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TRUTH, COURAGE, AND OTHER HUMAN DISPOSITIONS: REFLECTIONS ON FALSEHOODS AND THE FIRST AMENDMENT

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What is the relationship between traditional First Amendment jurisprudence and the dissemination of factually false statements? Some recent scholarship, though perhaps ambivalent about whether (or how much) the former actually may contribute to the latter, suggests that—especially in this age of the internet and giant social media platforms—the American free speech tradition offers little assistance in combatting powerful new threats of falsehoods being circulated widely in the public domain by virtue of "viral deception."[1] Thus, Professor Frederick Schauer, in his examination of the relationship between factual falsity and the free speech tradition, was "left with the conclusion that the seemingly increased pervasiveness of falsity in public discussion is a phenomenon that *may possibly* be a consequence of a strong free speech culture, but is certainly not a phenomenon that a free speech regime is likely to be able to remedy."[2] Rather, because the First Amendment "is only a tiny sliver of communications policy," it leaves "untouched" the question of "the increasing acceptance of patent factual falsity, . . . a question whose economic, psychological, sociological, cultural, scientific, political, and policy dimensions are far more important than the legal and constitutional ones."[3]

Similarly, though his focus is solely on the realm of political speech, Professor Tim Wu delineates "a golden age of efforts by governments and other actors to control speech, discredit and harass the press, and manipulate public debate" in ways that leave the "First Amendment . . . confined to a narrow and frequently irrelevant role."[4] This phenomenon raises "the question . . . when it comes to political speech in the twenty-first

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1. Samuel Hughes, *When Lies Go Viral*, PENN. GAZETTE, May/June 2017, at 50, 53 (quoting Kathleen Hall Jamieson, Director, Annenberg Public Policy Center, the University of Pennsylvania).

2. Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 911–12 (2010) (emphasis added).

3. *Id.* at 918–19.

4. Tim Wu, *Is the First Amendment Obsolete?* 2 (Knight First Amendment Inst. at Columbia Univ., Research Paper No. 14-573, 2018), https://ssrn.com/abstract=3096337.

century, is the First Amendment obsolete?"[5] And Professor Richard Hasen likewise worries that the dark uses of the internet and social media—the downside of the positive "cheap speech" opportunities such platforms afford—pose major threats to American democracy, including the proliferation of false political advertising and so-called "fake news."[6] He is concerned that, although the "Supreme Court's libertarian First Amendment doctrine did not cause the democracy problems associated with the rise of free speech, . . . it may stand in the way of needed reforms."[7]

The observations of these scholars and many others—alarms or clarion calls if you will—no doubt have a good deal of truth to them, but they also raise numerous questions even when confined to the perhaps insufficiently comprehensive context of our First Amendment traditions. First, even if the premise is correct that, by virtue of modern technology, falsehoods are more easily and widely disseminated today than in the past, is it clear that they are therefore more widely accepted than they were in prior eras? That is an empirical question not necessarily easily answered.

Second, is the volume, velocity, or virulence of falsehoods that would otherwise exist—and the degree to which they become accepted—increased, decreased, or largely unaffected by First Amendment jurisprudence? Answering that question requires analysis of multiple components: not just what the law is, but what moral incentives and customs and norms are, how speakers react, how listeners react, and overall societal reactions, among others.

Third, do elements of our First Amendment jurisprudence support truth-telling in a fashion that offsets the proliferation of falsehoods in a meaningful way? Fourth, is that jurisprudence a barrier to effective countermeasures against falsehoods, or can it assimilate and abide adjustment to lower any barriers without unduly sacrificing the core purposes and values that gave rise to its adoption and persistence? And finally (for now), do the customs and approaches signaled by traditional First Amendment jurisprudence significantly influence the possibilities of dealing with the worst ravages of proliferating falsehood, even when the doctrine does not apply directly to the problem?

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5. *Id.*

6. Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)* 16 FIRST AMEND. L. REV. 200, 200–01 (2018).

7. *Id.* at 201.

Answering all those questions comprehensively is too big a haul for a short essay, and many of them cannot be definitively answered in any event. But perhaps some partial observations might at least make a start.

I. The Relationship Between Existing Free Speech Protection and the Proliferation of Falsity

Let's begin with whether current First Amendment jurisprudence contributes to the spread of factually false statements, and, if so, how much. Of course in one sense it does—at least if one accepts the premise that immunity from liability for falsity makes it likely that more false statements will be circulated—because free speech and free press rulings since *New York Times Co. v. Sullivan*[8] have provided constitutional protection in some areas for falsehoods. But to what degree is this the case, and with what effect on the spread and acceptance of falsehoods?

The First Amendment guarantees the Supreme Court has extended in the areas of defamation, false-light privacy, fraud, intentional infliction of emotional distress, perjury, and false statements to government officials[9] no doubt have allowed the spread of careless and even grossly negligent false statements of fact to some degree. Given that calculated falsehoods are largely excluded from those guarantees, however, the full extent to which these protections have acted as a shield against the spread of falsehoods is unknown, due to the continued inhibiting effect of the fear of costly and disruptive litigation over whether the falsehood was knowingly or recklessly made. And where false statements have been provided First Amendment immunity, most scholars seem to believe that the risk of increased circulation of falsehoods is worth the sacrifice to avoid the chilling effects that permitting sanctions for falsehoods would have on the circulation of true statements.[10] Moreover, the potentially serious abuses of selective and repressive enforcement that might be aimed by dominant forces in government or the community—not at the falsity of the statements but at the speaker's critical or dissident opinions or the speaker's unpopularity—further justify considerable leeway for falsehoods in speech. That doesn't diminish the possibility that more false information may be

8. 376 U.S. 254 (1964).

9. United States v. Alvarez, 567 U.S. 709, 719–20 (2012).

10. *Id.* at 751–52 (recognizing that "it is sometimes necessary to 'exten[d] a measure of strategic protection' to [false statements of fact] in order to ensure sufficient 'breathing space' for protected speech." (quoting Gertz v. Robert Welch Inc., 418 U.S. 323, 342 (1974))).

disseminated, but justifiable tolerance of some falsity for larger gains is not the target of most critiques.

