.S. 843, 872 (1974) (Powell, J., dissenting) (An “absolute interview ban” that would have forbidden press coverage on “prison conditions and inmate grievances . . . significantly impair[ed] the constitutional interest of the people in a free flow of information and ideas on the conduct of their government.”).

352. *See* MINOW, *supra* note 27, at 146–47; Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 795–96 (1981); SNYDER, ON FREEDOM, *supra* note 32, at 53, 66 (showing need for governmental support to become sovereign).

353. *See* Henry W. Bikle, *The Jurisdiction of the United States over Seditious Libel*, 50 U. PA. L. REV. 1, 3 (1902). Autocratic and fascistic thinkers have long emphasized this need. *See, e.g.*, CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 46–47, 50 (George Schwab trans., The Univ. of Chi. Press Expanded ed., 2007) (1932).

354. MEIKLEJOHN, SELF-GOVERNMENT, *supra* note 11, at 6–9; HABERMAS, *supra* note 232, at 70; *see* James Madison, *Public Opinion*, NAT'L GAZETTE, Dec. 19, 1791, *reprinted in* 14 THE PAPERS OF JAMES MADISON 170, 170 (1983). (“Public opinion sets bounds to every government, and is the real sovereign in every free one.”).

355. David S. Ardia, *Beyond the Marketplace of Ideas: Bridging Theory and Doctrine to Promote Self-Governance*, 16 HARV. L. & POL'Y REV. 275, 308 (2022); BENKLER ET AL., *supra* note 144, at 16; ROSENFELD, *supra* note 18, at 129–30.

356. *See* RID, *supra* note 21, at 11, 426 (foreign threats); *Oversight of the Federal Bureau of Investigation: The January 6th Insurrection, Domestic Terrorism, and Other Threats*, Hearing Before the S. Comm. on the Judiciary, 117th Cong. 1, 3 (Mar. 2, 2021) (statement of Christopher A. Wray, Director of the Federal Bureau of Investigation) (domestic threats); WALTER, *supra* note 108, at 208 (domestic threats; discussing that testimony).

from the electorate to the misinformation purveyors.³⁵⁷ Therefore, the government has a well-founded duty to prevent misinformation by facilitating democratic deliberation.³⁵⁸

* * *

To preface the remainder of this Article, there is a critical understanding commonly overlooked in relevant scholarship on the contemporary misinformation crisis: the fundamental nature of the problem. Like any system of government, democracy has critical flaws that its adversaries may exploit. But as the timeless nature of the Anocratic Fork suggests, democracy's Achilles' heel of propaganda and misinformation is rooted in democracy's reliance on popular sovereignty. No matter how artificial the online misinformation causing democratic erosion may be, it is effective because it exploits the necessarily human element of democracy. The problem is human and, therefore, fundamental.³⁵⁹

Social media and other online communication channels undeniably give way to fast and thorough means of disseminating misinformation, accessing populist demagoguery, and conducting disinformation campaigns. And while these new challenges must be addressed, they are only modern instances of bad actors exploiting the ancient weakness that democracies neglect to fix. As such, any solution that only serves to address such anti-democratic uses of online media is necessary but insufficient. So long as the underlying, fundamental issue of susceptibility to misinformation exists, those measures are only band-aid fixes.

Speech is a unique and notoriously unwieldy subject that, as Part II makes clear, generally does not lend itself to analogies. However, for the sake of explanation, consider the analogy of speech to an environmental setting, or "information environment," as it is sometimes called.³⁶⁰ In this context, firefighting is an apt metaphor for combating misinformation. Forest fires are destructive but natural occurrences that must be managed to protect the ecosystem's well-being. Preventative measures are critical, as fire spreads

357. Lidsky, *Nobody's Fools*, *supra* note 12, at 839.

358. Wu, *Is the First Amendment Obsolete?*, *supra* note 164, at 571–72 (“[T]he duty of the state is to preserve the integrity of public debate’ so as to ‘safeguard the conditions for true and free collective self-determination.’” (quoting Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1416 (1986))).

359. BENKLER ET AL., *supra* note 144, at 21, 38; see Massaro & Norton, *supra* note 189, at 1641–42 (suggesting designing algorithms to offset human cognitive biases and improve decision-making); see also, e.g., Vosoughi et al., *supra* note 163, at 1150 (robots shared true and false information at same rate).

360. Tim Wu, *Disinformation in the Marketplace of Ideas*, 51 SETON HALL L. REV. 169, 170 (2020); see generally, e.g., Wu, *Is the First Amendment Obsolete?*, *supra* note 164.

rapidly and exponentially.³⁶¹ For misinformation, this has historically been various forms of education.³⁶² In firefighting, this would be preparation such as stocking up on firefighting resources, conducting regular controlled burns, hiring additional staff, planning and practicing response, or even ensuring that flammable material is not kept near the forest. Once a fire begins, however, those measures may well be futile if there is still an arsonist out in the forest lighting new blazes. For firefighting to succeed, the priority shifts from halting the fire to stopping the arsonist before subsequent fires become uncontrollable. Under our current negative free-speech tradition, we have no meaningful way to stop the arsonist—the misinformation purveyor—or prevent their actions.³⁶³

B. Immovable Supreme Court Precedents

Supreme Court precedent is even more obstructive of positive free speech than conventional negative free-speech wisdom. The Supreme Court has clung to an exceedingly formalistic approach to First Amendment issues, adhering to rigid negative free speech ideals like the marketplace of ideas, the clear and present danger standard, and the notion of maintaining a free flow of information.³⁶⁴ Even its few instances of upholding negative free speech restrictions are based on broadly preserving negative free speech principles.³⁶⁵ But the formalism of the 21st century Court's First Amendment jurisprudence borders on malicious compliance.³⁶⁶ Under the negative free-

361. See Vosoughi et al., *supra* note 163, at 1147 (finding that false information circulates significantly faster online than true information); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 n.9 (1974) (“[T]he law of defamation is rooted in our experience that the truth rarely catches up with a lie.”).

362. See sources cited *supra* note 115; see also, e.g., THOMAS JEFFERSON, A BILL FOR THE MORE GENERAL DIFFUSION OF KNOWLEDGE (1779), reprinted in 2 THE PAPERS OF THOMAS JEFFERSON 526, 526–35 (Julian P. Boyd ed., 1950) (any government may become tyrannical, so we must guard against this by educating the masses to protect freedom); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

363. See Simson, *supra* note 48, at 1016 (inapplicability of reactive measures to address misinformation); MCINTYRE, ON DISINFORMATION, *supra* note 99, at 84–85 (“We cannot debunk our way out of an infodemic. One doesn’t fix a polluted information stream simply by diluting it with truth. You have to remove the source of the pollution.”).

364. See, e.g., Thomas W. Joo, *The Worst Test of Truth: The “Marketplace of Ideas” as Faulty Metaphor*, 89 TUL. L. REV. 383, 409 (2014) (stating that the Court in *United States v. Alvarez*, 567 U.S. 709 (2012) (plurality opinion) applied the marketplace metaphor as a reason not to regulate false statements of fact on matters of public interest).

365. See, e.g., sources cited *supra* note 20.

366. See *supra* Part III.C (ideological weaponization of First Amendment jurisprudence); Pound, *Mechanical Jurisprudence*, *supra* note 283, at 605, 606–07 (stating legal decisions should not use outdated principles or legal structures when attempting to solve new problems); OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1, 35–37 (Stuart E. Thiel & David Widger eds., The

speech tradition Chafee instilled, political speech is pedestalized so highly as to be nearly immune to limitations until it infringes upon others' private rights.³⁶⁷ In accordance with this protection, and out of observation of a potential chilling effect on the exercise of free speech, the Court generally considers political misinformation to be constitutionally protected.³⁶⁸ As a result, the political misinformation constraints required for democratic deliberation to have some basis in fact are currently a non-starter.³⁶⁹

The Court has a history of acknowledging the lack of constitutional protection for false statements of fact in various forms.³⁷⁰ However, the clearest of these comes from Justice William Brennan's opinion for a unanimous Court in *Garrison v. Louisiana*:

That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effectuated. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" Hence the knowingly false statement and the

Project Gutenberg EBook 2000) (1881) (stating that the law must adapt to the public's evolving needs, not remain anchored in rigid formalism irrespective of the outcome).

367. See *supra* Part I.B (Chafee's free-speech tradition); Zechariah Chafee, Jr., *Freedom of Speech in Wartime*, 32 HARV. L. REV. 932, 957 (1919) ("Your right to swing your arms ends just where the other man's nose begins."); see also, e.g., *Alvarez*, 567 U.S. at 733 (Breyer, J., concurring) (listing the many ways that a deliberate lie might not cause actual harm).

