

## Free Speech Has Gotten Very Expensive: Rethinking Political Speech Regulation in a Post-Truth World

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## ARTICLES

# FREE SPEECH HAS GOTTEN VERY EXPENSIVE: RETHINKING POLITICAL SPEECH REGULATION IN A POST-TRUTH WORLD

JOHN A. BARRETT, JR.<sup>†</sup>

### INTRODUCTION

Protecting free speech has been a foundational principle of American democracy since the nation's founding.<sup>1</sup> A core element of free speech has long been a prohibition on regulating political speech.<sup>2</sup> The principle behind this protection holds that citizens are free to make whatever political pronouncements they wish and that their speech shall remain free from government suppression. Even within the limited exceptions to unfettered political speech, like defamation or libel, the speech is not banned but may merely result in liability.<sup>3</sup> A premise underlying this view is that competing viewpoints, by being made available to us all, will allow the best ideas to emerge and for truth to prevail over falsehood.<sup>4</sup> Even though such an approach may be imperfect at times, the historic view holds that the risks associated with regulating political speech are far worse: allowing the government and those in power to suppress dissenting voices and thereby consolidate power.<sup>5</sup>

However, as the United States proceeds through the 2020 election process, American democracy is under siege, and its historic viewpoint concerning the need for unfettered political

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<sup>1</sup> See U.S. CONST. amend. I.

<sup>2</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>3</sup> See, e.g., Garrett Epps, *Does the First Amendment Protect Deliberate Lies?*, THE ATLANTIC (Aug. 16, 2016), <https://www.theatlantic.com/politics/archive/2016/08/does-the-first-amendment-protect-deliberate-lies/496004/> [<https://perma.cc/EZN9-RFR6>].

<sup>4</sup> Dawn Carla Nunziato, *The Marketplace of Ideas Online*, 94 NOTRE DAME L. REV. 1519, 1523–27 (2019).

<sup>5</sup> *Id.* at 1525–26.

discourse is being challenged by the realities of a post-truth, globally interconnected era. Ten years after *Citizens United v. FEC*,<sup>6</sup> campaign spending continues to grow exponentially, and with it the corrupting influence of money in politics becomes ever more entrenched.<sup>7</sup> Politicians lie about readily verifiable matters, often claiming they never said something when they have been videotaped saying what they now deny.<sup>8</sup> Those acting on their behalf release false and misleading advertisements attacking the candidate's opponent, as well as doctored photographs and videos purporting to show compromising events that never occurred.<sup>9</sup> Foreign state actors attack United States elections by sowing discord and spreading disinformation.<sup>10</sup>

In addition to these threats and tied directly to how the United States regulates political speech, America finds itself deeply divided, with its citizens rejecting facts and information they disagree with as fake.<sup>11</sup> People who should be able to vote are disenfranchised by mechanisms including unduly strict voter identification standards, inadequate access to polling stations,

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<sup>6</sup> See generally 558 U.S. 310 (2010).

<sup>7</sup> Thomas B. Edsall, *After Citizens United, A Vicious Cycle of Corruption*, N.Y. TIMES (Dec. 6, 2018), <https://www.nytimes.com/2018/12/06/opinion/citizens-united-corruption-pacs.html> [<https://perma.cc/HLD7-NNMJ>].

<sup>8</sup> Sean Illing, *"The Fish Rots from the Head": A Historian on the Unique Corruption of Trump's White House*, VOX (Dec. 21, 2018, 9:06 AM), <https://www.vox.com/2017/11/16/16643614/trump-administration-corruption-russia-investigation> [<https://perma.cc/4QS2-JB4K>]; see also Oliver Hahl, Minjae Kim & Ezra W. Zuckerman Sivan, *The Authentic Appeal of the Lying Demagogue: Proclaiming the Deeper Truth About Political Illegitimacy*, 83 AM. SOC. REV. 1, 5 (2018); John Keane, *Post-Truth Politics and Why the Antidote Isn't Simply 'Fact Checking' and Truth*, THE CONVERSATION (Mar. 22, 2018, 10:47 PM), <https://theconversation.com/post-truth-politics-and-why-the-antidote-isnt-simply-fact-checking-and-truth-87364> [<https://perma.cc/W7EW-8EUV>].

<sup>9</sup> Simon Parkin, *The Rise of the Deepfake and the Threat to Democracy*, GUARDIAN (June 22, 2019, 8:00 AM), <https://www.theguardian.com/technology/ng-interactive/2019/jun/22/the-rise-of-the-deepfake-and-the-threat-to-democracy> [<https://perma.cc/LR6L-DG3N>].

<sup>10</sup> See Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating "Fake News" and Other Online Advertising*, 91 S. CAL. L. REV. 1223, 1225 (2018); Brian Beyersdorf, *Regulating the "Most Accessible Marketplace of Ideas in History": Disclosure Requirements in Online Political Advertisements After the 2016 Election*, 107 CALIF. L. REV. 1061, 1063 (2019).

<sup>11</sup> Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 55 (2013); Amanda Taub, *The Real Story About Fake News Is Partisanship*, N.Y. TIMES (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/upshot/the-real-story-about-fake-news-is-partisanship.html> [<https://perma.cc/63VX-NX2K>].

and politically motivated purging of voter rolls.<sup>12</sup> Overwhelming majorities vote for candidates of one party in a state, yet the other party controls the state legislature and wins a majority of that state's seats in the federal House of Representatives due to gerrymandering.<sup>13</sup> The Constitution's system of checks and balances appears to be failing, as independent branches of government and independent agencies appear to have become agents of an ever-growing executive branch.<sup>14</sup>

At such a time, the United States must rethink how its democracy is structured. The changes required will be broad and varied to combat these myriad challenges. This Article focuses on the challenges presented by how the United States regulates political speech, particularly with the problems associated with the need for massive sums of money to run for office effectively, and the proliferation of disinformation being targeted at voters.

The Article begins with an overview of why free speech is an essential component of democracy that must be protected. It then turns to an analysis of the problems being created by the current legal framework governing political speech. Next, the Article reviews the constitutional and regulatory parameters and the limits they place on regulating political speech, including some recent legislative proposals for change. Finally, different possible solutions are evaluated. After considering alternatives to address these concerns, the Article argues for two courses of action that should be taken to improve democracy by adjusting how America regulates political speech—one radical and long-term, and one more modest and capable of immediate implementation. In the long run, the Constitution should be amended to ban all television and digital political advertising. More immediately, Congress should adopt a robust regime for rating political advertisements and news programming that evaluates truthful-

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<sup>12</sup> Danielle Root & Adam Barclay, *Voter Suppression During the 2018 Midterm Elections*, CTR. FOR AM. PROGRESS (Nov. 20, 2018, 9:03 AM), <https://www.americanprogress.org/issues/democracy/reports/2018/11/20/461296/voter-suppression-2018-midterm-elections/> [https://perma.cc/4NMK-89TA]; Ian Samuel, *Rigging the Vote: How the American Right is on the Way to Permanent Minority Rule*, GUARDIAN (Nov. 4, 2018, 7:55 AM), <https://www.theguardian.com/commentisfree/2018/nov/04/america-minority-rule-voter-suppression-gerrymandering-supreme-court> [https://perma.cc/X72Y-VTU7].

<sup>13</sup> Samuel, *supra* note 12.

<sup>14</sup> Edward J. Larson, *Checks and Balances . . . and Trump*, BULWARK (Jan. 10, 2020), <https://thebulwark.com/checks-balances-and-trump/> [https://perma.cc/K8U7-LMFX].

ness, with such ratings being displayed as part of the content evaluated. While these solutions will not fix all the problems challenging modern democracy in the United States, they would solve the challenges being caused by the way political speech is currently regulated.

### I. FREE SPEECH AND THE ESSENTIAL REQUIREMENTS FOR DEMOCRACY

A healthy democracy requires a number of things, including free and fair elections, protection of basic human rights, adherence to the rule of law,<sup>15</sup> and free speech. Free speech may well be the most important ingredient of all.<sup>16</sup> Free speech is foundational to how a democratic society is structured and led. It helps create a marketplace of ideas for voters to choose among in structuring their societies, allowing the most popular ideas to become enacted as law and policy.<sup>17</sup> Free speech, in the form of political advertising and debates, also allows voters to get to know candidates for office and their messages, so that people can make informed decisions when they vote as to who they want their leaders to be.<sup>18</sup>

Just as free speech is foundational for a political marketplace in democracies, it is also essential for creating governmental accountability.<sup>19</sup> A democracy elects its leaders based on the preferences of the populace, and as such, the leaders must be accountable to the electorate.<sup>20</sup> If the elected officials are not pursuing the goals and policies the voters want, the voters must be able to replace them. As such, free speech in the short term allows voters to express their support for or opposition to the proposals and decisions their leaders are making, thereby pressuring leaders to adjust their stances to reflect the desires of their

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<sup>15</sup> See AUSTL. CONSERVATION FOUND., BUILDING A HEALTHY DEMOCRACY 3 (Sept. 2018) (discussing essential elements of a healthy democracy).

<sup>16</sup> Hasen, *supra* note 11, at 64; Peter Berkowitz, *Defending Democratic Norms Requires Defending Free Speech*, REAL CLEAR POLITICS (Apr. 7, 2019), [https://www.realclearpolitics.com/articles/2019/04/07/defending\\_democratic\\_norms\\_requires\\_defending\\_free\\_speech\\_139981.html](https://www.realclearpolitics.com/articles/2019/04/07/defending_democratic_norms_requires_defending_free_speech_139981.html) [<https://perma.cc/P6P5-A82A>].

<sup>17</sup> Nunziato, *supra* note 4.

<sup>18</sup> Evan Richman, Note, *Deception in Political Advertising: The Clash Between the First Amendment and Defamation Law*, 16 CARDOZO ARTS & ENT. L.J. 667, 667 (1998).

<sup>19</sup> *Freedom of the Press*, ACLU, <https://www.aclu.org/issues/free-speech/freedom-press> [<https://perma.cc/F6HL-826L>] (last visited May 18, 2021).

<sup>20</sup> Henry E. Dugan, Jr., *Independent or Accountable*, 48 MD. BAR J. 28, 30 (2015).

electorate. Over a longer term, the ability to criticize the decisions of one's leaders allows support to grow for electing new leaders and for modifying laws and regulations to meet a society's changing needs. Regardless of whether it is politicians responding to constituent pressure, electing new leaders, or approving new laws, free speech is a key component to creating accountability in a democracy.

It is also generally accepted that it is best for a democracy to be designed in a manner that creates a meaningful and realistic chance for a broadly diverse cross-section of the population to be elected to office.<sup>21</sup> If certain groups in the population can rarely, if ever, get elected to important positions, those groups are not really being represented, and thus their views and ideas are far less likely to be represented in the laws that get enacted.<sup>22</sup> For example, a democracy is substantially weakened if one or more ethnicities or one gender is precluded from voting. Similarly, a democracy where the rich and powerful are the only ones that can mount a successful political campaign essentially disenfranchises the poor and middle-class voters, whose views and preferences are far more likely to be pursued aggressively by someone from a similar background. Furthermore, the long-term success of a democracy requires the people to believe that the government they elect is legitimate, and when groups are excluded from voting or practically excluded from being elected, confidence in the legitimacy of the government is substantially eroded.<sup>23</sup>

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<sup>21</sup> Heba El-Kholy, *No Democracy Without Diversity*, UNITED NATIONS DEV. PROGRAMME (Sept. 19, 2013), <https://www.undp.org/content/undp/en/home/ourperspective/ourperspectivearticles/2013/09/19/no-democracy-without-diversity-heba-el-kholy.html> [<https://perma.cc/FB3L-HEF2>]; Bert Gambini, *Democracy Depends upon Diversity*, U. BUFF. NEWS CTR. (Aug. 28, 2018), <http://www.buffalo.edu/news/releases/2018/08/031.html> [<https://perma.cc/4JLA-GUHM>].

<sup>22</sup> Caterina Bulgarella, *Why the Increased Diversity of the Next Congress is a Victory for Ethics*, FORBES (Nov. 19, 2018, 8:28 AM), <https://www.forbes.com/sites/caterinabulgarella/2018/11/19/why-the-increased-diversity-of-the-next-congress-is-a-victory-for-ethics/> [<https://perma.cc/SJ2L-3WPD>]; Tyra A. Mariani, *Why Meaningful Diversity in Government Matters*, PAC. STANDARD (June 14, 2017), <https://psmag.com/news/why-meaningful-diversity-in-government-matters> [<https://perma.cc/3YVQ-VU7C>].

<sup>23</sup> See, e.g., Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. U. L. REV. 587, 626 (2011).

## II. PROBLEMS IMPACTING AMERICAN DEMOCRACY AFFECTED BY SPEECH DEREGULATION

### A. *Economic Effects on Speech and Elections*

The candidate supported by the most money usually wins.<sup>24</sup> In recent years, the amount spent on political campaigns has catapulted to astronomic heights, with spending increasing by 27% per year since 2012.<sup>25</sup> Political advertisement spending is estimated to increase by another 57% from the 2018 election cycle to 2020, with 2.5 million more advertisements being run.<sup>26</sup> In 2008, candidates and outsiders spent over \$5.3 billion running for office.<sup>27</sup> By 2016, this amount had grown to \$9.8 billion, which was surprisingly low, caused in part by the relatively low amount spent by the Trump campaign.<sup>28</sup> Michael Bloomberg alone spent over \$1 billion of his own money in his brief presidential run.<sup>29</sup> Forecasts estimate as much as \$15 billion will

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<sup>24</sup> Karl Evers-Hillstrom, *More Money, Less Transparency: A Decade Under Citizens United*, OPENSECRETS.ORG (Jan. 14, 2020), <https://dkftve4js3etk.cloudfront.net/news/reports/citizens-united/OpenSecrets-more-money-less%20transparency-a-decade-under-citizens-united.pdf> [https://perma.cc/V4L5-MHS9].

<sup>25</sup> 2020 *Political Spending Projections*, POLITICO, <https://www.politico.com/f/?id=0000016b-b029-d027-a97f-f6a95aca0000> [https://perma.cc/6AAF-VLXC] (last visited May 20, 2021). It must be noted that engaging in an apples-to-apples comparison is tricky for political advertising spending, given that some data looks only at candidate spending and other data attempts to include outside spending on behalf of candidates. Further complicating matters, outside spending by certain groups does not have to be reported.

<sup>26</sup> *Id.*

<sup>27</sup> Jeanne Cummings, *2008 Campaign Costliest in U.S. History*, POLITICO (Nov. 5, 2008, 5:28 AM), <https://www.politico.com/story/2008/11/2008-campaign-costliest-in-us-history-015283> [https://perma.cc/5L58-KJ3Z].

<sup>28</sup> Kate Kaye, *Data-Driven Targeting Creates Huge 2016 Political Ad Shift: Broadcast TV Down 20%, Cable and Digital Way Up*, ADAGE (Jan. 3, 2017, 6:45 PM), <https://adage.com/article/media/2016-political-broadcast-tv-spend-20-cable-52/307346> [https://perma.cc/VTP8-P8B6]; see also Reid Wilson, *Political Ad Spending Set to Explode in 2020*, THE HILL (Dec. 5, 2019, 2:03 PM), <https://thehill.com/homenews/campaign/473240-political-ad-spending-set-to-explode-in-2020> [https://perma.cc/G5KX-4T97]. The Trump campaign spent \$322 million on the election, which is \$243 million less than Clinton spent in 2016, \$453 million less than Obama in 2012, and \$138 million less than Mitt Romney in the same cycle. Jeremy W. Peters & Rachel Shorey, *Trump Spent Far Less Than Clinton, but Paid His Companies Well*, N.Y. TIMES (Dec. 9, 2016), <https://www.nytimes.com/2016/12/09/us/politics/campaign-spending-donald-trump-hillary-clinton.html> [https://perma.cc/LVA7-FCQ2].

<sup>29</sup> Benjamin Siegel & Soo Rin Kim, *Mike Bloomberg Spent More Than \$1 Billion on Four-Month Presidential Campaign According to Filing* (Apr. 20, 2020, 7:21 PM), <https://abcnews.go.com/Politics/mike-bloomberg-spent-billion-month-presidential-campaign-filing/story?id=70252435> [https://perma.cc/F5P7-TKBA]; see also Lisa Lerer, *Michael Bloomberg Is Open to Spending \$1 Billion To Defeat Trump*, N.Y. TIMES

be spent on 2020 contests, which would be a new record.<sup>30</sup> In comparison, the total spent on in the 2017 United Kingdom elections was about forty million pounds, a little over fifty million in United States dollars.<sup>31</sup> Another way to look at how important money is in our electoral process, beyond the amount spent, is to consider why candidates drop out of a race. Usually it is because they are not raising enough money to continue in a robust manner.<sup>32</sup>

A major reason for these dramatic increases in spending is the development of super political action committees (“PACs”), independent advocacy committees that can accept unlimited contributions, which arose as a consequence of the 2010 decision in *Citizens United v. FEC*.<sup>33</sup> Unlike other forms of donations to candidates and their campaigns, super PACs have no restrictions on the size of contributions people can make.<sup>34</sup> Furthermore, both PACs and super PACs can spend unlimited amounts on behalf of a candidate.<sup>35</sup> While PAC spending has remained relatively constant, super PAC spending has skyrocketed.<sup>36</sup> Frequently, the amount spent by super PACs on behalf of a candidate can

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(Jan. 11, 2020), <https://www.nytimes.com/2020/01/11/us/politics/michael-bloomberg-spending.html> [<https://perma.cc/5VH5-T7G6>].

<sup>30</sup> Kristina Monllos, “Nothing Typical About This Year’s Political Ad Market”: As Crises Continue Forecasts Predict Higher Than Ever Political Ad Spending, DIGIDAY (June 17, 2020), <https://digiday.com/marketing/nothing-typical-about-this-years-political-ad-market-as-crises-continue-forecasts-predict-higher-than-ever-political-ad-spending/> [<https://perma.cc/6Y5V-FQ7G>].

