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INHERENT POWERS AND THE LIMITS OF PUBLIC HEALTH FAKE NEWS

MICHAEL P. GOODYEAR[†]

INTRODUCTION

In a Vero Beach, Florida, supermarket, Susan Wiles rode her motorized cart through the produce aisle.[1] In any year other than 2020 or 2021, this would have been a routine trip to the grocery store. But in 2020, Mrs. Wiles was missing an accessory that had become ubiquitous in society during that year: a face mask.[2] Despite causing a commotion, Mrs. Wiles stood by her decision, claiming that the concerns about COVID-19 were overblown: "I don't fall for this. It's not what they say it is."[3] Mrs. Wiles' statement is emblematic of the year 2020. This is not the era of truth, but of alternative facts, fake news, and disinformation.

For most Americans, the novel coronavirus disease 2019 ("COVID-19") pandemic has dictated our lives for over two years. But the facts that different Americans adhere to have varied considerably. For example, in July 2020, Dr. Stella Immanuel claimed, "This virus has a cure. It is called hydroxychloroquine, zinc, and Zithromax, . . . I know you people want to talk about a mask. Hello? You don't need [a] mask. There is a cure."[4] The "cure," despite lacking any scientific support, was touted by President Donald J. Trump and others to counter medical recommendations for a lockdown.[5] In other cases, individuals followed other "miracle" cures they found on the Internet, such as

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[1] Tara McKelvey, *Coronavirus: Why Are Americans So Angry About Masks?*, BBC NEWS (July 20, 2020), https://www.bbc.com/news/world-us-canada-53477121 [https://perma.cc/S54E-ZU2B].

[2] *Id.*

[3] *Id.*

[4] Daniel Funke, *Don't Fall for This Video: Hydroxychloroquine Is Not a COVID-19 Cure*, KAISER HEALTH NEWS (July 31, 2020), https://khn.org/news/dont-fall-for-this-video-hydroxychloroquine-is-not-a-covid-19-cure [https://perma.cc/Z88X-SFCU].

[5] Christopher Giles, Shayan Sardarizadeh & Jack Goodman, *Hydroxychloroquine: Why a Video Promoted by Trump Was Pulled on Social Media*, BBC NEWS (July 28, 2020), https://www.bbc.com/news/53559938 [https://perma.cc/4843-SJH6].

drinking bleach or concentrated alcohol, the latter of which led to an estimated 800 deaths and over 5,000 hospitalizations worldwide.[6] Others, like Mrs. Wiles, believed rumors that COVID-19 is merely an overblown hoax from which doctors and hospitals can profit.[7] Public faith in COVID-19 vaccines is also being undermined through the widespread circulation of various fake conspiracy theories about the dangers of vaccines and government oversight.[8]

Yet U.S. law largely protects fake news,[9] even if it has led to confusion about proper medical advice and aggravated the state of COVID-19 in the United States. The Supreme Court of the United States has interpreted the First Amendment to protect fake news under the long-standing principles of the marketplace of ideas and counterspeech.[10] Yet the protection of such misinformation during a global pandemic is not just controversial, but deadly. While much scholarship has been written on fake news in general[11] and on ways to constrain it,[12] there has so far been a dearth of legal

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[6] Md Saiful Islam et al., *COVID-19–Related Infodemic and Its Impact on Public Health: A Global Social Media Analysis*, 103 AM. J. TROPICAL MED. & HYGIENE 1621, 1622, 1624 (2020).

[7] *See* Adam Satariano, *Coronavirus Doctors Battle Another Scourge: Misinformation*, N.Y. TIMES (Aug. 17, 2020), https://www.nytimes.com/2020/08/17/technology/coronavirus-disinformation-doctors.html (detailing how doctors and misinformation researchers have described an unprecedented slew of misinformation about healthcare during the COVID-19 pandemic).

[8] Rachel Lerman, *Vaccine Hoaxes Are Rampant on Social Media. Here's How to Spot Them*, WASH. POST (Dec. 18, 2020, 6:00 AM), https://www.washingtonpost.com/technology/2020/12/18/faq-coronavirus-vaccine-misinformation [https://perma.cc/UF3Q-Q7BP].

[9] *See infra* notes 59–66 and accompanying text.

[10] *See infra* notes 66–77 and accompanying text.

[11] *See, e.g.*, Andrea Butler, *Protecting the Democratic Role of the Press: A Legal Solution to Fake News*, 96 WASH. U. L. REV. 419, 420, 421–29 (2018) (discussing how the free press preserves democracy and fake news threatens the press's legitimacy and, ultimately, democracy itself); Marin Dell, *Fake News, Alternative Facts, and Disinformation: The Importance of Teaching Media Literacy to Law Students*, 35 TOURO L. REV. 619, 620 (2019) (discussing the importance of including media literacy in legal education); David O. Klein & Joshua R. Wueller, *Fake News: A Legal Perspective*, 20 J. INTERNET L. 1, 1 (Apr. 2017) (discussing potential legal problems regarding the publication of fake news).

[12] *See, e.g.*, Nabiha Syed, *Real Talk About Fake News: Towards a Better Theory for Platform Governance*, 127 YALE L.J. F. 337, 338 (2017) (advocating for greater regulation by online content platforms); Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 848–49, 869 (2018) (arguing that the marketplace of ideas rationale should only protect different ideas, not different facts); Daniela C. Manzi, Note, *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*, 87 FORDHAM L. REV. 2623, 2623 (2019) (suggesting the regulating of journalists).

scholarship on the legal regulation of fake COVID-19 news.[13] Furthermore, the important approach of inherent powers for public health has been neglected. This Article aims to fill this gap in the literature by exploring inherent powers in the United States and offering a framework for how inherent powers over public health could allow the federal government[14] to regulate fake news

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[13] *See, e.g.*, Chad G. Marzen & Michael Conklin, *Coronavirus "Cures" and the Courts*, 12 WM. & MARY BUS. L. REV. 1, 1 (2020) (discussing liability for fake "cures" for COVID-19); Jack Goldsmith & Andrew Keane Woods, *Internet Speech Will Never Go Back to Normal*, ATLANTIC (Apr. 27, 2020, 3:15 PM), https://www.theatlantic.com/ideas/archive/2020/04/what-covid-revealed-about-internet/610549 [https://perma.cc/QW76-BB4V] (discussing platforms' regulation of COVID-19 misinformation and how this could change the legal censorship landscape moving forward).

[14] While state and local governments also have an important role in fostering public health, see, e.g., Jorge E. Galva et al., *Public Health Strategy and the Police Powers of the State*, 120 PUB. HEALTH REP. 20, 20 (2005) (discussing the doctrine of state police power); Sarah H. Gordon, Nicole Huberfeld & David K. Jones, *What Federalism Means for the US Response to Coronavirus Disease 2019*, JAMA NETWORK (May 8, 2020), https://jamanetwork.com/channels/health-forum/fullarticle/2766033 [https://perma.cc/6LFZ-FH5X] (describing how public health federalism has worked during the COVID-19 pandemic), this Article focuses primarily on the federal government, given that the COVID-19 pandemic and fake news are both nationwide phenomena that necessitate a uniform federal response. Gordon, Huberfeld & Jones, *supra*. Public health has traditionally been addressed primarily at the state level under the Tenth Amendment. *See, e.g.*, Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996) ("Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens."). And as the Supreme Court noted in *Medtronic, Inc. v. Lohr*, public health matters were " 'primarily, and historically, . . . matter[s] of *local* concern,' . . . the 'States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons[.]' " *Id.* (emphasis added) (citations omitted). A global pandemic, on the other hand, is not a limited local outbreak of disease. The wide variation between state responses to COVID-19 measures so far has shown how a federalist public health system is poorly equipped to combat a pandemic. *See* Gordon, Huberfeld & Jones, *supra* ("During an emergency, when the health of the nation depends on acting with coordination and cooperation, the failures of federalism come into sharp relief, forcing us to reconsider one of the most deeply held American beliefs: that decisions made closer to home are inherently better."). In addition, although the exact delineation between state and federal inherent powers over public health has never been fully elucidated, the past 200 years of precedent and practice have shown that the federal government has broad powers over public health. *See Two Centuries of Law Guide Legal Approach to Modern Pandemic*, AM. BAR ASS'N (Apr. 2020), https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-april-2020/law-guides-legal-approach-to-pandemic [https://perma.cc/29WS-76XV]. Quarantine measures have generally been under the purview of the states in U.S. history, but even in this space the federal government likely has the power to act under the Commerce Clause. *See id.*; Alan Dershowitz, *Is Biden's Vaccination Mandate Constitutional?*, NEWSWEEK (Sept. 14, 2021, 9:00 AM), https://www.newsweek.com/bidens-vaccination-mandate-constitutional-opinion-1628586 [https://perma.cc/ASS5-9J7U] (concluding that a pandemic does not

about COVID-19 due to the countervailing public interest outweighing First Amendment considerations.

Part I of this Article establishes the contours and severity of the COVID-19 pandemic. Part II discusses the current status of fake news under prevailing First Amendment precedent. Then, Part III turns to the concept of inherent powers, analyzing how inherent powers have been historically understood both through Supreme Court precedent and as emergency powers. Part III continues by specifically addressing inherent powers related to public health and the inherent power of censoring speech during wartime. Part IV constitutes the main analysis of this Article. First, this Article argues that the traditional First Amendment rationales militate towards lower protections for fake news, especially in the context of COVID-19 misinformation. Next, it evaluates whether restrictions on COVID-19 fake news fit within each of the three historical inherent powers categories: (1) long-standing international custom, (2) powers pursuant to constitutionally enumerated powers, and (3) emergency powers. Finding that there are strong countervailing interests in favor of restricting COVID-19 fake news under all three inherent powers categories, this Article then concludes by looking to the future of government regulation of fake news both in public health and in general.

I. THE COVID-19 PANDEMIC

The COVID-19 pandemic is an unprecedented crisis. COVID-19 began as an epidemic in mainland China, with the first cases being confirmed in Wuhan in December 2019.[15] From February

recognize state boundaries, and is therefore within federal jurisdiction). But such an approach has remained untested, even during the 1918–1919 Spanish Influenza. *Two Centuries of Law Guide Legal Approach to Modern Pandemic*, *supra*. These clauses are especially potent in the context of the online spread of fake news, which practically always involves individuals in more than one state. Amy Watson, *Fake News in the U.S. – Statistics & Facts*, STATISTA (June 16, 2021), https://www.statista.com/topics/3251/fake-news/ [https://perma.cc/N7WR-HLH6] (noting that "almost 80 percent of consumers in the United States reported having seen fake news on the coronavirus outbreak"). The exact limits of public health federalism are outside of the scope of this Article, but even if state governments were given primary regulatory control during a pandemic instead of the federal government, the inherent powers discussed in this Article can also be utilized by state governments to regulate false information regarding public health.

[15] Chaolin Huang et al., *Clinical Features of Patients Infected with 2019 Novel Coronavirus in Wuhan, China*, 395 LANCET 497, 497 (2020).

2020, the coronavirus spread rapidly around the globe.[16] This led the World Health Organization ("WHO") to declare it a pandemic on March 11, 2020.[17]

As of April 1, 2022, there have been nearly 500 million confirmed cases of COVID-19, and over six million deaths.[18] The United States has suffered the largest number of cases and deaths, with over eighty million confirmed cases and nearly one million deaths.[19] For comparison, the number of COVID-19 deaths is over three hundred times that of the number of victims of the September 11, 2001 terrorist attacks .[20] The number of victims of COVID-19 is greater than battle deaths in any U.S. war.[21]

The public health responses to COVID-19 have varied considerably across the globe and the United States. Nearly every country instituted some sort of lockdown or at least issued public health recommendations.[22] These exact measures varied, from blocking international travel and limiting when residents could leave their houses to issuing public health guidelines and even suggesting the consumption of vodka and bleach.[23] The results also varied. For example, while the United States continued to hit prodigious numbers of new daily cases during September 2021,

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[16] Wagner Gouvea dos Santos, *Natural History of COVID-19 and Current Knowledge on Treatment Therapeutic Options*, BIOMEDICINE & PHARMACOTHERAPY, Sept. 2020, at 1.