368. See *N.Y. Times v. Sullivan*, 376 U.S. 254, 271–72 (1964).

369. See Simson, *supra* note 48, at 1010–12 (social media regulation unlikely to survive First Amendment scrutiny).

370. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) ("[T]he constitutional guarantees [of the First Amendment] can tolerate sanctions against calculated falsehood without significant impairment of their essential function."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("[T]he erroneous statement of fact is not worthy of constitutional protection"); *Herbert v. Lando*, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials."); *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) ("[D]emonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements."); *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 776 (1984) ("There is 'no constitutional value in false statements of fact.'" (quoting *Gertz*, 418 U.S. 323, 340 (1974))); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective.").

false statement made with reckless disregard of the truth, do not enjoy constitutional protection.³⁷¹

Despite the *Garrison* Court's excellent acknowledgment, Chief Justice John Roberts wrongly repudiated this position in an eight-justice majority opinion in *United States v. Stevens*, reaffirming the Court's commitment to a negative free-speech tradition:

The government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs." As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. . . . The Government derives its proposed test from these descriptions in our precedents [referring to the *Garrison* position above]. But such descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor.³⁷²

371. *Garrison v. Louisiana*, 379 U.S. 64, 75–76 (1964) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

372. *United States v. Stevens*, 559 U.S. 460, 470–71 (2010) (citations omitted) (quoting Brief for United States at 8, *Stevens*, 559 U.S. 460 (No. 08–769)); *but see* Roscoe Pound, *Interests of Personality [Concluded]*, 28 HARV. L. REV. 445, 455–56 (1915).

Under some circumstances[,] the interests of the state in its personality may have to be weighed against the individual interest in free political belief and free expression thereof. This may mean that the social interest in the free development of the individual must be weighed with the social interest in the state as a social institution. . . . But the manifestations of belief . . . may so affect the activities of the state necessary to its preservation as to outweigh the individual interest or even the social interest in free belief and free speech.

Id.

In one fell swoop, the Chief Justice dismissed a balancing test that would have been instrumental in combating misinformation and functionally reduced the underlying statements to dicta. The Court shortly thereafter solidified the Chief Justice's position in *United States v. Alvarez*.³⁷³ When given the chance to allow regulation of knowingly false statements of fact—whether on matters of public concern (i.e., political disinformation, or intentional political misinformation) or not—both Justice Kennedy's plurality opinion and Justice Breyer's concurrence rejected the idea on negative free speech grounds.³⁷⁴ Even when the *Garrison* Court's position is tempered by the Court's acknowledgment in *New York Times v. Sullivan* that false statements of fact are “inevitable in free debate” and require some protection “if the freedoms of expression are to have the ‘breathing space’ that they need to survive,” it still does not follow that knowingly false statements of fact on matters of public interest deserve complete protection from regulation.³⁷⁵ If regulating knowingly false statements of fact on matters of political interest were to lead to true political speech being chilled (as the *Sullivan* Court feared), that chilling effect would be limited to self-censorship by an inevitably small group who would irrationally withhold political speech that they believed to be correct out of fear of punishment for political speech they knew to be incorrect.³⁷⁶ Such a regulation would not clearly harm *any* valuable constitutional interest of either the disinforming speaker or disinformed audience, making the *Alvarez* plurality and concurrence's positions all the more maddening.³⁷⁷ Even protection for libelous political speech, under the deeply problematic *Sullivan* “actual malice” requirement, did not extend to *knowingly* false political speech.³⁷⁸

With such a dire public need to curb political misinformation, the Court's essentially absolutist approach to political speech hamstringing an already rapidly delegitimizing government's ability to do so.³⁷⁹ The support of democratic self-government, without which the United States cannot exist, is the paramount interest protected by the First Amendment, taking priority over, if absolutely nothing else, the mere ability of a malicious speaker to say

373. 567 U.S. 709 (2012) (plurality opinion).

374. *Id.* at 722; *id.* at 731–37 (Breyer, J., concurring).

375. 376 U.S. 254, 271 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

376. Simson, *supra* note 48, at 966 n.101; see Redish & Pereyra, *supra* note 22, at 471–72.

377. Simson, *supra* note 48, at 968.

378. *Sullivan*, 376 U.S. at 279–80 (stating that a public official cannot recover “damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, *with knowledge that it was false* or with reckless disregard of whether it was false or not.” (emphasis added)).

379. See Simson, *supra* note 48, at 1015–16; Kramer, *supra* note 29, at 26–27, 30–31.

what they please without restraint.³⁸⁰ Assuming no other significant interests are implicated, there is no sufficient reason that legislatures cannot pass viewpoint-neutral regulations targeting, at a bare minimum, political disinformation.³⁸¹ Until the Court recognizes the priority of democratic self-government, the government's available actions to tackle the existential threat of misinformation are limited to soft-power suggestions and incentive-based coercion. Always a carrot, never a stick. Even then, the "carrots" available to the government are only the ones that somehow manage to pass First Amendment muster. Worse still, we continually see that the education-based and debunking approaches of fighting misinformation are unsuccessful and can worsen the problem.³⁸²

Contrary to the Court's negative free-speech prescriptions, democratic deliberation requires positive free speech in the form of viewpoint-neutral speech regulations with built-in safeguards that prevent governmental abuse and democratic norms that reinforce proper usage. Despite his disappointing *Alvarez* concurrence, Justice Stephen Breyer later maintained that "the First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech *matters*."³⁸³ By not regulating misinformation to preserve a minimum level of factuality, political factions develop their own political realities, and speech loses its democratic utility. Meiklejohn's argument from democracy necessarily assumes that democratic deliberation is supported by a minimum basis in factuality.³⁸⁴ His basis for arguing for absolute freedom of political speech from government regulation was rooted in concerns of government paternalism³⁸⁵ undermining the public's ability to make informed political decisions.³⁸⁶ This is particularly understandable in that Meiklejohn lived and wrote in the context of the terrifying 20th-century authoritarianisms of Nazi Germany, the Soviet Union, and fascist Italy.³⁸⁷

380. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 107–08 (1960); ROSENFELD, *supra* note 18, at 163; *McCutcheon v. FEC*, 572 U.S. 185, 237 (2014) (Breyer, J., dissenting).

381. Massaro & Norton, *supra* note 189, at 1660–61.; see Redish & Pereyra, *supra* note 22, at 471–72.

382. MARIETTA & BARKER, *supra* note 132, at 292, 294–96; YOUNG, *supra* note 58, at 194, 213; MCINTYRE, *ON DISINFORMATION*, *supra* note 99, at 84–85.

383. *McCutcheon*, 572 U.S. at 237 (Breyer, J., dissenting).

384. Redish & Pereyra, *supra* note 22, at 470.

385. By "paternalism," this Article means "a restriction on otherwise protected speech justified by the government's belief that speaking or receiving the information in the speech is not in the citizens' own best interests." Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 582–83 (2004).

386. Redish & Pereyra, *supra* note 22, at 453 (stating that Meiklejohn argued for extending absolute protection to political speech); *id.* at 470 (basing the argument in paternalism).

387. See Scheppele, *supra* note 288, at 571–73.

Paired with his influence by Chafee—whose arguments Justices Holmes and Brandeis adopted—it is clear how such theories influenced his own.³⁸⁸ But guarding against the tactics of those regimes creates an outdated notion of speech protections that does not defend against the tactics of online-age autocrats and other contemporary populist demagogues.³⁸⁹ While government paternalism will always be a justifiable concern for democratic deliberation, it should never be understood to forbid any action by the government to facilitate a factual basis in democratic deliberation.³⁹⁰ The foreign nature of this understanding to First Amendment jurisprudence invites disaster by placing even partial and ineffective solutions to our misinformation crisis far out of reach.³⁹¹

C. A Proposed Framework

Without any realistic means of regulating misinformation under modern First Amendment jurisprudence, genuine positive free-speech solutions need to be explored in the abstract—that is, outside the context of what is realistic (or even possible) in our current negative free-speech tradition. As such, it is important to at least have a theoretical basis that prioritizes democratic self-government from which a working legal framework for viewpoint-neutral regulation may be drawn. To that end, this Article submits the two-part framework of principles presented below, against the backdrop of which Part IV.D will explore and evaluate what seem to be the strongest (though insufficient) partial solutions to the misinformation crisis. Most of the proposed principles in this Part will be presented as an elemental test. However, this formatting is purely for clarity of explanation and is not intended to suggest that the best approach to regulating misinformation is, for example, a tort claim for which this element test would serve as a *prima facie* case.

388. See GRABER, *supra* note 74, at 4 (noting that Holmes and Brandeis “adopted [Chafee’s] arguments as their own”); *id.* at 170–71 (explaining how Meiklejohn’s work is built on Chafee’s framework).