<sup>31</sup> Jenny Anderson, *The Three Things That Make British Elections so Different from American Ones*, QUARTZ (Nov. 7, 2019), <https://qz.com/1743234/the-three-main-differences-between-us-and-uk-elections/> [<https://perma.cc/ZC7Y-K7MU>].

<sup>32</sup> See, e.g., Elena Schneider, *Cash Shortage Hits Dem Presidential Field*, POLITICO (Oct. 16, 2019, 5:17 AM), <https://www.politico.com/news/2019/10/16/2020-election-democrats-fundraising-spending-048210> [<https://perma.cc/2JWG-S2A6>].

<sup>33</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010); 52 U.S.C. § 30116 (2018); *Contribution Limits*, FED. ELECTION COMM’N, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/> [<https://perma.cc/5YNS-YN6X>] (last visited May 20, 2021); Andrew Prokop, *The Citizens United Era of Money in Politics, Explained*, VOX (July 15, 2015, 11:39 PM), <https://www.vox.com/2015/2/9/18088962/super-pacs-and-dark-money> [<https://perma.cc/5GGW-2925>].

<sup>34</sup> 52 U.S.C. § 30116(a)(4); *Contribution Limits*, *supra* note 33; Prokop, *supra* note 33.

<sup>35</sup> 52 U.S.C. § 30116(a)(8); *Contribution Limits*, *supra* note 33; Prokop, *supra* note 33.

<sup>36</sup> Karl Evers-Hillstrom et al., *A Look at the Impact of Citizens United on Its 9th Anniversary*, OPENSECRETS.ORG (Jan. 21, 2019, 12:06 PM), <https://www.opensecrets.org/news/2019/01/citizens-united/> [<https://perma.cc/2MB8-W2DS>] (reporting \$416 million in PAC spending in 2008 and \$497 million in spending in 2018).



equal or exceed the amount spent by the campaign itself.<sup>37</sup> In the ten years of their existence, super PACs had spent approximately \$3 billion before 2020 election spending began ramping up,<sup>38</sup> with total outside spending topping \$4.5 billion in the last decade.<sup>39</sup> Just under one-quarter of all advertising expenditures for house races in 2018 were by outside sources.<sup>40</sup>

Why have political campaigns become so expensive? The answer is simple: the cost of television advertising. The lion's share of the sums described above are being spent to bombard the airwaves.<sup>41</sup> In the 2016 election cycle, broadcast television spending was 5.5 times greater than the next-highest medium, cable television.<sup>42</sup> Combining these two television formats makes digital, radio, and newspaper spending comparatively minor. Getting one's name and message out on TV is seen as an essential component to getting elected, and TV time is expensive. Of the \$9.8 billion spent in the 2016 election cycle, \$4.4 billion was spent on television advertising.<sup>43</sup> And these amounts are set to explode in the 2020 election. Comparing the first ten months of 2015 to a similar period in 2019, over twice as many political advertisements had been run on television—and that was before Michael Bloomberg entered the race.<sup>44</sup> Although he did not enter the race until November 24, 2019,<sup>45</sup> Bloomberg spent over \$1

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<sup>37</sup> Since *Citizens United*, outside parties have spent more than the candidate in 126 races, whereas this had happened only 15 times in the 5 prior election cycles. Evers-Hillstrom, *supra* note 24.

<sup>38</sup> Ian Vandewalker, *Since Citizens United, a Decade of Super PACs*, BRENNAN CTR. FOR JUST. (Jan. 14, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/citizens-united-decade-super-pacs> [<https://perma.cc/4AE7-4TTF>].

<sup>39</sup> Evers-Hillstrom, *supra* note 24.

<sup>40</sup> Erika Franklin Fowler et al., *The Big Lessons of Political Advertising in 2018*, THE CONVERSATION (Dec. 3, 2018, 6:34 AM), <https://theconversation.com/the-big-lessons-of-political-advertising-in-2018-107673> [<https://perma.cc/G4JN-Z6BQ>].

<sup>41</sup> Jacob S. Hacker & Nathan Loewentheil, *How Big Money Corrupts the Economy*, 27 DEMOCRACY 32, 37 (2013), <https://democracyjournal.org/magazine/27/how-big-money-corrupts-the-economy/> [<https://perma.cc/9SZK-X8U9>].

<sup>42</sup> Statista Research Department, *Political Advertising Spending in the United States in the 2016 Election Season*, by Medium, STATISTA (Apr. 6, 2016), <https://www.statista.com/statistics/470711/presidential-election-season-ad-spend/> [<https://perma.cc/SW39-Q7CT>].

<sup>43</sup> Kaye, *supra* note 28.

<sup>44</sup> Nathaniel Rakich, *We've Already Seen Twice as Many Presidential TV Ads Than at This Point in the 2016 Election*, FIVETHIRTYEIGHT (Oct. 23, 2019, 10:08 AM), <https://fivethirtyeight.com/features/weve-already-seen-twice-as-many-presidential-tv-ads-as-at-this-point-in-the-2016-election/> [<https://perma.cc/675D-MSGH>].

<sup>45</sup> Dan Merica, Christina Alesci & Jake Tapper, *Michael Bloomberg is the Latest 2020 Democratic Hopeful*, CNN POL. (Nov. 24, 2019, 1:20 PM), <https://www.cnn>

billion on his brief presidential campaign, beating out second-place spender Tom Steyer at just around \$345 million.<sup>46</sup> Donald Trump and Michael Bloomberg each spent over \$10 million for about one minute of national advertising during the 2020 Super Bowl.<sup>47</sup> While no other advertising time comes near that cost, broadcasting ads across the nation over multiple months of primaries and general elections adds up fast.

What other costs does a campaign have? One such cost is advertising via social media and the web. While digital content—excluding cable—is quickly growing in its relative importance in elections, its reach remains more limited than television.<sup>48</sup> Additionally, major network television—excluding news channels—consistently reaches a broad cross-section of the populace, whereas people are far more likely to self-select webpages or follow social media feeds on sites like Twitter that reinforce the views they already hold.<sup>49</sup> As such, social media may be a great way to reinforce a message to your base via pages they are likely to visit, but it is less effective at reaching a broader audience of potential new supporters.<sup>50</sup> Even more important, the relative cost of internet-based advertising is small compared to television advertising.<sup>51</sup> With over \$350 million spent on advertising through the first month and a half of 2020, Bloomberg spent only

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.com/2019/11/24/politics/michael-bloomberg-2020-election/index.html [https://perma.cc/9VLR-D3D3].

<sup>46</sup> Siegel & Kim, *supra* note 29; see also Shane Goldmacher, *Michael Bloomberg Spent More than \$900 Million on His Failed Presidential Run*, N.Y. TIMES (Mar. 20, 2020), <https://www.nytimes.com/2020/03/20/us/politics/bloomberg-campaign-900-million.html> [https://perma.cc/WM3Z-EKLY]; *Expenditures Breakdown, Tom Steyer, 2020 Cycle*, OPENSECRETS.ORG, <https://www.opensecrets.org/2020-presidential-race/expenditures/tom-steyer?id=N00044966> [https://perma.cc/77VK-5QTR] (last visited May 20, 2021).

<sup>47</sup> Nick Corasaniti, *Bloomberg and Trump Buy Super Bowl Ads at \$10 Million Each*, N.Y. TIMES (Jan. 7, 2020), <https://www.nytimes.com/2020/01/07/us/politics/bloomberg-trump-super-bowl-ad.html> [https://perma.cc/7DLJ-NWYZ].

<sup>48</sup> Shereta Williams, *Why Political Advertisers Double Down on Local TV and What Brand Media Pros Can Learn from Them*, MEDIAPOST (Jan. 8, 2020), <https://www.mediapost.com/publications/article/345329/why-political-advertisers-double-down-on-local-tv.html> [https://perma.cc/R65R-GEW9].

<sup>49</sup> Wood & Ravel, *supra* note 10, at 1270; see also Ari Lightman, *On TV, Political Ads Are Regulated—but Online, Anything Goes*, THE CONVERSATION (Nov. 21, 2019, 3:16 PM), <http://theconversation.com/on-tv-political-ads-are-regulated-but-online-anything-goes-126553> [https://perma.cc/5KQZ-J95U].

<sup>50</sup> See Erika Franklin Fowler et al., *Political Advertising Online and Offline*, 114 AM. POL. SCI. R. 1, 1–2 (2020).

<sup>51</sup> *Id.* at 2.

\$31 million of that on Facebook advertising.<sup>52</sup> However, digital's share is growing, with 2020 expected to reach 20% of total spending, compared with almost 75% for television.<sup>53</sup> Digital advertising spending grew 789% from 2012 to 2016, where it reached \$1.4 billion.<sup>54</sup> Digital spending topped \$2.1 billion in the 2020 elections.<sup>55</sup> Social media pages created by a candidate or by supporters cost little for global reach.<sup>56</sup> Similarly, social media posts can be handled by a few volunteers, but even if a few people are paid to perform such tasks, such expenses are trivial compared to television advertising costs. Even buying ads online is much cheaper than buying ads on television.<sup>57</sup> One thirty-second ad during the show *This Is Us* cost about \$434,000 in 2018, whereas a Facebook ad running for months could cost a fraction of that.<sup>58</sup>

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<sup>52</sup> See Jake Johnson, *Mega-Billionaire Bloomberg's \$350 Million Ad Spending Blitz Is 'What Plutocracy Looks Like,'* COMMON DREAMS (Feb. 11, 2020), <https://www.commondreams.org/news/2020/02/11/mega-billionaire-bloombergs-350-million-ad-spending-blitz-what-plutocracy-looks> [<https://perma.cc/73X8-RY6M>]; Kaelan Deese, *Bloomberg Has Spent \$1 Million a Day on Facebook Ads in the past Two Weeks, Surpassing Trump,* THE HILL (Feb. 12, 2020, 1:53 PM), <https://thehill.com/homenews/campaign/482770-bloomberg-has-spent-1-million-a-day-on-facebook-ads-in-last-two-weeks> [<https://perma.cc/E7LQ-973Z>]. Facebook and Google are the two most popular digital advertising platforms in the United States, with Facebook receiving about twice the level of political spending as Google gets. Anna Massoglia & Karl Evers-Hillstrom, *2020 Presidential Candidates Top \$100M in Digital Ad Spending as Twitter Goes Dark,* OPENSECRETS.ORG (Nov. 14, 2019, 2:08 PM), <https://www.opensecrets.org/news/2019/11/digital-ad-spending-2020-presidential-candidates-top-100m/> [<https://perma.cc/PPW9-MMBD>].

<sup>53</sup> Nicole Perrin, *Political Ad Spending to Reach \$6 Billion for 2020 Election,* EMARKETER (July 19, 2019), <https://www.emarketer.com/content/political-ad-spend-to-reach-6-billion-for-2020-election> [<https://perma.cc/2LF9-RFHJ>]; Joe Mandese, *2020 Political Spending to Hit \$6 Billion, Digital Will Be Biggest Gainer,* MEDIADAILYNEWS (June 27, 2019), <https://www.mediapost.com/publications/article/337563/2020-political-spending-to-hit-6-billion-digital.html> [<https://perma.cc/KB98-VTFB>].

<sup>54</sup> Kaye, *supra* note 28. In the 2012 election cycle, digital spending accounted for just \$159 million. *Id.*

<sup>55</sup> *Online Political Ad Spending,* OPENSECRETS.ORG (June 11, 2021), <https://www.opensecrets.org/online-ads> [<https://perma.cc/27CU-5ZDA>]; see also *2020 Political Spending Projections,* *supra* note 25.

<sup>56</sup> See Fowler et al., *supra* note 50, at 1, 4, 6; Tarleton Gillespie, *We Need to Fix Online Advertising. All of It,* SLATE (Nov. 15, 2019, 7:11 PM), <https://slate.com/technology/2019/11/twitter-political-ad-ban-online-advertising.html> [<https://perma.cc/3LMU-SRS2>].

<sup>57</sup> Fowler et al., *supra* note 50, at 6.

<sup>58</sup> Lightman, *supra* note 49.

Radio spending is comparatively minor, with total expenditures for the 2016 election cycle totaling \$621 million.<sup>59</sup> Likewise, direct mail is comparatively insignificant, totaling just \$301 million in 2016.<sup>60</sup> Yard signs have an even more limited reach and also add little to overall campaign costs.<sup>61</sup>

When one considers super PAC expenditures, the cost breakdowns become even more lopsided. Without the need for on-ground staff that a campaign requires, super PACs expend essentially all their funds on advertising, with the majority of that being spent on television.<sup>62</sup>

Due to the need to spend monumental amounts on television and digital advertising, candidates have only two options: be rich or spend a significant amount of time raising money for the next campaign.<sup>63</sup> For many, there is obviously no choice: the only option is to raise lots of cash. Even for the rich, a major senatorial or presidential run will cost far more than most candidates are willing to part with from their own funds.<sup>64</sup> With that being said, the effects of each of these options can be readily observed.

The first effect of the need for massive funds is how it impacts the ability of people who are not rich to run for major office. In the early stages of the 2020 presidential race, three candidates were billionaires, and as many as another twenty-two were millionaires.<sup>65</sup> It is likely that only one of the major

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<sup>59</sup> Kaye, *supra* note 28.

<sup>60</sup> *Id.*

<sup>61</sup> Philip Bump, *Sorry Campaign Managers: Lawn Signs Are Only 98.3 Percent Useless*, WASH. POST (Dec. 29, 2015, 11:33 AM), <https://www.washingtonpost.com/news/the-fix/wp/2015/12/29/sorry-campaign-managers-lawn-signs-are-only-98-3-percent-useless> [<https://perma.cc/KC5U-M7DQ>].

<sup>62</sup> Prokop, *supra* note 33.

<sup>63</sup> Daniel P. Valentine, Comment, *November Madness: A Proposal for Representative Democracy Brackets to Eliminate the Undue Influence of Money on Elections*, 4 TEX. A&M L. REV. 137, 141–42 (2016).

<sup>64</sup> See *How Much Does It Cost To Become President?*, INVESTOPEDIA (Jan. 31, 2020), <https://www.investopedia.com/insights/cost-of-becoming-president> [<https://perma.cc/46PH-5ZT4>]; Julia Glum, *All the Senators Running for Re-Election in the 2018 Midterms, Ranked by How Much They're Spending to Keep Their Jobs*, MONEY (Nov. 2, 2018, 12:39 PM), <https://money.com/all-the-senators-running-for-reelection-in-the-2018-midterms-ranked-by-how-much-theyre-spending-to-keep-their-jobs> [<https://perma.cc/Y6G2-VA8D>].

<sup>65</sup> *Net Worth of 2020 Presidential Candidates*, OPENSECRETS.ORG, <https://www.opensecrets.org/2020-presidential-race/financial-disclosures-and-net-worth> [<https://perma.cc/2MUW-8MDU>] (last visited May 20, 2021); Dan Alexander et al., *The Net Worth of Every 2020 Presidential Candidate*, FORBES (Aug. 14, 2019, 6:00 AM), <https://www.forbes.com/sites/danalexander/2019/08/14/heres-the-net-worth-of-every-2020-presidential-candidate/#70e848c837c5> [<https://perma.cc/W2GA-AJXQ>]; #20 Mi-

competitive contenders was not at least a millionaire, and of the last eleven Democratic candidates in the race, it is likely only two of them were not millionaires while they were running.<sup>66</sup> Even at the congressional level, 40% of elected officials are millionaires.<sup>67</sup> By comparison, in 2018 only 6.21% of American households had a net worth over a million dollars,<sup>68</sup> although this number has grown significantly in recent years given the steady growth in the stock market since 2009.<sup>69</sup> As was previously discussed, if only the rich can successfully run for office, democracy is eroded by disenfranchising the voice of the middle and lower classes.<sup>70</sup>

More directly and importantly, all but the very richest must raise massive amounts of money to run for office. Raising money consumes a significant amount of a politician's time.<sup>71</sup> In practice, politicians raise a significant percentage of their campaign funds from major donors, given their access to large sums of money: in the 2018 midterms, only 0.47% of the population gave \$200 or more to political campaigns, yet such contributions accounted for 71% of the money contributed toward the election.<sup>72</sup> Given the

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chael Bloomberg, FORBES <https://www.forbes.com/profile/michael-bloomberg> [<https://perma.cc/8TF3-36MY>] (last visited May 20, 2021); Justin Wingerter, *John Hickenlooper Files Financial Disclosure Form Showing Net Worth Is at Least \$9M*, THE DENVER POST (Dec. 20, 2019, 6:41 PM), <https://www.denverpost.com/2019/12/20/john-hickenlooper-financial-disclosure-net-worth/> [<https://perma.cc/Z8EY-XWP2>].

<sup>66</sup> Of former Vice President Joe Biden, Massachusetts Senator Elizabeth Warren, Vermont Senator Bernie Sanders, Minnesota Senator Amy Klobuchar, and South Bend Mayor Pete Buttigieg, only Buttigieg was known not to be a millionaire. *Net Worth of 2020 Presidential Candidates*, *supra* note 65; Alexander et al., *supra* note 65.

<sup>67</sup> Randy Leonard & Paul V. Fontelo, *Every Member of Congress' Wealth in One Chart*, ROLL CALL (Mar. 2, 2018, 5:03 AM), <https://www.rollcall.com/news/politics/every-member-congress-wealth-one-chart> [<https://perma.cc/G23F-SMFX>].

<sup>68</sup> Dan Burrows, *Millionaires in America 2019: All 50 States Ranked*, KIPLINGER (May 28, 2020), <https://www.kiplinger.com/slideshow/investing/T006-S001-millionaires-in-america-2019-all-50-states-ranked/index.html> [<https://perma.cc/K99K-UAXA>].