To be sure, there have been some dissenting voices along the way. For example, we might remember that Justice Harlan wrote separately (though unsuccessfully) in *Time, Inc. v. Hill*[11] to complain in part that refutation of inaccurate facts—the "more speech, not enforced silence" part of our free speech tradition—is much less likely to be forthcoming on the part of private individuals seeking to pursue their privacy than where the purpose of refuting falsehoods is to restore reputation.[12] And Justice White's equally unsuccessful attempt to have the Court reconsider the limitations it had imposed in defamation cases against both public officials[13] and private individuals caught up in matters of public concern[14] spoke to a broader apprehension that the *Sullivan* rule "countenances two evils: the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts."[15] The policy arguments—the relevance of how much weight should be given in different contexts to the effectiveness of counterspeech, and the fear that falsehoods in our public affairs risk degrading the proper connection between speech and self-governance—may not have prevailed in those cases, but the concerns they addressed certainly have not gone away.

The cumulative effect of guaranteed protection for non-calculated falsehoods in these areas may have contributed some to the spread of falsehoods, most of it as a justifiable sacrifice for larger public goals and with offsetting benefits in the form of true disclosures of public importance that were not deterred for fear of error. But by and large these protections are decidedly not the target of those who have sounded the alarm about pervasive and proliferating falsity.[16] Nor is their primary focus the arena of

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11. 385 U.S. 374, 402 (1967) (Harlan, J., concurring in part and dissenting in part).

12. *Id.* at 407–09.

13. *See Sullivan*, 376 U.S. at 268.

14. *See Gertz*, 418 U.S. at 362.

15. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 769 (1985) (White, J., concurring in the judgment).

16. *See*, *e.g.*, Schauer, *supra* note 2, at 911 ("Arguments from democratic deliberation or decisionmaking, from autonomy, and from self-expression . . . may accept false speech and its detrimental effects as a price worth paying in order that people may express themselves or in order that democratic decisionmaking may remain unfettered." (footnotes omitted)); Hasen, *supra* note 6, at 3 (noting that, although in "the era of cheap speech, some

deceptive commercial advertising, a vast field where incentives to falsify and mislead are at their height, but where the Court continues to leave plenty of regulatory authority untouched by First Amendment limits. As is well known, "forms of regulation that would be offensive if applied to other kinds of speech (like requirements that ads be reviewed before they are published or aired, or that warnings, disclaimers, or other information be added to ensure accuracy) have been accepted in the case of commercial speech."[17] And "[p]erhaps most centrally, the First Amendment has been held to allow the complete prohibition of false, deceptive, and misleading commercial speech—a wide scope of regulatory power that emphatically would not be permitted with respect to noncommercial speech on matters of public concern."[18] With respect to at least one part of that summary, the relatively recent case *Milavetz, Gallop & Milavetz, P.A. v. United States* reaffirms that the Court remains largely deferential to government-compelled disclosure measures that are reasonably related to the interest in preventing commercial consumer deception.[19] Difficult cases where commercial speech and arguably ideological speech are intertwined may elicit greater First Amendment limits, but constitutional restraints in such cases would likely be justified for the same reasons that apply in the defamation cases and their progeny.[20]

Despite the above-discussed cases adopting First Amendment limits in the context of false statements, until 2012 the Supreme Court had not extended First Amendment protection to lies—that is, false statements that the speaker knows to be false when uttered. But then the Stolen Valor Act,

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shifts in First Amendment doctrine seem desirable to assist citizens in ascertaining truth . . . it is important not to fundamentally rework First Amendment doctrine, which also serves as a bulwark against government censorship and oppression potentially undertaken in an ostensible effort to battle 'fake news'"). Professor Wu may be somewhat more open to a relaxation of doctrine in this regard. Wu, *supra* note 4, at 23. Although, for example, he "personally would not favor the creation of a fairness doctrine for social media or other parts of the web," in part because such a law "would be . . . too prone to manipulation," his focus on "the increasing scarcity of human attention, the rise to dominance of a few major platforms, and the pervasive evidence of negative effects on our democratic life," seem to have led him to this conclusion: "To handle the political speech challenges of our time, I suggest that the First Amendment must be interpreted to give wide latitude for new measures to advance listener interests, including measures that protect some speakers from others." *Id*. at 23, 26.

17. Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1128 (2006).

18. *Id.*

19. 559 U.S. 229, 256 (2010).

20. *See* Varat, *supra* note 17, at 1129–32.

by which Congress criminalized lying about having received military medals, arrived before the Court on review of a federal prosecution of Xavier Alvarez for falsely claiming that he had received the Congressional Medal of Honor.[21] Interpreting the Act as limited to a prohibition on lies about this topic, the Court nonetheless decided, in a fractured decision, that the Act constituted an abridgment of the freedom of speech.[22]

Extended attention to that decision may be justified to reflect on just how little regulatory power to punish lies it ultimately eliminated; what effect offering protection to some lies within the scope of the decision might have on the proliferation of false statements of fact; and, perhaps of most importance, what the decision signals for both future doctrinal developments and efforts to combat falsehood that are beyond the direct control of First Amendment rulings. Justice Kennedy's plurality opinion for four, and Justice Breyer's opinion concurring only in the judgment for himself and Justice Kagan, rejected, for separate reasons, the Government's contention (based on lots of language in previous Court opinions) that lies are categorically unprotected by the First Amendment.[23] For Justice Kennedy, the Act was a presumptively impermissible, content-based restriction[24] that needed to undergo strict scrutiny, which it could not survive, largely because it was not narrowly tailored in two respects.[25]

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21. United States v. Alvarez, 567 U.S. 709, 714–15 (2012).

22. For an excellent discussion of this case and its broader implications, see Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161.

23. *See Alvarez*, 567 U.S. at 716–22; *id.* at 732–36 (Breyer, J., concurring).