389. See Scheppele, *supra* note 288, at 565, 570–75, 578 (explaining that new-age autocrats “have learned to speak the language of democratic constitutionalism while identifying resonant-frequency points of tension and complexity in order to reverse its effects;” they are skilled at “[p]ortraying themselves as democratic constitutionalists.”).

390. See Redish & Pereyra, *supra* note 22, at 470; SCHAUER, *FREE SPEECH*, *supra* note 2, at 155; SUNSTEIN, *LIARS*, *supra* note 88, at 133.

391. See Simson, *supra* note 48, at 1010–12 (social media regulations are unlikely to survive First Amendment scrutiny).

1. Capacity and the Megaphone Principle

One of the foremost points of this article is that disseminating information to the public regarding matters of public concern implicitly carries with it some form of obligation to ensure that the information is factually accurate and able to be relied upon for democratic deliberation. The need for a minimum basis in factual accuracy appears inescapable for any contributor to democratic deliberation. That factual obligation, however, need not (and should not) be uniform among all contributors, as they do not have the same capacity for harm and do not hold equal interests in informed democratic deliberation. The key is *audience size*, a significant determining factor in the destructive potential of political misinformation and the reason that technological advancements make historically tolerable misinformation intolerable.³⁹² Historically, the Supreme Court has given essentially no consideration to audience size as a criterion for First Amendment protection, instead mistakenly treating speech and publication as functionally interchangeable forms of expression.³⁹³ But unlike verbal speech, a publication is a tangible and durable recording that can be disseminated more broadly, giving it a greater capability to misinform and defame.³⁹⁴ In the context of misinformation, equal constitutional protection for speech and publication is extraordinarily harmful.

Taken together, that issue of audience size and the need for a minimum factual basis would strongly suggest that the extent of a contributor's obligation to provide a minimum factual basis should be proportionate to the extent of their access to the public. In other words, the greater the reach of their megaphone, the greater their factual obligation to the public. This *megaphone principle* is the basis for the first element of the framework: *capacity*. While a uniform requirement of accuracy in political speech to the

392. See YOUNG, *supra* note 58, at 192; see also, e.g., sources cited *supra* notes 183, 199, 201 (printing press bolstering misinformation).

393. See STROSSEN, FREE SPEECH, *supra* note 1, at 142–43; see also, e.g., Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2043–44, 2047 (2021). The majority gives no consideration whatsoever to the number of recipients made available by social media or the lack of impact an inflammatory video would have had if it were not posted. Simson, *supra* note 48, at 1014–15; see generally *id.* at 973–90 (2023) (using *Mahanoy* and *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) to demonstrate the Supreme Court's disregard for audience size). The majority even refers to the 250 recipients as a “private circle.” *Mahanoy*, 141 S. Ct. at 2047.

394. PROSSER AND KEETON ON THE LAW OF TORTS § 112, at 785 (5th ed. 1984) (stating that, between slander and libel, libel has been “established as the greater wrong”). This is why, for instance, libel damages are typically notably higher than slander damages. 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 2:3, at 2-10 (5th ed. 2017) (stating that, historically, plaintiffs would be more likely to recover in libel cases than in slander cases because libel's effects are more permanent).

public would certainly produce far too strong a chilling effect, making the extent of that requirement proportionate to the size of the speaker's audience provides a twofold benefit. First, at the far end of the reach-obligation spectrum, political speech contributors with the greatest reach are typically those with both the means to afford that reach and the ability to abuse that reach to misinform the public. It is only appropriate that they face a higher burden to provide factually accurate information. Second, as we approach the near end of the reach-obligation spectrum, the inverse is true. Those political speech contributors without the means or resources to reach a significant audience are unlikely to disseminate much political misinformation and therefore need not be burdened with a meaningful responsibility to provide factually accurate information.³⁹⁵ The essence of the megaphone principle is that, by nature of not having significant material resources, the average private citizen very rarely has the capacity for their political speech to disinform or defame, whereas the larger political speech contributors—who produce a vast majority of political misinformation—do far more damage to democratic discourse.³⁹⁶ As such, only the latter needs to be meaningfully regulated. Determining a political speech contributor's capacity to disinform or defame should focus on two factors: (1) possession of the means or material resources required to reach a sufficient audience, and (2) a significant likelihood that the contributor's audience will believe their statements.³⁹⁷

While this sort of positive free-speech empowerment of the electorate is “wholly foreign to” our current negative free-speech tradition, using such a basis to regulate political misinformation may produce a number of benefits.³⁹⁸ First, it safeguards individual political speech protections for the vast majority of the public while curbing the ability of materially wealthy sources of political speech to disproportionately influence democratic

395. See Seana Valentine Shiffirin, *Unfit to Print: Government Speech and the First Amendment*, 69 UCLA L. REV. 986, 1025–26 (2022). Ironically, Justice Holmes may have unwittingly been onto something with his strange, majoritarian principle of impotence discussed in Part II.C.3. See sources cited *supra* note 183.

396. See WALTER, *supra* note 108, at 215 (megaphone analogy); MCINTYRE, ON DISINFORMATION, *supra* note 99, at 79–81; RonNell Andersen Jones, *Defamation, Disinformation, and the Free Press Function*, 3 J. FREE SPEECH L. 103, 110–11 (2023) [hereinafter Jones, *Free Press Function*] (referring to a small group of large-scale, repeat offenders of disseminating political misinformation); Philip M. Napoli & Fabienne Graf, *Social Media Platforms as Public Trustees: An Approach to the Disinformation Problem*, in ARTIFICIAL INTELLIGENCE AND THE MEDIA: RECONSIDERING RIGHTS AND RESPONSIBILITIES 93, 100 (2022).

397. See MCINTYRE, ON DISINFORMATION, *supra* note 99, at 22 (“Disinformation must be created, it must be amplified, and it must be believed.”).

398. *Citizens United v. FEC*, 558 U.S. 310, 350 (2010).

deliberation.³⁹⁹ Second, it provides a significantly easier means of enforcing misinformation regulations, as a uniform standard for all contributors would be almost as unenforceable as it would be undesirable. Third, it could serve to restore quality news coverage and support a diversity of news sources; large news outlets have the resources to conduct fact-checking and ensure journalism standards to which they should be adhering already, whereas smaller outlets with fewer resources would be able to build an audience and only face such a burden as that audience grows.

Restoring these journalistic standards is especially important in a time when social media news coverage is destroying the news industry. Social media platforms replace the press by providing news coverage on their platforms without compensating the original reporting outlets, amplify other news sources without any standards of journalistic integrity, and destroy trust in the press by providing users with ample misinformation inconsistent with press coverage.⁴⁰⁰ As well, social media allows for *parasitic journalism*, wherein users deprive news outlets of revenue by identifying their professionally investigated and reported news story, recycling it as their own content, and circulating it for views.⁴⁰¹ As such, by addressing such issues, the megaphone principle could serve to curb political misinformation in the context of both legacy media and social media.

2. Knowledge or Blatancy

Second, the megaphone principle demands several considerations regarding political speech contributors with the capacity to disinform. For a contributor to be subject to viewpoint-neutral regulation under this principle, they must make a statement of fact to the public on a matter of public concern that possesses five qualities. The following subparts explore each of these qualities in turn.

a. Falsity (or Functional Equivalent)

The statement at issue must, of course, be false. As such, a demonstration of factual accuracy would serve as a total defense against regulation. For this element, a “false” statement is not verifiably or demonstrably factually accurate by normal means. This wording is

399. See, e.g., *id.* at 349–50 (2010) (prioritizing marketplace input despite disproportionate and undue influence on marketplace discourse by materially wealthy speakers).

400. See MINOW, *supra* note 27, at 25–35 (social media undermines trust in journalism); Kramer, *supra* note 29, at 23.

401. Napoli, *supra* note 25, at 69–70.

intentional, however, since the propagandic use of ridiculous but unfalsifiable statements of fact may be just as potent as garden-variety misinformation (e.g., conspiracy theories) while being easier to produce. For only this element, such unfalsifiable claims should be deemed false by default.

b. Knowing Falsity (or Functional Equivalent)

The statement at issue must be either knowingly false or readily or easily recognizable as false. “Knowingly false” political speech is political disinformation and must be regulable.⁴⁰² Similar to the *Sullivan* standard of reckless indifference to truth or falsity, the statement may satisfy this element by being easily or readily recognizable as false. While a complete lack of research is a lower bar than the *Sullivan* standard, 60 years of technological development has made political speech exponentially easier to both verify and broadcast.⁴⁰³ Moreover, being recognizably false allows for the regulation of statements of fact that—while technically unfalsifiable because they cannot realistically be disproven—are so highly misleading or absurd as to be recognizably false in context.⁴⁰⁴ The issue of unfalsifiability in cases like political conspiracy theories requires further consideration, like whether the claim, taken in context, was ridiculous enough that the contributor clearly recognized (or reasonably should have recognized) it as such.⁴⁰⁵

c. Material Falsity

The statement at issue must be materially false—that is, the false components of the statement must pertain to the matter of public concern that the statement addresses.⁴⁰⁶ For example, this was a concern that led to overprotection in *New York Times v. Sullivan*.⁴⁰⁷ The publication at issue correctly highlighted extensive police abuse of civil rights protesters,

402. See Simson, *supra* note 48, at 966 & n.101, 968 (justification for regulating knowingly false statements of fact).

403. See *St. Amant v. Thompson*, 390 U.S. 727, 731, 733 (1968) (“Failure to investigate does not in itself establish bad faith.”); Redish & Pereyra, *supra* note 22, at 473 (noting the actual malice element of proposed misinformation regulation).