<sup>69</sup> *New Spectrem Group Market Insights Report Reveals Significant Growth in U.S. Household Wealth in 2017*, SPECTREM GROUP (Mar. 19, 2018), <https://spectrem.com/Content/press-release-new-spectrem-group-market-insights-report-reveals-significant-growth-in-US-household-wealth-in-2017.aspx> [<https://perma.cc/9UEN-DHYA>]; Robert Frank, *U.S. Added 700,000 New Millionaires in 2017*, CNBC (Mar. 22, 2018, 6:00 AM), <https://www.cnbc.com/2018/03/21/us-added-700000-new-millionaires-in-2017.html> [<https://perma.cc/R4QD-EA8Y>].

<sup>70</sup> See *supra* notes 21–23 and accompanying text.

<sup>71</sup> Valentine, *supra* note 63, at 142.

<sup>72</sup> Glenn Kessler, *Would "Every Small Dollar Donated" Be Matched 6 to 1 Under the House Democratic Plan?*, WASH. POST (Mar. 8, 2019, 3:00 AM), <https://www.washingtonpost.com/politics/2019/03/08/would-every-small-dollar-donated-be-matched-under-house-democratic-plan/>.

limits on individual contributions that can be made directly to candidates, such fundraising often takes the form of contributions to super PACs formed to act on behalf of a specific candidate.<sup>73</sup> Two-thirds of donations to super PACs were over \$1 million.<sup>74</sup> Regardless of whether a contribution goes directly to a candidate's campaign or a super PAC, its corrosive effect on democracy is the same.

The practical effect of having to raise significant funds from mega-donors is that once a politician is elected, she feels beholden to her major donors, and therefore feels pressure to promote laws and policies favored by them.<sup>75</sup> If this pressure were not effective in influencing which policies a politician promotes, mega-donors would not keep giving—they demand a return on their investment. There is a clear and demonstrable correlation between a politician's positions to those of her major donors.<sup>76</sup> Additionally, the prospect of a major donation provides access to the politician, allowing a mega-donor to pitch her agenda directly to the candidate.<sup>77</sup> The combined effects of needing money from mega-donors—knowing what these donors desire and knowing they will give only if a politician pursues their goals—corrupts democracy by diluting the influence of the overwhelming majority of voters.<sup>78</sup>

### B. *Misinformation's Effects on Elections*

In the not too distant past, most Americans agreed on what was going on in the world—on the “facts.”<sup>79</sup> But the world has

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<sup>73</sup> Prokop, *supra* note 33.

<sup>74</sup> Vandewalker, *supra* note 38.

<sup>75</sup> Lee Drutman, *What Do Rich Political Donors Get for Their Contributions?*, SUNLIGHT FOUND. (Aug. 15, 2012, 1:18 PM), <https://sunlightfoundation.com/2012/08/15/what-do-rich-political-donors-get-for-their-contributions/> [<https://perma.cc/G2F9-CDQ5>]; Hacker & Loewentheil, *supra* note 41.

<sup>76</sup> Drutman, *supra* note 75; Hacker & Loewentheil, *supra* note 41.

<sup>77</sup> Valentine, *supra* note 63, at 142–43; Drutman, *supra* note 75.

<sup>78</sup> For the People Act of 2019, H.R. 1, 116th Cong. (2019); *U.S. Congress House Bill 1*, LEGISCAN, <https://legiscan.com/US/bill/HB1/2019> [<https://perma.cc/Q7DQ-DAJM>] (last visited June 8, 2021); Kyle Langvardt, *Imagining Change Before and After Citizens United*, 3 ALA. CIV. RTS. & CIV. LIBERTIES L. REV. 227, 242 (2012); Hacker & Loewentheil, *supra* note 41.

<sup>79</sup> See, e.g., JENNIFER KAVANAGH & MICHAEL D. RICH, TRUTH DECAY: AN INITIAL EXPLORATION OF THE DIMINISHING ROLE OF FACTS AND ANALYSIS IN AMERICAN PUBLIC LIFE 1–2 (2018).

changed,<sup>80</sup> and as a society we are no longer able to agree on what the facts are.<sup>81</sup> We live in an era where there are conservative and liberal news stations and a virtually uncountable number of partisan news sources online.<sup>82</sup> As such, most people now self-select into news sources that reflect their political predispositions.<sup>83</sup> Additionally, with the advent of twenty-four hour news networks, these networks need to fill the broadcasting day, and people just are not going to watch the same stories repeatedly for extended periods. As such, much of the programming has evolved into commentary or opinion-based shows that reflect the political orientation of the network and its viewers.<sup>84</sup> Some of these programs significantly distort the truth, and even misrepresent it on a recurring basis.<sup>85</sup> While there is nothing wrong per se with political commentary shows or websites, they run a substantial risk of confusing their viewers as to what is fact and what is opinion,<sup>86</sup> especially when airing on a news network or when a news ticker tape is scrolling across the screen. Not surprisingly, everyone has noticed that the “news” being reported is not the same on the various networks, which has led an increasing number of people to believe that they just cannot trust the news or

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<sup>80</sup> See generally Daniel Hallin, *Whatever Happened to the News?*, CTR. FOR MEDIA LITERACY, <https://www.medialit.org/reading-room/whatever-happened-news> [https://perma.cc/6HBX-Q5LX ] (last visited May 27, 2021).

<sup>81</sup> See KAVANAGH & RICH, *supra* note 79, at 21–27.

<sup>82</sup> See *id.* at 96; JENNIFER KAVANAGH ET AL., NEWS IN A DIGITAL AGE: COMPARING THE PRESENTATION OF NEWS INFORMATION OVER TIME AND ACROSS MEDIA PLATFORMS 4–6 (2019).

<sup>83</sup> See, e.g., KAVANAGH & RICH, *supra* note 79, at 82–85; 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'NS. L. J. 55, 77 (2018).

<sup>84</sup> See KAVANAGH & RICH, *supra* note 79, at 96–98, 106–07; KAVANAGH ET AL., *supra* note 82, at 80–93; Joe Concha, *Journalism Is Now Opinion-Based—Not News-Based*, THE HILL (May 24, 2019, 10:30 AM), <https://thehill.com/opinion/white-house/445385-journalism-is-now-opinion-based-not-news-based> [https://perma.cc/G5PG-QCLF].

<sup>85</sup> Aaron Sharockman, *Punditfact Checks in on the Cable News Channels*, POLITIFACT (Jan. 29, 2015), <https://www.politifact.com/article/2015/jan/29/punditfact-checks-cable-news-channels/> [https://perma.cc/4TTT-CQSJ]; see also Sean Illing, *How Fox News Evolved into a Propaganda Operation*, VOX (Mar. 22, 2019, 11:20 AM), <https://www.vox.com/2019/3/22/18275835/fox-news-trump-propaganda-tom-rosenstiel> [https://perma.cc/BP99-XNG8] (explaining how television ratings drive news networks to become unwilling to tell their audiences “inconvenient things”). Furthermore, this statement is not meant to include reporting of breaking news events where the facts ultimately prove to be different than was initially reported, but rather deliberate distortion or ignorance of clearly established facts.

<sup>86</sup> See generally Concha, *supra* note 84.

that the news others listen to is “fake news.”<sup>87</sup> This feedback loop further erodes any sense that there is any truth beyond one’s preexisting biases and creates a major barrier to informing the electorate adequately.

There is an old joke that asks: “How do you know when a politician is lying?” The answer being: “His lips are moving.” This adage reflects the view that politicians lie regularly, both currently and historically. However, things seem to have gotten worse. Previously, there appeared to be some minimal level of shame that even politicians possessed that constrained just how far they would go in bending the truth. America now lives in a post-shame era<sup>88</sup> with “alternative facts,” where politicians will blatantly lie about observable or verifiable truths—misrepresenting their positions and those of their opponents.<sup>89</sup> They will say they have never said something even though there is videotape of them saying it,<sup>90</sup> and increasingly, they will post doctored photographs and videos.<sup>91</sup> These lies may come in the form of reported statements or political advertising.

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<sup>87</sup> KAVANAGH & RICH, *supra* note 79, at 33, 85.

<sup>88</sup> See generally Jack Holmes, *The Death of Shame, or the Rise of Shamelessness?*, *ESQUIRE* (Jan. 31, 2018), <https://www.esquire.com/news-politics/a15940835/trump-shame-shamelessness/> [<https://perma.cc/3XGX-GDYM>] (explaining that increasingly, public officials “now feel they can say anything” without shame, “even when they previously said the opposite, or when we can readily see their falsehoods”).

<sup>89</sup> See Angie Drobnic Holan, *All Politicians Lie. Some Lie More than Others*, *N.Y. TIMES* (Dec. 11, 2015), <https://www.nytimes.com/2015/12/13/opinion/campaign-stops/all-politicians-lie-some-lie-more-than-others.html> [<https://perma.cc/SE44-M88K>]; Chris Cillizza, *Donald Trump Lies More Often than You Wash Your Hands Every Day*, *CNN* (June 10, 2019, 4:56 PM), <https://www.cnn.com/2019/06/10/politics/donald-trump-lies-fact-check/index.html> [<https://perma.cc/LL3M-G6PA>]; see also Lee Moran, *The Number of Lies Donald Trump Has Now Told in Office is Mind-Boggling*, *HUFFINGTON POST* (Dec. 17, 2019, 4:37 AM), [https://www.huffpost.com/entry/donald-trump-lies-washington-post\\_n\\_5df898c3e4b03aed50f4725d](https://www.huffpost.com/entry/donald-trump-lies-washington-post_n_5df898c3e4b03aed50f4725d) [<https://perma.cc/FP3C-TRFY>].

<sup>90</sup> See Daniel Dale, *A Month-by-Month Look at Donald Trump’s Top Lies of 2019*, *CNN* (Dec. 31, 2019, 3:03 PM), <https://www.cnn.com/2019/12/31/politics/fact-check-donald-trump-top-lies-of-2019-daniel-dale/index.html> [<https://perma.cc/3V6L-4VJ4>].

<sup>91</sup> Richard Cowan et al., *Trump Retweets Doctored Video of Pelosi To Portray Her as Having “Lost It,”* *REUTERS* (May 24, 2019, 7:28 PM), <https://www.reuters.com/article/us-usa-trump-pelosi/trump-retweets-doctored-video-of-pelosi-to-portray-her-as-having-lost-it-idUSKCN1SU2CB> [<https://perma.cc/59LV-CRYT>]; Shirin Ghaffary, *Twitter is Finally Fighting Back Against Deepfakes and Other Deceptive Media*, *VOX* (Feb. 4, 2020, 4:00 PM), <https://www.vox.com/recode/2020/2/4/21122653/twitter-policy-deepfakes-nancy-pelosi-biden-trump> [<https://perma.cc/B9MZ-LSAM>]; Jamie Ross, *Trump Retweets Fake Image of Pelosi in Hijab Standing in Front of Iranian Flag*, *DAILY BEAST* (Jan. 13, 2020, 10:01 AM), <https://www.thedailybeast.com/trump-retweets-fake-image-of-pelosi-in-hijab-standing-in-front-of-iranian-flag> [<https://perma.cc>].



What kind of accountability is there for this lying? The sad answer is, almost none. Political speech is the most important of all of the types of free speech our Constitution protects.<sup>92</sup> The stakes involved here are so high that the courts are reluctant to even consider holding politicians accountable for their lies, out of fear that any limitations in this area could easily be perverted into state suppression of dissent.<sup>93</sup> While this is a real and critical concern, the practical effect is that for a politician with no shame, there is virtually no pressure to tell the truth.<sup>94</sup> And there is no legal accountability for false or misleading statements.<sup>95</sup> Thus, any lie told in a political advertisement is unlikely to have any negative legal consequences for the speaker. Not only is the person running the commercial unlikely to face any personal consequences, the advertisement—and the lies within it—can continue to run and spread disinformation. Furthermore, when the news networks report on what a politician has said, the report is filtered through the bias of the network or host. The networks aligned with the general political orientation of the speaker will typically ignore or downplay any lies, and those with a different orientation will point out untruths.<sup>96</sup>

While this facially creates the opportunity for accountability and repercussions when a politician lies, these hopes fail in the face of the realities of our current political and information ecosystem. With a two-party system close to being evenly split in electoral support,<sup>97</sup> pressure on a politician to change her behavior must come not only from the opposition but also from her own supporters. While one would expect a certain amount of

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/EX98-7VZL]; David Frum, *The Very Real Threat of Trump's Deepfake*, THE ATLANTIC (Apr. 27, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/trumps-first-deepfake/610750/> [https://perma.cc/6Y2W-NZ8Y].

<sup>92</sup> Victoria L. Killion, *The First Amendment: Categories of Speech*, CONG. RSCH. SERV. (Jan. 16, 2019), <https://fas.org/sgp/crs/misc/IF11072.pdf> [https://perma.cc/59XB-Q68C].

<sup>93</sup> See *infra* notes 128–186 and accompanying text.

<sup>94</sup> Matt Welch, *Politicians Will Keep Lying as Long as We Don't Punish Them*, REASON (Oct. 9, 2012, 6:14 PM), <https://reason.com/2012/10/09/politicians-will-keep-lying-as-long-as-w/> [https://perma.cc/L3EL-Q4J2].

<sup>95</sup> See *infra* Part III.

<sup>96</sup> Sharockman, *supra* note 85; Illing, *supra* note 85.

<sup>97</sup> Looking at presidential elections, voter totals are usually relatively close, showing the split in support the two-party system creates. See Colton Carpenter, *The Divided United States of America*, HARV. POL. REV. (Mar. 18, 2019), <https://harvardpolitics.com/columns-old/divided-states/> [https://perma.cc/XSZ6-WVLX]; see also *2012 Presidential Election, 270TOWIN*, [https://www.270towin.com/2012\\_Election/](https://www.270towin.com/2012_Election/) [https://perma.cc/H68S-ZS3H] (last visited May 27, 2021).

deference or forgiveness from one's supporters, this is generally not unlimited. For some, certain types of behavior—if known—will be unacceptable and will cause a supporter to cease her support. And for almost everyone, support will be withdrawn if a politician actively pursues laws and policies contrary to one's important preferences. However, most Americans receive their information from news sources that reflect their own biases, and those sources increasingly tend to minimize misbehavior by politicians they align with.<sup>98</sup> Politicians are increasingly unlikely to get pushback from their supporters, which is essential for accountability.

When one considers super PACs, and the enormous amounts they spend on political advertising, the situation is even worse. Like politicians themselves,<sup>99</sup> there is virtually no accountability for inaccuracies in their advertisements, since we place such a high value on allowing unfettered and unaccountable political speech.<sup>100</sup> Compounding the problem is the manner in which we regulate super PACs. One of the reasons super PACs are allowed to spend unlimited amounts on a candidate's behalf is that they are prohibited from coordinating with the candidate.<sup>101</sup> While at first glance this may seem like a good way to keep politicians from being “bought” by big-money interest groups, it fails to keep money from corrupting the process<sup>102</sup> and creates less accountability for the spread of disinformation. As has been well documented, politicians provide access to lobbyists and mega-donors, and can still be beholden when mega-donors contribute to super PACs.<sup>103</sup> Both by meeting with these people to hear their agendas and through passive communication from a candidate about her general campaigning preferences, the lobbyist is able to make her positions known to the politician, and the politician is able to have a high degree of confidence that the super PACs supporting her will generally act in a manner the candidate supports.<sup>104</sup> However, since the politician and the super PAC are officially precluded from coordinating, the advertisements run by the super PAC can be even less truthful and more misleading than

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<sup>98</sup> See *supra* notes 79–87 and accompanying text.

<sup>99</sup> See *supra* notes 79–87 and accompanying text.

<sup>100</sup> See *infra* Part III.

<sup>101</sup> See *Contribution Limits*, *supra* note 33; Prokop, *supra* note 33.

<sup>102</sup> See *Contribution Limits*, *supra* note 33; Edsall, *supra* note 7.

<sup>103</sup> See *supra* notes 74–77 and accompanying text.

<sup>104</sup> *Id.*

those run by the politician herself. The lack of coordination essentially provides a shield against the politician being blamed for the content of super PAC advertisements, no matter how egregious.<sup>105</sup> Not surprisingly, the sleaziest political ads are almost always from super PACs; these ads further spread misinformation to the detriment of a healthy democracy.<sup>106</sup>

Of course, there are other actors out there creating and spreading disinformation. With the relatively low cost of creating websites and of disseminating information through social media platforms,<sup>107</sup> it should come as no surprise that there is a significant number of independent actors with strongly held political views that create and post false or misleading information.<sup>108</sup> This misinformation is then shared by misled consumers.<sup>109</sup> In the worst cases, these fabrications are picked up by news outlets<sup>110</sup> or the politicians themselves,<sup>111</sup> thereby amplifying their

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<sup>105</sup> See Sam Wolfson, *Five of the Most Bigoted and Divisive Political Ads from the 2018 Midterms*, GUARDIAN (Oct. 25, 2018, 12:10 PM), <https://www.theguardian.com/us-news/2018/oct/25/midterm-attack-ads-five-most-bigoted-divisive-republicans-democrat-videos> [<https://perma.cc/LB82-CEBR>]; see also Langvardt, *supra* note 78, at 232 (presenting a similar argument).

<sup>106</sup> See Jaywon Choe, *CHARTS: Here's Why Super PACs Are TERRIBLE*, BUSINESS INSIDER (May 3, 2012, 5:05 PM), <https://www.businessinsider.com/this-one-chart-explains-why-super-pacs-are-so-evil-2012-5> [<https://perma.cc/MU3A-PUY8>]; Nathan Katz, *How Super PACs Shape U.S. Elections with Advertisements that Portray Candidates in Ways Publicly Identified Campaign Ads Often Avoid*, SCHOLARS STRATEGY NETWORK (Jan. 22, 2019), <https://scholars.org/contribution/how-super-pacs-shape-us-elections-advertisements-portray-candidates-ways-publicly> [<https://perma.cc/V4J5-BMS9>]; Wolfson, *supra* note 105.

<sup>107</sup> See *supra* notes 56–58 and accompanying text.