24. My distinguished colleague Professor Shiffrin disagrees with the view that restrictions on lying are content-based restrictions. SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 125–35 (2014). Her powerful and nuanced book offers an original deontological case both for why freedom of speech deserves special solicitude and why lies (not just false statements or deception, but insincere, deliberate assertions of what the speaker does not believe) are morally wrong and therefore (with important exceptions) should be more readily subject to regulation than many believe. Her own summary of her argument is roughly this:

> [T]he lie's primary moral defect is that it subverts the reliability of a special, uniquely precise mechanism for the conveyance of our mental contents. Reliable, sincere speech enables sophisticated forms of self-understanding, knowledge of others and of the world, moral agency, and personal relations of trust. The relation between communication and these foundational compulsory ends explains the strong presumption of sincere communication as well as our responsibility to strive for accuracy.
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> [T]his relation also supplies the foundations of freedom of speech. Affording opportunities for the sincere externalization of one's mental contents and access to others' mental contents, and enabling the dynamic interchange between them is an essential social condition of freedom of thought, the

First, its "sweeping, quite unprecedented reach" allowed suppression of "all false statements on this one subject in almost limitless times and settings . . . entirely without regard to whether the lie was made for the purpose of material gain."[26] Upholding such a government power had "no clear limiting principle" and, referencing George Orwell's classic book *Nineteen Eighty-Four*, "[o]ur constitutional tradition stands against the idea that we need Oceania's Ministry of Truth."[27] Justice Kennedy invoked the perceived core principles of that tradition and contended that

> [w]ere the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition.[28]

Indeed, just the "mere potential for the exercise of that power casts . . . a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom."[29] In particular, in this instance the government failed to demonstrate "a direct causal link between the restriction imposed and the injury to be prevented," providing "no evidence to support its claim that the public's general perception of military awards is diluted by false claims" like Alvarez's.[30] Naturally, this leaves open in future cases both the power of the government to punish lies when stronger evidence of causal connection to material harm is provided and what the Court will be prepared to recognize as material harm.

> development of the capacities of the thinker, and the development of moral agency. It therefore is an individual human right and among the prerequisite social conditions for a just society.

Id. at 186. Professor Shiffrin argues that the regulation of lies is not content-based because the

> impetus for regulation does not stem from disagreement with the content of the speech or from a worry about how others react to its content, but rather from the fact that insincere, but seriously presented, representations interfere with our ready, reliable ability to transmit our mental contents, whatever they may be, and have them taken as testimonial warrants of our beliefs.

Id. at 126.

25. *Alvarez*, 567 U.S. at 724.
26. *Id.* at 722–23.
27. *Id.* at 723.
28. *Id.*
29. *Id.*
30. *Id.* at 725, 726.

Second, the government did not, and could not, show "why counterspeech would not suffice to achieve its interest"—particularly in light of the possibility of an accurate government-created database of Medal of Honor winners.[31] Justice Kennedy, emphasizing one of the most essential and longstanding precepts of the American free speech tradition, further noted that "[t]he facts of this case indicate that the dynamics of free speech, of counterspeech, of refutation, can overcome the lie."[32] That was so in part because the lie Alvarez told, easily detected in this case, prompted "outrage and contempt" that could "serve to reawaken and reinforce the public's respect for the Medal, its recipients, and its high purpose."[33] Lionizing the Holmes-Brandeis tradition, here in the context of "lies not spoken under oath and simply intended to puff up oneself,"[34] Justice Kennedy reaffirmed some foundational premises of that tradition:

> The remedy for speech that is false is speech that is true . . . . The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth . . . . And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse . . . .[35]

The cognitive and emotional mechanisms by which suppression of falsehoods might make exposure of falsity more difficult bear intense investigation for their nature and effect, both qualitatively and quantitatively, but the recognition of this possible phenomenon surely is a point worth raising. Furthermore, although the oft-questioned prospects for the success of counterspeech, especially in the form of rational investigation and explanation of evidence-based fact, appear to many to be an insufficient guarantee or an overly optimistic assessment of real-world behavior, that, too, is an area of emphasis that, while it certainly is likely to vary from context to context, is, if not determinative, hardly irrelevant. One might even say, with Justice Holmes, that this is part of the "experiment" of the robust free speech tradition in the United States.[36] Just how effective

31. *Id.* at 726.
32. *Id.*
33. *Id.* at 727.
34. *Id.* at 721.
35. *Id.* at 727–28.
36. Explicitly speaking only of "expressions of opinion," Justice Holmes's famous dissent in *Abrams v. United States*, 250 U.S. 616 (1919), nonetheless expressed a risk-

opportunities for successful counterspeech, much less the *realization* of such success, must be in order to overcome the First Amendment preference for refutation rather than regulation is often a matter of intense scrutiny in free speech jurisprudence and beyond. As perfection will never be achieved, there surely always will be argument over how far short of non-regulatory perfection counterspeech possibilities must be before regulatory intervention—itself far from uniformly effective—can be justified.

In any event, in another foundational statement that again harkened back to the "civic courage" expected of individuals in a free society of which Justice Brandeis spoke so eloquently in his concurrence in *Whitney v. California*,[37] Justice Kennedy emphasized that "[o]nly a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication."[38]

Without sounding quite as many magisterial or foundational notes regarding the free speech tradition as Justice Kennedy had, Justice Breyer's concurrence, applying his preferred proportionality or intermediate scrutiny review, nonetheless emphasized some similar themes as he reasoned towards his conclusion that the Stolen Valor Act "work[ed] speech-related

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embracing *attitude* that potentially could be extended to factual statements as well when he wrote so influentially

> that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth [likely the truth of the "best test of truth," not truth itself] is the only ground upon which [people's] wishes safely can be carried out.

Id. at 630. His embrace of that idea as "the theory of our Constitution"—"an experiment" requiring "that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country," is an embrace of community risk-taking that necessitates a confident, courageous attitude. *Id.* Experiments of this sort are not for the faint of heart. And his remarkable statement in his dissent in *Gitlow v. New York*, 268 U.S. 652, 673 (1925)—that "[i]f in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way"—surely is about as powerful a willingness to take chances as one can imagine. One might reasonably ask whether a similar risk-taking, experimental approach also should apply to strong presumptive reliance on refutation of false statements of fact.