404. See Wes Henricksen, *Disinformation and the First Amendment*, 96 ST. JOHNS L. REV. 543, 559 (2021) (“verifiably false or misleading information” as an element of proposed misinformation regulation).

405. See, e.g., sources cited *supra* notes 206–07, 210 (Alex Jones); *supra* Part III.E (Chaya Raichik, or “Libs of TikTok”).

406. See Redish & Pereyra, *supra* note 22, at 474, 477–79 (noting the materiality element of proposed misinformation regulation).

407. 376 U.S. 254 (1964).

expressing factually accurate, constitutionally protected support for the movement.⁴⁰⁸ But the publication falsely alleged specific instances of police abusing and attacking student protestors and bombing Martin Luther King Jr.'s home.⁴⁰⁹ These statements were materially false, but because the publication was not defamatory, the *Sullivan* Court ruled that the publication was constitutionally protected political speech.⁴¹⁰

d. Actual Harmfulness

The statement at issue must be actually harmful to democratic deliberation. For misinformation to do damage, it must actually succeed in affecting democratic deliberation. So, the materially false statement at issue must result in political misinformation (or be reasonably expected to do so).⁴¹¹

e. Foreseeable Harmfulness

The statement at issue must also be foreseeably harmful to democratic deliberation, as suggested above. The contributor must either realize (or reasonably be expected to realize) that the statement may realistically lead to harm.⁴¹² As such, this element necessarily implicates the propensity of the statement to be believed, and, by extension, the contributor's knowledge that the audience will believe the statement. Prior instances of the audience believing the contributor's (or similar contributors') statements are a helpful guideline.⁴¹³

408. *Id.* at 256–57.

409. *Id.* at 257–58.

410. *Id.* at 264.

411. See Helen Norton, *Government Falsehoods, Democratic Harm, and the Constitution*, 82 OHIO ST. L.J. ONLINE 1, 2–3 (2021) (“democratic harms”); see, e.g., Helen Coster & Jack Queen, *Fox Settles Dominion Lawsuit for \$787.5 Million Over U.S. Election Lies*, REUTERS (Apr. 19, 2023), <https://www.reuters.com/legal/dominions-defamation-case-against-fox-poised-trial-after-delay-2023-04-18/>; Dietrich Knauth, *Alex Jones Must Pay \$1.1 Billion of Sandy Hook Damages Despite Bankruptcy, Judge Rules*, REUTERS (Oct. 19, 2023), <https://www.reuters.com/legal/alex-jones-cant-avoid-sandy-hook-verdicts-bankruptcy-judge-2023-10-19/>; WILL SOMMER, TRUST THE PLAN 7–9 (1991) (“PizzaGate,” part of the QAnon conspiracy theory that led to the attack Washington, D.C., pizza shop by a gunman who believed a global, Satanic child sex-trafficking ring to be in its basement.).

412. See *supra* Parts II.C.4, III.E (stochastic terrorism); sources cited *supra* notes 210, 315–17, 319 (stochastic terrorism; Chaya Raichik & “Libs of TikTok”).

413. See *supra* Part II.C.4 (stochastic terrorism; Alex Jones); sources cited *supra* notes 206–07, 210 (Alex Jones).

D. Insufficient Solutions

Given the fundamental nature of the contemporary misinformation crisis and how far afield the American negative free-speech tradition is, meaningful solutions are exceedingly unlikely. The proposed solutions, if any, will only be half-measures, focusing on the contemporary symptoms of political misinformation and leaving unchallenged the fundamental democratic weakness that causes them.⁴¹⁴ And while such half-measures would be pleasant surprises, if the objective is to successfully curb political misinformation, the best these measures can hope to accomplish is supplementing a genuine solution. Without one, they address only superficial symptoms. This Part illustrates that dynamic by using the proposed framework of Part IV.C to highlight the insufficiency of (theoretically) feasible solutions proposed elsewhere. Because they serve to contrast with that framework, these proposed solutions will not be explored in great depth.

1. Active Negative Intervention

Some scholars propose active governmental efforts to mitigate online extremism by intervening in the dynamics of the radicalization feedback loop explored in Part III.A–B. One example comes from Harvard Law Professor Cass Sunstein, which he refers to as the “cognitive infiltration of extremist groups.”⁴¹⁵ Sunstein suggests the use of government agents, to the extent permitted by law and ethical constraints, to penetrate online information silos and to introduce a diversity of opinion to “undermine percolating conspiracy theories by raising doubts about their factual premises, causal logic, or implications for action, political or otherwise.”⁴¹⁶ Sunstein also suggests two methods for the government agents to participate: undercover (via a fake identity or anonymity) or openly as themselves. The open option allows for an honest and transparent attempt to dispel political misinformation, whereas the undercover option provides a means (although ethically questionable) of avoiding being dismissed by users.⁴¹⁷

Thankfully, Sunstein does recognize the difficulty posed by some of the cognitive factors at play, such as the “self-sealing,” debunk-resistant nature of conspiracy theories.⁴¹⁸ However, Sunstein clearly maintains faith in a marketplace of ideas, evident in his emphasis on viewpoint diversity as a

414. *See supra* Part IV.A.

415. *See* SUNSTEIN, ON RUMORS, *supra* note 21, at 28–30.

416. *Id.* at 29.

417. *Id.* at 29–30.

418. *Id.* at 29.

solution and his assumption that users are receptive interlocutors deep in their fact-finding mission. Sunstein's suggestion, at least in the context of this article, embodies the worst of both worlds for negative and positive conceptions of free speech, respectively. First, by focusing on the users and not the content or its creator, this is an ad hoc solution that provides no means of addressing or deterring the misinformation that is radicalizing users. As a result, its all-carrot-no-stick approach does not serve to establish a minimum basis in fact and allows misinformation to continue unimpeded.

Second, it makes liberal use of the main problem of positive free speech efforts: government overreach. Because this proposal targets extremism (an issue of opinion) and not misinformation (an issue of fact), this proposal would establish an alarmingly direct form of viewpoint discrimination and government paternalism. Of course, the government has an interest in curbing political extremism as a means of supporting democratic deliberation. However, the United States already has a profound and overlooked problem of government officials disinforming and propagandizing the public.⁴¹⁹ The notion of the government developing the infrastructure, tactics, and precedent needed to carry out modern targeted domestic disinformation campaigns is a much greater threat to democratic self-government than it is a help.

2. Revisiting the *Sullivan* Actual Malice Standard

In 1964, the Supreme Court brought forth a new negative free speech paradigm for First Amendment speech and press protections in its landmark decision *New York Times v. Sullivan*.⁴²⁰ Justice William Brennan's unanimous majority opinion established the "actual malice" standard, wherein a public official suing for defamation over statements about their official conduct could only seek damages if the official could establish that the statement was made with "actual malice"—namely, "with knowledge that it was false or with reckless disregard of whether it was false or not."⁴²¹ The standard the suing official needed to meet rose from the moderately protective "negligence" standard to the exceptionally protective "actual malice" standard; this shift established a strong negative free speech protection for political speech by implicating the defendant's subjective

419. See *supra* Part III.B–D; BENKLER ET AL., *supra* note 144, at 78–80 (government officials' role in political misinformation); Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 OHIO ST. L.J. 815, 838–48 (2020) (prevalence of contemporary misinformation by government officials).

420. 376 U.S. 254, 279–80 (1964).