[17] *Id.*

[18] *COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU)*, JOHNS HOPKINS CORONAVIRUS RES. CTR. (Sept. 16, 2021, 9:21 AM), https://coronavirus.jhu.edu/map.html [https://perma.cc/YSK5-HQRN] (The COVID-19 Dashboard is udpated daily.).

[19] *Id.*

[20] *See September 11 Terror Attacks Fast Facts*, CNN (Sept. 18, 2020, 2:25 PM), https://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/index.html [https://perma.cc/4UJ5-3CSX] (noting that 2,977 people were killed in the September 11 attacks in New York City, Washington, DC, and outside of Shanksville, Pennsylvania).

[21] *See America's Wars*, DEP'T OF VETERANS AFFS. (Nov. 2020), https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf (noting that the greatest number of battlefield deaths was 291,557 in World War II, while the greatest number of overall deaths was in the Civil War, in which 498,332 Union and Confederate soldiers died).

[22] *See Coronavirus: The World in Lockdown in Maps and Charts*, BBC NEWS (Apr. 7, 2020), https://www.bbc.com/news/world-52103747 [https://perma.cc/QD7F-68MC] (charting local and national measures against COVID-19 in every country).

[23] *Id.*; Katie Rogers et al., *Trump's Suggestion That Disinfectants Could Be Used to Treat Coronavirus Prompts Aggressive Pushback*, N.Y. TIMES (Apr. 24, 2020), https://www.nytimes.com/2020/04/24/us/politics/trump-inject-disinfectant-bleach-coronavirus.html.

New Zealand had less than one thousand active cases[24] and Taiwan reported less than fifteen new positive tests per day.[25]

Responses have also varied considerably across U.S. states, both initially and throughout the pandemic. For example, Vermont initially imposed strict quarantine requirements for visitors and only started to re-open after the first wave at a very slow, careful pace.[26] Despite being an initial hot zone of COVID-19 in the spring of 2020, New York City emerged as one of the safer areas of the country by that summer through following stricter social distancing protocols.[27] Meanwhile, more rural states in the Midwest saw a massive spike in the number of cases from fall 2020 through early 2021.[28] Perhaps unsurprisingly, those few states that never instituted stay-at-home orders, such as Iowa, saw a precipitous rise in cases during this period.[29] As one *Atlantic* article succinctly put it, this is "what happens when a government does basically nothing to stop the spread of a deadly virus."[30]

The pandemic also bred an economic crisis in the United States. A 2021 Congressional report painted a bleak picture of the economic fallout from COVID-19, with "elevated levels of poverty, lives upended, careers derailed, and increased social unrest."[31] Among lower-income adults, forty-six percent reported that they

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[24] *COVID-19: Current Cases*, N.Z. MINISTRY HEALTH, https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus/covid-19-data-and-statistics/covid-19-current-cases [https://perma.cc/RNQ2-YGUW] (last updated Sept. 16, 2021, 1:00 PM).

[25] TAIWAN CTRS. FOR DISEASE CONTROL, https://www.cdc.gov.tw/En (last visited Oct. 8, 2021).

[26] Tucker Doherty et al., *Which States Had the Best Pandemic Response?*, POLITICO, https://www.politico.com/news/2020/10/14/best-state-responses-to-pandemic-429376 [https://perma.cc/GF3K-TQ8S] (last updated Oct. 15, 2020, 4:05 PM).

[27] Ivan Pereira, *How New York Has Been Able to Keep Coronavirus at Bay While Other States See Surges*, ABC NEWS (July 17, 2020, 5:05 AM), https://abcnews.go.com/Health/york-coronavirus-bay-states-surges/story?id=71772507 [https://perma.cc/3UZG-XQ97].

[28] Jonathan Levin & Lynn Donaldson, *Covid Ravages Rural America, Sweeping Through Montana's Plains*, BLOOMBERG (Oct. 30, 2020, 7:00 AM), https://www.bloomberg.com/news/articles/2020-10-30/covid-ravages-rural-america-sweeping-through-montana-s-plains.

[29] *See Reopening Plans and Mask Mandates for All 50 States*, N.Y. TIMES, https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html (last updated July 1, 2021) (using maps and charts to show current COVID-19 orders and laws in each state).

[30] Elaine Godfrey, *Iowa Is What Happens When Government Does Nothing*, ATLANTIC (Dec. 3, 2020), https://www.theatlantic.com/politics/archive/2020/12/how-iowa-mishandled-coronavirus-pandemic/617252/ [https://perma.cc/95XL-74QS].

[31] JAMES K. JACKSON ET AL., *Introduction,* CONG. RSCH. SERV., R46270, GLOBAL ECONOMIC EFFECTS OF COVID-19 (July 9, 2021).

"have had trouble paying their bills" since the start of the pandemic.[32] Fifteen percent reported being laid off due to the pandemic, with young adults being the hardest hit.[33] Racial and ethnic minorities were the most affected, with more Latinos and Asian-Americans reporting that someone in their household was laid off than other racial groups.[34] By August 2020, approximately 57.4 million Americans had filed for unemployment benefits since the start of the pandemic, over a fourth of Americans over the age of eighteen.[35] However, even this large number was lower than it could have been due to the Paycheck Protection Program, a multimillion dollar stimulus plan for businesses to retain their employees.[36] In addition, lost jobs led to increased rates of homelessness and evictions in the United States.[37]

States varied widely in how they addressed this economic crisis. Colorado paid out unemployment claims quickly and Iowa and Minnesota paid the highest average wage replacement rates of any state in the country.[38] Massachusetts and Connecticut were standouts in acting to prevent evictions.[39] An agency order by the Centers for Disease Control and Prevention ("CDC") and the Department of Health and Human Services ("HHS"), which was extended several times, temporarily halted residential evictions from September 4, 2020 through August 26, 2021.[40] However, the social and economic responses by individual states have varied considerably, with social distancing measures and economic and

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[32] Kim Parker, Rachel Minkin & Jesse Bennett, *Economic Fallout From COVID-19 Continues to Hit Lower-Income Americans the Hardest*, PEW RSCH. CTR. (Sept. 24, 2020), https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest.

[33] *Id.*

[34] *Id.*

[35] Jack Kelly, *Jobless Claims: 57.4 Million Americans Have Sought Unemployment Benefits Since Mid-March—Over 1 Million People Filed Last Week*, FORBES (Aug. 20, 2020, 11:13 AM), https://www.forbes.com/sites/jackkelly/2020/08/20/jobless-claims-574-million-americans-have-sought-unemployment-benefits-since-mid-marchover-1-million-people-filed-last-week/?sh=161fcda16d59 [https://perma.cc/3K43-SNER].

[36] *Id.*

[37] *Coronavirus Leads to Increase in Homelessness in the US*, DW NEWS (Sept. 26, 2020), https://www.dw.com/en/coronavirus-leads-to-increase-in-homelessness-in-the-us/av-54798441 [https://perma.cc/T6RP-78HD].

[38] Doherty et al., *supra* note 26.

[39] *Id.*

[40] Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292, 55292, 55297 (Sept. 4, 2020); *see also* Alabama Assoc. of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021) (holding that the CDC had almost certainly exceeded its authority and declining to vacate the stay).

legal support coming in noticeably different amounts depending on where one lives.[41]

In short, COVID-19 has upended the American society of yesteryear and caused nearly a million deaths already. There are many reasons why the pandemic harmed the United States to such a degree, including the government squandering opportunities to prepare in advance for the spread of COVID-19, the bloated and inefficient U.S. healthcare system, underfunding of public health, and a voracious resistance in certain sectors—including the Trump White House—to sound social distancing measures.[42] Undoubtedly, one such significant factor is the prevalence of fake news.

False information about COVID-19 has been promulgated on social media, spreading misinformation about how COVID-19 functions, where it came from, and how to treat it.[43] Some of these fake news stories, such as 5G radiation causing COVID-19 or China purposefully creating COVID as a bioweapon,[44] do not directly pose a serious problem to public health. But, as scientific studies have shown, fake news has also been linked to influencing people's behavior regarding public health, including whether they social distance and get tested, or flout scientific opinion and instead opt for conspiracy theories and the like.[45] A significant part of U.S. society encounters fake news and deems it reliable, meaning that fake news poses a significant threat to suppressing the pandemic.[46] Social media and easy access to online

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[41] *The Best and Worst States to Work in America – During COVID-19*, OXFAM, https://www.oxfamamerica.org/explore/issues/economic-well-being/covid-map [https://perma.cc/NL3H-HL4J] (last visited Oct. 8, 2021) (An interactive chart ranking all fifty states' responses to COVID-19.).

[42] *See* Alex Fitzpatrick & Elijah Wolfson, *COVID-19 Has Killed Nearly 200,000 Americans. How Many More Lives Will Be Lost Before the U.S. Gets It Right?*, TIME (Sept. 10, 2020, 6:15 AM), https://time.com/5887432/coronavirus-united-states-failure (describing the myriad reasons why the U.S. COVID-19 response was so ineffective compared to that of other countries); Ed Yong, *How the Pandemic Defeated America*, ATLANTIC (Sept. 2020), https://www.theatlantic.com/magazine/archive/2020/09/coronavirus-american-failure/614191 [https://perma.cc/BD6L-3Q4A] (describing the various ways in which COVID-19 spread quickly in the United States).

[43] Islam et al., *supra* note 6, at 1621.

[44] Mark Easton, *Coronavirus: Social Media 'Spreading Virus Conspiracy Theories'*, BBC NEWS (June 18, 2020), https://www.bbc.com/news/uk-53085640 [https://perma.cc/84T2-SSYJ]; Nic Fleming, *Fighting Coronavirus Misinformation*, 583 NATURE 155, 156 (2020).

[45] Jon Roozenbeek et al., *Susceptibility to Misinformation About COVID-19 Around the World*, 7 ROYAL SOC'Y OPEN SCI. 1, 11–13 (2020).

[46] *Id.* at 12–13.

information has contributed to a dangerous conflagration of misinformation in the midst of a global pandemic, threatening human health and safety.[47] Scientists and the WHO have strongly advocated for countries to take stronger action to stop the spread of fake news about COVID-19.[48] Yet there is a problem with that recommendation in the United States: fake news is protected by the First Amendment.

II. FAKE NEWS UNDER THE FIRST AMENDMENT

Fake news is largely protected as free speech under the First Amendment. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press[.]"[49] It is one of the most sacred rights enshrined in the Bill of Rights, and it is essential to democracy and U.S. culture.[50] While the First Amendment does not directly address false statements in the context of free speech, the Supreme Court has created a regime that protects the vast majority of speech, whether true or false.

As a general rule, free speech is protected by the First Amendment, with the Supreme Court having only identified certain narrow exceptions. The Court has ruled that obscenity,[51]

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[47] Josh Reisberg, *How to Protect IP Against COVID-19 Scammers Leveraging Social Media Algorithms to Legitimize Fake Products*, WESTLAW J. INTELL. PROP., Nov. 10, 2020, at 1.

[48] *COVID-19 Disinformation: How to Spot It—and Stop It*, UNION OF CONCERNED SCIENTISTS (Feb. 12, 2021), https://www.ucsusa.org/resources/covid-19-disinformation; *COVID-19 Pandemic: Countries Urged to Take Stronger Action to Stop Spread of Harmful Information*, WORLD HEALTH ORG. (Sept. 23, 2020), https://www.who.int/news/item/23-09-2020-covid-19-pandemic-countries-urged-to-take-stronger-action-to-stop-spread-of-harmful-information.

[49] U.S. CONST. amend. I.

[50] *See* Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053, 1054 (2016) ("Freedom of speech does more than protect democracy; it also promotes a *democratic culture*.").