<sup>108</sup> See Alexandra S. Levine et al., *Why the Fight Against Disinformation, Sham Accounts and Trolls Won't Be Any Easier in 2020*, POLITICO (Dec. 1, 2019, 6:49 AM), <https://www.politico.com/news/2019/12/01/fight-against-disinformation-2020-election-074422> [<https://perma.cc/7T56-NE3A>]; Natasha Korecki, “Sustained and Ongoing” Disinformation Assault Targets Dem Presidential Candidates, POLITICO (Feb. 20, 2019, 6:05 AM), <https://www.politico.com/story/2019/02/20/2020-candidates-social-media-attack-1176018> [<https://perma.cc/66DF-CLZ6>].

<sup>109</sup> See Ctr. for Info. Tech. & Soc’y, *How is Fake News Spread? Bots, People Like You, Trolls and Microtargeting*, CITS, <https://www.cits.ucsb.edu/fake-news/spread> [<https://perma.cc/UEB4-UVBZ>] (last visited May 27, 2021) [hereinafter *How is Fake News Spread?*].

<sup>110</sup> See Peter Weber, *Fox News Warns Fox News About Spreading Pro-Trump “Disinformation” on Ukraine*, WEEK (Feb. 7, 2020), <https://theweek.com/speedreads/894352/fox-news-warns-fox-news-about-spreading-protrump-disinformation-ukraine> [<https://perma.cc/GR9S-V52L>] (highlighting that Fox News guests have spread “disinformation” about the Trump-Ukraine scandal).

<sup>111</sup> McKay Coppins, *The Billion-Dollar Disinformation Campaign to Reelect the President*, THE ATLANTIC (Feb. 10, 2020, 2:30 PM), <https://www.theatlantic.com/magazine/archive/2020/03/the-2020-disinformation-war/605530/> [<https://perma.cc/KD75-H6XJ>] (“[L]eaders have learned to harness the democratizing power of

spread. Even when this does not occur, it is easy for people to be misled since voters often look for online information to validate their pre-existing biases.<sup>112</sup> The First Amendment's protection of political speech assumes that deceptions will be exposed in the marketplace of ideas, but social media and the internet essentially bypass the marketplace by directly targeting those that are receptive to their message.<sup>113</sup> Further compounding this problem are hostile foreign state actors. There is significant evidence to support the conclusion that multiple foreign governments now create misinformation and disseminate it on a widespread basis.<sup>114</sup> With the resources and technology available to them, these governments can have a significantly larger impact on the number of people misled by these campaigns than individual rogue actors.<sup>115</sup>

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social media for their own purposes—jamming the signals, sowing confusion.”); Margaret Sullivan, *This Was the Week America Lost the War on Misinformation*, WASH. POST (July 30, 2020, 11:47 AM), [https://www.washingtonpost.com/lifestyle/media/this-was-the-week-america-lost-the-war-on-misinformation/2020/07/30/d8359e2e-d257-11ea-9038-af089b63ac21\\_story.html](https://www.washingtonpost.com/lifestyle/media/this-was-the-week-america-lost-the-war-on-misinformation/2020/07/30/d8359e2e-d257-11ea-9038-af089b63ac21_story.html) [<https://perma.cc/4NPF-YQ8Z>].

<sup>112</sup> Wood & Ravel, *supra* note 10, at 1270; *see also* Lightman, *supra* note 49 (noting that ads on social media differ from TV advertising, as the FCC does not monitor social media the way it monitors TV ads); *How Is Fake News Spread?*, *supra* note 109; Amy Mitchell et al., *Americans Who Mainly Get Their News on Social Media Are Less Engaged, Less Knowledgeable*, PEW RSCH. CTR. (July 30, 2020), <https://www.journalism.org/2020/07/30/americans-who-mainly-get-their-news-on-social-media-are-less-engaged-less-knowledgeable/> [<https://perma.cc/J27M-M2XT>].

<sup>113</sup> Nunziato, *supra* note 4, at 1520, 1524–27; Sue Halpern, *The Problem of Political Advertising on Social Media*, NEW YORKER (Oct. 24, 2019), <https://www.newyorker.com/tech/annals-of-technology/the-problem-of-political-advertising-on-social-media> [<https://perma.cc/87FL-ULWT>]; Ed. Bd., *Twitter Is Banning Political Ads. If Facebook Won't, It Must at Least Moderate Them*, WASH. POST (Nov. 1, 2019, 6:46 PM), [https://www.washingtonpost.com/opinions/twitter-is-banning-political-ads-if-facebook-wont-it-must-at-least-moderate-them/2019/11/01/9d3457c0-fc01-11e9-ac8c-8eced29ca6ef\\_story.html](https://www.washingtonpost.com/opinions/twitter-is-banning-political-ads-if-facebook-wont-it-must-at-least-moderate-them/2019/11/01/9d3457c0-fc01-11e9-ac8c-8eced29ca6ef_story.html) [<https://perma.cc/7VKH-PW9V>]; *see generally* Wood & Ravel, *supra* note 10.

<sup>114</sup> Nunziato, *supra* note 4, at 1528–31; CHRISTINA NEMR & WILLIAM GANGWARE, WEAPONS OF MASS DISTRACTION: FOREIGN STATE-SPONSORED DISINFORMATION IN THE DIGITAL AGE 14–15 (2019); Margaret L. Taylor, *Combating Disinformation and Foreign Interference in Democracies: Lessons from Europe*, BROOKINGS (July 31, 2019), <https://www.brookings.edu/blog/techtank/2019/07/31/combating-disinformation-and-foreign-interference-in-democracies-lessons-from-europe/> [<https://perma.cc/8YAH-AY55>]; Korecki, *supra* note 108; Ina Fried, *Human Actors are Changing the Spread of Disinformation*, AXIOS (Oct. 17, 2019), <https://www.axios.com/misinformation-disinformation-human-actors-e490d5ee-4480-44a8-8922-e724cd852acb.html> [<https://perma.cc/K9GQ-PZQQ>]; *see generally* Beyersdorf, *supra* note 10.

<sup>115</sup> *See* NEMR & GANGWARE, *supra* note 114 (“[Russia’s influence on the 2016] campaign was significant—thousands of Russian-backed human operatives and automated bots created more than one million tweets and hundreds of thousands of

Taken together, the compounded lies and misinformation spread through these methods severely impact how well informed voters are, and democracy cannot function properly with an ignorant electorate.<sup>116</sup> An increasing number of people just believe what they choose to believe and disregard any information, no matter how credible, that contradicts their position.<sup>117</sup> In such an echo chamber, properly informing voters becomes almost impossible. Good decisions on how to vote come from having quality information about the candidates and their positions.<sup>118</sup> The current climate makes it hard for a candidate to clearly get her message out and makes it likely that many voters will be misled.<sup>119</sup> In such a situation, it is hard for voters to know enough to vote intelligently, and equally hard for them to hold their leaders accountable.

### C. *Technology's Effects on Elections*

Some of the disinformation problems described above are directly attributable to the internet and social media, which allow virtually anyone to have a worldwide platform easily and at little cost. These problems are unlikely to be resolved in the future, given current technology. Until quite recently,<sup>120</sup> social media platforms had done little to police the accuracy of the content their users post, and have often aggressively resisted efforts to make them do more.<sup>121</sup> In some ways, this makes sense—when billions of people can all write their own posts, overseeing such a colossal amount of data is a herculean task, without even considering the potentially chilling effects on free speech. But even if the will were present in these companies to

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Facebook and Instagram posts, while uploading more than 1,000 YouTube videos. The tweets garnered 288 million views and the Facebook posts reached 126 million US accounts.”).

<sup>116</sup> Wood & Ravel, *supra* note 10, at 1234–37.

<sup>117</sup> See generally Napoli, *supra* note 83.

<sup>118</sup> Wood & Ravel, *supra* note 10, at 1234–37; Hasen, *supra* note 11, at 55–56.

<sup>119</sup> See Wood & Ravel, *supra* note 10, at 1234–37.

<sup>120</sup> As the 2020 election approaches, Twitter, Facebook, and YouTube have begun labelling some misleading posts and removing others that violate their policies on manipulated media. See Rachel Lerman et al., *Twitter Penalizes Donald Trump Jr. for Posting Hydroxychloroquine Misinformation Amid Coronavirus Pandemic*, WASH. POST (July 28, 2020, 6:18 PM), <https://www.washingtonpost.com/nation/2020/07/28/trump-coronavirus-misinformation-twitter/> [https://perma.cc/X8AB-BXSW].

<sup>121</sup> Wood & Ravel, *supra* note 10, at 1244–46; see also Beyersdorf, *supra* note 10, at 1063–64; Gillespie, *supra* note 56.

combat political disinformation, it would quickly devolve into the world's largest game of whack-a-mole.<sup>122</sup> Given the ease of creating and disseminating bogus digital content, foreign states and rogue actors can quickly create new sources of disinformation any time a source is shut down or removed.<sup>123</sup> Furthermore, there are multiple platforms available, and many reside outside of the United States' jurisdiction—even though they are readily accessible from American devices. Thus, foreign states and rogue actors can easily create and disseminate bogus content outside the reach of the American government's power to regulate them effectively.

To make matters worse, the ability to create fake content is only growing. From the perspective of trying to have an informed electorate, few things are scarier than the ever-increasing ability to create “deep-fakes”—realistic photos and videos of people doing or saying things that they never did or said.<sup>124</sup> They say a picture is worth a thousand words, and with good reason. Few things are more powerfully persuasive in affecting one's opinion than seeing someone say or do something.<sup>125</sup> The ability to create these realistic fabrications will have devastating effects on how misinformed voters will become in the future, and will only exacerbate the mistrust of information that does not comport with one's biases.<sup>126</sup> This impact is certain to be further amplified as politicians and news outlets re-transmit such content, thereby giving it increased credibility to the viewer. In the last year, we have seen several examples of high-level politicians and their allies promoting a blatantly false message using this

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<sup>122</sup> Barbara Ortutay, *Social Media and Misinformation: It's a Game of Whack-a-Mole*, AP NEWS (Dec. 18, 2018), <https://apnews.com/0d02a1cec5b04638810372ba23e03ee3> [<https://perma.cc/T8BY-NFM4>]. Even when items are labelled or removed, millions can often view the misleading information prior to such action. See Lerman et al., *supra* note 120.

<sup>123</sup> Ortutay, *supra* note 122; Levine et al., *supra* note 108.

<sup>124</sup> Martijn Rasser, *Why Are Deepfakes So Effective?*, SCI. AM. (Aug. 14, 2019), <https://blogs.scientificamerican.com/observations/why-are-deepfakes-so-effective/> [<https://perma.cc/VC9M-2SLJ>].

<sup>125</sup> William A. Galston, *Is Seeing Still Believing? The Deepfake Challenge to Truth in Politics*, BROOKINGS (Jan. 8, 2020), <https://www.brookings.edu/research/is-seeing-still-believing-the-deepfake-challenge-to-truth-in-politics/> [<https://perma.cc/S7XY-QZD6>]; Rasser, *supra* note 124. See generally *What Is a Deepfake?*, THE ECONOMIST (Aug. 7, 2019), <https://www.economist.com/the-economist-explains/2019/08/07/what-is-a-deepfake> [<https://perma.cc/JH4G-SCGY>].

<sup>126</sup> Rasser, *supra* note 124.

technology.<sup>127</sup> While the quality of most of these materials, particularly videos, makes it relatively easy to spot fabrications, it will not be long before they become virtually indistinguishable from real content. How is democracy to survive in an era where it is so easy to completely deceive voters, especially when this new wrinkle is stacked on top of all the other information problems that democracy faces?

### III. REGULATION OF POLITICAL SPEECH

Political speech has long been recognized as the most important type of free speech there is.<sup>128</sup> America is so concerned about the risk of chilling or suppressing it that it essentially chooses to err on the side of letting almost anything be said—without accountability for its accuracy.

#### A. *First Amendment Limitations*

Protection for free speech is enshrined in the First Amendment to the United States Constitution, which has been found to protect the inviolability of the marketplace of ideas.<sup>129</sup>

[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . . . To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wi[d]e-open.”<sup>130</sup>

Based on well-developed jurisprudence, one’s freedom of speech is generally presumed to be protected unless it falls within the scope of one of the narrow exceptions that have been recognized.<sup>131</sup> Even then, our system strongly prefers to create

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<sup>127</sup> Cowan et al., *supra* note 91; Ghaffary, *supra* note 91; Ross, *supra* note 91; Frum, *supra* note 91; *see also* Halpern, *supra* note 113.

<sup>128</sup> Killion, *supra* note 92.

<sup>129</sup> Cohen v. California, 403 U.S. 15, 26 (1971); *see also* Citizens United v. FEC, 558 U.S. 310, 354 (2010).

<sup>130</sup> Police Dep’t of Chi. v. Mosley, 408 U.S. 92, 95–96 (1972) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

<sup>131</sup> Exceptions include, among other things, fighting words, inciting violence or other imminent lawless action, obscenity, defamation, and breaches of national

liability for unprotected speech rather than prohibiting it in the first place.<sup>132</sup> While defamation, or lying about someone else, is generally an exception, *Hustler Magazine v. Falwell*<sup>133</sup> reaffirmed an actual malice standard for liability to public figures.<sup>134</sup> Actual malice is a high defamation bar for public figures; it makes their likelihood of recovering remote.<sup>135</sup> This standard creates a cause of action for lies about fact, but statements of opinion are not actionable regardless of how irrational a speaker's opinion is.<sup>136</sup> Thus, by merely couching a fabrication in the language of an opinion, any potential liability is essentially removed due to the difficulty of proving intent. Even though there is a clear difference between saying "Bob molests children" and "I believe Bob molests children," how likely is a voter to truly internalize that difference while watching an advertisement? Further complicating matters, the time it takes to complete a lawsuit is almost always longer than the length of a campaign. As such, an opponent's lies will be able to do their damage, and voters will have voted with this misinformation circulating.<sup>137</sup> When these limitations are added to the risk of politicians harming their own image by suing, and the fact that the only compensation is monetary, it is not surprising that defamation suits by politicians are rare.<sup>138</sup>

While the details are beyond the scope of this Article, it must be noted that the standard of review for regulations on speech varies depending on the type of speech involved. For example,

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security. See Erwin Chemerinsky, *CONSTITUTIONAL LAW: PRINCIPLES & POLICIES* 1076–1228 (6th ed. 2019).

<sup>132</sup> See generally Epps, *supra* note 3.

<sup>133</sup> 485 U.S. 46, 56 (1988).

<sup>134</sup> For liability, the false statement must be made on purpose or with reckless disregard for the truth. See *id.* at 49–50; *Sullivan*, 376 U.S. at 279–80; Richman, *supra* note 18, at 676.

<sup>135</sup> While lawsuits for defamation by politicians are rare, they do occasionally occur. But even when they do, they rarely succeed. See Richman, *supra* note 18, at 677–78.

<sup>136</sup> Epps, *supra* note 3 (explaining that “[p]ublic persons can’t collect without showing a false statement of fact”).

<sup>137</sup> See Chris Weller, *Here’s Why Trump Can Legally Get Away with Saying Things That Aren’t True*, *BUS. INSIDER* (Nov. 28, 2016, 12:14 PM), <https://www.businessinsider.com/why-politicians-dont-get-sued-over-ads-2016-11> [<https://perma.cc/5VBC-KV58>]; Brooks Jackson, *Suing over False Political Advertising*, *FACTCHECK.ORG* (Feb. 7, 2008), <https://www.factcheck.org/2008/02/suing-over-false-political-advertising/> [<https://perma.cc/97VG-MR54>].

<sup>138</sup> See Weller, *supra* note 137 (explaining that if politicians sue, then discovery may reveal embarrassing private information).



the standards for regulating commercial speech are lower than those for political speech.<sup>139</sup> Government regulations on political speech must meet a strict scrutiny standard of review by showing (1) a compelling state interest for such regulation, (2) that the regulation is narrowly tailored to meet such purpose, and (3) that the method chosen to achieve such purpose is the least restrictive means available.<sup>140</sup> This high standard has routinely led to the invalidation of statutory attempts to place restrictions on political advertisements.

In *Citizens United v. FEC*, one of the most important recent cases on regulating political speech, the Supreme Court of the United States applied strict scrutiny to rules promulgated by the Federal Elections Commission (“FEC”) that limited the ability of corporations and unions to spend money in support of candidates.<sup>141</sup> *FEC v. Wisconsin Right to Life, Inc.*<sup>142</sup> had previously made clear that the FEC cannot prohibit third parties from political advertising, provided the advertising does not advocate directly for or against a candidate, which set the stage for dark money contributions through 501(c)(4) entities.<sup>143</sup> The Court went further in *Citizens United*; the rules at issue there failed the strict scrutiny test because the Court found no compelling governmental interest in limiting political speech by corporations in preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>144</sup>

The Court also effectively held that money was the equivalent of speech, stating “[a]ll speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting

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<sup>139</sup> See Killion, *supra* note 92; see also R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and “Reasonableness” Balancing*, 8 ELON L. REV. 291, 370 (2016) (providing an overview of free speech regulation).

<sup>140</sup> The levels of judicial scrutiny were introduced in *United States v. Carolene Products Co.* 304 U.S. 144, 152 n.4 (1938); see also Killion, *supra* note 92; Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2418 (1996); Wood & Ravel, *supra* note 10, at 1238–44.

<sup>141</sup> 558 U.S. 310, 340 (2010). This limitation includes spending in the form of materials criticizing a candidate’s opponent. *Id.* at 393.

<sup>142</sup> 551 U.S. 449, 469–70 (2007).

<sup>143</sup> Evers-Hillstrom, *supra* note 24, at 37.