421. *Id.*; see *St. Amant v. Thompson*, 390 U.S. 727, 728 (1968).

thought process.⁴²² Despite Meiklejohn hailing the *Sullivan* decision as “an occasion for dancing in the streets,” and the fact that the Supreme Court has made numerous subsequent decisions building upon the *Sullivan* precedent, its actual malice standard has become quite controversial.⁴²³ Decades of legal scholarship have thoroughly criticized the *Sullivan* actual malice standard and its progeny for a wide array of democratically harmful reasons: its poor adaptability to digital and online media;⁴²⁴ the extraordinary difficulty of proving actual malice;⁴²⁵ and its incentivizing of poor journalistic standards.⁴²⁶ While each of these points contains valid criticisms of the doctrine, the most significant problem with the *Sullivan* decision and its progeny is their inappropriate establishment and solidification of negative free speech protections for misinformation.⁴²⁷

While the *Sullivan* Court correctly recognized that an “erroneous statement is inevitable in free debate,” it dangerously extended First Amendment protection to false political speech unless that speech violated a person’s private rights, as in defamation.⁴²⁸ Moreover, the *Sullivan* Court did so unnecessarily, as the Court needed only to reverse the libel judgment because the publication at issue did not mention the plaintiff by name, position, or indirect reference, and therefore provided no basis for a libel claim.⁴²⁹ Worse still, the Court gratuitously and wrongly tethered its speech-protective rationale to an ahistorical (and intellectually dishonest) characterization of the Sedition Act of 1798 as a purely self-interested and overwhelmingly panned attack on partisan dissent.⁴³⁰ Section 2 of the

422. Daniel E. Rauch, *Defamation as Democracy Tort*, 172 U. PA. L. REV. 1453, 1488–89 (2024) [hereinafter Rauch, *Defamation as Democracy Tort*].

423. Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment”*, 1964 SUP. CT. REV. 191, 221 n.125 (1964) (evincing Alexander Meiklejohn’s statement).

424. See Delery H. Perret, *An Unforeseen Problem: How Gertz Failed to Account for Modern Media and What to Do Now*, 80 LA. L. REV. 541, 543–44 (2020); Jasmine E. McNealy, *All the Rumors are True: Verification, Actual Malice, and Celebrity Gossip*, 88 MO. L. REV. 751, 753–54 (2023).

425. See Kang, *Actual Malice Test*, *supra* note 350, at 519–20; Rauch, *Defamation as Democracy Tort*, *supra* note 422, at 1488–89.

426. See Rauch, *Defamation as Democracy Tort*, *supra* note 422, at 1488, 1509–10.

427. See *id.* at 1479–82; Kang, *Actual Malice Test*, *supra* note 350, at 527.

428. *N.Y. Times v. Sullivan*, 376 U.S. 254, 271 (1964); *United States v. Alvarez*, 567 U.S. 709, 732–33 (2012) (Breyer, J., concurring).

429. See Kang, *Actual Malice Test*, *supra* note 350, at 558–59.

430. *Sullivan*, 376 U.S. at 273–77. In providing favorable arguments, the *Sullivan* Court selectively omitted from its condemnation of the Sedition Act that the Virginia and Kentucky Resolutions represented (at least officially) the minority view in the 16 states, as only 4 states (Georgia, Kentucky, Tennessee, and Virginia) condemned the Act whereas at least 8 states (Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont) and the Pennsylvania House of Representatives officially opposed the Resolutions; 3 states (New Jersey, North Carolina, and South Carolina) did not issue official resolutions of support or opposition. Kang, *Against Political Speech*, *supra*

Sedition Act, the primary provision at issue, allowed for criminal punishment of anyone who would:

[W]rite, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . or the President . . . with intent to defame . . . or to bring them . . . into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States⁴³¹

There is no doubt that the Sedition Act's vague language was abused for partisan political ends—a mistake that no solution to the contemporary misinformation crisis can afford to repeat. However, the primary problem of the Sedition Act was that it conflated seditious libels that harmed democratic deliberation with non-seditious libels that harmed public individuals' reputations.⁴³² The government had an existential need to prevent political misinformation and, as an independent matter, a valid interest in protecting individuals' reputations from defamatory falsehoods.⁴³³ However, the Sedition Act's overbroad application and partisan abuse made it unpopular among the newly democratic American public and created a generalized animosity toward the Act, irrespective of the needs its individual provisions addressed.⁴³⁴ So, when the *Sullivan* Court uncritically asserted that “the lesson to be drawn from the great controversy over the Sedition Act of 1798”⁴³⁵ was the need for greater political speech protection, it wholly missed the point. Ironically, by failing to distinguish between democratically harmful libels and libels that harm individual reputation, the *Sullivan* Court's rationale for the actual malice standard makes the same mistake of overbroad application as those who passed the Sedition Act.⁴³⁶ The *Sullivan* Court's mistake, however, is inverted, as it overprotects political misinformation to the same sweeping extent that the Sedition Act underprotected it.

note 10, at 818–21; WENDELL BIRD, *PRESS AND SPEECH UNDER ASSAULT: THE EARLY SUPREME COURT JUSTICES, THE SEDITION ACT OF 1798, AND THE CAMPAIGN AGAINST DISSENT* 323–25 (2016). The *Sullivan* Court also omitted that the Resolutions were partially rooted in the nullification doctrine. See Bikle, *supra* note 353, at 21–22.

431. Sedition Act, ch. 74, § 2, 1 Stat. 596, 596 (1798).

432. Bikle, *supra* note 353, at 18–19; see Kang, *Actual Malice Test*, *supra* note 350, at 527.

433. Bikle, *supra* note 353, at 23.

434. *Id.*

435. *Sullivan*, 376 U.S. at 273.

436. See Rauch, *Defamation as Democracy Tort*, *supra* note 422, at 1479, 1482–83, 1485–87, 1535 (demonstrating mischaracterization of issue as purely one of political speech interest versus reputational interest).

In light of these considerations, it would be appropriate to alter the *Sullivan* actual malice standard, as many scholars and jurists have suggested. Returning to a standard of negligence by overturning *Sullivan* outright would likely have deeply undemocratic results. If it were overturned, public officials, public figures, major corporations and organizations, and other materially wealthy plaintiffs could easily resort to “libel bullying”—that is, filing suit merely to intimidate and silence speakers or publishers over unfavorable statements about them.⁴³⁷ A replacement standard needs to (1) be flexible enough to allow recovery for the defamed, (2) be strict enough to prevent either abuse by libel-bully plaintiffs or excess protection for negligently misinformative publications, and (3) have sufficient guardrails to prevent misapplication by a partisan court. What such a standard would look like is an article unto itself. However, while they presumably need to be refined and adapted, a possible starting place may be an objective standard of “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.”⁴³⁸

Alternatively, or perhaps in conjunction with a new standard, courts should consider supplemental claims for recovery to offset the pressure a lower standard would place on reporting by news outlets. For example, Professors Randall Bezanson and Gilbert Cranberg once proposed a standard of “institutional reckless disregard,” wherein plaintiffs could bring tort claims “not against the reporter and editor but against the corporation” for business decisions it makes “that affect journalism when they manifest knowing indifference to the risk of defamatory falsehood that flows from the decisions.”⁴³⁹ For another example, several legal scholars have suggested modified fraud suits as a viable vehicle for suits against political misinformation made for personal or political benefit, creating causes of action for speech that constitutes, for example, “political fraud” or “fraud on the public.”⁴⁴⁰ As a final example, there seems to have been little exploration of non-financial alternatives to the damages-based actual malice standard.

437. See Lyrissa Barnett Lidsky, *Untangling Defamation Law: Guideposts for Reform*, 88 MO. L. REV. 663, 681 (2023) [hereinafter Lidsky, *Untangling Defamation Law*] (libel bullying); Lyrissa Barnett Lidsky, *Cheap Speech and the Gordian Knot of Defamation Reform*, 3 J. FREE SPEECH L. 79, 82 (2023) [hereinafter Lidsky, *Gordian Knot*] (“SLAPP” suits); Rauch, *Defamation as Democracy Tort*, *supra* note 422, at 1511 (“win-by-suing” nuisance plaintiffs).

438. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967); see Rauch, *Defamation as Democracy Tort*, *supra* note 422, at 1488–89, 1509.

439. Randall P. Bezanson & Gilbert Cranberg, *Institutional Reckless Disregard for Truth in Public Defamation Actions Against the Press*, 90 IOWA. L. REV. 887, 891, 901 (2005).

440. See Redish & Pereyra, *supra* note 22, at 472–479 (noting the “political fraud” claim); Henricksen, *supra* note 404, at 559–72 (“fraud on the public” claim).

For instance, creative use of a forced retraction and apology as an alternative to monetary damages may provide more avenues to resolution, so long as sufficient guardrails exist to prevent abuse by powerful interests.⁴⁴¹ At the very least, this may circumvent resource-intensive litigation leveraged by libel bullying.⁴⁴²

Unfortunately, reforming the *Sullivan* actual malice standard as a means of addressing the contemporary misinformation crisis is deeply problematic and risky. In addition to the factor of libel bullying mentioned above, there are two significant issues. First, defamation suits are an inadequate means of combating political misinformation because of their imprecision in targeting it. Defamatory statements or publications are not necessarily political, and political misinformation need not be defamatory. So, while defamation suits for defamatory political speech or publication can be used to great effect, such suits are limited in the amount of political misinformation they can address.⁴⁴³ Because defamation suits function as a means of recovering damages for reputational harm, they only incidentally curb misinformation and do so only after it has been released to and consumed by a broad audience.