37. 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring).

38. *Alvarez*, 567 U.S. at 729.

harm . . . out of proportion to its justifications."[39] Although he acknowledged that "false statements about easily verifiable facts" that are not about "philosophy, religion, history, the social sciences, the arts, and the like" are "less likely than are true factual statements to make a valuable contribution to the marketplace of ideas,"[40] he was more explicit than Justice Kennedy had been that

> [f]alse factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates' methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth.[41]

In addition to recognizing the utility of some false factual statements, Justice Breyer considered the common concern that "the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart," as well as the concern that "the pervasiveness of false statements, made for better or worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more" and risks dangerously selective prosecution of the unpopular.[42] As a result, Justice Breyer was led "to believe that the statute as written risks significant First Amendment harm."[43] That risk could not be justified by the desire to eliminate lies, even as to this one subject, when this unusual Act failed to narrow its application—as most other regulations of false statements do—by requiring "a showing that the false statement caused specific harm or at least was material, or" covered only lies "most likely to be harmful or [in] contexts where such lies are most likely to cause harm."[44]

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39. *Id.* at 730 (Breyer, J., concurring).
40. *Id.* at 731–32.
41. *Id.* at 733.
42. *Id.* at 733–34.
43. *Id.* at 737.
44. *Id.* at 738.

Justice Breyer also recognized a special concern that the Act "also applies in political contexts, where although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is also high."[45] In political contexts, the necessary statutory narrowing "will not always be easy to achieve," and "a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker)."[46] Simultaneously, however, in the political context "criminal prosecution is particularly dangerous (say, by radically changing a potential election result) . . . and consequently can more easily result in censorship of speakers and their ideas."[47] Notably, he did not express any view about the validity of lower court cases that had upheld "roughly comparable but narrowly tailored statutes in political contexts,"[48] but clearly those statutes and cases were not far back in either his mind or those of the other Justices. And no doubt those cases will present much more difficult tradeoffs than the Stolen Valor Act did.

Justice Alito's dissent, joined by Justices Scalia and Thomas, contended that the Act was sufficiently narrow and adequately served a sufficiently important government interest. Notably, he rejected any claim that the "lies covered by the Stolen Valor Act" had any sort of "intrinsic value."[49] He did agree that there were times when false factual statements should receive First Amendment protection, but only for the instrumental reason "to prevent the chilling of other, valuable speech."[50] Like the other Justices, however, the concern about deterrence of valuable speech led him to express views that would seem to immunize falsehoods—or at least afford them "a degree of instrumental constitutional protection"[51]—in large swaths of public life, about subjects that Professor Mark Tushnet likely would describe as involving "ideologically inflected factual claims."[52] His acknowledgment in that regard actually seems of much greater importance than his willingness to uphold the Stolen Valor Act. That acknowledgement resided in these passages:

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45. *Id.* at 736.

46. *Id.* at 738.

47. *Id.*

48. *Id.*

49. *Id.* at 750 (Alito, J., dissenting). As Justice Alito essentially acknowledged, however, the plurality and the concurrence took a different view. *Id.* at 748–49, 749 n.14.

50. *Id.* at 751.

51. *Id.*

52. Mark Tushnet, *"Telling Me Lies": The Constitutionality of Regulating False Statements of Fact* 18 (Harv. L. Sch. Pub. L. & Legal Theory, Working Paper Series, Paper No. 11-02), http://ssrn.com/abstracts=1737930.

> [T]here are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat. The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth . . . . Allowing the state to proscribe false statements in these areas also opens the door for the state to use its power for political ends. Statements about history illustrate this point. If some false statements about historical events may be banned, how certain must it be that a statement is false before the ban may be upheld? And who should make that calculation? . . . [T]he potential for abuse of power in these areas is simply too great.[53]

Though Justice Alito did not think that the lies prohibited by the Stolen Valor Act fell into any portion of those "broad areas," it should not be missed that the Court remained unanimous in its view that the fear of government abuse in seeking to regulate falsehoods must be a salient, often overriding factor in limiting regulation of them. The Justices' common ground also included attention to the need for regulation of lies to be sufficiently narrow in coverage to avoid free speech problems generally and attention to both the effectiveness of counterspeech and the effectiveness of regulation in controlling the spread of lies.

The mismatch between the arguably narrow context of Alvarez's lies and the Court's broad analysis, justified no doubt by its consideration of the validity of the entire Act (given that Congress chose to extend its coverage so categorically), is quite stark. Had the circumstances presented only an as-applied challenge, or, put differently, had the Act been drafted or interpreted only to apply to the circumstances in the *Alvarez* case, what might have been more apparent is that the Court only extended First Amendment protection to a self-aggrandizing, autobiographical lie[54] that

53. *Alvarez*, 567 U.S. at 751–52 (Alito, J. dissenting).

54. For a developed argument, made just before the Supreme Court decided *Alvarez*, that if "the First Amendment is designed, at least in part, to preserve individual autonomy," autobiographical lies that do not result in cognizable harm to others "merit at least some degree of constitutional protection, since they represent a significant means by which we craft and calibrate the personas we present to others," see David Han, *Autobiographical Lies and the First Amendment*, 87 N.Y.U. L. REV. 70, 130 (2012). But see SHIFFRIN, *supra* note

was uttered without seeking material gain, in a context where the lie was both relatively easily detected and relatively easily refuted. Thus, while the Court did treat the case as one where a good deal more was at stake than Alvarez's lie, it remains unclear how the Court will react in much more difficult cases, like those where regulation condemns election lies, either broadly or in a more narrowly tailored fashion reflecting time and circumstance to protect the integrity of honest and fair electoral processes.