<sup>144</sup> 558 U.S. at 348 (quoting *Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 660 (1990)).

speech . . . .”<sup>145</sup> One of the arguments put forth in support of the campaign-spending limitation was to limit the corrupting influence of money on politics, out of a concern that the need for campaign funding could lead politicians to engage in a quid pro quo with a big-money donor.<sup>146</sup> While the Court previously deemed the anti-corruption interest sufficiently important to allow contribution limits,<sup>147</sup> the Court was unwilling to extend this reasoning to direct expenditures made by persons, including corporations, in support of or in opposition to a candidate.<sup>148</sup> Justice Kennedy indicated that acceptable limitations on campaign spending are “limited to [those targeting] quid pro quo corruption,” which the majority defined as “dollars for political favors,” not mere favoritism or access.<sup>149</sup> This was subsequently clarified as “captur[ing] the notion of a direct exchange of an official act for money.”<sup>150</sup> In essence, to limit such expenditures of money is to muzzle speech, and concerns about corruption could be met through more narrowly tailored policies like disclosure requirements.

Based on this holding, the super PAC was born, allowing unlimited contributions and expenditures during election cycles, provided that the super PAC does not coordinate with the candidate that it advocates for.<sup>151</sup> Another argument rejected by the Court was that corporations are spending money that ultimately belongs to its owners—the shareholders—and that the government should be able to regulate corporate expenditures to protect dissenting shareholders from being forced to fund political speech they may disagree with.<sup>152</sup>

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<sup>145</sup> *Id.* at 351.

<sup>146</sup> *Id.* at 452 (Stevens, J., concurring in part and dissenting in part).

<sup>147</sup> *Buckley v. Valeo*, 424 U.S. 1, 101 (1976); *Vandewalker*, *supra* note 38; *Prokop*, *supra* note 33.

<sup>148</sup> *Citizens United*, 558 U.S. at 359.

<sup>149</sup> *Id.*

<sup>150</sup> *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (citing *McCormick v. United States*, 500 U.S. 257, 266 (1991)); *see also* *Prokop*, *supra* note 33 (“In other words, little short of a direct bribe really counts.”).

<sup>151</sup> *Vandewalker*, *supra* note 38; *Contribution Limits*, *supra* note 33; *Prokop*, *supra* note 33.

<sup>152</sup> *Citizens United v. FEC (Supreme Court)*, FED. ELECTION COMM’N, <https://www.fec.gov/updates/citizens-united-v-fecsupreme-court/> [<https://perma.cc/9UQG-RYLZ>] (last visited May 31, 2021).

### B. Federal Trade Commission Limits on Advertising

The Federal Trade Commission (“FTC”) regulates advertising and generally requires advertisements to be accurate and truthful.<sup>153</sup> However, there is a major exception for political advertisements. Under Section 315 of the Federal Communications Act of 1934, broadcast television networks are prohibited from blocking political advertisements from a candidate based on their content.<sup>154</sup> By its terms, this limitation applies only to broadcast networks, but cable television companies largely adhere to it as well.<sup>155</sup> And although, based on the wording of the statute, it does not apply to advertising by outside groups such as PACs and super PACs, networks remain hesitant to block such content in all but the most extreme cases.<sup>156</sup> Thus, surprisingly, the law requires more truth in advertising for a hamburger than in critically important political advertising.<sup>157</sup>

### C. Federal Election Law Limitations

The Federal Election Campaign Act of 1971 limits the amount that donors can give to political campaigns.<sup>158</sup> However, the government may not cap the total amount a campaign may spend on an election.<sup>159</sup> The individual donation limits are based both on who is making the donation and who will receive the donation.<sup>160</sup> For example, in 2020, an individual can give up to \$2,800 to a candidate, \$5,000 to a PAC, \$10,000 to a non-national

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<sup>153</sup> *Truth in Advertising*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/media-resources/truth-advertising> [<https://perma.cc/ZHM7-EMWJ>] (last visited May 31, 2021).

<sup>154</sup> See 47 U.S.C. § 315(a), (c)(1) (2019); Amy Sherman, *In Phony Facebook Ad, Warren Said Most TV Networks Will Refuse Ads with a “Lie” But That’s Wrong*, POLITIFACT (Oct. 15, 2019), <https://www.politifact.com/factchecks/2019/oct/15/elizabeth-warren/phony-facebook-ad-warren-said-most-tv-networks-wil/> [<https://perma.cc/HUH9-ZSDU>]; see also Halpern, *supra* note 113; see generally, Richman, *supra* note 18.

<sup>155</sup> Sherman, *supra* note 154.

<sup>156</sup> See, e.g., Katie Sanders, *Fact-Check-A-Thon Calls Out Misleading TV Ads in 2016 Primaries*, POLITIFACT (Mar. 8, 2016), <https://www.politifact.com/article/2016/mar/08/fact-checking-misleading-tv-ads-2016-presidential/> [<https://perma.cc/C95Q-2CDV>] (listing several misleading or false political advertisements that networks allowed to run on TV).

<sup>157</sup> Sherman, *supra* note 154; *Truth in Advertising*, *supra* note 153; *Advertising and Consumer Information*, N.D. STATE UNIV., <https://www.ag.ndsu.edu/foodlaw/processingsector/advertising-productclaims> [<https://perma.cc/44KV-B7YK>] (last visited May 31, 2021).

<sup>158</sup> 52 U.S.C. §§ 30101(a), 30116(a) (2019).

<sup>159</sup> *Buckley v. Valeo*, 424 U.S. 1, 58–59 (1976).

<sup>160</sup> *Contribution Limits*, *supra* note 33.

party committee, and \$35,500 to a national party committee per election.<sup>161</sup> On the other hand, a national party committee can give \$5,000 to a candidate and \$5,000 to a PAC, but has no limits on transfers to party committees.<sup>162</sup> After *McCutcheon v. FEC*, caps on total combined contributions to all candidates a person wishes to support are prohibited.<sup>163</sup>

More importantly, given *Citizens United*, there are no limits on contributions to super PACs.<sup>164</sup> Thus, the limitations are essentially meaningless, since anyone can give as much as they want over the stated limits to a super PAC formed to support a particular candidate.<sup>165</sup> Over two-thirds of super PAC contributions are more than one million dollars,<sup>166</sup> making a mockery of the FEC limits on contributions to candidates. While candidates and super PACs are technically barred from coordinating, it is well understood that super PACs frequently choreograph their activities with the campaigns they support, and many super PACs are actually run by party leaders who carefully align their spending with that of the party.<sup>167</sup> Despite numerous potential violations of this prohibition on coordination, the FEC has not imposed a single penalty for such actions since *Citizens United*.<sup>168</sup>

While super PACs contain no limits on the amounts they can spend on a candidate's behalf, they must disclose who their donors are.<sup>169</sup> However, large-money donors often do not want their identities revealed—especially if they are helping create misleading advertisements. That is where non-profit advocacy groups come into play. Groups that advocate on behalf of policy issues that register as “social welfare” groups under 501(c)(4) of the Internal Revenue Code may spend unlimited funds to create

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<sup>161</sup> *Id.* Primaries and the general election are treated as different elections.

<sup>162</sup> *Id.*

<sup>163</sup> 572 U.S. 185, 192–93 (2014); Evers-Hillstrom, *supra* note 24.

<sup>164</sup> *Contribution Limits*, *supra* note 33; Prokop, *supra* note 33.

<sup>165</sup> *Contribution Limits*, *supra* note 33; Prokop, *supra* note 33.

<sup>166</sup> Vandewalker, *supra* note 38.

<sup>167</sup> Rachael Marcus & John Dunbar, *Rules Against Coordination Between Super PACs, Candidates, Tough to Enforce*, CTR. FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), <https://publicintegrity.org/politics/rules-against-coordination-between-super-pacs-candidates-tough-to-enforce/> [<https://perma.cc/ABT2-52T6>]; Adam Wollner & Nat'l Journal, *10 Ways Super PACs and Campaigns Coordinate, Even Though They're Not Allowed To*, ATLANTIC (Sept. 27, 2015), <https://www.theatlantic.com/politics/archive/2015/09/10-ways-super-pacs-and-campaigns-coordinate-even-though-theyre-not-allowed-to/436866/> [<https://perma.cc/Y8K3-KKCR>]; *see generally* Evers-Hillstrom, *supra* note 24; *see* Edsall, *supra* note 7.

<sup>168</sup> Evers-Hillstrom, *supra* note 24.

<sup>169</sup> Prokop, *supra* note 33.

political advertisements about such issues without disclosing who their donors are.<sup>170</sup> Thus, an environmental or gun rights group, for example, can create advocacy ads attacking or supporting a candidate based on her position on the issues of concern to such group, with no amount limits and no disclosure of who its donors are.<sup>171</sup> This dark-money loophole also allows foreign money to infiltrate American elections secretly, even though foreign contributions are prohibited.<sup>172</sup> These groups are often referred to as “dark money” groups, since their donors are not disclosed.<sup>173</sup> It is difficult to know how much dark money is being spent on political campaigns, since these groups do not have to disclose all of their expenditures to the FEC.<sup>174</sup> While it is known that at least \$1 billion in dark money has been spent on federal elections since 2010, this figure likely represents a conservative estimate.<sup>175</sup> In the 2018 election cycle, approximately one-third of all advertising from outside groups in senate races was bought by dark money groups,<sup>176</sup> and a majority of overall outside spending was by dark-money sources or groups that take money from such sources.<sup>177</sup>

Additionally, the FEC is charged with enforcing campaign finance laws.<sup>178</sup> One way it does this is by requiring candidates, political parties, PACs and super PACs to disclose amounts raised and spent on elections.<sup>179</sup> Unfortunately, beyond this, the FEC accomplishes very little.<sup>180</sup> The commission is composed of six members; no more than three are allowed from one political

<sup>170</sup> Prokop, *supra* note 33; Evers-Hillstrom, *supra* note 24.

<sup>171</sup> Such advertisements may be harshly critical of a candidate for her positions but may not specifically advocate a vote for or against her. Prokop, *supra* note 33.

<sup>172</sup> Evers-Hillstrom, *supra* note 24.

<sup>173</sup> Prokop, *supra* note 33.

<sup>174</sup> *Id.*

<sup>175</sup> Daniel I. Weiner, *Fixing the FEC: An Agenda for Reform*, BRENNAN CTR. FOR JUST. 1 (Apr. 30, 2019), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Fixing\\_FEC.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Fixing_FEC.pdf) [<https://perma.cc/Y8CE-ND4C>]; Prokop, *supra* note 33.

<sup>176</sup> Fowler et al., *supra* note 40.

<sup>177</sup> Evers-Hillstrom et al., *supra* note 36.

<sup>178</sup> *Federal Election Commission*, USA.GOV, <https://www.usa.gov/federal-agencies/federal-election-commission> [<https://perma.cc/CY49-EB36>] (last visited June 3, 2021).

<sup>179</sup> Zachary G. Parks & Kevin Glandon, *FEC Issues New Guidance on Donor Disclosure for Entities Making Independent Expenditures*, NAT'L L. REV. (Oct. 5, 2018), <https://www.natlawreview.com/article/fec-issues-new-guidance-donor-disclosure-entities-making-independent-expenditures> [<https://perma.cc/6XR5-8KGR>].

<sup>180</sup> See, e.g., Eric Lichtblau, *F.E.C. Can't Curb 2016 Election Abuse*, *Commission Chief Says*, N.Y. TIMES (May 2, 2015), <https://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html> [<https://perma.cc/2DLL-Z8NS>]; Weiner, *supra* note 175, at 1–3.

party.<sup>181</sup> Thus, in practice, that means the commission is effectively paralyzed by gridlock.<sup>182</sup> In 2015, FEC Chair Ann Ravel said that “the likelihood of [campaign finance] laws being enforced [was] slim” prior to the 2016 elections.<sup>183</sup> Not surprisingly, enforcement actions have dropped significantly as a result of the FEC’s gridlock: in 2006, the FEC assessed over \$5.5 million in civil penalties, but this amount has consistently been under one million dollars annually since 2009.<sup>184</sup> Not surprisingly, enforcement actions have dropped significantly as a result. In such an environment, the ability of the FEC to stop super PACs from coordinating, in a practical if not literal sense, with campaigns is almost non-existent.<sup>185</sup> If these problems were not enough, the FEC has been unable to function since September 2019 due to a lack of sufficient members to constitute a quorum, resulting in over “300 cases on its . . . docket that cannot be resolved.”<sup>186</sup>

#### D. *The Internet and Social Media*

With the 2020 election cycle getting into high gear, candidates and advocacy groups are poised to spend over \$1.6 billion on internet and social media advertising.<sup>187</sup> However, there is virtually no federal regulation covering these advertisements.<sup>188</sup>

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<sup>181</sup> Wood & Ravel, *supra* note 10, at 1274.

<sup>182</sup> See OFFICE OF COMM’R ANN M. RAVEL, DYSFUNCTION AND DEADLOCK: THE ENFORCEMENT CRISIS AT THE FEDERAL ELECTION COMMISSION REVEALS THE UNLIKELIHOOD OF DRAINING THE SWAMP 1–4 (2017); Wood & Ravel, *supra* note 10, at 1274–75; Prokop, *supra* note 33; Weiner, *supra* note 175, at 1–2. Gridlock has not always been the norm at the FEC. As recently as 2006, it was able to unanimously impose major fines on violators. Lichtblau, *supra* note 180.

<sup>183</sup> Lichtblau, *supra* note 180.

<sup>184</sup> Weiner, *supra* note 175, at 4.

<sup>185</sup> See, e.g., OFFICE OF COMM’R ANN M. RAVEL, *supra* note 182, at 7–10.

<sup>186</sup> Michael Beckel, *Five Numbers that Show How the FEC is MIA*, ISSUE ONE (Dec. 1, 2019), <https://www.issueone.org/five-numbers-that-show-how-the-fec-is-mia/> [<https://perma.cc/X96R-66N6>]; *Coalition Urges White House, Senate to Restore FEC Quorum with Commissioners Committed to Enforcing Anti-Corruption Laws*, COMMON DREAMS (Jan. 13, 2020), <https://www.commondreams.org/newswire/2020/01/13/coalition-urges-white-house-senate-restore-fec-quorum-commissioners-committed> [<https://perma.cc/TM9F-UBW4>]; Emily Glazer & Patience Haggin, *Political Ads Are Flourishing Online. Few Agree on How to Regulate Them*, WALL ST. J. (Nov. 15, 2019, 2:34 PM), <https://www.wsj.com/articles/as-political-ad-spending-balloons-online-consensus-on-regulation-is-elusive-11573813803> [<https://perma.cc/Y958-KX39>].

<sup>187</sup> 2020 *Political Spending Projections*, *supra* note 25. Others have estimated this spending could be as high as \$2.9 billion. Glazer & Haggin, *supra* note 186.

<sup>188</sup> R. Sam Garrett, *Online Political Advertising: Disclaimers and Policy Issues*, CONG. RSCH. SERV. (Mar. 18, 2019), <https://crsreports.congress.gov/product/pdf/IF>

Digital advertising presents increased risks for our democracy, with its ability to directly target groups with disinformation, raising the need for appropriate controls.<sup>189</sup> However, internet platforms and social media are not considered broadcasters subject to many of the current FEC rules.<sup>190</sup> More and more people have argued for the need for clear rules for regulating political advertising on the web and social media.<sup>191</sup> Realistically, however, what are these calls for regulation likely to achieve? Given the severe First Amendment limitations to regulating content in television advertising,<sup>192</sup> even a rigorous mapping of television rules to digital platforms will result in all the same limits and potential problems.

Furthermore, until quite recently, internet and social media platforms seemed uninterested or unwilling to self-regulate political advertisements.<sup>193</sup> Even if such platforms were willing to police the content posted, this raises several major concerns. First, as is always the case with censoring political content, are we comfortable as a society with a private company making such determinations? How will the public know whether a platform is biasing an election by being stricter in banning or allowing one candidate's content over another's?<sup>194</sup> Additionally, what liability

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/F10758 [https://perma.cc/73DS-V3WP]; Ed. Bd., *Online Political Ads Are in Urgent Need of Regulation*, FIN. TIMES (Nov. 1, 2019), https://www.ft.com/content/e0a93d3c-fbd3-11e9-a354-36acbbb0d9b6 [https://perma.cc/MXY2-KWPF]; see generally Halpern, *supra* note 113; Lightman, *supra* note 49.

<sup>189</sup> Ed. Bd., *supra* note 188; see Wood & Ravel, *supra* note 10, at 1225, 1229–31; see also Ed. Bd., *supra* note 113; Halpern, *supra* note 113.

<sup>190</sup> Halpern, *supra* note 113; Karl Evers-Hillstrom, *FEC Chair Makes Another Go at Regulating Online Political Ads*, OPENSECRETS.ORG (June 17, 2019, 4:04 PM), https://www.opensecrets.org/news/2019/06/fec-chair-takes-another-go-at-regulating-online-ads/ [https://perma.cc/6QJU-SQP2].

<sup>191</sup> Glazer & Haggin, *supra* note 186; Ed. Bd., *supra* note 113; Halpern, *supra* note 113; Evers-Hillstrom, *supra* note 190.

<sup>192</sup> See *supra* Section III.A.

<sup>193</sup> Wood & Ravel, *supra* note 10, at 1244–47; Beyersdorf, *supra* note 10, at 1082–84; Gillespie, *supra* note 56; Glazer & Haggin, *supra* note 186. *But see* Lerman et al., *supra* note 120 (discussing recent changes to social media companies' laissez faire approach).

<sup>194</sup> The recent moves by the major social media platforms to police political misinformation have drawn significant criticism from conservatives claiming bias, with President Trump issuing an executive order to try to prohibit their self-policing. See James Wellemeier, *Conservatives Are Flocking to a New "Free Speech" Social Media App That Has Started Banning Liberal Users*, NBC NEWS (July 3, 2020, 12:13 AM), https://www.nbcnews.com/tech/tech-news/conservatives-flock-free-speech-social-media-app-which-has-started-n1232844 [https://perma.cc/6UPW-6B95]; Shannon Bond, *Trump Accuses Social Media of Anti-Conservative Bias After Twitter Marks His Tweets*, NPR (May 27, 2020, 4:08 PM), https://www.npr.org/2020/05/27/863422722

would this form of self-regulation expose a platform to for incorrectly identifying and blocking false or misleading content?