Second, while at least two Supreme Court justices have thankfully criticized the *Sullivan* actual malice standard's enabling of misinformation, those justices have a poor grasp of the misinformation crisis and risk worsening the problem if the Court were to revisit *Sullivan*. Justice Clarence Thomas primarily roots his *Sullivan* criticisms in constitutional originalism, calling its actual malice standard constitutionally baseless and neglectful of "the Constitution's original . . . meaning."⁴⁴⁴ While Justice Neil Gorsuch agrees with Justice Thomas's ahistorical originalist bases, he focuses more on the real-world damage misinformation causes and whether the actual malice standard actually fosters informed

441. See Kang, *Actual Malice Test*, *supra* note 350, at 564–65; Lidsky, *Gordian Knot*, *supra* note 437, at 84; SUNSTEIN, *LIARS*, *supra* note 88, at 102–03 ("notice and takedown" liability in an online context).

442. See Rauch, *Defamation as Democracy Tort*, *supra* note 422, at 1492–93, 1510–11, 1521 (arguing for lower standards as a faster resolution of libel claims that does not sacrifice evaluation on the merits).

443. Jones, *Free Press Function*, *supra* note 396, at 108–13; see Lidsky, *Untangling Defamation Law*, *supra* note 437, at 673 (discussing *Sullivan*'s limited effect on political misinformation); see also, e.g., Helen Coster & Jack Queen, *Fox Settles Dominion Lawsuit for \$787.5 Million over U.S. Election Lies*, REUTERS (Apr. 19, 2023), <https://www.reuters.com/legal/dominions-defamation-case-against-fox-poised-trial-after-delay-2023-04-18/>; Knauth, *supra* note 411.

444. *McKee v. Cosby*, 139 S. Ct. 675, 678 (2019) (mem.) (Thomas, J., concurring in denial of cert.); *Berisha v. Lawson*, 141 S. Ct. 2424, 2424–25 (2021) (mem.) (Thomas, J., dissenting in denial of cert.).

democratic deliberation.⁴⁴⁵ However, Justice Gorsuch is also concerned with the plaintiff classes created by subsequent cases and seems to neglect the issue above by overattributing the prevalence of political misinformation to the news media.⁴⁴⁶ Accordingly, if the broader Court shares any of Justices Thomas's or Gorsuch's disdain for news media, the Court may use (a)historical bases to overrule or amend *Sullivan* in ways that do not address the misinformation crisis and instead further entrench negative free speech protections.

3. A Fairness Doctrine 2.0

As is hopefully clear, a significant legal challenge in curbing misinformation is a near-total reliance on reactive responses to misinformation once it has already been consumed. Prior restraints on First Amendment-protected expression are nearly absolute. However, political speech in mass media has been regulated in the past, most notably when the mid-20th century Supreme Court upheld some content regulations of public broadcasts. Amid the rise in televised news consumption, the Federal Communications Commission (FCC) promulgated the Fairness Doctrine in 1949, which required the broadcasting of "discussion of public issues" and "fair coverage" for opposing viewpoints on those issues.⁴⁴⁷ In 1987, however, a deregulation-minded FCC unwisely repealed the doctrine, claiming it "contravene[d] the First Amendment," despite numerous Supreme Court decisions upholding the doctrine's application to broadcasting as constitutional.⁴⁴⁸ In response to this unpopular move, Congress passed a bipartisan bill to codify the Fairness Doctrine that same year, which President Reagan vetoed, echoing the FCC's rationale.⁴⁴⁹ The doctrine has since remained dead.

Immediately following the doctrine's demise, extreme partisan talk radio programs exploded onto the scene, where they thoroughly undermined

445. *Berisha*, 141 S. Ct. at 2428, 2430 (Gorsuch, J., dissenting in denial of cert.); *see id.* at 2425 (Thomas, J., dissenting in denial of cert.) (originalist interpretation).

446. *See id.* at 2427–28 (Gorsuch, J., dissenting in denial of cert.) (overemphasizing news media editorial shortcomings); *id.* at 2428–29 (overinclusiveness of public figure doctrine).

447. *In re* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949); *Red Lion Broad. v. FCC*, 395 U.S. 367, 369 (1969).

448. *Syracuse Peace Council v. FCC*, 867 F.2d 654, 658 (D.C. Cir. 1989), *aff'g In re* Complaint of Syracuse Peace Council Against Television Station WTVH, 2 F.C.C. Rcd. 5043, 5057 (1987); *see In re* Inquiry into Section 73.1910 of the Comm'ns' Rules and Reguls. Concerning the Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d 145, 145, 246 (1985).

449. S. 742, 100th Cong. (1987); Message to the Senate Returning Without Approval the Fairness in Broadcasting Bill, 1 PUB. PAPERS 690 (Jun. 19, 1987) (Pres. Reagan's veto message).

democratic deliberation throughout the 1990s virtually unimpeded.⁴⁵⁰ These new, pre-internet partisan echo chambers led to extreme partisan division and affective polarization, reflected in the “Contract with America” in 1994 and the establishment of partisan television news networks in 1996, which capitalized on this new public sentiment.⁴⁵¹ The resulting partisan animosity, amplified by the internet and social media, has evolved into what America is experiencing today.⁴⁵²

While many scholars caution against a reinstatement of the original Fairness Doctrine, they advocate for comparable alternatives.⁴⁵³ Although divided on whether doing so could be effective, their explorations of the idea seem to neglect major reasons for and against its adoption. Beginning with the doctrine’s benefits, it served both negative and positive free speech purposes. On one hand, the doctrine required viewpoint diversity, which prevented information silos and encouraged toleration.⁴⁵⁴ On the other hand, the doctrine safeguarded democratic deliberation by preventing hyperpartisan or extremist viewpoints from being asserted as fact.⁴⁵⁵ Modern scholarship, operating within our negative free-speech tradition, has focused predominantly on the former benefit, despite continual evidence supporting the contrary.⁴⁵⁶

As evidence for the efficacy of purely negative free speech measures against misinformation, the Fairness Doctrine is a false positive, but its simultaneous positive free speech function makes it a rare historical example of a proactive positive free speech measure in the United States. Moreover, its negative free speech value is also significant. Where the FCC and President Reagan were mistaken, as social media has illustrated, is that viewpoint diversity must come from *within* the same information source, not merely be made optionally available across numerous, ideologically committed information sources.⁴⁵⁷ Moreover, the Fairness Doctrine was concerned only with matters of opinion, leaving out the logistical challenges of mandating accurate coverage.

450. See ROSENFELD, *supra* note 18, at 146–48.

451. See *id.*; YOUNG, *supra* note 58, at 58–59, 175–76 (discussing Contract with America and partisan television news networks); RAUCH, THE CONSTITUTION OF KNOWLEDGE, *supra* note 140, at 174 (epistemic separatism).

452. BENKLER ET AL., *supra* note 144, at 21.

453. See, e.g., MINOW, *supra* note 27, at 154–57; SUNSTEIN, #REPUBLIC, *supra* note 89, at 213–15; Victor Pickard, *The Strange Life and Death of the Fairness Doctrine*, 12 INT’L J. COMM’N 3434–3444, 3447 (2018).

454. *In re* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949).

455. See MCINTYRE, ON DISINFORMATION, *supra* note 99, at 77.

456. See MARIETTA & BARKER, *supra* note 132, at 262–63, 294–96.

457. MCINTYRE, ON DISINFORMATION, *supra* note 99, at 76–77.

Turning to its weaknesses, however, there are plenty. Scholars correctly point to the Fairness Doctrine's poor applicability to the individualized nature of the internet and social media, and the historical difficulty of enforcing it. While these are both salient concerns, they are not dispositive. First, improving mass media news coverage would improve the quality of a significant amount of political information entering the public sphere, and second, historical practices of enforcing the doctrine were evidently successful before the advent of contemporary technologies that may facilitate enforcement.⁴⁵⁸ Without more, the fact that a solution is only a partial fix or difficult to carry out at one point in time is not enough of a reason to forgo it. However, there are at least three significant problems. First, the Supreme Court's rationale for holding the Fairness Doctrine constitutional was that the public airwaves it applied to were considered a scarce resource to which the public required greater access for informed democratic deliberation.⁴⁵⁹ The Court was not concerned with supporting a minimum basis in fact, and a lack of access is certainly no longer an issue. Second, while presenting information in a "fair and balanced"⁴⁶⁰ manner may seem appropriate, it creates a dangerous false equivalency of opinions. Democratic deliberation is a means of problem-solving, and as such, granting empirically uninformed opinions the same value as informed ones is counterproductive, unnecessarily making the uninformed opinion more widely available.⁴⁶¹ This is particularly problematic in circumstances where one political faction is polarized to a notably greater extent than the other.⁴⁶² Third, a "balanced" and "objective" coverage of political news stories leads to a sanitized presentation of competing political factions' arguments rather than an investigation of those arguments' respective merits. Doing so still leads to cynicism, the taking of sides, and partisan hostility.⁴⁶³

458. Pickard, *supra* note 453, at 3434 ("Although the Fairness Doctrine's effectiveness and enforceability are debatable, it encouraged sensitivity toward programming biases and provided local communities an important tool with which to hold broadcasters accountable.").