[51] *See* Miller v. California, 413 U.S. 15, 24 (1973) (defining obscene materials as those that "appeal to the prurient interest in sex," depict or describe "sexual conduct in a patently offensive way," and lack "serious literary, artistic, political, or scientific value").

defamation,[52] incitement of imminent lawless action,[53] fighting words,[54] true threats,[55] speech integral to criminal conduct,[56] and child pornography[57] are categories of speech that the government may regulate. Commercial speech has also received less First Amendment protection, particularly if the speech is misleading.[58] But fake news is not one of those excluded categories. The Supreme Court has acknowledged that false statements have less value than true ones and that they should receive less protection under the First Amendment.[59] But the Court has only said this in the context of legally cognizable harms.[60] Acknowledging that many falsehoods do not fall within this category, the Supreme

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[52] However, in cases of public interest, plaintiffs must prove a requisite level of intent by the defendant. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (holding that in matters of public interest, "States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth"); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (holding that the law "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not").

[53] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (advocating the use of force or lawbreaking is protected "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

[54] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942) (defining fighting words as those "likely to provoke the average person to retaliation, and thereby cause a breach of the peace").

[55] Virginia v. Black, 538 U.S. 343, 359 (2003) (" 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.").

[56] Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (rejecting the contention that "the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute").

[57] New York v. Ferber, 458 U.S. 747, 764 (1982) (defining child pornography as "limited to works that *visually* depict sexual conduct by children below a specified age").

[58] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980) ("If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed.").

[59] Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective."); Brown v. Hartlage, 456 U.S. 45, 60 (1982) (stating that false statements "are not protected by the First Amendment in the same manner as truthful statements"); *see also* United States v. Alvarez, 567 U.S. 709, 732 (2012) (Breyer, J., concurring) ("Such false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas.").

[60] *Alvarez*, 567 U.S. at 719.

Court reasoned in in *United States v. Alvarez* that "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation[.]"[61] False information can only be restricted if it causes a cognizable harm, namely by way of those statements being either misleading commercial information (fraud) or defamatory.[62]

On the other hand, false information that does not create a concrete injury is protected. Indeed, while *Alvarez* is one of the most recent incarnations of this point, the Supreme Court has repeatedly defended the protection of false information under the First Amendment.[63] The Supreme Court has been reticent to expand the limited exceptions to the First Amendment, worrying that the government could become the ultimate arbiter of free speech.[64] The *Alvarez* Court was less concerned about the dangers of false information than that the ends of free speech and discourse "are not well served when the government seeks to orchestrate public discussion through content-based mandates. . . . Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth."[65]

This protection of false information has been upheld on the basis of needing to preserve a marketplace of ideas and counterspeech.[66] The marketplace of ideas theory is built on the dissent of Justice Oliver Wendell Holmes in *Abrams v. United States* and the concurring opinion of Justice Louis Brandeis in *Whitney v. California*.[67] In *Abrams*, Justice Holmes wrote that "the ultimate good desired is better reached by free trade in

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[61] *Id.* at 718.

[62] *Id.* at 719.

[63] New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) ("[E]rroneous statement is inevitable in free debate, and . . . it must be protected[.]"); NAACP v. Button, 371 U.S. 415, 444–45 (1963) ("[T]he Constitution protects expression and association without regard to . . . the truth, popularity, or social utility of the ideas and beliefs which are offered."); Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) ("[I]n spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.").

[64] Brittany Vojak, Note, *Fake News: The Commoditization of Internet Speech*, 48 CAL. W. INT'L L.J. 123, 145 (2017).

[65] 567 U.S. at 728–29.

[66] Michael P. Goodyear, *Is There No Way to the Truth? Copyright Liability as a Model for Restricting Fake News*, 34 HARV. J. L. & TECH. 279, 285 (2020).

[67] Rodney A. Smolla, *The Meaning of the "Marketplace of Ideas" in First Amendment Law*, 24 COMMC'N L. & POL'Y 437, 437–38 (2019) (citations omitted).

ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market[.]"[68] He noted,

> I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[69]

In *Whitney*, Justice Brandeis reiterated this theory, stating "that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones."[70] Justice Brandeis counseled that "[f]ear of serious injury cannot alone justify suppression of free speech[,]" citing the example of the colonial witch trials.[71] Since these two opinions were published, the Supreme Court has continuously invoked the marketplace of ideas metaphor in First Amendment cases, mentioning it explicitly in over 100 opinions.[72]

The other doctrine that is central to free speech protection is counterspeech. Justice Brandeis was the first to express this doctrine in *Whitney v. California*.[73] He reasoned that "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[74] Counterspeech is an outgrowth from the marketplace of ideas theory.[75] It reacts to speech in the marketplace, creating a fight between ideas.[76] If the marketplace is capable of "distinguishing between truth and falsity," an environment that encourages as much speech as possible is desirable so that the fight between speech and counterspeech will result in the truth.[77]

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[68] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[69] *Id.*

[70] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *majority opinion overruled on other grounds by* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

[71] *Id.* at 376.

[72] Smolla, *supra* note 67, at 438–39.

[73] Philip M. Napoli, *What if More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMMC'NS L.J. 55, 60 (2018).

[74] *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

[75] Napoli, *supra* note 73, at 61.

[76] Dawn Carla Nunziato, *The Marketplace of Ideas Online*, 94 NOTRE DAME L. REV. 1519, 1526 (2019).

[77] Napoli, *supra* note 73, at 61.

Yet these two rationales are deeply problematic, relying on the fantasy of a perfectly rational audience, which is a poor match for how the U.S. population consumes information in the twenty-first century.[78] The marketplace of ideas and counterspeech doctrines only work if one assumes that all participants in the marketplace place a greater value on truth than falsity and that the majority of participants in the marketplace will be exposed to the truth.[79] In addition, the marketplace of ideas should by its very name protect ideas and not facts, which are not debatable.[80]

The breakdown of the marketplace of ideas and counterspeech has accelerated due to technological changes over the past two decades.[81] Public policy professor Philip M. Napoli has identified several potentially fatal problems with these doctrines due to technological advancements.[82] Media ecosystems have transformed practically beyond recognition.[83] Serious journalism has declined due to economic trends harming traditional print media, while fake news is less costly to produce and can generate greater revenues today due to the ease of distribution through the Internet and social media.[84] Gatekeeping by traditional media and journalism has been reduced due to the open access nature of the Internet.[85] Technological advances and algorithms have allowed purveyors of fake news to target individuals who are particularly vulnerable to misinformation.[86]

The marketplace of ideas and counterspeech are also premised on there being an exchange of ideas. Social media and news aggregation services have effectively created filtered bubbles where individuals consume content that matches their pre-existing preferences and opinions, and they are thus not exposed to countervailing ideas.[87] The sheer amount of information online

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[78] Goodyear, *supra* note 66, at 286.

[79] Napoli, *supra* note 73, at 61.

[80] Waldman, *supra* note 12, at 848.

[81] Napoli, *supra* note 73, at 68.

[82] *See generally id.*

[83] *Id.* at 70–71 (describing how the Internet has greatly changed how individuals consume media).

[84] *Id.* at 69–71; Yariv Tsfati et al., *Causes and Consequences of Mainstream Media Dissemination of Fake News: Literature Review and Synthesis*, 44 ANNALS INT'L COMMC'N ASS'N 157, 162 (2020) ("[J]ournalists complain that reporting has become 'increasingly sloppy' and that 'bottom-line pressure is hurting journalism'[.]").

[85] Napoli, *supra* note 73, at 71–74.

[86] *Id.* at 74–77.

[87] *See generally* ELI PARISER, THE FILTER BUBBLE: HOW THE NEW PERSONALIZED WEB IS CHANGING WHAT WE READ AND HOW WE THINK (2011).

has also crippled individuals' ability to distinguish between legitimate and false news.[88] The rapid speed at whichh false news stories are dissemniated over social media is also a serious challenge to the efficacy of the marketplace of ideas doctrine, as consumers quickly learn this false information, and counterspeech must take time to respond and saturate the market.[89]

But despite these serious problems with the marketplace of ideas and counterspeech doctrines, they persist as bases for broad First Amendment protections.[90] As articulated in *Alvarez*, the government cannot regulate fake new because the marketplace of ideas and counterspeech are the proper vehicles for society coming to the truth.[91] To overcome the First Amendment and infringe upon individuals' First Amendment right to spread fake news, there is a very stringent test. To regulate protected speech, the government must meet the high bar of either strict or intermediate scrutiny depending on whether the government is regulating the content of the speech.[92] Strict scrutiny requires a content-based restriction on speech to be narrowly tailored to meet a compelling government interest.[93] Intermediate scrutiny requires a time, place, or manner restriction on speech to be substantially related to an important government interest.[94] These are extremely high barriers to regulating false information.

This strong protection for false information is especially dangerous at this point in history, when fake news has proliferated to an extreme extent. The number of traditional reporters has continued to dwindle while more Americans are turning to the Internet,[95]—and, more specifically, social media—as their primary

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[88] Napoli, *supra* note 73, at 79–85.

[89] *Id.* at 85–87.

[90] *See generally* Michael P. Goodyear, *Priam's Folly: United States v. Alvarez and the Fake News Trojan Horse*, 73 STAN. L. REV. ONLINE 194 (2021) (discussing why the *Alvarez* framework for protecting fake news is a poor fit for the modern online dissemination of disinformation).

[91] United States v. Alvarez, 567 U.S. 709, 727–28 (2012).

[92] Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622, 641–42 (1994).

[93] *See* Johnson v. California, 543 U.S. 499, 505 (2005); Ozan O. Varol, *Strict in Theory, but Accommodating in* Fact, 75 MO. L. REV. 1243, 1245–47 (2010).

[94] *See* United States v. Virginia, 518 U.S. 515, 533 (1996).

[95] *See Digital News Fact Sheet*, PEW RSCH. CTR. (July 23, 2019), https://www.journalism.org/fact-sheet/digital-news (discussing the patterns of U.S. consumption of news from online sources); Peter Suciu, *More Americans Are Getting Their News From Social Media*, FORBES (Oct. 11, 2019, 10:35 AM), https://www.forbes.com/sites/petersuciu/2019/10/11/more-americans-are-getting-their-news-from-social-media/#e1aee33e1791 [https://perma.cc/U45P-22RG] (describing a study that found that social media is an integral part of the modern U.S. population's news diet).

source of news.[96] The marketplace of ideas is no longer filled with ready access to factual counterspeech, but is full of false ideas that are presented as the truth.[97] Getting news from the Internet combines content filters, insular online communities, rapid idea dissemination, profit incentives, and amplification of fringe ideas into a disinformation maelstrom.[98] For example, fake news wreaked havoc during the 2016 election[99] and has even become a tool in war.[100]

Perhaps the most harmful fake news campaigns of them all have been directed against science.[101] For example, law professors Dorit Rubinstein Reiss and John Diamond have found that

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[96] *See* Leonard Downie, Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. JOURNALISM REV. (Nov./Dec. 2009), https://archives.cjr.org/reconstruction/the_reconstruction_of_american.php (describing the Internet's crucial role in U.S. news consumption in the twentieth century, including the possibilities and dangers created by the Internet for journalism and news consumption); Michael Griffin, *How News Has Changed*, MACALESTER (Apr. 10, 2017), https://www.macalester.edu/news/2017/04/how-news-has-changed [https://perma.cc/J9RS-6JSB] (describing the historical trajectory of news and media history in the United States).

[97] *See* Vojak, *supra* note 64, at 130.

[98] Syed, *supra* note 12, at 345–53. The World Economic Forum went as far as denouncing online misinformation as "digital wildfires" that pose a serious global problem. *Digital Wildfires*, WORLD ECON. F., https://reports.weforum.org/global-risks-2018/digital-wildfires (last visited Oct. 8, 2021).

[99] Two notable highlights were fake news stories that alleged that Democratic nominee Hillary Clinton was running a sex trafficking ring from a pizza parlor and selling weapons to the Islamic State. Amanda Robb, *Anatomy of a Fake News Scandal*, ROLLING STONE (Nov. 16, 2017, 3:07 PM), https://www.rollingstone.com/feature/anatomy-of-a-fake-news-scandal-125877 [https://perma.cc/8DWY-D53G]; Hannah Ritchie, *Read All About It: The Biggest Fake News Stories of 2016*, CNBC (Dec. 30, 2016, 2:04 AM), https://www.cnbc.com/2016/12/30/read-all-about-it-the-biggest-fake-news-stories-of-2016.html [https://perma.cc/3JNC-BN2R].