On another front, the United States' national security apparatus attempts to monitor and combat foreign government attacks on our elections, including the dissemination of false and misleading information via digital media.<sup>195</sup> However, the low cost of producing disinformation and the ability to quickly distribute it via multiple avenues limits the effectiveness of such efforts.<sup>196</sup> Additionally, these efforts are focused only on foreign-based disinformation, even though there is considerable domestically produced misinformation content.<sup>197</sup> Furthermore, every time an attack is thwarted, it is easily redirected back via another webpage or portal.<sup>198</sup> The country's guardians lack sufficient resources to effectively combat these attacks.<sup>199</sup>

#### *E. For the People Act of 2019*

In March of 2019, the House of Representatives overwhelmingly approved the For the People Act of 2019.<sup>200</sup> Since then, the bill has languished, awaiting action by the Senate, with no progress to speak of since March 2019. This bill proposes a number of changes to how the United States conducts elections and is designed to improve our democracy; most of these pro-

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/trump-accuses-social-media-of-anti-conservative-bias-after-twitter-marks-his-twe [https://perma.cc/VF4B-4C62]; Brian Heater, *Appeals Court Rules in Favor of Google, Apple, Facebook and Twitter in Anti-Conservative Bias Suit*, TECHCRUNCH (May 27, 2020, 6:17 PM), <https://techcrunch.com/2020/05/27/appeals-court-rules-in-favor-of-google-apple-facebook-and-twitter-in-anti-conservative-bias-suit/> [https://perma.cc/RG9J-LMYW]; Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020) (addressing what President Trump calls anti-conservative bias from social media companies). Furthermore, GOP state legislators have introduced bills in numerous states that would allow social media platforms to be sued for political censorship. Anthony Izaguirre, *GOP Pushes Bills To Allow Social Media "Censorship" Lawsuits*, AP NEWS (March 7, 2021), <https://apnews.com/article/donald-trump-legislature-media-lawsuits-social-media-848c0189ff498377fbfde3f6f5678397> [https://perma.cc/YW9M-LMHW].

<sup>195</sup> Philip Ewing, *What You Need to Know About Foreign Interference and the 2020 Election*, NPR (Sept. 1, 2019, 7:00 AM), <https://www.npr.org/2019/09/01/737978684/what-you-need-to-know-about-foreign-interference-and-the-2020-election> [https://perma.cc/8VKL-QAD2].

<sup>196</sup> See Fowler et al., *supra* note 50, at 1.

<sup>197</sup> Levine et al., *supra* note 108.

<sup>198</sup> Ortutay, *supra* note 122; Levine et al., *supra* note 108.

<sup>199</sup> Max Boot & Max Bergmann, *Defending America from Foreign Election Interference*, COUNCIL FOREIGN REL. (Mar. 6, 2019), <https://www.cfr.org/report/defending-america-foreign-election-interference> [https://perma.cc/M6PC-7PJV].

<sup>200</sup> For the People Act of 2019, H.R. 1, 116th Cong. § 1 (2019).



posed reforms are beyond the scope of this Article.<sup>201</sup> However, several of its provisions impact matters that have been addressed. The bill expands disclosure rules for organizations spending money during elections, for campaign advertisements and for online platforms, and revises disclaimer requirements for political advertising.<sup>202</sup> It also expands the ban on foreign nationals expending funds in United States elections, and repeals the treasury regulation that allows 501(c)(4) organizations not to disclose who their donors are.<sup>203</sup> While these are all welcome improvements, none of these changes fundamentally affect the corrosive power of the need candidates have for vast sums of money, nor most of the problems being caused by the growing dissemination of misinformation to the electorate, largely due to the limitations imposed by the First Amendment. Title V of the bill would also create a program that would provide federal funds matching six times the amount of eligible small-donor contributions to a candidate.<sup>204</sup> This provision is designed to help offset the massive amounts of funds being poured into campaigns by super PACs, often from very few actual people, in an effort to amplify the diluted voice of the average voter.<sup>205</sup> While this is a step toward offsetting the massive influence of big-donor money on our political system, it does nothing to stem the tide of ever-growing need for more money to get elected.

#### F. *Honest Ads Act of 2019*

In 2019, the Honest Ads Act was reintroduced in both the House and Senate.<sup>206</sup> While forward progress on this proposed legislation seems unlikely at this time,<sup>207</sup> the bill, if passed, would update the Federal Election Campaign Act of 1971 to expand the current disclosure requirements regarding who has

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<sup>201</sup> See generally *id.* (including provisions to make Election Day a federal holiday, reforms to improve voter registration and voter access, limitations on removing voters from voter rolls, the creation of non-partisan redistricting commissions, various measures designed to enhance the security and integrity of elections, and a number of new ethics rules).

<sup>202</sup> *Id.* § 5001(2), (9)–(10).

<sup>203</sup> *Id.* §§ 4101(a), 522(b)(1)–(b)(2).

<sup>204</sup> *Id.* § 5001(2), (9)–(10); see also Kessler, *supra* note 72.

<sup>205</sup> H.R. 1 § 5001 (9)–(10).

<sup>206</sup> Honest Ads Act, S. 1356, 116th Cong. (2019); Honest Ads Act, H.R. 2592, 116th Cong. (2019); Zach Montellaro, *The Honest Ads Act Returns*, POLITICO (May 9, 2019, 10:00 AM), <https://www.politico.com/newsletters/morning-score/2019/05/09/the-honest-ads-act-returns-615586> [<https://perma.cc/38GM-FABW>].

<sup>207</sup> Montellaro, *supra* note 206.

bought TV, print, and radio ads to the internet.<sup>208</sup> It would also require reasonable efforts by platforms to ensure that advertisements are not purchased by foreign governments, disclosure of how advertisements were targeted, and the cost of those advertisements.<sup>209</sup> While this act would help clarify digital advertising regulation, such disclosures will do little to combat the deluge of misinformation flooding online political advertising.

#### IV. POTENTIAL SOLUTIONS

With all of the problems that our current approach to regulating political speech allows or causes, how can the United States change its approach to make democracy function better?

##### A. *Make Politicians and Other Political Advertisers Accountable for Their Lies and Misinformation*

Some have argued that current defamation laws, possibly with some tweaking, could be better used to hold politicians and others accountable when they lie or spread disinformation in their advertisements.<sup>210</sup> The risk of accountability would then presumably lead to advertisers lying less, or at least to confining their statements to matters that are less clearly and verifiably false. If meaningful accountability were in place and advertisers were so deterred, this would help solve the misinformation crisis that the United States finds itself in. The good news is that defamation is well established as an exception to First Amendment free speech rights, and there have been successful cases brought in the area of political speech by defamed parties.<sup>211</sup> However, such an approach presents several conceptual difficulties and raises other major risks that likely outweigh the potential benefits of pursuing this idea.

First, defamation law is directed at stopping one party from lying about another, but it is poorly suited to dealing with situations where a candidate is lying about herself. When a candidate lies about herself or her accomplishments, no one has been defamed, so no one would have standing to sue for defamation.<sup>212</sup>

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<sup>208</sup> S. 1356 § 5(a); H.R. 2592 § 5(a); *see generally* Halpern, *supra* note 113.

<sup>209</sup> S. 1356 §§ 8(2)(B)–(C)(i), 9; H.R. 2592 §§ 8(2)(B)–(C)(i), 9.

<sup>210</sup> *See, e.g.*, Richman, *supra* note 18, at 697.

<sup>211</sup> Hasen, *supra* note 11, at 57–63.

<sup>212</sup> *Id.* at 57.

The second problem with the approach arises from the current “actual malice” liability standard for defaming a public figure.<sup>213</sup> Having to show actual intent to spread an untruth, or reckless disregard for the truth, has proven to be a difficult bar to meet.<sup>214</sup> However, lowering this standard for political figures risks overbroad liability, and more importantly, a substantial chilling effect on overall political speech if politicians constantly had to live in fear of liability for false or inaccurate statements.<sup>215</sup>

The next obstacle this approach faces is determining which statements are actionable. If a politician makes an unrealistic promise—as politicians have done forever—does that count as a prohibited lie? The answer should be no. Promises of future action are, at the time made, non-actionable because no one can know what a politician will do until after being elected. And even then, circumstances and opinions can change. Putting aside such an easy example, what about misstatements of verifiable facts as opposed to statements of opinion? This has a certain appeal, given that a similar distinction already exists in other areas of law. Pursuant to Article 2 of the UCC, statements of fact regarding goods being sold must be true to avoid breaching an express warranty.<sup>216</sup> But statements of opinion, or “puffing,” are not actionable.<sup>217</sup> Unfortunately, politicians are masters at parsing speech. If falsely saying your opponent is a sexual predator is actionable, but disingenuously saying you believe your opponent is a sexual predator is not, political ads will quickly shift their language when spreading disinformation to present such lies as subtly stated opinions.

A further obstacle that must be overcome is determining who gets to decide whether an advertisement creates liability. Since this is an issue of liability for defamatory actions that have already occurred, the obvious choice for enforcement would be the court system, to ensure due process requirements are met. Unfortunately, the court process moves slowly, and as a result any ruling would be unlikely to occur prior to voting. As such, a

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<sup>213</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); Richman, *supra* note 18, at 676.

<sup>214</sup> See Hasen, *supra* note 11, at 57–63; see also Richman, *supra* note 18, at 675–80.

<sup>215</sup> See Hasen, *supra* note 11, at 74–77.

<sup>216</sup> See U.C.C. § 2-313 (Westlaw 2019) (governing express warranties).

<sup>217</sup> *Id.*

party that chooses to lie may well find the lie effective in getting the person elected despite risking liability.<sup>218</sup>

Compounding this problem is the issue of what type of liability would attach to such conduct.<sup>219</sup> If the only remedy is a fine or monetary damages, the lying candidate still gains office and the court award merely becomes another cost of getting elected—a cost that is ultimately a drop in the bucket to a major campaign. Of course, one could consider other types of remedies: incarceration, loss of office, or enjoining the advertisement. But each of these options carries other potential problems. In the highly divided and partisan society in which the United States now finds itself, few should be comfortable jailing candidates for false advertising. Such a remedy is also potentially excessive. Would one false advertisement or claim about an opponent be enough, or would the conduct need to be pervasive? Such a possibility would encourage overuse of the courts as a way to potentially remove an opponent. Given the fine line that often exists between facts and opinions, and the central importance of political speech to a healthy democracy, such a major consequence for a misstep would have a major chilling effect on political speech. Generally, the only nations that imprison politicians for “lying” about their opponents are dictatorships, which use incarceration to suppress dissent and incapacitate opposition.<sup>220</sup> Loss of office is certainly a lesser penalty than incarceration, but if a single lie could result in ineligibility, would any candidate qualify? In the course of a campaign, lies will almost always occur, and so would post-election lawsuits from losing candidates trying to disqualify victorious opponents.

Enjoining a misleading ad from running seems like a more balanced potential remedy—it stops the misinformation from being disseminated without reducing the remedy to a mere cost of getting elected or over-penalizing the act. But banning advertisements with falsehoods presents its own set of problems, which are discussed in the next Section.

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<sup>218</sup> Weller, *supra* note 137; Jackson, *supra* note 137.

<sup>219</sup> See Hasen, *supra* note 11, at 57–64 (providing a more in-depth discussion of these concerns).

<sup>220</sup> See generally Daniel Funke & Daniela Flamini, *A Guide to Anti-Misinformation Actions Around the World*, POYNTER, <https://www.poynter.org/ifcn/anti-misinformation-actions/> [<https://perma.cc/WF2A-SRRM>] (last visited June 7, 2021) (compiling information on anti-misinformation actions taken by different national governments around the world).

More broadly, any attempt to create additional accountability for spreading political disinformation faces a major jurisdictional limitation: enforcement actions against advertisements on foreign-based digital platforms would be difficult to pursue, as it would be unlikely for the rogue actors to subject themselves to the United States' court system.

Finally, any accountability-based regime would, at most, help mitigate the spread of disinformation. It would do nothing to stem the meteoric growth of campaign spending and all of its attendant problems.

*B. Ban Misleading and Factually Incorrect Political Advertising*

Another possibility is to ban political advertising that is misleading or factually incorrect. The European Union, and in particular Germany, has begun heading down this avenue with significant fines for failure to remove false or misleading content upon notice to do so.<sup>221</sup> This approach could take one of two forms: advertisements could require pre-approval before publication, or disseminated content that is flagged as potentially false could be investigated and then ordered removed if falsity is confirmed. The second approach appears to fit nicely within the current FTC prohibition on, and enforcement mechanisms for, false and misleading advertising<sup>222</sup> applicable to non-political advertising.

The benefit of either approach is that false and misleading information would be removed. The concerns raised by both of these possibilities are largely the same, but with two exceptions. First, pre-approval would require every ad to be reviewed, whereas flagging potentially problematic ads would require review only of those flagged. In the highly politicized environment we now live in, this may result in little actual difference. If viewers are allowed to flag potentially violating content, trolls will likely flag virtually everything.<sup>223</sup> However, if this does not

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<sup>221</sup> Nunziato, *supra* note 4, at 1531–38.

<sup>222</sup> *Truth in Advertising*, *supra* note 153.

<sup>223</sup> See generally Yuen Yiu, *Battling Online Bots, Trolls and People*, INSIDE SCIENCE (Aug. 31, 2018, 10:30 AM), <https://www.insidescience.org/news/battling-online-bots-trolls-and-people> [<https://perma.cc/SYN8-FM3D>] (focusing on issues that bots and trolls create regarding American politics); see also Darrell M. West, *How to Combat Fake News and Disinformation*, BROOKINGS (Dec. 18, 2017), <https://www.brookings.edu/research/how-to-combat-fake-news-and-disinformation/> [<https://perma.cc/W76D-CP7U>] (discussing the presence of false accounts that exist for malevolent

occur, a flagging-based approach should have fewer transactional costs and thus be administratively cheaper. On the other hand, a flagging-based approach allows disinformation to disseminate and influence people before it is dealt with.

Overall, however, these minor differences pale in comparison to the more significant concerns raised by banning false and misleading political advertising. First, such a ban runs afoul of the parameters set out by the Supreme Court for political speech.<sup>224</sup> The Court has held that good and bad political ideas—false and true ones—are to battle it out in the marketplace of ideas, with the belief that this process will allow the truth to prevail.<sup>225</sup> Ignoring the naivete of this historic view in an era of misleading ads directly targeted at those most likely to be affected by them,<sup>226</sup> any ban on political speech will have to survive a strict scrutiny review. Even if preventing political misinformation in the digital age rises to the level of a compelling state interest, a ban is unlikely to meet the requirement of being narrowly tailored, and most certainly is not the least restrictive option available. Obviously, a system that required labelling of advertisements as potentially false or misleading to put consumers on notice would be less restrictive than a ban.<sup>227</sup>

Furthermore, such an approach poses significant risks to a democracy.<sup>228</sup> Who makes the final decision on which ads get to run and which ones are banned? Letting the government decide this matter potentially allows the party in power to favor its own candidates or disadvantage others.<sup>229</sup> Even a bipartisan commission runs the risk of lopsided quorums that lead to a similar result. If an even number from both major parties are required

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purposes); *How Is Fake News Spread?*, *supra* note 109 (explaining that bots and trolls exist, in part, to perpetuate misinformation on the internet).

<sup>224</sup> Nunziato, *supra* note 4, at 1537; Epps, *supra* note 3; Casey Newton, *Why Facebook Can't Stop Politicians from Lying*, THE VERGE (Oct. 19, 2019, 6:00 AM), <https://www.theverge.com/interface/2019/10/9/20904516/facebook-political-ad-lies-regulation> [<https://perma.cc/G2LL-4JZ2>].

<sup>225</sup> Nunziato, *supra* note 4, at 1520, 1524–27.

<sup>226</sup> See generally Ed. Bd., *supra* note 188; see also Lightman, *supra* note 49; Ed. Bd., *supra* note 113; Wood & Ravel, *supra* note 10, at 1225, 1227.

<sup>227</sup> See *infra* Section IV.G (discussing this alternative).

<sup>228</sup> See Nunziato, *supra* note 4, at 1531–38 (discussing some of the problems that this approach has caused in the European Union, and, more specifically, showing that the EU approach has placed a significant burden on platforms operating in Europe while also emboldening supporters of controversial “opinion martyrs” whose hateful content has been censored).

<sup>229</sup> Hasen, *supra* note 11, at 56, 64.

to ban an ad, the practical effect is likely to be gridlock, with few if any ads being blocked, since neither side will want to vote against its candidates.<sup>230</sup> Additionally, a bipartisan commission runs a meaningful risk of stifling third-party candidates, since none of its members would care about protecting ads by them.

Handing decision-making over to the courts appears better on its face, given the supposed independence of the judiciary, but the court system is ill-equipped to process such cases in a timely manner.<sup>231</sup> And in this hyper-partisan age, it is more likely just to cause further politicization of the courts and further mistrust of the judiciary by the public. Given these concerns, it is not surprising that few major democracies have embraced this option.<sup>232</sup> The nations that allow such bans are almost exclusively totalitarian and use this power to suppress dissent.

Finally, the FCC has little ability to reach foreign actors. While the FCC can coopt United States-based broadcast networks and digital platforms into helping it police such a policy, its ability to do so for platforms based outside the United States is practically nonexistent.<sup>233</sup> Thus banning politically misleading advertising would allow foreign-based disinformation to coexist next to domestic content that met truthfulness standards. In such a situation, people might actually be more inclined to believe both types of content than they would be now, where no political advertising has an imprimatur of legitimacy based on passing a truth-based filtering process. Of course, foreign election interference is already prohibited, and the national security apparatus already works to combat foreign misinformation.<sup>234</sup>

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<sup>230</sup> This phenomenon can already be seen in the FEC's gridlock difficulties. *See supra* notes 178–186 and accompanying text.