459. *See* *Red Lion Broad., Inc. v. FCC*, 395 U.S. 367, 390 (1969).

460. *In re* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1253 (1949).

461. ROSENFELD, *supra* note 18, at 160–62; *see* YOUNG, *supra* note 58, at 141, 152, 160–61 ("bothsidesism" and conflict framing); ORESKES & CONWAY, *supra* note 139, at 240–41; *id.* at 19 ("no need to 'balance Hitler against Churchill'" (quoting David Halberstam, *THE POWERS THAT BE* 39 (Univ. of Ill. Press 2000) (1979))).

462. BENKLER ET AL., *supra* note 144, at 16; YOUNG, *supra* note 58, at 70–71, 235 (asymmetric polarization).

463. YOUNG, *supra* note 58, at 141–42, 156 ("conflict framing"); MCINTYRE, ON DISINFORMATION, *supra* note 99, at 36, 53–55 (false equivalence and defactualization).

4. Social Media Regulation

As the primary medium for the contemporary misinformation crisis, no solution can be viable unless that leaves social media unregulated. Social media companies are aware their platforms “‘exploit the human brain’s attraction to divisiveness’ and promote ‘more and more divisive content in an effort to gain user attention and increase time on the platform.’”⁴⁶⁴ The attention-based and profit-driven nature of social media companies’ business models means that social media “cannot optimize for the public interest,” and thus they must be regulated.⁴⁶⁵ Thankfully, social media regulation is a more realistic response under a negative free-speech tradition in the respect that First Amendment protections only protect against regulations by the government, not private corporations.

Contemporary scholarship across disciplines is teeming with proposed solutions for curbing social media misinformation. The most common example is amending Section 230(c) of the Communications Decency Act of 1996, which shields social media companies from liability for the content posted on their platforms and does not require them to set content standards.⁴⁶⁶ While this would be both a welcome change and one that is responsive to intense bipartisan interest in accountability for social media companies, amending Section 230(c) is likely futile for two reasons. First, while there is bipartisan disdain for social media companies, the defactualized nature of our misinformation crisis has led each major political party to take issue with Section 230(c) for opposite reasons. Political liberals take issue with the misinformation liability shield in Section 230(c)(1), whereas political conservatives tend to take issue with the “good faith” provision in Section 230(c)(2), which allows a platform to voluntarily act “in good faith” to limit content it deems objectionable regardless of that content’s constitutionality.⁴⁶⁷ The parties’ staunchly opposed stances make meaningful

464. DiResta, *Algorithms, Affordances, and Agency*, *supra* note 179, at 129–30 (quoting Horwitz & Seetharaman, *supra* note 257).

465. *Hearings*, *supra* note 112, at 1, 3.

466. 47 U.S.C. § 230(c); Andrew Ceresney et al., *Regulating Harmful Speech on Social Media: The Current Legal Landscape and Policy Proposals*, in *SOCIAL MEDIA, FREEDOM OF SPEECH AND THE FUTURE OF OUR DEMOCRACY* xxiii, xxiv–xxvii (Lee C. Bollinger & Geoffrey R. Stone eds., 2022); *see, e.g.,* *Gonzalez v. Google*, 282 F. Supp. 3d 1150 (N.D. Cal. 2017) (Facebook, Google, and Twitter not liable for terrorist posts); Bauder, *supra* note 332 (Facebook stops fact-checking for its posts).

467. Danielle Draper, *Summarizing the Section 230 Debate: Pro-Content Moderation vs Anti-Censorship*, BIPARTISAN POL’Y CTR. (July 5, 2022), <https://bipartisanpolicy.org/blog/summarizing-the-section-230-debate-pro-content-moderation-vs-anti-censorship/>; Ashley Johnson & Daniel Castro, *Fact-Checking the Critiques of Section 230: What Are the Real Problems?*, INFO. TECH. & INNOV. FOUND. (Feb. 22, 2021), <https://itif.org/publications/2021/02/22/fact-checking-critiques-section-230-what-are-real-problems/> (Critique #8).

reform unlikely, let alone desirable. Second, as this Article has stressed, while social media regulations are welcome and necessary, social media is but the most recent development in communication technology that has allowed bad actors to exploit the fundamental and unaddressed weakness of democracy. Addressing the misinformation-enabling features of new technological developments will only ever be a band-aid fix, especially as technology develops at a progressively quicker pace. Amending Section 230(c), if even possible, is too superficial a solution.

Instead, among the best courses of action regarding social media misinformation is to regulate the online sphere as a public resource. This implies some form of recognition of the public sphere as a publicly held resource, the maintenance of which requires governmental regulation.⁴⁶⁸ Where the public sphere is privatized, the private owners and managers drawing exorbitant profits from it should be considered public trustees, saddled with public interest obligations to support democratic deliberation.⁴⁶⁹ This could be particularly beneficial in that it avoids several additional legal requirements for antitrust regulation, and because social media implicates other substantial user interests like privacy concerns.⁴⁷⁰ Additionally, regarding the latter, the implication of such substantial social interests may serve as a threshold for determining which platforms require regulation, ensuring that public trustee obligations tend to fall on larger platforms.⁴⁷¹ Moreover, social media platforms could be regulated as public utilities. The oversight from public-utility-style regulation would allow for incentives to offset the profit motives at issue and numerous means of holding the social media companies accountable for misinformation. For example, certain public servants may be empowered to compel annual reports, set performance benchmarks, oversee platforms' actions within the market, raise responsiveness to user complaints, and "ensure due process and transparency while leaving the platforms as private entities still able to restrict hate speech, clickbait articles, or inflammatory or untrustworthy news."⁴⁷² While public-trust-based regulatory solutions would implicate partisan policy preferences and would need to be adapted to new technological advancements, this may

468. See MINOW, *supra* note 27, at 120–21; *New St. Ice Co. v. Liebmann*, 285 U.S. 262, 304 (1932) (Brandeis, J., dissenting) (vendors monopolizing a publicly necessary good or service may justifiably be regulated more heavily). This public-resource rationale is often consistent with existing regulations. See, e.g., 47 C.F.R. § 73.1217(a) (broadcast hoaxes).

469. See *Hearings*, *supra* note 112, at 1, 3–4; Napoli & Graf, *supra* note 396, at 14, 16; ROSENFELD, *supra* note 18, at 164.

470. Napoli & Graf, *supra* note 396, at 16, 32–33.

471. *Id.* at 21.

472. See MINOW, *supra* note 27, at 123; Napoli & Graf, *supra* note 396, at 32–33.

be a viable long-term solution and a complement to the fundamental change required.

CONCLUDING THOUGHTS

To reiterate, “the First Amendment advances not only the individual’s right to engage in political speech, but also the public interest in preserving a democratic order in which collective speech *matters*.”⁴⁷³ There should be no mistake that, especially in the context of the First Amendment, the American obsession with negative freedom at the expense of positive freedom is what will end the American experiment. After all, this is why the United States is the only developed democracy to which misinformation poses an existential threat.⁴⁷⁴ America’s conception of freedom as a relief from oppression—and, by extension, a distrust of government—distinguishes it from other Western democracies, which understand both the government’s necessary role “as a safety net against corrupt private sector interests” and the need “to protect [democracy] from anti-democratic ideas.”⁴⁷⁵ Yet, here in the United States, we cannot bring ourselves to do so.

It seems that the only viable solution, no matter how improbable, is a widespread consensual understanding that some degree of regulation of factually inaccurate information is necessary for the sake of democratic self-government.⁴⁷⁶ But current conventional wisdom would have us believe that maintaining our woefully inadequate negative free-speech tradition is preferable to jumping ship, as if the flaws of other nearby ships make them worse alternatives to the actively sinking ship we stand upon.⁴⁷⁷ This conventional wisdom has developed an unacceptable habit of turning valid concerns into thought-terminating cliches. Several common ones should be dispelled.

A. Regulation and Censorship Are Not Synonymous

Viewing content only as either censored or uncensored is a false dichotomy, ignoring the possible middle grounds between the slightest regulation and full-throated censorship. Exclaiming “censorship” at the

473. *McCutcheon v. FEC*, 572 U.S. 185, 237 (2014) (Breyer, J., dissenting).