[100] In the 2020 conflict between Armenia and Azerbaijan over Nagorno-Karabakh, both pro-Armenia and pro-Azerbaijan news sources claimed that the other side engaged in a fake news campaign. *See, e.g.*, Dilara Aslan, *Research Reveals Extent of Armenian Fake News on Mercenaries in Nagorno-Karabakh Conflict*, DAILY SABAH (Oct. 8, 2020, 11:00 AM), https://www.dailysabah.com/politics/research-reveals-extent-of-armenian-fake-news-on-mercenaries-in-nagorno-karabakh-conflict/news [https://perma.cc/H5AN-THE8] (accusing Armenians of propagating fake news); Paul Antonopoulos, *Azerbaijani Media & Government Repeatedly Caught Making Fake News About War Against Armenia*, GREEK CITY TIMES (Oct. 8, 2020), https://greekcitytimes.com/2020/10/08/azerbaijan-fake-news [https://perma.cc/T3PG-R6DY] (claiming that Azerbaijanis propagated fake news).

[101] *See* Nicky Woolf, *Obama Is Worried About Fake News on Social Media – and We Should Be Too*, GUARDIAN (Nov. 20, 2016, 1:50 PM), https://www.theguardian.com/media/2016/nov/20/barack-obama-facebook-fake-news-problem [https://perma.cc/UF3X-BX9D] (documenting "myths and lies about vaccination and . . . global warming").

misrepresentation about vaccines creates very real dangers.[102] "A false statement that a vaccine is safe, when it is not," can cause serious harm.[103] False statements that deter people from getting vaccines by incorrectly alleging that they carry certain risks can lead to a larger outbreak by preventing the achievement of herd immunity, risking long-term health complications and even death.[104]

The anti-vaxxer movement in the United States is one of the best-known misinformation campaigns.[105] Its successes have had terrible consequences. In 2017, an outbreak of measles among the Somali-American community in Minnesota was directly linked to anti-vaccine activists' efforts to convince that community that the measles, mumps, and rubella vaccine causes autism.[106] Similar anti-vaxxer campaigns against target populations led to measles outbreaks among the Ultra-Orthodox Jewish communities in Brooklyn in 2013 and 2019.[107] The 2019 outbreak lead to 1,234 confirmed cases of measles, including 125 individuals that needed hospitalization.[108] The public health risks posed by anti-vaxxers led many social media platforms to remove anti-vaxxer content.[109] The danger to society was simply too high.

The spread of anti-scientific views on health and vaccines ballooned during COVID-19 and intensified the dangers of the

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[102] *See generally* Dorit Rubinstein Reiss & John Diamond, *Measles and Misrepresentation in Minnesota: Can There Be Liability for Anti-Vaccine Misinformation That Causes Bodily Harm?*, 56 SAN DIEGO L. REV. 531 (2019).

[103] *Id.* at 561.

[104] *Id.*

[105] *See* Jan Hoffman, *How Anti-Vaccine Sentiment Took Hold in the United States*, N.Y. TIMES (Mar. 26, 2021), https://www.nytimes.com/2019/09/23/health/anti-vaccination-movement-us.html (discussing the history of the anti-vaxxer movement in the United States); Azhar Hussain, Syed Ali, Madiha Ahmed & Sheharyar Hussain, *The Anti-Vaccination Movement: A Regression in Modern Medicine*, CUREUS, July 3, 2018, at 1–5 (reviewing the rise of the modern anti-vaxxer movement, the importance of the Internet in its rise, and the repercussions for public health).

[106] Rubinstein Reiss & Diamond, *supra* note 102, at 532, 551 (explaining that fourteen children were hospitalized and one narrowly avoided death, having been on a ventilator for fifteen days after developing Measles pneumonia).

[107] Barbara Pfeffer Billauer, *When Public Health Is Eroded by Junk Science: Muzzling Anti-Vaxxer FEAR Speech — and the First Amendment*, (Mar. 9, 2020) (manuscript at 9–10), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3550670.

[108] Stephanie Soucheray, *US Measles Cases Hit 1,234 as Brooklyn Outbreak Called Over*, CIDRAP (Sept. 3, 2019), https://www.cidrap.umn.edu/news-perspective/2019/09/us-measles-cases-hit-1234-brooklyn-outbreak-called-over.

[109] *See* Page Trotter & Scott Stroud, *Case Study: Anti-Vax Censorship on Social Media—Limiting or Lifesaving?*, 30 MEDIA ETHICS, 2019, at 1 (describing the restriction of anti-vaxxer content by websites such as Pinterest and Amazon).

pandemic. The COVID-19 pandemic has had a much greater impact on the United States than the isolated outbreaks of others diseases, which only impacted certain communities. Unlike the measles outbreaks in Minnesota and Brooklyn, COVID-19 was not caused by false information.[110] However, the trajectory of COVID-19 in the United States has been greatly affected by the spread of fake news about the coronavirus.[111] As mentioned above, fake news about COVID-19 has affected people's public health behavior.[112] An ongoing study by Princeton University has identified thousands of fake news stories about COVID-19 on social media.[113] Fake news is especially likely to spread in the context of COVID-19, as individuals seek out anything to regain a sense of control over an existential threat.[114] The inverse is also true: people tend to downplay factual information that is threatening.[115] Continuing resistance to wearing face masks is directly counter to medical advice, which recommends them as one of the most effective ways to reduce the spread of COVID-19.[116] Many still believe that COVID-19 is no worse than the seasonal flu, despite epidemiologists reporting that COVID-19 is likely far deadlier than the flu, with a fatality rate of 0.5–1% versus 0.1%

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[110] *See* Claire Felter, *Will the World Ever Solve the Mystery of COVID-19's Origin?*, COUNCIL ON FOREIGN RELS. (June 3, 2021, 2:05 PM), https://www.cfr.org/backgrounder/will-world-ever-solve-mystery-covid-19s-origin?gclid=CjwKCAjwos-HBhB3EiwAe4xM94VhrPffUoppN9nFK_yABp-zqHYf3RdxpFUnoByGiOSv9fB2OzJP5hoCKTcQAvD_BwE (explaining that while the exact cause of COVID-19 is unknown, many scientists believe it spread from animals to humans).

[111] *See* Zara Abrams, *Controlling the Spread of Misinformation*, AM. PSYCH. ASS'N (Mar. 1, 2021), https://www.apa.org/monitor/2021/03/controlling-misinformation.

[112] *See supra* Part I.

[113] Jacob N. Shapiro, Jan Oledan & Samiskshya Siwakoti, *ESOC COVID-19 Misinformation Dataset*, EMPIRICAL STUD. CONFLICT (2020), https://esoc.princeton.edu/publications/esoc-covid-19-misinformation-dataset.

[114] Greg Nyilasy, *Fake News in the Age of COVID-19*, PURSUIT (Apr. 10, 2020), https://pursuit.unimelb.edu.au/articles/fake-news-in-the-age-of-covid-19 (explaining that, for the same reason, in the past people turned to magical beliefs or religion to regain some sense of control over natural disasters).

[115] *Id.* (noting examples of cigarette and alcohol consumption in the past).

[116] *See, e.g.*, Jason Abaluck et al., *The Case for Universal Cloth Mask Adoption and Policies to Increase the Supply of Medical Masks for Health Workers*, (Apr. 1, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3567438 (describing the efficacy of universal cloth mask adoption to stem the onslaught of COVID-19); *see also* Elizabeth Chuck, *Necessary or Needless? Three Months into the Pandemic, Americans Are Divided on Wearing Masks*, NBC NEWS (June 17, 2020, 3:03 AM), https://www.nbcnews.com/news/us-news/necessary-or-needless-three-months-pandemic-americans-are-divided-wearing-n1231191 [https://perma.cc/7Z75-XBYX] (describing Americans' contrary views on wearing masks during the COVID-19 pandemic).

for influenza.[117] Others turned to false treatments such as hydroxychloroquine, which in turn breeds a false sense of safety among individuals.[118] Those suggesting working towards herd immunity also ignored the untold numbers of deaths it would cause, as presented by the example of Sweden, which aimed for herd immunity only to have much higher rates of death than its neighbors.[119] This confusion and misunderstanding about the dangers of COVID-19 has only aggravated its harm to Americans.[120]

Even now that there are viable vaccines for COVID-19, individuals, especially anti-vaxxers, have sowed much doubt about the side-effects of the vaccine and spread associated conspiracy theories.[121] For months before viable vaccines were first released to the public in December 2020,[122] conspiracy theories about, for instance, vaccines containing microchips and tracking technology were widely shared on social media.[123] These claims, despite being widespread, are baseless.[124] Other fake news stories exaggerated true stories to extreme degrees. A report that people who took the Pfizer COVID-19 vaccine developed Bell's palsy was true, but the number of cases was only four out of 22,000 recipients, a rate that is consistent with the normal incidence of Bell's palsy in the population.[125] Despite this non-threat, the exaggerated story

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[117] Tanya Lewis, *Eight Persistent COVID-19 Myths and Why People Believe Them*, SCI. AM. (Oct. 12, 2020), https://www.scientificamerican.com/article/eight-persistent-covid-19-myths-and-why-people-believe-them [https://perma.cc/YY2J-DDUH].

[118] *See id.*

[119] *Id.* Not to mention that Sweden provides universal healthcare to its citizens, which is not the case in the United States. Shawn Radcliffe, *Why Sweden's COVID-19 Strategy Can't Work in the U.S.*, HEALTHLINE (June 4, 2020), https://www.healthline.com/health-news/heres-what-happened-in-sweden-and-you-cant-compare-it-to-u-s [https://perma.cc/Z8VT-QA4M].

[120] Marianna Spring, *Coronavirus: The Human Cost of Virus Misinformation*, BBC NEWS (May 27, 2020), https://www.bbc.com/news/stories-52731624 [https://perma.cc/DT25-M9F2].

[121] Jack Goodman & Flora Carmichael, *Covid Vaccine: 'Disappearing' Needles and Other Rumors Debunked*, BBC NEWS (Dec. 20, 2020), https://www.bbc.com/news/55364865 [https://perma.cc/8667-G5LK]; Lerman, *supra* note 8; Lewis, *supra* note 117.

[122] *See* Peter Loftus & Betsy McKay, *The COVID-19 Vaccine: When Will It Be Available for You?*, WALL ST. J. (Dec. 11, 2020, 9:49 AM), https://www.wsj.com/articles/the-covid-19-vaccine-when-will-it-be-available-for-you-11606339361 (describing the rollout of vaccines after they were first released in December 2020).

[123] Katherine J. Wu, *No, There Are No Microchips in Coronavirus Vaccines.*, N.Y. TIMES (Dec. 17, 2020, 1:35 PM), https://www.nytimes.com/2020/12/17/technology/no-there-are-no-microchips-in-coronavirus-vaccines.html.

[124] *Id.*

[125] Lerman, *supra* note 8.

gained popularity on social media, fostering vaccine hesitancy.[126] Social media companies have tried to limit the spread of fake COVID-19 news, but fake news stories are still shared quickly and widely across social media communities.[127] The spread of doubt about vaccines is a serious risk to public health. Indeed, the WHO declared vaccine hesitancy one of its top ten global health risks in 2019.[128] Francesco Rocca, President of the International Federation of Red Cross and Red Crescent Societies, described fake news about COVID-19 and the virus as a "parallel pandemic" that must be defeated.[129] The undermining of public faith in vaccines through the circulation of fake news poses a serious problem to achieving herd immunity and ultimately ending the COVID-19 pandemic.