<sup>231</sup> *See generally* Weller, *supra* note 137; Jackson, *supra* note 137.

<sup>232</sup> *See generally* Funke & Flamini, *supra* note 220.

<sup>233</sup> Even clear prohibitions on activity that is not speech itself but directly impacts political speech will have extraterritorial limitations, assuming they can pass constitutional muster. For example, Ireland has proposed a law that makes it a criminal offense to create multiple fake online accounts where one poses as different people and spreads political messages. While this could likely survive a constitutional challenge, since it merely prescribes that one cannot disseminate speech through multiple fake accounts, the ability to find and prosecute any such parties who are foreign actors is quite low. *See* Online Advertising and Social Media (Transparency) Bill 2017 (Act No. 150/2017) (Ir.), <https://data.oireachtas.ie/ie/oireachtas/bill/2017/150/eng/initiated/b15017d.pdf> [<https://perma.cc/R96B-YMK2>].

<sup>234</sup> 52 U.S.C. § 30121 (2018); *see, e.g., Combating Foreign Influence*, FBI, <https://www.fbi.gov/investigate/counterintelligence/foreign-influence> [<https://perma.cc/W2HX-G35P>] (last visited June 7, 2021) (stating that “[t]he FBI is . . . responsible for investigating foreign influence operations” that “spread disinformation” directed

But as has been noted, the ease with which foreign actors can create new portals for dissemination and the limited resources of the United States' cybersecurity apparatus makes this a never-ending game of whack-a-mole with bad data perpetually leaking through.<sup>235</sup>

### C. *Publicly Funded Campaigns*

Support for publicly funded campaigns has gained traction recently, as evidenced by its inclusion in the For the People Act of 2019.<sup>236</sup> However, this idea is less grandiose than it first appears. Given the holding in *Citizens United*—that the government cannot limit direct expenditures by people on behalf of political causes or politicians they support<sup>237</sup>—these proposals rarely suggest eliminating private funding, but rather suggest providing a level of public funding to candidates via matching funds for contributions that candidate receives.<sup>238</sup> Furthermore, the Court's ruling in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* prohibits using escalating matching funds, so a publicly funded option could not be structured to directly offset amounts spent by a candidate's opponent and her supporters.<sup>239</sup> As such, these proposals, by themselves, would do nothing to combat misinformation and do little to stem the corrosive effects of money on politics. While having such funds available might allow some politicians to be less beholden to big-money donors and allow more non-wealthy candidates to successfully run for office, it would throw more money into the advertising arms race, and many politicians would still deem it advantageous to raise larger amounts from major donors.

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against the United States); *Global Engagement Center: Core Mission & Vision*, U.S. DEPT OF STATE, <https://www.state.gov/bureaus-offices/under-secretary-for-public-diplomacy-and-public-affairs/global-engagement-center/> [<https://perma.cc/3UDZ-DMBL>] (last visited June 7, 2021) (describing the State Department's Global Engagement Center, whose mission is to “recognize, understand, expose, and counter foreign state and non-state propaganda and disinformation efforts aimed at undermining or influencing . . . the United States”).

<sup>235</sup> See *supra* Section II.C; Ortutay, *supra* note 122.

<sup>236</sup> For the People Act of 2019, H.R. 1, 116th Cong. § 5211 (2019).

<sup>237</sup> *Citizens United v. FEC*, 558 U.S. 310, 371–72 (2010).

<sup>238</sup> See, e.g., H.R. 1 § 5201(a)(1)(A) (proposing that the federal government provide six times the amount a candidate receives in small-money campaign contributions).

<sup>239</sup> *Ariz. Free Enter. Club's Freedom PAC v. Bennett*, 564 U.S. 721, 754–55 (2011).



#### D. *Digital Platform Self-Regulation*

With the exception of Twitter, which due to its structure generates little in the way of advertising content,<sup>240</sup> most digital platforms had shown little interest in monitoring or regulating political advertising prior to 2020.<sup>241</sup> However, with rampant misinformation being spread via social media in the run-up to the 2020 election, several of the major social media platforms have begun labeling content as misleading or removing it outright.<sup>242</sup> One advantage of this approach is that it can be likely be done without running afoul of the First Amendment. As private companies, digital platforms are not government actors, and therefore are generally allowed to regulate speech as they wish.<sup>243</sup> Furthermore, as the parties hosting the content, they are in the best position to monitor and control content on their platforms.

If these and other social media platforms decide to continue pursuing this approach, it raises other significant concerns, however.<sup>244</sup> Each company can, and will, set its own policies. At a minimum, this creates inconsistencies and the possibility of confusion, making it harder for people to know which content has been vetted or filtered and which has not. Potentially more disturbingly, as private citizens, there is no legal prohibition against a platform favoring certain views or candidates over others, thereby creating more disinformation.<sup>245</sup> While the desire to have broad market appeal may discourage some companies from heading in this direction, television networks like Fox News and MSNBC indicate a viable market for information providers

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<sup>240</sup> Katie Snyder, *Twitter's Decision to Ban Political Ads: Violation of First Amendment Rights?*, U. RICH. J.L. & TECH. BLOG (Nov. 19, 2019), <https://jolt.richmond.edu/2019/11/19/twitters-decision-to-ban-political-ads-violation-of-first-amendment-rights> [<https://perma.cc/CVS2-MQSZ>] (noting that Twitter's platform differs from Facebook's, since advertisements on Twitter are not as popular or common); Gillespie, *supra* note 56.

<sup>241</sup> Wood & Ravel, *supra* note 10, at 1244–46; *see generally* Beyersdorf, *supra* note 10; Gillespie, *supra* note 56.

<sup>242</sup> *See generally*, Lerman et al., *supra* note 120.

<sup>243</sup> Nunziato, *supra* note 4, at 1522; Jessica Melugin, *Twitter's Ban on Political Ads Has No First Amendment Implications*, COMPETITIVE ENTER. INST. (Oct. 31, 2019), <https://cei.org/blog/twitters-ban-political-ads-has-no-first-amendment-implications> [<https://perma.cc/F6QD-2J2V>]; Heater, *supra* note 194.

<sup>244</sup> *See* Wood & Ravel, *supra* note 10, at 1244–46 (offering a more detailed discussion of some of these problems).

<sup>245</sup> As has been noted, conservatives are already complaining about bias from traditional social media platforms and are encouraging a migration to a conservative platform. *See* Wellemeyer, *supra* note 194.

with a clear political leaning. That said, broadcast networks require a license from the FCC that places certain limits on their ability to discriminate in accepting advertising—candidates for federal office must be provided with reasonable access to advertising opportunities.<sup>246</sup> Thus, current proposals to extend broadcast rules to digital media could help minimize platform bias. But although this may help solve the concern with bias domestically, it would have little impact extraterritorially. Furthermore, the misinformation problems present with the hands-off broadcast regulation system would be equally present in the digital arena—especially with the constitutional limitations present.<sup>247</sup> Finally, even if a company is not trying to play favorites, self-enforcement of one’s own policies runs the risk of censoring material that should not be removed while allowing other more problematic content to remain. This risk is especially present with the massive number of potential micro-targeted ads being created.<sup>248</sup> These internal and platform-to-platform inconsistencies could have a material impact on an election.

#### *E. Media Literacy Campaigns*

Several governments have begun or are considering media literacy campaigns, aimed at helping their citizens develop skills to better identify false and misleading content.<sup>249</sup> While such programs are better than nothing and can help create more informed consumers, they are almost certainly inadequate for solving the problems caused by massive and widespread disinformation.<sup>250</sup> It is very difficult for a nation to provide meaningful education to its citizens who have already completed their

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<sup>246</sup> Dan Kirkpatrick, *Political Broadcasting Rules Q&A*, COMMLAWBLOG (Feb. 27, 2018), <https://www.commlawblog.com/2018/02/articles/deadlines/political-broadcasting-rules-qa/> [<https://perma.cc/NYV9-RV3S>].

<sup>247</sup> See *supra* Sections III.A, III.B.

<sup>248</sup> See generally Lightman, *supra* note 49.

<sup>249</sup> Annina Claesson, *Coming Together To Fight Fake News: Lessons from the European Approach to Disinformation*, CTR. FOR STRATEGIC & INT’L STUD. (Apr. 8, 2019), <https://www.csis.org/coming-together-fight-fake-news-lessons-european-approach-disinformation> [<https://perma.cc/DKA7-5ACZ>]; *Action Plan Against Disinformation*, at 9–11, JOIN (2018) 36 final (May 12, 2018); see generally Funke & Flamini, *supra* note 220.

<sup>250</sup> See Wood & Ravel, *supra* note 10, at 1268–71 (discussing the advantages of such an approach).

formal education.<sup>251</sup> There is no effective way to bring all adults in to receive this education, making it hard for such a campaign to reach a nation's entire electorate. As such, these programs are most likely to be most effective for those still in school, but are unlikely to reach the most vulnerable targets for misinformation: the old and the poorly educated.<sup>252</sup> Furthermore, with deep-fake technology improving all the time, even sophisticated consumers of information will become more susceptible to being misled. In such a climate, it is difficult to imagine the truth winning in the marketplace of ideas.

*F. Ban Political Advertising on Television and Digital Platforms*

While there are occasional mentions of the idea of banning political advertising, it seldom receives serious consideration in the United States.<sup>253</sup> Given massive advertising costs, the corrupting influence of money on modern politics, and the prevalence of disinformation in advertising, it is time to reconsider this alternative. The massive rise in misinformation has pushed society to the point where it is preferable to ban false advertising, as opposed to allowing the spread of lies, especially in an era where misinformation can be narrowly targeted for maximum effectiveness.<sup>254</sup> In the two-week runup to the most recent British election, Britain's leading fact-checking organization Full Fact identified over eighty-eight percent of the Conservative Party's digital ads as false or misleading.<sup>255</sup>

A ban on all television and digital political advertising would remove a candidate's need for large sums of money to get elected and, with that, the influence major donors have over politi-

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<sup>251</sup> Susan Nash, *Older Adults and Technology: Moving Beyond the Stereotypes*, STAN. CTR. ON LONGEVITY (Apr. 13, 2019), <http://longevity.stanford.edu/older-adults-and-technology-moving-beyond-the-stereotypes/> [https://perma.cc/NE5S-4DS9].

<sup>252</sup> Saida Mamedova & Emily Pawlowski, *A Description of U.S. Adults Who Are Not Digitally Literate*, NAT'L CTR. FOR EDUC. STAT.: U.S. DEP'T. OF EDUC. 1, 3, 5–6 (May 2018), <https://nces.ed.gov/pubs2018/2018161.pdf> [https://perma.cc/RMZ4-6HQQ]; Nash, *supra* note 251.

<sup>253</sup> *But see* Langvardt, *supra* note 78, at 241, 246 (proposing a ban on political advertising and expenditures).

<sup>254</sup> *See generally* Ed. Bd., *supra* note 188; Lightman, *supra* note 49; Ed. Bd., *supra* note 113; Wood & Ravel, *supra* note 10, at 1234–37.

<sup>255</sup> Alastair Reid & Carlotta Dotto, *Thousands of Misleading Conservative Ads Side-Step Scrutiny Thanks to Facebook Policy*, FIRST DRAFT NEWS (Dec. 6, 2019), <https://firstdraftnews.org/latest/thousands-of-misleading-conservative-ads-side-step-scrutiny-thanks-to-facebook-policy/> [https://perma.cc/V87T-FS3E].

cians.<sup>256</sup> Considering where money gets spent during elections, this ban would need to apply to all political television advertising.<sup>257</sup> Less clear is whether it should also apply to internet and social media advertising. Historic spending levels suggest that removing television advertising would remove the overwhelming majority of funds needed to run for office.<sup>258</sup>

However, internet and social media ad spending is growing rapidly, given that people increasingly turn to these outlets for their news and given the ability to micro-target potential voters with ads most designed to appeal to them.<sup>259</sup> Furthermore, if television advertising alone was banned without currently unconstitutional caps on political advertising spending, the large sums of money currently being raised would likely just be diverted to internet and social media. The only reason to consider excluding such materials is that most internet-based advertising can be viewed over longer periods and more carefully than TV ads. Television ads, by virtue of their format, stream in real time, often resulting in viewers not picking up on subtle caveats and phraseology. Internet ads often have the potential to be viewed as a page and carefully scrutinized, as videos can be clicked on and viewed again so that the viewer can digest the material as fully as desired. However, false content is no more likely to be discovered by a viewer simply from careful or multiple viewings, without referencing external information.<sup>260</sup> Based on these considerations taken as a whole, both television and internet advertising would need to fall within the scope of the ban for it to be effective. Other types of advertising, including radio, direct mail, and yard placards, are currently insignificant and unlikely to absorb significant additional expenditures, given their comparative effectiveness.<sup>261</sup> As such, they should be exempt from such a ban, thereby allowing some avenues for candidates to get their message out.

Such a ban would allow politicians to spend far less time fundraising and spend the time saved attending to their actual jobs of legislating. More importantly, it would remove the leash

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<sup>256</sup> Langvardt, *supra* note 78, at 241–42.

<sup>257</sup> *See supra* notes 41–44 and accompanying text.

<sup>258</sup> *See id.*

<sup>259</sup> *See supra* notes 48–51 and accompanying text.

<sup>260</sup> Misleading content, however, may be exposed in some circumstances by careful reexamination.

<sup>261</sup> Kaye, *supra* note 28.

held by lobbyists and big-money donors over politicians and allow a candidate's constituents to take primacy, thereby improving the United States' representative democracy. Given the reduced need for money by candidates, a true publicly funded campaign system could be financially viable. If implemented, this system would remove any remaining corrupting influences of money on the election process, though the need for such funds is likely to be rather modest in light of advertising's elimination. Similarly, it would make it easier for people with less money to run for office successfully.

Equally important, this ban effectively eliminates all the misinformation being spread by deceptive advertising, regardless of the source. Concerns about the future quality of deep-fakes and their ability to deceive people would largely be eliminated. All candidate advertising is banned, but so are ads by PACs and super PACs. Web and social media ads, if based on a United States platform, would be covered by the ban. As a result, everyone would know that if they saw a political ad, it must be from a foreign source, and accordingly should not be trusted. Furthermore, concerns about decisionmaker bias do not apply since there are no real decisions to be made, making a comprehensive ban preferable to a ban based on misleading content.

A ban solves both the money in politics problems and the misinformation problems, even extraterritorially. So, what are the downsides of a ban? From a practical standpoint, there are few negatives to this proposal. Obviously, there is some issue with what exactly constitutes a political advertisement subject to the ban, as many statements have political overtones or values imbedded in them. This concern is less poignant than it might appear at first glance. As proposed, advertisements that attack or promote a candidate, party, or ballot initiative would be prohibited. Public service announcements, like a piece on the effects of climate change on rising coastal water levels, would be excluded from the ban unless they are targeted at a jurisdiction or populace in a jurisdiction that is voting on a matter related to the public service announcement's message. The FEC currently recognizes a difference between express advocacy, advocating for or against a candidate or issue, and issue advocacy, support for or against a policy, with most of the limited regulation being directed at express advocacy.<sup>262</sup> However, since policy issues can

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<sup>262</sup> Garrett, *supra* note 188.

be voted upon apart from candidates, issue advocacy should be included in the advertising ban. A new distinction based on whether the advertisement is designed to promote voting behavior in an upcoming election or merely designed to promote support for a policy viewpoint generally should be used instead.

Another concern is that such a program could favor incumbents in political races, since they are better known than their challengers, and challengers are perceived to need advertising to make themselves known.<sup>263</sup> While there is unquestionably some truth in this concern, this objection is likely an oversimplification of the incumbent's advantage, and the disadvantage can be mitigated. First, incumbents also generally possess a fundraising advantage over challengers.<sup>264</sup> So if advertising is allowed, the money advantage creates the same problems as being lesser known if advertising were prohibited.<sup>265</sup>

Second, the ban applies to advertising, but not to appearing on television generally. Thus, one way for a candidate to make herself known is by appearing in a sanctioned debate. Given the ban on advertising, every candidate listed on the ballot should have a right to appear in any debate for the office. Since this becomes one of the most important ways to get to know the candidates who are running, debate viewership should increase, especially if the electorate is not constantly being bombarded by ads. Furthermore, a debate is the best place for a candidate to put forth arguments for himself and against his opponents, as a debate has built-in accountability—one's opponent will call attention to any attempted misinformation. Another minor enhancement to debates from an advertising ban is that it essentially removes a leading candidate's ability to dodge debating her opponents. With fewer ways to promote oneself, candidates will have a strong incentive to participate in debates.

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<sup>263</sup> See generally Bradley A. Smith, *Campaign Finance Regulation*, UNIV. OF VT. (Sept. 13, 1995), <http://www.uvm.edu/~dguber/POLS125/articles/smith2.htm> [<https://perma.cc/27WF-U6CW>].

<sup>264</sup> Except, of course, if the challenger has meaningful funds of her own that she is willing to spend.

<sup>265</sup> Fowler et al., *supra* note 50, at 5–6 (explaining that the cost to advertise on television is great and commonly cited as part of the incumbency advantage at the federal level); Andrew Cowin, *A Campaign Finance "Reform" That Protects Incumbents*, HERITAGE FOUND. (Sept. 7, 1990), <https://www.heritage.org/election-integrity/report/campaign-finance-reform-protects-incumbents> [<https://perma.cc/2BBG-K5Q9>] (explaining how incumbents' financial advantages over challenger candidates "diminish electoral competition").