In the end, the *Alvarez* decision, despite its constitutional disapproval of laws that would restrict lies in the way the Stolen Valor Act did, is unlikely to increase the volume of harmful lies to which our society and polity will be subject. Its generative potential, and its firm roots in some foundational elements of the American free speech tradition, could have extended impact in future rulings, but for now there is no particular reason to believe that it let loose a growing culture of lying. That is particularly so to the extent that all the Justices expressed at least some concern that suppression of falsity might also suppress truth in some measure, leaving us with the sense that we are unsure what the appropriate tradeoff should be (if there is to be a tradeoff) between any reduction in the spread of falsehoods that their regulation might produce and any reduction in the spread of truth that the same regulation might deter. Perhaps more to the point, it seems rather farfetched to believe that a carefully reasoned First Amendment ruling that would not allow Mr. Alvarez to be punished for his pathetic claim would be more likely to provoke more people to lie than to elicit more moral and social condemnation of liars.[55]

24, at 144–51, who maintains that legal regulation of such lies does not violate any "self-definition" component of freedom of speech, but that autobiographical lies like Alvarez's "nonetheless ought to be legally accommodated as a measure of meaningful social inclusivity and an expression of a tolerant conception of political equality." *Id.* at 157–58.

55. Professor Shiffrin offers a contingently different assessment when comparing the relative effectiveness of refutation and regulation in efforts to reduce the spread of lying in our culture:

> Whether by government or individuals, counter-speech castigating lying may help dispel the impression that deliberate misrepresentation is acceptable and help keep moral morale and resolve high. But, counter-speech cannot dispel the impression that it is legally discretionary whether to misrepresent (and so acceptable in that way). More importantly, it cannot work against the unreliability of the speaker that the speaker's own misrepresentation introduces. Whereas, if legal regulation were effective in motivating (some) speakers not to misrepresent and in establishing public recognition of a collective interest in truthful speech, in these ways it would be qualitatively more effective than counter-speech.

II. The Challenges of Modern Epidemic Falsity

What, then, is to be made of the new threats to truth (and old ones) that are not from identifiable speakers whose lies may be detected readily and are likely to excite more contempt than adulation, but rather from voluminous and frequently anonymous sources that seek to persuade or confuse listeners into believing falsehoods that can undermine significant decision-making processes in their public and private lives, and that are not easily rebutted in an effective way? For the scholars and others who rightly worry about such threats, the observation delineated in Part I that free speech doctrine has not done much to facilitate falsehoods or their acceptance provides little comfort, even if correct. A litany of obstacles to the emergence and acceptance of factual truth in the face of an onslaught of false statements—particularly when deliberately made in a campaign to obscure the truth or, at least, to sow doubt about what can and cannot be believed—is an ancient problem of the human condition.[56] Today, however, this age-old problem is exacerbated by technology. It is the challenge of addressing that problem that concerns so many. For all the education we seek to provide that is aimed at honoring and investigating truth, our success threatens to be thwarted to some unknown degree by those who would relentlessly propagate false information for their own ends, using increasingly sophisticated technological weapons of cheap speech.

As recent events and reports suggest, that onslaught can take a number of forms. One is deployment of communicators who work for or support foreign or domestic political groups or governments to post false reports on the internet, especially on websites that have tens and sometimes hundreds

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SHIFFRIN, *supra* note 24, at 139. But will legal regulation actually have a significant salutary effect? And even if the public needs to recognize more than it currently does "a collective interest in truthful speech," a proposition that may be doubted despite many instances of that proposition being honored more in the breach than the observance, is legal regulation of lying really likely to have much of an impact on bolstering that recognition? I have my doubts.

As a separate matter, before completing the tally of falsehood debits and credits attributable to free speech jurisprudence, a ledger entry for truth should be recorded for First Amendment limits on deceptions perpetrated by the government, especially the well-established First Amendment rule from such cases as *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), and *Wooley v. Maynard*, 430 U.S. 705 (1977), that the government may not compel its citizens to profess the government's message as though it were the citizens' own—a protection against being required to speak falsely. Varat, *supra* note 17, at 1132–40.

56. Recall Machiavelli, for example, or any of your favorite deceitful rulers from history.

of millions of subscribers.[57] Perhaps even more insidious, the use of automated "bots" to deliver false messages en masse to micro-targeted voters, as if those messages were the product of actual investigative reporting, can exacerbate the undermining of the legitimacy of electoral choices.[58] And false information attacks can be launched against reputable news outlets that actually have done the sort of fact investigation on which we often rely, designed to undermine both reporting that is likely to be closer to the truth and the reporters and news outlets who seek to inform the public as accurately as possible.[59]

The aim of these tactics may be to favor a political outcome or simply to sow confusion so that the political process as a whole loses the trust of the electorate. If people do not know what to believe is true, the risk that credible sources will be disbelieved as readily as untrustworthy ones may rise to a level that makes spreading truth more difficult. Hence, the cognitive capacities of the audience can be overwhelmed by what Professor Wu calls the "flooding" technique of speech control—where false reports are disseminated repeatedly as if they were true—which results in the audience either not knowing what to believe or simply refusing to pay attention anymore in an attempt to avoid information overload.[60] The absence of any sort of meaningful journalistic review only exacerbates the problem, allowing much false, uninvestigated information to be conveyed and sowing confusion about what is true and what is not.

How successful are these tactics likely to be? Or, to put it differently, why and how is demonstrably true information often overcome by factually erroneous information, at least for a critical time (such as before an election), and often for a long time? Much common sense and scholarly research has been directed at understanding how false statements of fact find and maintain acceptance, even when true information may have been presented or is at least available for review. Answers to these questions can perhaps begin to suggest, if possible, how best to respond to campaigns to deceive or confuse.

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57. *See generally* Hasen, *supra*, note 6; Nathaniel Persily, *Can Democracy Survive the Internet?,* J. DEMOCRACY, Apr. 2017, at 63; Wu, *supra*, note 4.

58. *See* sources cited *supra* note 57.