These false beliefs, and their spread, are perhaps just as dangerous as the virus itself.[130] If everyone followed proper social distancing protocols and public health advice, "the number of new cases you could count on your fingers and toes," said Andy Slavitt, President Barack Obama's former acting Administrator of the Centers for Medicare and Medicaid Services.[131] But fake news about COVID-19 undermines adherence to this sound public health advice.[132] Scientists and the WHO have strongly advocated for countries to take stronger action to stop the spread of fake news regarding COVID-19.[133] Scholars have suggested that the

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[126] *Id.*

[127] *Id.*

[128] *Ten Threats to Global Health in 2019*, WORLD HEALTH ORG., https://www.who.int/news-room/spotlight/ten-threats-to-global-health-in-2019 (last visited Oct. 8, 2021).

[129] Harmeet Kaur & Naomi Thomas, *'Fake News' About a Covid-19 Vaccine Has Become a Second Pandemic, Red Cross Chief Says*, CNN (Dec. 1, 2020, 1:21 PM), https://www.cnn.com/2020/12/01/media/red-cross-chief-warns-vaccine-mistrust-trnd/index.html [https://perma.cc/U5B8-66E5].

[130] *See* John Naughton, *Fake News About COVID-19 Can be as Dangerous as the Virus*, GUARDIAN (Mar. 14, 2020, 12:00 PM), https://www.theguardian.com/commentisfree/2020/mar/14/fake-news-about-covid-19-can-be-as-dangerous-as-the-virus [https://perma.cc/3XZU-7CA4] (describing how the dangers of misinformation about COVID-19 can worsen the pandemic).

[131] Craig Welch, *There Is a Path Out of America's COVID-19 Mess—If We Choose to Take It*, NAT'L GEOGRAPHIC (Aug. 27, 2020), https://www.nationalgeographic.com/science/article/the-path-out-united-states-coronavirus-mess-choose-to-take-it-cvd#close [https://perma.cc/9SLD-M6GH].

[132] Roozenbeek et al., *supra* note 45, at 1, 13.

[133] *COVID-19 Disinformation: How to Spot It—and Stop It*, *supra* note 48; *COVID-19 Pandemic: Countries Urged to Take Stronger Action to Stop Spread of Harmful Information*, *supra* note 48.

government and social media should act to block fake news.[134] Keeping COVID-19 under control, which may require staunching the flow of COVID-19 fake news, is an essential prerequisite for life in the United States, and the U.S. economy, to return to normal.

In response to this problem, at least one piece of legislation has been proposed that aligns with those suggestions. On July 22, 2021, Senator Amy Klobuchar introduced the Health Misinformation Act of 2021 in the Senate.[135] The bill would carve out an exception to Section 230 of the Communications Decency Act, which immunizes websites from content posted on their platform by third-parties or for good faith restriction of access to such material by the platform.[136] The bill would remove this immunity for a website that, during a public health emergency, promotes third-party posted "health misinformation through an algorithm used by the provider (or similar software functionality)."[137] However, if this law is passed, in effect, it would do nothing, as there is no underlying cause of action for health misinformation, so no claim could be brought against online platforms.[138]

In addition, as explained above, such approaches to health misinformation face a critical roadblock: fake news is protected by the First Amendment. Unlike false commercial speech, like the marketing of counterfeit medical protective products,[139] fake news is generally not circumscribed by legal restrictions. This has been the case even with COVID disinformation, as a district court recently noted in dicta.[140] Scholars have tried to formulate First

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[134] Nyilasy, *supra* note 114.

[135] S. 2448, 117th Cong. (2021).

[136] *Id.*; 47 U.S.C. § 230(c).

[137] S. 2448.

[138] *See* Mike Masnick, *Senators Klobuchar and Lujan Release Ridiculous, Blatantly Unconstitutional Bill to Make Facebook Liable for Health Misinformation*, TECHDIRT (July 23, 2021, 9:28 AM), https://www.techdirt.com/articles/20210722/17302447227/senators-klobuchar-lujan-release-ridiculous-blatantly-unconstitutional-bill-to-make-facebook-liable-health-misinformation.shtml [https://perma.cc/T596-XVRW].

[139] Reisberg, *supra* note 47, at 3.

[140] *See* Cohoon v. Konrath, No. 20-cv-00620-BHL, 2021 WL 2356069, at *5 (E.D. Wis. Sept. 24, 2021). In *Cohoon*, a sheriff forced a teenager to remove a social media post in which she said she tested positive for COVID. Although the teenager ultimately tested negative for COVID, her statement was not false, as her doctor told her that she may have been positive despite the negative test. The court, citing to *Alvarez*, noted that "even if Amyiah's posts had been untruthful, no court has ever suggested that noncommercial false speech is exempt from First Amendment scrutiny." *Id.* (citing 567 U.S. at 720).

Amendment arguments to restrict fake news in the context of public health. Rubinstein Reiss and Diamond tried to fit actual injuries due to fake news over vaccines into a tort liability context for misrepresentation, allowing free speech while imposing consequences for negligently or intentionally providing misleading information on vaccines.[141] Bioethics scholar Barbara Pfeffer Billauer recommends a new First Amendment balancing test that will weigh the interests of free speech against the dangers posed by the anti-vaxxer movement.[142] These new modifications of First Amendment doctrine might be viable long-term, but in the short term, there is another avenue for regulating COVID-19 fake news that has so far been largely unexamined in legal literature: inherent powers.

III. INHERENT POWERS

The dangers of fake news to the spread of COVID-19 are significant, yet current First Amendment doctrine effectively prevents the U.S. government from regulating fake news. However, despite U.S. law generally being considered to flow from enumerated powers in the Constitution, there is also a body of law around the U.S. government's inherent powers, those that are innate to all independent governments in the world.[143] Inherent powers have been recognized many times by the Supreme Court and, indeed, have been recognized in the public health and free speech contexts specifically.[144] Due to the undefined nature of many inherent powers, a brief history of inherent powers in general, emergency powers, public health inherent and emergency powers, and emergency censoring of speech is necessary to lay the analytical framework for regulating fake news through inherent federal powers.

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[141] Rubinstein Reiss & Diamond, *supra* note 102, at 560–62.

[142] Pfeffer Billauer, *supra* note 107, at 22–28 (advocating for adapting the imminent lawless incitement test from *Brandenburg v. Ohio* into a two-pronged time-phase inquiry, which looks at whether the measure will be used to stem published health misinformation during or before an outbreak).

[143] *See generally* Johnson v. M'Intosh, 21 U.S. 543 (1823) (holding that the federal government has inherent powers).

[144] *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 26–27 (1905) (regarding public health); Gilbert v. Minnesota, 254 U.S. 325, 332 (1920) (regarding free speech); Frohwerk v. United States, 249 U.S. 204, 206 (1919) (regarding free speech).

A. Inherent Powers in U.S. Law

In the seminal Supreme Court case of *McCulloch v. Maryland*, Chief Justice John Marshall unequivocally concluded that "[t]his government is acknowledged by all, to be one of enumerated powers."[145] This was reaffirmed more recently by Chief Justice William Rehnquist in *United States v. Lopez*, where he wrote, "[w]e start with first principles. The Constitution creates a Federal Government of enumerated powers."[146] Some scholars, such as law professor Steven G. Calabresi, welcomed this statement as a "long overdue" return to the federal government being one of "limited and enumerated powers."[147]

Yet despite these forceful assertions, the powers of the federal government are not limited to those enumerated in the Constitution. As law professor David S. Schwartz has argued, the federal government is not really limited to enumerated powers; by the Constitution's very nature, implied or inherent powers are necessary.[148] Even Chief Justice Marshall understood this, stating in *McCulloch*: "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code . . . ."[149] The Constitution enumerates its "great outlines" and "important objects," but much must still be "deduced."[150]

In deducing the rest, the Supreme Court has recognized a series of federal powers based on the concept of inherent powers.[151] An inherent power is "[a] power that necessarily derives from an office, position, or status."[152] It is a power that can neither be found in the text of or indirectly implied in the Constitution.[153] By their very nature, inherent powers are nebulous and ill-defined, with

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[145] 17 U.S. 316, 405 (1819).

[146] 514 U.S. 549, 552 (1995).

[147] *See* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 752 (1995).

[148] *See* David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumeration*, 59 ARIZ. L. REV. 573, 609–10 (2017) (describing how legislative powers granted by the Constitution could not function without implied powers).

[149] *McCulloch*, 17 U.S. at 407.

[150] *Id.*

[151] *See id.*; Johnson v. M'Intosh, 21 U.S. 543, 574, 589 (1823); Prigg v. Pennsylvania, 41 U.S. 539, 618–19 (1842).

[152] *Inherent Power*, BLACK'S LAW DICTIONARY (11th ed., 2019).

[153] Cheng-Yi Huang, *Unenumerated Power and the Rise of Executive Primacy*, 28 WASH. INT'L L.J. 395, 426 (2019).

the term "inherent" being open to a flood of interpretations.[154] But at the very least, inherent powers are not unchecked powers.[155] By analyzing some of the most significant Supreme Court decisions and emergency actions by different presidential administrations in the past two centuries, three specific veins in inherent powers emerge.[156]

1. Supreme Court Precedent

The doctrine of inherent powers has a longstanding position in Supreme Court jurisprudence that has developed over time. In *Johnson v. M'Intosh*, in 1823, the Supreme Court recognized the discovery doctrine, the ability to acquire territory through discovery or, rather, conquest, based on the "universal recognition of these principles."[157] This was one of the earliest invocations of inherent powers of the federal government. The issue in that case was who had proper title to a plot of land in Georgia, an individual who had earlier purchased the land from the Indian tribes that controlled it or a different individual who later purchased the land directly from the U.S. government.[158] Chief Justice John Marshall found that the nations of Europe, such as Great Britain, Spain, Portugal, France, and Holland, had recognized the right of occupancy by Indians, but also "a power [of the European

[154] Louis Fisher, *Introduction: Invoking Inherent Powers: A Primer*, 37 PRESIDENTIAL STUD. Q. 1, 2 (2007).

[155] *See* Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480, 2483 (2006) (comparing American inherent executive power practices with those of the United Kingdom, Germany, France, Mexico, and South Korea, concluding that all of these nations have recognized that limits must be placed on executive power).

[156] There is also substantial jurisprudence over the inherent powers of courts. *See, e.g.*, Dietz v. Bouldin, 136 S. Ct. 1885, 1890 (2016) (holding that "a federal district court has the inherent power to rescind a jury discharge order and recall a jury for further deliberations after identifying an error in the jury's verdict"); Chambers v. NASCO, Inc., 501 U.S. 32, 35 (1991) (holding that the "District Court, sitting in diversity, properly invoked its inherent power in assessing as a sanction for a party's bad-faith conduct attorney's fees and related expenses paid by the party's opponent to its attorneys"). There are also several Supreme Court cases on the inherent powers of Indian tribes. *See, e.g.*, United States v. Lara, 541 U.S. 193, 196 (2004) (holding that Indian tribes could prosecute nonmember Indians as an exercise of their inherent authority); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982) (affirming that Indian tribes have inherent powers subject only to the restrictions of the U.S. Constitution, federal statutes and regulations, and the Jicarilla Apache Constitution). However, these two sets of inherent power precedent are outside of the scope of this Article, which focuses on inherent federal legislative and executive powers.

[157] Johnson v. M'Intosh, 21 U.S. 543, 574, 587–589 (1823); *see also* Jones v. United States, 137 U.S. 202, 212 (1890).