The other major way to get known is by appearing on established television shows.<sup>266</sup> This occurs regularly already, with candidates regularly appearing on news and talk shows. Like debates, these shows also provide a level of accountability for truthfulness, albeit to a lesser extent, in the form of questions and pushback from the host. While such pushback will be limited when appearing on a friendly network, the need for a broader appeal will motivate candidates to appear on multiple networks. Furthermore, the veracity rating proposal discussed in the next Section as an additional step would apply to television shows, and will provide additional cautioning against misinformation when candidates appear on a biased platform.<sup>267</sup>

The biggest problem with a ban is that it would clearly violate the First Amendment.<sup>268</sup> A ban is neither narrowly tailored nor the least restrictive means available, as required by current jurisprudence. Such a barrier should not deter the United States from adopting this approach, but it does mean that accomplishing such a step will likely take a significant period of time. As such, one must consider other steps that can be taken in the interim to help solve the problems facing our democracy.

While not a problem per se, a ban on political advertising would do nothing to stop the spread of disinformation by biased or disreputable news outlets.

### G. *Grade Content for Veracity*

A final possible solution—one which the author of this Article advocates taking in conjunction with a ban on television and digital political advertising—is to develop a robust evaluation and grading system for political advertisements, news networks, and news shows to inform consumers of information's veracity until a ban can go into effect. While political fact-checking has been around for some time, and the idea of a ratings system for political advertisements has been tossed around by various commentators,<sup>269</sup> there has been little attempt to fully describe the details of such a system.

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<sup>266</sup> The point of this phraseology is to make clear that buying a full television time slot to run an infomercial would be considered an advertisement rather than a television show appearance.

<sup>267</sup> See *infra* Section IV.G.

<sup>268</sup> See *supra* Section III.A.

<sup>269</sup> See Gillespie, *supra* note 56.

The idea itself is rather simple: all political advertising—until a ban is constitutional—will be rated on its level of veracity before the ad is permitted to run. And every time the ad runs or appears digitally, it must include a banner indicating the rating it received. Similarly, news and opinion shows will receive ratings that will be shown on-screen throughout the show, tied to how forthrightly the shows present the news—with ratings based on frequency and level of deception in what is reported.<sup>270</sup> With easily identifiable tags tied to veracity ratings, people can run whatever advertisements and commentary they wish, and others can consume whatever content they wish, but the consumer will be clearly put on notice about the likelihood they are being misled. Thus, the information consumer is put in a much better position to decide whether the information being digested deserves additional scrutiny before being accepted. An enhanced version of this approach in online media could include links in the ratings banner to more detailed information on why the advertisement is misleading.

Operationalizing this simple concept is somewhat more complex. While such a system does not prohibit any content from reaching consumers, the ratings are still likely to affect consumers substantially over time. As such, it is important to construct this system carefully to minimize the government's role—both to minimize constitutional concerns and to diminish the possibility of favoritism. Limiting the governmental role would also maximize the likelihood that the ratings will be impartial and accurate.

The first thing that must be considered is who gets to conduct the ratings. If the government creates the ratings, this unnecessarily entangles the government in regulating political speech. More importantly, it raises the significant risk of bias in favor of those in power.<sup>271</sup> While allowing private parties to control the process avoids these concerns, it runs a high risk of the entire system becoming meaningless. If a private company can choose to become a rater with few limitations on eligibility, partisan companies will be formed in order to make high veracity ratings available for advertisements and news programs aligning with their orientations.

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<sup>270</sup> See Wood & Ravel, *supra* note 10, at 1229–34 (arguing that “Fake News” is political advertising).

<sup>271</sup> Hasen, *supra* note 11, at 56, 64.



Likewise, allowing content viewers to rate what they are viewing is fraught with peril.<sup>272</sup> The point of a ratings system is to allow experts to help guide people who otherwise could be deceived. The average person is unlikely to have the skills, knowledge, or desire to conduct the fact check necessary to establish a rating that is more than a personal preference. Furthermore, in these polarized times, there is every reason to believe that trolls would give great ratings to sites that confirm their biases and to torpedo sites they disagree with, furthering the self-selection echo chamber problem. One need only look to Sean Spicer's successful run on *Dancing with the Stars*, in spite of being an objectively terrible dancer, to see how people can be mobilized based on their political leanings to support a questionable cause.<sup>273</sup>

Given these concerns, the best approach to verification would be a two-step process whereby one entity promulgates and enforces rules for eligible evaluators, and then approved evaluators engage in the evaluation process. For the first step, allowing one or more private parties to approve potential evaluators runs the risk of bias in who gets approved, which would result in the process being corrupted.

The better approach is to create a bipartisan commission made up of an equal number of representatives from the Democratic and Republican parties.<sup>274</sup> To avoid selection bias that could occur if the president were empowered to nominate candidates for approval and to avoid the risk of unfilled vacancies, both the majority and minority parties in one chamber of congress would select an equal number of representatives to the committee.<sup>275</sup> Any entity wishing to become an evaluator would apply to the committee for approval, and approval would require the positive recommendation of a majority of the total committee.

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<sup>272</sup> Nunziato, *supra* note 4, at 1548 (arguing that allowing people to rate the veracity of news sources may further "entrench information silos and filter bubbles").

<sup>273</sup> Bill Keveney, "Dancing with the Stars": Why Sean Spicer Survives Despite the Lowest Judge Scores, USA TODAY (Nov. 11, 2019, 10:40 AM), <https://www.usatoday.com/story/entertainment/tv/2019/11/11/why-sean-spicer-survives-dancing-stars-rules-explained/2515869001/> [<https://perma.cc/39KV-HRPU>].

<sup>274</sup> While it currently seems unlikely given the long-established existence of a two-party system, if one or more additional parties were to become viable in the future, the composition of and rules governing such a commission would need to be adjusted to create a balanced representation and approval process.

<sup>275</sup> The author expresses no opinion as to whether this function would be better fulfilled by the House or the Senate.

By requiring a majority of the committee to approve an applicant, no applicant could be approved without some level of bipartisan support. This obviously creates a risk of difficulties in getting approved, but the consequences of this are far less harmful than allowing one side to be able to approve biased raters, which could undermine the credibility of the entire process. Furthermore, since each side will want its candidates to be able to advertise, there is a strong incentive to work together to get evaluators approved.

The next question that must be answered is how this commission decides whether to approve an applicant. In order to know whether a company is capable of accurately evaluating the veracity of content, one must examine its record for accuracy and bias. As such, companies that have been engaged in rating content for truthfulness for at least a year would be eligible for immediate certification, pending a review by the commission of their past year's evaluations. Each year, a company will have to reapply for certification based on the prior year's activities to ensure the company remains neutral in its evaluations. For companies with less than a year of evaluations, the committee can provide a set of test evaluations for the applicant to perform, which if passed would allow the company to begin evaluations for the following six months, at which time it would be re-evaluated based on its performance. After a full year of operations, it would be evaluated again and move to a yearly renewal cycle. As membership-based international fact-checking organizations proliferate,<sup>276</sup> the committee could decide that membership in such an organization that has appropriately stringent membership requirements is sufficient for approval. Such deemed sufficiency could further help prevent gridlock by the committee.

One risk to this model would be posed by a start-up company that accurately performs any test created to get accredited but does so with the intent, once licensed, of certifying biased information in the critical months before an election. Even though such a company would not be recertified, the company

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<sup>276</sup> See Glenn Kessler, *Fact-Checking Organizations Around the Globe Embrace Code of Principles*, WASH. POST (Sept. 15, 2016, 10:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2016/09/15/fact-checking-organizations-around-the-globe-embrace-code-of-principles> [<https://perma.cc/Y2AK-SHWH>]; Mark Stencel & Joel Luther, *Annual Census Finds Nearly 300 Fact-Checking Projects Around the World*, DUKE REPORTERS' LAB (June 22, 2020), <https://reporterslab.org/annual-census-finds-nearly-300-fact-checking-projects-around-the-world> [<https://perma.cc/VH5E-JZCM>].

could nonetheless sow havoc for one election cycle and then go out of business, only to re-emerge under a new name a few years later to do the same again. Several measures should be taken to combat this risk. First, new companies—those without a year of past evaluations—should not be approved in the six-month period before a major election cycle. This forces any applicants to have a real and meaningful history that must be reviewed before approval, when the stakes become important. Of course, a company could potentially do its job properly until the election cycle heats up, only to reveal its true intent. To further combat this scenario, the commission should have the power to bring civil and criminal penalties against any company, and its officers, whose accuracy in grading significantly departs from its historical record during an election cycle. Furthermore, companies and their principals could be banned from future certification for such activity. To make these sanctions effective, only companies subject to enforceable United States sanctions can be approved.

In order to post a political advertisement, the candidate, PAC, super PAC, or other person wishing to do so must first have the advertisement rated by any approved evaluator. Allowing groups to choose their evaluator minimizes the regulatory burden being imposed on such party and allows one to avoid any evaluator perceived as biased against one's message. The ad will then be allowed to run by including a banner stating the rating it received. If a party is dissatisfied with a rating, she may have another company perform a second evaluation, but both evaluations would have to be displayed with the ad. Posting an advertisement without its rating banner would subject the poster to criminal penalties and the advertisement from being blocked or removed. Posting a forged banner would subject the poster to similar criminal liability.

The commission will develop the different gradations for rating advertisements, but there should be at least four levels: (1) highly inaccurate, misleading, or false, (2) somewhat inaccurate, misleading, or false, (3) mostly accurate or true, and (4) highly accurate or true. The ratings banner should also have a corresponding color code to make it conspicuous to the viewer. While not absolutely necessary, an additional rating could be created that labels shows and content that are parody or satire.

Furthermore, search engine results could be ordered to make results with more credible ratings appear higher in the results.<sup>277</sup>

A similar evaluation and disclosure process should also be created for news and opinion shows. This step is necessary, given the increasing number of news outlets with clear political biases and the amount of opinion programming such networks contain.<sup>278</sup> As such, a number of these networks and programs are actively engaged in disinformation,<sup>279</sup> and the ability to create a well-informed electorate will remain hampered if such a rating system were confined to advertisements. However, it is impractical, if not impossible, to pre-rate news content as news is developing. Furthermore, news outlets will invariably get some information wrong as stories develop and news breaks, so ratings will need to focus less on whether every detail in every story is accurate and more on a general evaluation of how misleading the show consistently is. As such, the ratings and banner should reflect whether the program in question is (1) highly misleading or untrustworthy, (2) somewhat misleading or untrustworthy, (3) somewhat accurate or trustworthy, or (4) highly accurate or trustworthy based on the prior two to three months' content. By evaluating relatively recent content over a period of time, shows will have an incentive to maintain a higher rating by minimizing bias and deception. Similarly, user-created content from high-profile people, like tweets from a politician, could be rated based on accuracy of recent content, with the account having the rating appended to each post.

Finally, an information campaign must be established to help people understand the color-coded rating system. While many may not fully understand the system at first, the pervasive scope of the system will become well known and well understood by everybody. This would be similar to how virtually every

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<sup>277</sup> See Dieter Bohn & Sean Hollister, *Google is Changing its Search Algorithm To Prioritize Original News Reporting*, VERGE (Sept. 12, 2019, 7:12 PM), <https://www.theverge.com/2019/9/12/20863305/google-change-search-algorithm-original-reporting-news-human-raters> [<https://perma.cc/CD58-RPTS>].

<sup>278</sup> See *supra* notes 79–87 and accompanying text.

<sup>279</sup> See Will Sommer et al., *Fox News Internal Document Bashes Pro-Trump Fox Regulars for Spreading “Disinformation,”* DAILY BEAST (Feb. 6, 2020, 7:58 PM), <https://www.thedailybeast.com/fox-news-internal-document-bashes-john-solomon-joe-digenova-and-rudy-giuliani-for-spreading-disinformation> [<https://perma.cc/UP3J-KMQY>]; Tom Kludt, *Fox Has Been “More Fair”: Why Bernie’s Team Has Had It With MSNBC*, VANITY FAIR (Feb. 18, 2020), <https://www.vanityfair.com/news/2020/02/fox-has-been-more-fair-why-bernies-team-has-had-it-with-msnbc> [<https://perma.cc/7DWA-V97T>].

American can now recite the Miranda warning,<sup>280</sup> even though it was created in the case of *Miranda v. Arizona*,<sup>281</sup> and was not immediately known by the public. One important component of this campaign will be to instill in the public that any web-based content without a rating should be considered highly inaccurate, misleading, or false. This is a necessary step to solve the problem of extraterritorial sources of disinformation. Since the internet is global, this United States' rating and disclosure system will be unable to force foreign sites to comply. However, as people come to understand the banner system, the lack of a rating will effectively act as a poor rating—viewers will know that no rating means it is a foreign site and should be viewed with suspicion. If someone posts a fake banner, that site will be blocked.

This approach has a number of positive attributes. First, it should pass the strict scrutiny test applied to free speech.<sup>282</sup> The government clearly has a compelling state interest in ensuring its citizens are not misinformed, especially about political matters.<sup>283</sup> The regulation is narrowly tailored to accomplish this goal by merely providing information as to likely issues with veracity to put viewers on notice, without blocking such content or otherwise restricting people from viewing whatever content they wish. Finally, it is hard to imagine a less restrictive means to help people avoid being deceived by misinformation than posting a warning about the risk that what one is looking at might be misleading.

Second, even if bias creeps into the approval or ratings system, the harms caused by a warning are far less than the harms that can occur as a result of trying to ban false and misleading content. Furthermore, with a bipartisan approval process, regular renewal requirements, a pre-election barrier on new evaluators, and the economic incentive of raters to be hired for evaluation, there are numerous checks to minimize the risk of bias. Additionally, color-coded banners will constantly remind

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<sup>280</sup> See Cyrus Farivar, *Here's What a "Digital Miranda Warning" Might Look Like*, ARS TECHNICA (Dec. 29, 2016, 7:30 AM), <https://arstechnica.com/tech-policy/2016/12/should-the-miranda-warning-be-expanded-to-encompass-passcodes> [https://perma.cc/TV5B-NSEP].

<sup>281</sup> 384 U.S. 436, 478–79 (1966).

<sup>282</sup> See *supra* notes 139–140 and accompanying text.

<sup>283</sup> *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 349–51 (1995) (recognizing the state's interest in preventing fraudulent statements, which should be all the more compelling today given the proliferation of disinformation).

consumers of the risks associated with the content they are consuming, in a manner that deals with both domestic and foreign sources of misinformation, since there is a clear message to a viewer if there is no banner.

As people come to understand the system fully and trust its ratings over time, politicians, their supporters, and news programming will all have an incentive to be more truthful and accurate to avoid getting poor ratings. As such, the system not only helps inform consumers but also creates a positive-feedback loop that improves the overall quality of information being disseminated. This in turn should help bring society back to a place where people trust the news and have common agreement about the facts of a situation, even if they disagree on how to deal with a given situation.

As for downsides to this approach, there are few. Obviously, such a system does nothing to combat the corrosive influence of money on politics, which is why it should be pursued in conjunction with a constitutional amendment that would permit banning all political advertising. Furthermore, people will likely object, especially in the early phases of such a system, if their preferred information sources receive poor ratings. While this may hurt the acceptance of the system in the short term, information sources will want good ratings, causing them to adjust their behavior and the situation to correct itself. To decrease the risk of such pushback in the program's infancy, one option is to have the rating system apply to only political advertisements for the first few years, so that people can get accustomed to the system without it being perceived to attack an information source that has established trust with its viewers. Once people are used to the system, it could be expanded to news and news opinion programming, hopefully prompting people to reevaluate what they have been consuming if necessary. Finally, there is a cost to having to rate all of this material, but that cost should be minimal compared to the costs of creating content and purchasing advertising time.

#### CONCLUSION

As America worked its way through the 2020 election campaign cycle, it was clear that democracy was struggling. There were, and still are, concerns associated with voter disenfranchisement due to unduly strict voter identification standards, inadequate access to polling stations, and politically motivated

purging of voter rolls. There were, and still are, concerns about the equality of peoples' votes due to gerrymandering. There were, and still are, concerns about the erosion of the constitutional system of checks and balances, as the executive branch grows ever more powerful. There were, and still are concerns about the corrupting influence of money in an era of exponential growth in campaign spending. And there were, and still are concerns about misinformation being disseminated to the masses, by politicians, those acting on their behalf, and foreign-state actors with malicious intent. While no one set of actions will address all of these concerns, it is imperative for the long-term health of the country that these matters are dealt with.

The current corrosive influence of money on politics and the dissemination of disinformation are, in the final analysis, essentially problems with how the United States regulates political speech. The nation and its court system remain wedded to a historical notion that democracy is best served by allowing a full and robust marketplace of ideas, free of virtually any restraints, regardless of the degree to which money removes power from the people or to which misinformation corrupts the market. Given the well-established effectiveness of misinformation in the modern era and the corrupting influence of money on the electoral process, the United States' democracy can no longer afford its *laissez faire* approach to regulating political speech.

However, the risks are very high when one starts restricting political speech. There is a long history of repressive regimes stifling dissenting voices to maintain and increase power, and there is a substantial likelihood that any powers granted to the government to limit political speech will be misused by those in power for their own benefit.

As such, any regulation of political speech must be carefully constructed to minimize or eliminate these risks of abuse while addressing the underlying problems caused by money and disinformation on the electoral process. When the potential solutions to these problems are fully considered in light of the risks each alternative presents, the best approach becomes clear. To deal with the long-term corrupting influence that money has on the political process, as well as the pervasive rise in disinformation from multiple sources, banning political advertising on television, the internet, and social media is the best approach. It would not only effectively remove the need politicians have for vast sums of money, but also remove most avenues for spreading

disinformation, while allowing more accurate information to flow in as a result. Unfortunately, this solution requires a constitutional amendment or radical change in jurisprudence, so it is a long-term solution to work toward.

In the interim, a robust rating and disclosure regime for political advertising would significantly reduce the effectiveness of disinformation, would help promote the spread of accurate information, and would pose minimal risks of abuse. By expanding such a regime to include news network programming, this approach would similarly promote better and more accurately informed voters, making it a desirable modification regardless of whether political advertisements can be banned.

While these approaches will not eliminate all the challenges facing the modern democracy of the United States, they can solve most of the problems being caused by the way political speech is currently regulated.