474. See *YOUNG*, *supra* note 58, at 192.

475. Simson, *supra* note 48, at 1008.

476. As John Milton himself once wrote, “[H]e . . . who overcomes by force hath overcome but half his foe.” *PARADISE LOST* bk. I, ll. 647–49 (Stephen Orgel & Jonathan Goldberg eds., Oxford Univ. Press ed., 2005) (1674).

477. See *YOUNG*, *supra* note 58, at 222; *but see* Kramer, *supra* note 29, at 31; *Reductio Ad Absurdum*, *BLACK’S LAW DICTIONARY* (11th ed. 2019).

slightest instance of regulation cannot continue to be a get-out-of-jail-free card.⁴⁷⁸ This is especially true given that there is no firm agreement among the defenders of our negative free-speech tradition about what constitutes a free-speech violation.⁴⁷⁹

B. Regulatory Results Will Not Be Distributed Evenly

While misinformation regulation must be nonpartisan, one political faction will inevitably be regulated more than another.⁴⁸⁰ This, without more evidence, cannot be labeled as discriminatory or biased for two reasons. First, the party not presently in power will always be the more frustrated party (and thus, more likely to produce partisan misinformation). Second, while no faction is immune from populist demagoguery, the identity-based appeals from Part III are more attractive to political conservatives and dominant ethnic, racial, and religious groups.⁴⁸¹ A partisan basis for misinformation does not make it more tolerable.

C. There Must Be an “Optimal Chill”

The dreaded “chilling effect” on free expression is a product of our overprotection of political speech, and it misleadingly implies that no such chill should exist.⁴⁸² On the contrary, there is indeed an appropriate level of chilling, and the real task is to find the optimal amount.⁴⁸³

478. DiRESTA, *INVISIBLE RULERS*, *supra* note 112, at 147. This is a common tactic of extremists and conspiracy theorists like Alex Jones (InfoWars), who, case in point, brazenly named his media company, “Free Speech Systems LLC.” Warning Letter from Donald D. Ashley, Director, U.S. Food & Drug Admin., and Richard A. Quaresima, Acting Associate Director, Fed. Trade Comm’n, to Free Speech Systems LLC d.b.a. Infowars.com, MARCS-CMS 605802, (Apr. 9, 2020), <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/free-speech-systems-llc-dba-infowarscom-605802-04092020>.

479. See GRABER, *supra* note 74, at 7, 187–88 (noting Justices Black and Douglas, among the staunchest civil libertarian justices ever, disagreeing over a negative free speech violation).

480. See MCINTYRE, *ON DISINFORMATION*, *supra* note 99, at 53–55.

481. BENKLER ET AL., *supra* note 144, at 16 (asymmetric polarization); YOUNG, *supra* note 58, at 70–71, 191–92, 235.

482. See Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1636 n.7 (2013).

483. SUNSTEIN, *LIARS*, *supra* note 88, at 64–65; see Rauch, *Defamation as Democracy Tort*, *supra* note 422, at 1510–11; Redish & Pereyra, *supra* note 22, at 454–55, 471–72; Simson, *supra* note 48, at 966 n.101, 968; *supra* Part IV.B.

D. The Slope Is Not So Slippery

While free speech is an indispensable right that must be guarded cautiously, the notion that free speech regulation creates a slippery slope to tyranny is fallacious and perhaps the best example of a speech-related perpetuation of the status quo.⁴⁸⁴ It assumes, first, that each supposed loss of speech rights necessarily entails another with no possibility of reversal or redirection, and second, that no safeguards can prevent the undesirable outcome (e.g., ensuring that the principles guiding the regulation are specific enough to prevent abuses).⁴⁸⁵ The slippery-slope argument is essentially a concession that a line in the sand must be drawn, but because there is disagreement or uncertainty as to where to draw that line, it would be best not to draw one at all.⁴⁸⁶

E. The Devil We Know Is Not Better than the Devil We Do Not

While the logistics of holding the speech regulator accountable to the electorate is a perfectly reasonable concern, the age-old question of “*quis custodiet ipsos custodes?*”⁴⁸⁷ (“who will watch the watchmen?”)⁴⁸⁸ is another unwarranted insistence on maintaining the status quo.⁴⁸⁹ While a comprehensive and exhaustive solution to the watchman problem is not possible here, this Article has shown at length why continuing in the negative free-speech tradition is a non-option. It is also foolish to assume that the question’s logistics, alone, make it unanswerable, as though no viable solution can be fashioned using, for example, courts or expert bodies with layers of partisan insulation or legal standards like the burden of proof.⁴⁹⁰ As

484. See Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 373 (1985) [hereinafter Schauer, *Slippery Slopes*]; Kramer, *supra* note 29, at 27–31.

485. See Schauer, *Slippery Slopes*, *supra* note 484, at 375.

486. See *id.* at 381–82.

487. Decimus Junius Juvenalis, *Ivni Ivvenalis Satvra VI* [Satire VI] ll. 347–48.

488. [Editor’s note:] While often translated in popular culture as “who will watch the watchmen?”, scholarly translations often differ. One classic translation renders the phrase as: “who will watch the warders?” G. G. Ramsay, *Juvenal, Satires. (1918). Satire 6*, THE TERTULLIAN PROJECT, https://www.tertullian.org/fathers/juvenal_satires_06.htm (last visited May 17, 2026).

489. This is the “status-quo bias.” See Ilana Ritov & Jonathan Baron, *Status-Quo and Omission Biases*, 5 J. RISK & UNCERTAINTY 49, 49 (1992) (emphasis omitted); see MILL, *supra* note 4, at 34–36, 45 (stating that censorship is “an assumption of infallibility”).

490. See SUNSTEIN, *LIARS*, *supra* note 88, at 59–61; YOUNG, *supra* note 58, at 221–22 (discussing Facebook’s “quasi-independent body of experts and scholars who [c]ould be called on to review particularly contentious content decisions and issue binding verdicts”); see generally DEWEY, *PUBLIC AND ITS PROBLEMS*, *supra* note 50, at 153–77 (experimental approach to legislation incorporating public input); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279–95 (1975)

well, there is no reason to believe that democratic norms, guardrails, or other means of minimizing corruptive influences cannot provide a long-term solution.

F. Perfection Is the Enemy of Progress

It is common among defenders of our negative free-speech tradition to point to the difficulties of speech regulation or its inability to fully address an issue as justification not to adopt such measures.⁴⁹¹ However, difficulty is often the bullet to be bitten, and, absent a comprehensive solution, partial solutions to a problem are preferable to non-solutions or inaction. Even if that were not the case, a necessary but imperfect law needs to be adapted and refined to real-world conditions to better serve its function. There is an inescapable experimental, trial-and-error requirement for it to become more effective, even if never perfect.⁴⁹²

* * *

Justice Jackson was correct to identify adherence to negative freedom as a constitutional “suicide pact.”⁴⁹³ A principle overapplied is a liability. Our steadfast commitment to that negative freedom makes an existential and imminent threat out of an obvious and foreseeable weakness. In a world where history repeats itself—or at least rhymes—American enamored with negative freedom protections is leading us to fail the open-book test of history. The price of freedom is indeed eternal vigilance, and vigilant we have not been. The lesson that democracy is defeated from within has eluded us, and for that oversight, we are suffering the consequences.

As President John Adams once presciently replied to a critic:

Remember Democracy never lasts long. It soon wastes exhausts and murders itself. There never was a Democracy Yet, that did not commit suicide. It is in vain to Say that Democracy is less vain, less proud, less selfish, less ambitious or less avaricious than Aristocracy or Monarchy.

(11 elements of a fair hearing); ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 111–98 (1962) (“passive virtues”).

491. See generally, e.g., NADINE STROSSEN, *HATE* 106–19 (2018); STROSSEN, *FREE SPEECH*, *supra* note 1, at 32–36, 173–74 (arguing that hate speech laws are difficult to draft, difficult to enforce, and unable to eliminate hate speech and hate crimes); *but see* Murray, *supra* note 98, at 202.

492. Dewey, *Logical Method and Law*, *supra* note 283, at 26; *see* POPPER, *supra* note 219, at 148–57 (piecemeal engineering); Kramer, *supra* note 29, at 29.

493. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

It is not true in Fact and no where appears in history. Those Passions are the same in all Men under all forms of Simple Government, and when unchecked, produce the same Effects of Fraud Violence and Cruelty. When clear Prospects are opened before Vanity, Pride, Avarice or Ambition, for their easy gratification, it is hard for the most considerate Phylosophers and the most conscientious Moralists to resist the temptation. *Individuals have conquered themselves, Nations and large Bodies of Men, never.*⁴⁹⁴

494. Letter from John Adams to John Taylor (Dec. 17, 1814) (emphasis added), <https://founders.archives.gov/documents/Adams/99-02-02-6371> [<https://perma.cc/5299-X7N4>].