[158] *M'Intosh*, 21 U.S. at 550–62.

governments] to grant the soil, while yet in possession of the natives."[159] Therefore, title granted by the tribes prior to the land coming under U.S. authority was not valid.[160] Justice Marshall recognized that "neither the declaration of independence, [sic] nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled."[161] In other words, the United States had inherent powers, but those inherent powers were no greater than those of other nations, since they were inherent to nationhood itself. Justice Marshall then recognized the right of ownership through discovery as an inherent national right:

> If the discovery be made, and possession of the country be taken under the authority of an existing government . . . it is supposed to be equally well settled, that the discovery is made for the whole nation, that the country becomes a part of the nation, and that the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national domains, by that organ in which all vacant territory is vested by law.[162]

The next major invocation of inherent powers was in the 1842 case of *Prigg v. Pennsylvania*. In *Prigg*, the Supreme Court recognized the power to legislate in effectuation of the rights and duties provided for under the Constitution.[163] The issue was whether Pennsylvania's personal liberty law, under which Prigg was prosecuted for capturing an escaped slave from Maryland inside Pennsylvania, was constitutional.[164] Pennsylvania's law was preempted by the federal Fugitive Slave Act, but Pennsylvania argued that since the Fugitive Slave Act was not an enumerated power of Congress under the Constitution, it was invalid.[165] The Supreme Court instead found that the Constitution guaranteed possession of enslaved peoples, and "the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it."[166] The Court explicitly rejected limiting Congress' powers to those

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[159] *Id.* at 574–81.
[160] *Id.* at 604–05.
[161] *Id.* at 584.
[162] *Id.* at 595.
[163] *See* Prigg v. Pennsylvania, 41 U.S. 539, 616 (1842).
[164] *Id.* at 539.
[165] *Id.* at 618, 622.
[166] *Id.* at 615.

enumerated in the Constitution.[167] The federal government is inherently provided with the means, or legislative authority, "to carry into effect all the rights and duties imposed upon it by the [C]onstitution."[168] Although the slavery upon which *Prigg* was premised has been long since overturned, the principle of inherent powers from *Prigg* is still extant.

Following *Prigg*, the 1880s proved to be the busiest period of inherent powers decisions in the Supreme Court, with the Court deciding four important decisions on inherent powers during this decade. In the first of these, *United States v. Jones*, the Court recognized the inherent power to take private property for public uses, the right of eminent domain.[169] The case was centered on lands in Wisconsin that had been ceded in 1846 by the federal government to the state to improve navigation along the Fox and Wisconsin Rivers.[170] The land was eventually transferred to the Green Bay and Mississippi Canal Company, but in 1870, Congress passed a law authorizing the payment of a lump sum to reacquire the land it had ceded in 1846.[171] The actual issue in the case was whether the federal government was obligated to pay for damages caused by the dams flooding third parties' lands.[172] In one part of the decision, the Court rejected the notion that a taking is not lawful until proper compensation is made, instead concluding that "[t]he power to take private property for public uses, generally termed the right of eminent domain, *belongs to every independent government*."[173] It then states that eminent domain is "an *incident of sovereignty*, and . . . requires no constitutional recognition."[174] The Fifth Amendment Takings Clause is "merely a limitation upon the use of the [inherent] power . . . of disposing, in case of necessity and for the public safety, of all the wealth of the country."[175]

A year later, in *Juilliard v. Greenman*, better known as the *Legal Tender Case*, the Supreme Court held that the federal government could make paper money legal tender for private debts.[176] The issue in the case was whether United States legal

[167] *Id.* at 618.
[168] *Id.* at 616.
[169] 109 U.S. 513, 518–19 (1883).
[170] *Id.* at 513.
[171] *Id.* at 514.
[172] *Id.* at 514–15.
[173] *Id.* at 518 (emphasis added).
[174] *Id.* (emphasis added).
[175] *Id.* at 518–19.
[176] 110 U.S. 421, 449–50 (1884).

tender notes could be legal tender for all public and private debts.[177] The Supreme Court found that "Congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments."[178] The Court noted that "impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a *power universally understood to belong to sovereignty*."[179] The fact that this practice was long-standing was of particular importance for the Court.[180] The Court also saw the inherent power to make legal tender fortified by the constitutional vesting of Congress with the exclusive power to coin money.[181] The fact that this decision turned on inherent powers is further suggested by the dissent, which explicitly opposed inherent powers.[182] Despite the dissent's protests, inherent powers were once again recognized by the Court.

In *United States v. Kagama*, the Supreme Court returned to questions of sovereignty and American Indian tribes. The issue presented in the case was whether the Major Crimes Act, which allowed the federal government to prosecute felonies by Indians against other Indians in Indian country, was constitutional.[183] The Constitution itself is nearly silent in regard to relations with Indian tribes within the United States' borders.[184] The Court did not find the two clauses in the Constitution that do mention Indian tribes, the "*Indians not taxed*" clause and the Commerce Clause, helpful to answering the question at hand.[185] Instead, the Supreme Court relied on inherent powers, concluding that,

> this power of [C]ongress to organize territorial governments, and make laws for their inhabitants, arises, not so much from the clause in the [C]onstitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States, as *from the ownership of the country* in which the territories are, and the *right of exclusive sovereignty*

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[177] *Id.* at 421–22.

[178] *Id.* at 447.

[179] *Id.* (emphasis added).

[180] *See id.* at 447–48.

[181] *Id.* at 448.

[182] *Id.* at 467 (Field, J., dissenting) ("Congress can exercise no power by virtue of any supposed inherent sovereignty in the general government.").

[183] 118 U.S. 375, 375–76 (1886) (referring to the Major Crimes Act as the ninth section of the Indian Appropriation Act of March 3, 1885, 23 Stat. 385).

[184] *Id.* at 378.

[185] *Id.* at 378–79.

which must exist in the national government, and can be found nowhere else.[186]

The Court held that Congress has the power to legislate for Indian tribes through an inherent duty of protection over all U.S. territory.[187]

In the final inherent powers case from the 1880s, the *Chinese Exclusion Case*, or *Ping v. United States*, the Court held that the federal government had the inherent power to exclude aliens from its territory, deeming it a power "incident of every independent nation."[188] While the power to exclude foreigners is not explicitly granted by the Constitution, the Supreme Court found that the "power of exclusion of foreigners [is] an *incident of sovereignty* belonging to the government of the United States as a part of those sovereign powers delegated by the [C]onstitution."[189]

Then, nearly fifty years later, in perhaps the greatest endorsement of inherent powers, Justice George Sutherland wrote in *United States v. Curtiss-Wright Export Corp.* that the federal government had complete authority over foreign affairs, reasoning that otherwise the United States would not hold complete sovereignty on par with the rest of the family of nations.[190] The Supreme Court determined that not all powers of the federal government are articulated in the Constitution, nor need they be.[191] Justice Sutherland noted that "[t]he powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, *would have vested in the federal government as necessary concomitants of nationality*."[192] In referring to other inherent powers, the Court concluded that those powers need not be expressed in the Constitution, as they "exist as *inherently inseparable* from the conception of nationality."[193] While the opinion in *Curtiss-Wright* has been criticized,[194] it is still

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[186] *Id.* at 380 (emphasis added).

[187] *Id.* at 383–85.

[188] 130 U.S. 581, 603 (1889); *see also* Fong v. United States, 149 U.S. 698, 711 (1893) ("The right to exclude or to expel all aliens, or any class of aliens . . . [is] an inherent and inalienable right of every sovereign and independent nation . . . .").

[189] *Ping*, 130 U.S. at 609 (emphasis added).

[190] 299 U.S. 304, 318 (1936).

[191] McCulloch v. Maryland, 17 U.S. 316, 419–21 (1819).

[192] *Curtiss-Wright*, 299 U.S. at 318 (emphasis added).

[193] *Id.* (emphasis added).

[194] *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 6–7 (2002) (discussing various scholars' criticisms of *Curtiss-Wright*

valid law. Indeed, while *Curtiss-Wright* may be one of the clearest articulations of inherent powers, inherent powers had been long established in a variety of legal spheres, as articulated above.[195] Law professor Cheng-Yi Huang notes that although *Curtiss-Wright* often stands for the proposition that the President is the sole organ of foreign affairs, it is more accurately read in the broader arc of inherent powers in U.S. law, under which the federal government has long relied on inherent powers to justify its actions in both foreign and domestic affairs,[196] such as in the examples above.

Then, in 1952, the Supreme Court addressed the bounds of inherent powers in *Youngstown Sheet & Tube Co. v. Sawyer*. In *Youngstown*, President Truman ordered the Secretary of Commerce to take direct control of steel plants in response to nationwide labor strikes.[197] The government "asserted that a strike disrupting steel production for even a brief period would so endanger the well-being and safety of the Nation that the President had 'inherent power' to do what he had done[.]"[198] The government argued that the President had this power pursuant to his authority as the Commander in Chief of U.S. military forces.[199] But the Supreme Court was hesitatant; in his concurring opinion, Justice Robert Jackson famously noted that one "may also suspect that [the Founders] suspected that emergency powers would tend to kindle emergencies."[200] Indeed, Justice Jackson was extremely skeptical of inherent powers. In his concurring opinion, he

as an anomaly or Justice Sutherland's discussion of inherent powers as dicta). The most recent Supreme Court majority opinion to address *Curtiss-Wright* was *Zivotofsky ex rel. Zivotofsky v. Kerry*, in which the Court interpreted *Curtiss-Wright* to not give unfettered jurisdiction over U.S. foreign policy to the President alone, but to the President and Congress. 576 U.S. 1, 20–21 (2015). While *Zivotofsky* at least partially abrogated the famous language from *Curtiss-Wright* that the President is the "sole organ of the federal government in the field of international relations[,]" 299 U.S. at 320, it did not address the part of *Curtiss-Wright* related to inherent powers.

[195] *See supra* notes 159–205 and accompanying text; *see also* Cleveland, *supra* note 194, at 7.

[196] *See* Huang, *supra* note 153, at 425–26 ("This is the inherent power of the President, which enables him or her to gain preemptive power in the realm of foreign affairs. . . . The contrast between domestic and international issues has become less and less apparent. . . . Therefore, it is implausible to argue that the [P]resident enjoys inherent powers in the terrain of international relations but not in the domestic context.").

[197] 343 U.S. 579, 582–83 (1952).

[198] *Id.* at 584.

[199] *Id.* at 582.

[200] *Id.* at 650 (Jackson, J., concurring).

rejected inherent powers to put down labor strikes during times of war, but even he noted that a more serious emergency, such as an imminent invasion or threatened attack, could justify the use of inherent powers.[201] Instead, Justice Jackson laid out his well-known three categories of presidential power: power authorized by the Constitution, power authorized by Congress, and power in the "zone of twilight" where Congress has not yet acted.[202] Justice Jackson saw Congress as the gatekeeper for inherent powers, placing limits on what the President could do during an emergency.[203]

2. Emergency Powers

In a separate line of actions, the executive and legislative branches have declared inherent powers pursuant to emergency situations, like those President Truman tried to invoke in *Youngstown*. Like the Supreme Court decisions related to inherent powers, the parameters of emergency powers have developed over time, creating the emergency powers regime that exists today. A national disaster constitutes an emergency, granting the President extraordinary powers that must be used quickly and decisively, and limits the role of Congressional oversight or judicial review.[204] As the Supreme Court has stated, "no governmental interest is more compelling than the security of the Nation."[205]

Emergency powers have been especially pronounced in military contexts, pursuant to the President's role as Commander in Chief.[206] In the earliest, and perhaps most well-known example, President Abraham Lincoln suspended the writ of habeas corpus

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[201] *Id.* at 645.

[202] *Id.* at 635–38.

[203] *Id.* at 653.

[204] Joshua L. Friedman, *Emergency Powers of the Executive: The President's Authority When All Hell Breaks Loose*, 25 J. L. & HEALTH 265, 267 (2012) (addressing the question of how broad the President's emergency powers are during a crisis).

[205] Haig v. Agee, 453 U.S. 280, 307 (1981) (citing Aptheker v. Sec'y of State, 378 U.S. 500, 509 (1964)).