59. *See, e.g.*, Paul Farhi, *Sinclair Attacks CNN with Video Alleging 'Hypocrisy' in 'Fake News' Debate*, WASH. POST (Apr. 10, 2018), https://www.washingtonpost.com/lifestyle/style/sinclair-attacks-cnn-with-video-alleging-hypocrisy-in-fake-news-debate/2018/04/10/d071a2de-3cf7-11e8-974f-aacd97698cef_story.html?utm_term=.314622db40e3.

60. Wu, *supra* note 4, at 15–17.

For purposes of this Essay, human limitations that make for the successful spread and acceptance of falsehoods might be divided into the cognitive and the psychological, or some combination of the two. On the cognitive side, one might think of speed, volume, and a kind of first mover advantage. In his "Essay on the Art of Political Lying" in 1710, Jonathan Swift famously wrote, "Falsehood flies, and truth comes limping after it, so that when men come to be undeceived, it is too late; the jest is over, and the tale hath had its effect . . . ."[61] If that was true in 1710, is it even truer today when falsehoods can fly at the speed of the internet? Perhaps, though, if deception can be viral, why can't correction be viral as well? The simplest answer to that question is that people need to pay attention to the viral correction as much or more than they pay attention to the viral deception. But first impressions are not easy to dislodge, and so the aggressive false statement has something like a first mover advantage.

Theoretically, the truth could make the first move, and no doubt often it does. Yet it frequently will be difficult to anticipate what sort of falsehood campaign will be mounted, and, as a result, the truth is often placed in a reactive, defensive posture. Furthermore, when a high volume of false reports flood social media, listeners may be inclined toward believing the widely reported message, subject to a healthy skepticism concerning the ubiquity of the practice. But, then, what will they believe? Listeners will need to have both the determination and the capacity in time and effort to seek out the truth. Moreover, a healthy skepticism may ultimately become an unhealthy cynicism, which may be more than enough to satisfy those who seek to confuse and distort.

With respect to the more psychological dynamics of willingness or readiness to accept the veracity of false factual statements, a burgeoning literature indicates that acceptance of false statements implicates much more than what can be shown to be demonstrably true or false.[62] As an insightful portion of the lyrics from the classic Simon & Garfunkel song "The Boxer" suggests, "all lies and jests, still a man hears what he wants to hear and disregards the rest."[63] Academic research might call that readily observable phenomenon a product of confirmation bias, biased assimilation,

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61. Jonathan Swift, *Political Lying*, *in* 3 ENGLISH PROSE: SELECTIONS 405, 408 (Henry Craik ed., 1906), https://archive.org/details/englishprosesele03craiuoft.

62. *See* Zachary S. Price, *Our Imperiled Absolutist First Amendment*, 20 PA. J. CONST. L. (forthcoming 2018).

63. SIMON AND GARFUNKEL, *The Boxer*, *on* BRIDGE OVER TROUBLED WATER (Columbia Records 1970).

or motivated reasoning.[64] Other research tends to indicate that at least in some circumstances a "backfire effect" may occur, whereby attempts to correct falsehoods actually may increase the strength of the conviction with which people who have accepted as true what is demonstrably false will continue to believe the false facts.[65]

All these technological, cognitive and psychological advantages, which can be manipulated to make the spread of falsehoods more pervasive and their acceptance more likely, pose a significant challenge to our First Amendment's persistent reliance on counterspeech as the right response for a free society to promote more truth and less falsity. Yet in many instances the same advantages may pose just as significant a challenge to effective regulation, particularly given difficulties of source detection and other barriers to enforcement that stem from high speed and high volume campaigns. Certainly bad actors bent on undermining the truth and others who sincerely believe false factual propositions and want to propagate them are not easily going to be deterred from following their inclinations by virtue of any felt moral need to follow the law. And, of course, regulation brings with it a number of potential threats to freedom—and sometimes to truth as well.

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64. *See* Edward Glaeser & Cass R. Sunstein, *Does More Speech Correct Falsehoods?*, 43 J. LEGAL STUD. 65, 71 (2014) (and sources cited therein).

65. *Id*. at 66; Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POLITICAL BEHAVIOR 303 (2010). But see Thomas Wood & Ethan Porter, *The Elusive Backfire Effect: Mass Attitudes' Steadfast Factual Adherence*, POL. BEHAV. (forthcoming), https://ssrn.com/abstract=2819073, the abstract of which contains the following:

> [R]esults from five experiments in which we enrolled more than 10,100 subjects and tested 52 issues of potential backfire . . . found no corrections capable of triggering backfire, despite testing precisely the kinds of polarized issues where backfire should be expected. Evidence of factual backfire is far more tenuous than prior research suggests. By and large, citizens heed factual information, even when such information challenges their ideological commitments.

Id. See Brendan Nyhan, The Challenge of False Beliefs: Understanding and Countering Misperceptions in Politics and Health Care (June 13, 2016), https://www.isr.umich.edu/cps/events/Nyhan_20160613.pdf (white paper prepared for University of Michigan conference on "How We Can Improve Health Science Communication," June 17–18, 2016), for a further review of what remains less well understood with respect to "the mechanisms by which false beliefs become politicized, disseminated, and integrated into individual belief systems and the role of elites and the media in that process," *id.* at 1. *See also* D.J. Flynn et al., *The Nature and Origins of Misperceptions: Understanding False and Unsupported Beliefs about Politics*, 38 ADVANCES IN POL. PSYCH. 127 (2017).

III. Can We Meet These Challenges and Still Preserve Robust Protection for Freedom of Speech?

What, then, to do about responding to persistent dissemination of false facts with the best possible, though never perfect, combination of refutation and regulation? Can our First Amendment culture and traditions help beyond their ability to point us in the direction of assuring ourselves that at least we are always focused on the substantial downsides and limitations of regulation or refutation, and to compare the operation and potential impact of the two in each different realm?