[206] *See generally* William B. Fisch, *Emergency in the Constitutional Law of the United States*, 38 AM. J. COMPAR. L. 389 (1990) (discussing how the Supreme Court has interpreted emergency powers over the course of U.S. history); *see also* David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477, 566–67 (2008) (arguing in favor of shifting away from broad invocation of inherent powers under the Commander in Chief power).

at the start of the Civil War.[207] During the Civil War, President Lincoln used the excuse of war to both suspend the writ of habeas corpus and institute military trials.[208] President Lincoln received significant pushback, including a federal court decision by Supreme Court Chief Justice Roger Taney[209] which declared the suspension of habeas corpus invalid by concluding that prisoner John Merryman should be released.[210] But ultimately Congress passed legislation authorizing the President to suspend the writ of habeas corpus "whenever, in his judgment, the public safety may require it."[211]

More recently, the George W. Bush administration justified a range of activities under the guise of inherent power authorization, including "creat[ing] military commissions, designat[ing] U.S. citizens as 'enemy combatants,' condon[ing] torture as an interrogation technique, engag[ing] in 'extraordinary rendition,' and conduct[ing] warrantless National Security Agency (NSA) eavesdropping."[212] As with President Lincoln, Congress partially acquiesced to these "inherent" powers due to the perceived national emergency following the terrorist attacks on September 11, 2001.[213]

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[207] 6 COMPLETE WORKS OF ABRAHAM LINCOLN 258 (John G. Nicolay & John Hay eds., new and enlarged ed. 1894) (reproducing President Lincoln's April 27, 1861 order to General Winfield Scott granting him authority to suspend habeas corpus between Philadelphia and Washington, D.C.); *see also* Fisher, *supra* note 154, at 2–4.

[208] Daniel A. Farber, *Lincoln, Presidential Power, and the Rule of Law*, 113 NW. U. L. REV. 667, 681–85, 688 (2018).

[209] There is a debate, however, about whether the decision was issued by the Circuit Court for the District of Maryland or Chief Justice Taney in his personal capacity, and whether Chief Justice Taney even had the authority to issue the decision. Seth Barrett Tillman, Ex Parte Merryman: *Myth, History, and Scholarship*, 224 MIL. L. REV. 481, 504–05 (2016).

[210] *Ex parte* Merryman, 17 F. Cas. 144, 151–52 (C.C.D. Md. 1861) (No. 9,487); *see also* Farber, *supra* note 208, at 681–85. The exact dimensions of the *Ex parte Merryman* decision have been examined in detail by Seth Barrett Tillman. *See generally* Tillman, *supra* note 209. Tillman notes that Taney's opinion asserted that Merryman should be freed, but that his order left Merryman in jail, throwing the actual precedential power of *Merryman* into question. *Id.* at 495–506.

[211] Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, 755.

[212] Fisher, *supra* note 154, at 12–19.

[213] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); *see also* Ari D. MacKinnon, *Counterterrorism and Checks and Balances: The Spanish and American Examples*, 82 N.Y.U. L. REV. 602, 623–36 (2007) (discussing how the U.S. legal counterterrorism model was crafted, including from claims of "inherent constitutional authority"); John Wynne, *After Al-Qaida: A Prospective Counterterrorism AUMF*, 93 N.Y.U. L. REV. 1884, 1887–89 (2018) (discussing the example of the 2001 Authorization for Use of Military Force ("2001 AUMF"), which was passed by Congress in the wake of the September 11 attacks).

The state of emergency declared by the Bush administration was renewed by President Barrack Obama, and there were a total of thirty ongoing states of emergency during the Obama administration.[214] Pursuant to these emergency powers, the President has been authorized to block property of and transactions involving designated individuals,[215] suspend minimum wage requirements in public contracts,[216] and engage in a long list of other emergency powers.[217] President Donald J. Trump also proclaimed a dozen national emergencies.[218]

The hallmarks of inherent powers, as recognized in these cases and examples, are: (1) long-standing practice by the family of nations,[219] (2) powers that would naturally be needed to carry out, or are incidental to, the enumerated powers in the Constitution, and (3) emergency situations. In *Johnson*, *Jones*, the *Chinese Exclusion Case*, and *Curtiss-Wright*, the Supreme Court stressed the long-standing and universal practice of the family of nations in these areas.[220] Yet, in *Prigg* and *Julliard*, the Court instead relied on these powers being so related to extant

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[214] Patrick A. Thronson, Note, *Toward Comprehensive Reform of America's Emergency Law Regime*, 46 U. MICH. J.L. REFORM 737, 738 (2013).

[215] *See* International Emergency Economic Powers Act, 50 U.S.C. § 1702 (2001) ("[During national emergencies], the President may . . . investigate, regulate, or prohibit—(i) any transactions in foreign exchange, (ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof, (iii) the importing or exporting of currency or securities.").

[216] 40 U.S.C. § 3147 (2002).

[217] *See* Patrick A. Thronson, *Compendium of Emergency Powers Statutes*, 46 MICH. J. L. REFORM, Mar. 31, 2013 (cataloging all statutory provisions and presidential orders as of 2013 containing powers based on the declaration of a national emergency).

[218] *Declared National Emergencies Under the National Emergencies Act*, BRENNAN CTR. JUST., (June 10, 2021), https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act [https://perma.cc/NJH3-9NLY]; *see also* Scott Horsley, *Many Presidents Have Declared Emergencies—But Not Like Trump Has*, NPR (Feb. 15, 2019, 3:19 PM), https://www.npr.org/2019/02/15/695203852/many-presidents-have-declared-emergencies-but-not-like-trump-has [https://perma.cc/9R7R-JMT6].

[219] In this regard, inherent powers overlap with customary international law, the "ancient usage among civilized nations." The Paquete Habana, 175 U.S. 677, 686 (1900); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. L. INST. 1987) (stating that custom arises from "general and consistent practice of states").

[220] Johnson v. M'Intosh, 21 U.S. 543, 574, 587, 589 (1823); United States v. Jones, 109 U.S. 513, 518 (1883); Ping v. United States, 130 U.S. 581, 603 (1889); United States v. Curtiss-Wright Exp. Co., 299 U.S. 304, 318 (1936). *See also* Cleveland, *supra* note 194, at 6–7 (discussing how inherent federal powers developed over Indian tribes, immigration, and territories).

constitutional powers as to be inherent,[221] and the federal government tried to make the same argument in *Youngstown*.[222] Notably, *Kagama* stands as an amalgam of both principles.[223] Control of all national territory is an inherent right of all nations, but the duty to protect Indian tribes is also pursuant to their status as "domestic dependent nations," the exact formation of which was elucidated by the Supreme Court in an earlier case by relying on the Taxing and Spending Clause.[224] But even the Court in *Kagama* relied principally on long-standing international practice as the justification for the inherent power of control over all national territory.[225] Emergency powers have instead relied on authorized responses during particular circumstances, but have not necessarily relied on long-standing international practice or specific enumerated powers.[226] Therefore, the inherent powers test is not comprised of three required prongs, but three potential grounds for validity: long-standing practice by nations, powers necessary for or incidental to enumerated powers, and responses to national emergencies.

B. Inherent Powers Related to Public Health

1. Quarantines

The practice of utilizing inherent powers to address public health concerns has been a longstanding practice among nations. Governments have obligations to the public to serve as the euphemistic parent of those under their jurisdiction in matters related to public health and safety.[227] Perhaps the best known example of inherent public health powers is the quarantine, which restricts the free movement of people.[228] The very term "quarantine," coming to English from the Italian word for "forty," possibly stretches back to the age of the ancient Greek

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[221] Prigg v. Pennsylvania, 41 U.S. 539, 616–19 (1842); Juilliard v. Greenman, 110 U.S. 421, 449–50 (1884).

[222] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952).

[223] *See generally* United States v. Kagama, 118 U.S. 375 (1886).

[224] Cherokee Nation v. Georgia, 30 U.S. 1, 17–18 (1831); *Kagama*, 118 U.S. at 380.

[225] *Kagama*, 118 U.S. at 380.

[226] *See generally* Thronson, *supra* note 217.

[227] *See generally* Michele Goodwin et al., *Quarantine and the Limits of Government by Prof. Michele Goodwin*, UNIV. CAL. IRVINE LAW (May 13, 2020) [hereinafter *Quarantine and the Limits of Government*], https://www.law.uci.edu/news/videos/goodwin-covid-quarantine-government.html [https://perma.cc/NM3Z-EC7X].

[228] Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53, 55–57 (1985).

Hippocrates, who recommended a forty-day period of isolation to determine the acuteness of a disease and limit its transmission.[229]

History is replete with examples of government-imposed quarantines. The Bible describes quarantine measures imposed by governmental authorities during ancient times.[230] In the Byzantine Empire, Emperor Justinian I (r. 527-565 CE) issued edicts to prevent travel from regions afflicted by bouts of bubonic plague.[231] There are numerous examples of quarantine structures being instituted throughout the Middle Ages, and in the fourteenth century, the maritime republics of Ragusa and Venice established forty-day quarantines for travelers as official state practice.[232] From the seventeenth century on, quarantining became a standard norm for governments in response to epidemics.[233] The twentieth century saw the rise of national and international bodies to monitor and research the spread of diseases, resulting in greater surveillance of infected populations as well as adjustments to the traditional forty-day quarantine to meet different public health crises, such as the Severe Acute Respiratory Syndrome ("SARS").[234] It is therefore longstanding state practice to take extraordinary measures that restrict persons' rights during public health crises.

2. U.S. Judicial Precedent and Public Health Powers: *Jacobson v. Massachusetts*

While quarantines are perhaps the best-known example of inherent powers over public health, U.S. legal understanding of public health regulation by the state developed gradually, as it did with inherent powers. As described previously, inherent powers have been cited at a number of key points in American history; this

[229] A.A. Conti, *Quarantine Through History*, *in* INT'L ENCYCLOPEDIA OF PUB. HEALTH 454, 455 (Harald Kristian Heggenhougen ed., 1st ed. 2008).

[230] *See id.* (citing *Leviticus* 13).

[231] *Id.* at 456; *see also* WILLIAM ROSEN, JUSTINIAN'S FLEA: THE FIRST GREAT PLAGUE AND THE END OF THE ROMAN EMPIRE 214 (2008).

[232] Conti, *supra* note 229, at 456; *see also* Eugenia Tognotti, *Lessons from the History of Quarantine, from Plague to Influenza A*, 19 EMERGING INFECTIOUS DISEASES 254, 255 (2013). For a thorough discussion on the Republic of Venice's role in the adoption of quarantines and other public health measures more broadly in Western Europe, *see* MEREDITH F. SMALL, INVENTING THE WORLD: VENICE AND THE TRANSFORMATION OF WESTERN CIVILIZATION ch. 5 (2020).

[233] Conti, *supra* note 229, at 457–59.

[234] *Id.* at 460.

is also true in the public health context.[235] The federal government enacted its first quarantine law in 1796,[236] and in *Gibbons v. Ogden*, the Supreme Court recognized inherent state police powers to compel isolation and quarantine "to provide for the health of its citizens," despite the fact that these deprive citizens of certain rights.[237] That rule in *Gibbons v. Ogden* was given its corollary nearly a century later, when the federal role in quarantines was partially elucidated. In *Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health*, the Supreme Court ruled that states can quarantine individuals and goods, even if they involve interstate or foreign commerce—provided that Congress has not created its own quarantine.[238]

Three years later, in the seminal public health law case of *Jacobson v. Massachusetts*, the Court explicitly recognized that constitutional liberties do not create an absolute right to be free from restraint.[239] Instead, the Court reasoned that the Constitution guarantees "liberty regulated by law," and in situations of necessity, the "safety, health, peace, good order, and morals of the community" must overrule the individual enjoyment of liberty.[240] Under this rationale, the *Jacobson* Court ruled that a state could impose a fine upon someone who "refused to obey the statute [to vaccinate against smallpox] and the regulation adopted in execution of its provisions for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease."[241] The Court noted that it would only step in where there was "a plain, palpable invasion of rights secured by the fundamental law" which lacks a real or substantial nexus to the "public health, the public morals, or the public safety."[242]

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[235] Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, ATLANTIC (Jan./Feb. 2019), https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/ [https://perma.cc/3GM7-A9JG].

[236] Parmet, *supra* note 228, at 57.

[237] 22 U.S. 1, 205 (1824); *see also* Parmet, *supra* note 228, at 57 (placing *Gibbons v. Ogden* in the historical context of quarantines under U.S. law).

[238] 186 U.S. 380, 387 (1902) ("[U]ntil Congress has exercised its power on the subject, such state quarantine laws and state laws for the purpose of preventing, eradicating, or controlling the spread of contagious or infectious diseases, are not repugnant to the Constitution."). One can query whether a federal quarantine for COVID-19 would be upheld under the Commerce Clause, for which there is at least some support. *See supra* note 14.