Though it may seem a bow to cliché at this point in our free speech development, it may be worthwhile to reaffirm some of the characteristics that Justice Brandeis emphasized in *Whitney* regarding what it takes to achieve and preserve liberty in a self-governing democracy that depends on robust public discussion. Justice Kennedy called on some of them in his opinion in *Alvarez*, not only when he declared (likely more as a matter of a description of our free speech principles than as a guarantee of success) that the "response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth," but also when he spoke of society's "right and civic duty to engage in open, dynamic, rational discourse" and when he remarked that "[o]nly a weak society needs government protection or intervention before it pursues its resolve to preserve the truth."[66] Brandeis had associated himself with the views of those "who won our independence by revolution" who, among other things, "believed . . . courage to be the secret of liberty" and who understood "that the greatest menace to freedom is an inert people" and "that public discussion is a political duty."[67] Those revolutionaries, in Justice Brandeis's understanding, also "knew . . . that repression breeds hate; that hate menaces stable government; . . . and that the fitting remedy for evil counsels is good ones."[68]

Reliance on civic courage in the form of willingness to tolerate the risk of substantial evils from harmful speech, at least so long as the "evil apprehended is" not "so imminent that it may befall before there is opportunity for full discussion," was and is paired with a civic duty to respond with good counsels.[69] People remaining "inert" in the face of

66. United States v. Alvarez, 567 U.S. 709, 727–29 (2012).
67. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
68. *Id.*
69. *Id.* at 377.

harmful speech—failing to respond—is an unacceptable "menace." And the serious dangers of repression must always be borne in mind.[70]

Even though Brandeis was speaking of political opinions and was not likely focused on remedies for false factual statements, the dispositions on which he focused can easily be taken to be directly relevant to the latter. Notably, contributions to this symposium and other like efforts manifest precisely some of those characteristics. Refusal to remain "inert" in the face of assaults on factual truth, performing the civic duty of public discussion, remaining wary of the repressive potential of regulation when applied without sufficient care, and seeking the most effective methods by which to help true information overtake false statements of fact are all Brandeisian free speech prescriptions that contain enough wisdom to heed. To be sure, it is the disheartening, seeming insufficiency of factually true counsels to overcome false ones that perhaps poses the greatest challenge. But that has always been true, at least to a significant extent, in the realm of political expressions and has been a problem from time immemorial—even without the internet. There never could have been a belief that truth always will prevail, so considerable imprecision about just how much falsity can be tolerated before regulatory intervention is permitted is inherent in any meaningful free speech regime. These general attitudes will not decide concrete cases alone, but they are far from irrelevant to the enterprise of striking an appropriate balance between free speech and those who would abuse it.

Consider for a moment a challenge concerning the persistence of false factual beliefs in a context that we might not think is particularly serious. The *Los Angeles Times* recently reported on a group of people in Golden, Colorado, who meet in person and online at the Official Flat Earth Globe & Discussion page on Facebook.[71] Powered by biblical verses that speak of "the four corners of the Earth" and "Earth being God's 'footstool'" and by thousands of YouTube videos claiming "the world is flat, gravity is uncertain, space is fake and the curvature of the planet is an illusion," these people resist all manner of scientific refutation and seem to believe that those who dispute their version of reality are engaged in conspiracies to falsify the truth they "know" for the purpose of making so-called "flat-

70. *See generally* Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653 (1988).

71. David Kelly, *The Earth Is Round, and Other Myths, Debunked by the Flat Earth Movement (You Read That Right)*, L.A. TIMES, Jan. 15, 2018, at A6.

earthers" feel small and less special than God intended.[72] It is unlikely that any government in the United States would attempt to impose regulatory controls to extirpate their false statements of fact, and even if one did, the common ground in *Alvarez* would likely find such a provision in conflict with the First Amendment. The fact that refutation of their false beliefs will likely never succeed (not even with attempts by "surprising validators"[73] to convince them) does not suggest that repression is therefore justified. Furthermore, this would seem like a classic instance where repression would almost surely be more likely to breed hate and potentially menace stable government than to help truth prevail. Especially where the stakes might in any event seem low (because the threat posed by these false factual communications is itself not a threat of serious evil), it does not require much courage to tolerate what is probably a miniscule risk that they will succeed in convincing others to the listeners' great detriment.

Viral deception in politics and dissemination of false statements posing as serious reporting (what we perhaps too readily and oxymoronically have come to call "fake news," even though that rhetoric tends to undermine "news" as a serious journalistic endeavor ideally seeking to report accurate information), pose much greater risks, to be sure, but does that mean that the First Amendment signals Brandeis provided to us should be followed any less? More vigorously, perhaps, with more urgency and creativity given the challenges we face today, but abandonment seems highly unwise. As Justice Breyer noted in his concurrence in *Alvarez*, and as many others have noted before, in political contexts "although . . . lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is also high."[74] It may take more courage to tolerate the risks of falsity in these kinds of cases, and it may be that narrowly tailored regulations could be justified in certain forms when addressed to particular kinds of problems. But the wise course still would be presumptively to approach the problem with the sort of confidence and courage that Brandeis extolled. Risk-aversion is a bad strategy for maintaining a free speech culture.

We are not left without hope or imagination or creativity with mostly non-regulatory responses, however, and sustained attention to them already

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72. *Id*. Although patently false, the false statements made by the group are very likely sincere, rather than knowing misrepresentations of their actual beliefs.

73. Glaeser & Sunstein, *supra* note 64, at 91, find that if people who are expected to agree with a listener's false beliefs instead surprisingly validate the truth, their credibility with those listeners may move the latter towards accepting the truth and putting aside the false understanding.

74. United States v. Alvarez, 567 U.S. 709, 736 (2012) (Breyer, J., concurring).

appears to be underway. Education of all sorts, including factchecking and watchdog websites in online environments, can strengthen prospects for refutation.[75] Even if the government decides to reduce or eliminate fact-based compilations of information about climate change on its own websites, for example, private sector compilations can fill the void and advertise their availability.[76] Exposure of sources of false statements of fact, once detected, can assist viewers and listeners to separate the credible from the untrustworthy.[77] Focused and significant efforts—financial, moral, and reputational—to strengthen the independence of responsible media institutions that take honest investigation and reporting seriously can help make consumers of information more capable of sorting the true and the false.[78] Incorporating some of those journalistic standards into the practices of social media platforms may also help. We must be careful, however, and exercise a healthy skepticism about technological truth filters, developed and deployed by powerful social media enterprises whose accountability is to shareholders as well as the public writ large.[79] But they could facilitate disclosure of sources with less fear of deterring unpopular speakers than could similar efforts by government.

Such efforts certainly would not guarantee success in what might be described as a soft "war on lies." As Professor Wu contends, it is the competition for listener attention that may pose the greatest obstacle to combatting falsity.[80] Deliberate distraction and confusion threaten all manner of attempts at education and honest refutation, however well-conceived. But then neither have rather draconian regulatory efforts in the now decades-long "war on drugs" eliminated either receptivity by some people to harmful substances or the efforts of dealers to supply them. Why should we expect more of efforts to regulate lies into submission? It is one

75. *E.g.*, POLITIFACT, http://www.politifact.com (last visited Apr. 11, 2018).

76. For example, consider the newly created website, "Silencing Science Tracker," a joint initiative of the Sabin Center for Climate Change Law at Columbia Law School and the Climate Science Legal Defense Fund. The website tracks government attempts to restrict or prohibit scientific research, education, or discussion, or the publication or use of scientific information, since the November 2016 election. *Silencing Science Tracker*, COLUM. L. SCH.: SABIN CTR. FOR CLIMATE CHANGE L., http://columbiaclimatelaw.com/resources/silencing-science-tracker/ (last visited Apr. 21, 2018).

77. *See, e.g.*, Hiroko Tabuchi, *How Climate Change Deniers Rise to the Top of the Google Searches*, N.Y. TIMES, Dec. 29, 2017, at B3.

78. *See* Lili Levi, *Real "Fake News" and Fake "Fake News*,*"* 16 FIRST AMEND. L. REV. 232 (2018); *see also* Hasen, *supra* note 6, at 227–29.

79. Levi, *supra* note 78, at 63–89; Hasen, *supra* note 6, at 224–27.

80. Wu, *supra* note 4, at 7.

thing to claim substantial—though not total—success in regulating deceptive commercial advertising in open markets. It is quite another to take the risk of applying the same approach to political false statements, and we have not done so with anything short of lies for good reasons that largely have to do with fears of government abuse. No doubt that is why there seems to be so little appetite, including among those like Professor Wu who are most sensitive to the proliferation of corrosive new threats to important factual truths, for anything remotely approaching broad punishment of lies.

Finally, what of carefully crafted, purportedly narrow regulatory efforts to curb lies that may not seem to threaten the robustness of our true public discussions so centrally? Two efforts in particular deserve attention, both worthy of sustained analysis elsewhere. One sounds in compelled disclosure on the internet to allow viewers and listeners to have some basis for assessing the credibility of those who post.[81] But rights of anonymous speech[82] are naturally in tension with compelled disclosure requirements, making any adjustment in the reconciliation of those doctrines in order to address cyberthreats an area for cautious and thorough examination before implementation. The other might be directed at attempted foreign interference in American elections or in distorting public perceptions more generally, by way of agents or contractors assigned to spread propaganda, much of it in the form of falsehoods, and often aided by artificial mechanisms like "bots" to make it seem as though many people believe to be accurate what are actually false statements of fact. Assuming they can be identified, can the First Amendment abide the exclusion of foreign sources of falsehoods on the internet? Can it do so without permitting selective exclusions that are so highly problematic under free speech principles? These questions may be open, and they are certainly difficult.[83]

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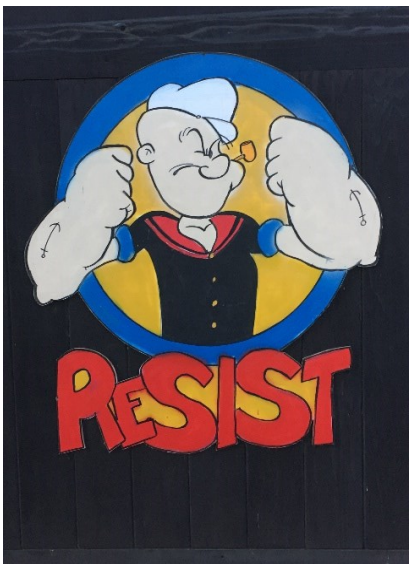
81. *See* Hasen, *supra* note 6, at 219–21; Levi, *supra* note 78, at 80–86 (including some discussion of the proposed Honest Ads Act). On the subject of compelled disclosures more generally, see Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277 (2014).

82. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 349 (1995) (stating that although the "state interest in preventing fraud and libel . . . carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large[,]" the First Amendment requires at a minimum that any regulation seeking to further that interest by prohibiting anonymous communications must be narrowly tailored).

83. For the views of two advocates of such regulation, see Hasen, *supra* note 6, at 216–24, and Wu, *supra* note 4, at 25. *But see* Joseph Thai, *The Right to Receive Foreign Speech*, 71 OKLA. L. REV. 269 (2018) (debating the constitutionality of such regulations based on the First Amendment right to receive information).

IV. Conclusion

In the end, perhaps our free speech culture leaves us with what Brandeis thought we needed most: civic courage, a confident participatory vigor to defend liberty and truth, a constant effort to improve forms of refutation to move forward our public discussion, and a strong, presumptive resistance to repressive impulses except in the most extreme of circumstances. As many know, we have more work to do to adjust to new realities and to understand how to address longstanding ones. Yet some of the foundational premises of our free speech culture continue to remind us of the dispositions we need to remain free and self-governing, even as free speech doctrine itself may play a smaller, though still important, role.



In a wealthy enclave of Los Angeles, a homeowner has posted a message on the gate to his driveway. The homeowner probably intended a broader and different message, but I like to think of it as making reference to what should be courageous, non-repressive efforts to combat falsehoods. No guarantee of success, but fighting the good fight both to preserve free speech and to defend the truth against all antagonists.