[239] 197 U.S. 11, 26 (1905).

[240] *Id.* at 26–27.

[241] *Id.* at 12, 39.

[242] *Id.* at 31.

In the following years, the rule from *Jacobson* was upheld. During the 1918 influenza pandemic, closings of businesses, churches, and schools and prohibiting large gatherings were upheld.[243] In the mid-twentieth century, gathering places were periodically closed in response to polio outbreaks.[244] When the different levels of government had to confront HIV in the late twentieth century, legal scholars thought that the decision in *Jacobson* would be read as too submissive by courts.[245] Indeed, health law scholar Larry Gostin thought that depriving an individual of personal liberty like in 1905 would likely be held unconstitutional if it was heard by today's courts.[246] But the solutions that Gostin and other legal scholars recommended for public health measures were not so different from those articulated by the Supreme Court in *Jacobson*.[247] Gostin and others sought a balance of individual rights and public health emergency powers.[248] The *Jacobson* Court similarly tried to strike a balance and noted that it would not permit arbitrary infringement of individual rights.[249] As the Seventh Circuit recently noted, impliedly accepting this balance, "vaccination requirements, like other public-health measures, have been common in this nation."[250]

During COVID-19 litigation, *Jacobson* has been cited repeatedly to support public health measures by state governors.[251] At least some circuit and district courts have also approvingly cited to *Jacobson*, with the Fifth Circuit, for example, stating that "*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency."[252]

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[243] Lindsay F. Wiley, *Democratizing the Law of Social Distancing*, 19 YALE J. HEALTH POL'Y, L., & ETHICS 50, 63–64 (2020).

[244] *Id.* at 64.

[245] *Id.*

[246] Larry Gostin, *The Future of Communicable Disease Control: Toward a New Concept in Public Health Law*, 83 MILBANK Q. 1, 8 (2005), https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1468-0009.2005.00433.x [https://perma.cc/56TW-4YCT].

[247] Wiley, *supra* note 243, at 64–65.

[248] *Id.*

[249] Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905).

[250] Klaasen v. Trs. of Ind. Univ., 7 F.4th 592, 593 (7th Cir. 2021).

[251] Lawrence O. Gostin, Wendy E. Parmet & Sara Rosenbaum, *Health Policy in the Supreme Court and a New Conservative Majority*, 324 JAMA 2157, 2158 (2020) ("So far, most courts have rejected challenges to emergency orders, relying on the Court's landmark decision in *Jacobson v. Massachusetts*.").

[252] *In re* Abbott, 954 F.3d 772, 786 (5th Cir. 2020), *vacated as moot sub nom.*, Planned Parenthood Ctr. for Choice v. Abbott, 141 S. Ct. 1261 (2021); *see also In re* Rutledge, 956 F.3d 1018, 1028 (8th Cir. 2020) (finding that "the district court's failure

The Supreme Court appeared to endorse this approach in its May 2020 decision in *South Bay United Pentecostal Church v. Newsom*, in which the California executive order against large gatherings at religious institutions was upheld.[253] Critically, in his concurrence, Chief Justice John Roberts explicitly endorsed the wisdom of *Jacobson*.[254] The Court ruled similarly in its July 2020 decision in *Calvary Chapel Dayton Valley v. Sisolak*, in which the Court denied an application for injunctive relief by a Nevada church that wanted to operate worship services exceeding the public health restrictions instituted by the Nevada government.[255] However, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, decided in November 2020, the Supreme Court granted injunctive relief for religious institutions in New York that had been subject to Governor Andrew Cuomo's executive order that restricted attendance at religious services.[256]

But this shift in *Roman Catholic Diocese* does not mean that *Jacobson* is dead; far from it. In his concurring opinion, Justice Gorsuch noted that *Jacobson* is "essentially . . . rational basis review," again acknowledging that *Jacobson* strikes a balance between rights and the public good.[257] One of the major differences pointed to between the two cases was the replacement of Justice Ruth Bader Ginsburg by Justice Amy Coney Barrett, shifting a key vote on the court.[258] Yet in August 2021, Justice Barrett

to apply the *Jacobson* framework produced a patently erroneous result"); *Klaasen*, 7 F.4th at 593 (rejecting a substantive due process claim because "vaccination requirements, like other public-health measures, have been common in this nation"); Harris v. Univ. of Massachusetts, No. 21-cv-11244, 2021 WL 3848012, at *6 (D. Mass. Aug. 27, 2021) ("[T]he Supreme Court has 'settled that it is within the police power of a state to provide for compulsory vaccination.' " (quoting Zucht v. King, 260 U.S. 174, 176 (1922))). *See also* Robinson v. Att'y Gen., 957 F.3d 1171, 1183 (11th Cir. 2020) (holding that "the district court [correctly] applied both the *Jacobson* framework and the *Casey* undue-burden test" in preliminarily enjoining Alabama's mandate postponing all non-emergency medical procedures during the COVID-19 pandemic, includeing abortions).

[253] 140 S. Ct. 1613, 1613 (2020).

[254] *Id.* at 1613–14.

[255] *See* 140 S. Ct. 2603, 2603 (2020); *see also id.* at 2614 (Kavanaugh, J., dissenting) (agreeing "that courts should be very deferential to the States' line-drawing in opening businesses and allowing certain activities during the pandemic").

[256] 141 S. Ct. 63, 65–66 (2020) (per curiam).

[257] *Id.* at 70 (Gorsuch, J., concurring). *But see* S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 718–20 (2021) (statement of Gorsuch, J.) (arguing that a non-narrowly tailored prohibition on singing and chanting during indoor services did not meet strict scrutiny, but not directly connecting the interest to *Jacobson*).

[258] *See* Adam Liptak, *Splitting 5 to 4, Supreme Court Backs Religious Challenge to Cuomo's Virus Shutdown Order*, N.Y. TIMES (Apr. 5, 2021),

summarily rejected an emergency request to stop Indiana University's vaccine mandate,[259] and below, the Seventh Circuit favorably cited *Jacobson* in reaching that conclusion, strongly supporting the notion that *Jacobson* is alive and well.[260]

Another important point in why *Roman Catholic Diocese* was decided the way it was is that the executive orders at issue in all three cases singled out places of worship rather than just being a blanket prohibition against large gatherings.[261] In all three of these cases, the singling out of houses of worship implicated the First Amendment guarantee of religious liberty.[262] In the New York case, houses of worship were explicitly treated differently, with the number of attendees being capped at a certain number rather than as a percentage based on overall capacity, as was the case for many businesses.[263] The Supreme Court explicitly noted that the restrictions in the New York case were far more onerous

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https://www.nytimes.com/2020/11/26/us/supreme-court-coronavirus-religion-new-york.html (noting that Justice Barrett played a decisive role in the outcome of the case).

[259] Amy Howe, *Barrett Leaves Indiana University's Vaccine Mandate in Place*, SCOTUSBLOG (Aug. 12, 2021, 9:40 PM), https://www.scotusblog.com/2021/08/barrett-leaves-indiana-universitys-vaccine-mandate-in-place [https://perma.cc/P6QY-ZMX4] (suggesting that Justice Barrett not referring this question to the entire Court meant that the Supreme Court did not find this to be a particularly contentious question).

[260] Klaasen v. Trs. of Indiana Univ., 7 F.4th 592, 593 (7th Cir. 2021) ("Given *Jacobson v. Massachusetts*, which holds that a state may require all members of the public to be vaccinated against smallpox, there can't be a constitutional problem with vaccination against SARS-CoV-2.") (citation omitted).

[261] *See S. Bay United Pentecostal Church*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting) ("California has now limited attendance at religious worship services to 25% of building capacity or 100 attendees, whichever is lower."); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2604 (2020) (Alito, J., dissenting) ("[The Governor of Nevada] has issued a directive that severely limits attendance at religious services. A church, synagogue, or mosque, regardless of its size, may not admit more than 50 persons, but casinos and certain other favored facilities may admit 50% of their maximum occupancy . . . ."); *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 65–-66 ("Both applications seek relief from an Executive Order issued by the Governor of New York that imposes very severe restrictions on attendance at religious services in areas classified as 'red' or 'orange' zones.").

[262] *See S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring); *Cavalry Chapel*, 140 S. Ct. at 2604 (Alito, J., dissenting); *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 66.

[263] *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 66 ("In red zones, no more than 10 persons may attend each religious service, and in orange zones, attendance is capped at 25. . . . In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as 'essential' may admit as many people as they wish. . . . The disparate treatment is even more striking in an orange zone. While attendance at houses of worship is limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit.").

than those in the California and Nevada cases.[264] Blanket orders that apply the same rules equally to all gatherings would appear to bypass this First Amendment challenge. Even if the First Amendment religious liberty right has been strengthened by Justice Barrett's addition to the Supreme Court, there is still a strong ground for restricting religious freedoms under public health inherent powers pursuant to *Jacobson* as long as the restrictions are not specifically targeted at houses of worship. Indeed, this approach was reinforced by a trio of Supreme Court decisions in the first half of 2021. In *South Bay United Pentecostal Church v. Newsom*, the Supreme Court granted in part an application for injunctive relief against California's COVID measures that prohibited indoor religious services, while other provisions of the law were not enjoined because they were applied in a "generally applicable manner."[265] The Court then endorsed this approach in its brief opinion in *Gateway City Church v. Newsom*.[266] Finally, in its most comprehensive discussion, the Supreme Court in *Tandon v. Newsom* held that California's restrictions on private gatherings contained numerous exceptions for secular activities, but not for religious ones, and were therefore "not neutral and generally applicable" and triggered strict scrutiny.[267] The Court succinctly noted that "[t]he State cannot 'assume the worst when people go to worship but assume the best when people go to work.' "[268]

As suggested by these recent Supreme Court decisions, *Jacobson* is not an absolute privilege for governments to override personal freedoms in the name of public health. In one article, constitutional law professor Josh Blackman criticized modern usages of *Jacobson*, arguing that *Jacobson* should be interpreted as the law stood in 1905.[269] Blackman argued that *Jacobson* was written before modern tests of rational basis and heightened scrutiny for due process had been articulated and the Bill of Rights had not yet been incorporated into the Fourteenth Amendment to

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[264] *Id.* (citing *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613, and *Cavalry Chapel*, 140 S. Ct. at 2603) ("They are far more restrictive than any COVID–related regulations that have previously come before the Court . . . .").

[265] 141 S. Ct. 716 (2021).

[266] 141 S. Ct. 1460 (2021).

[267] 141 S. Ct. 1294, 1296–97 (2021).

[268] *Id.* at 1297 (quoting Roberts v. Neace, 958 F.3d 409, 414 (6th Cir. 2020)).

[269] Josh Blackman, *The Irrepressible Myth of* Jacobson v. Massachusetts, 70 BUFF. L. REV. 131, 153 (2021).

apply to states.[270] In particular, Blackman notes that *Jacobson* should not permit the overriding of constitutional fundamental rights, particularly those in the Bill of Rights, as such laws are subject to a heightened level of scrutiny.[271] Similarly to Blackman, Professors Lindsay F. Wiley and Stephen I. Vladeck argue that judicial review of civil liberties is necessary during public health emergencies to prevent "gross violations of civil rights."[272] In a pre-COVID article, Ben Horowitz also advocated for narrowing *Jacobson* by utilizing strict scrutiny to protect the purported right to refuse vaccination, although he concluded that the government could craft vaccine mandates that would meet strict scrutiny even absent *Jacobson*.[273] Yet Supreme Court cases have largely failed to address how *Jacobson*—or inherent powers over public health more broadly—square against specific fundamental rights.[274] And *Jacobson* itself addresses some of Blackman's concerns: it provides that *Jacobson* does not grant an absolute privilege and that abuse or enforced vaccination of an individual too unfit to be vaccinated would likely be barred by law.[275]

Instead of being focused on individual rights, *Jacobson* is more accurately interpreted as a continuation of the recognition of inherent powers over public health. The language of *Jacobson* specifically invokes the public health of the community and holds it above individual liberty, noting that it is not acceptable for the individual to "endanger[ ] [the community] by the presence of a dangerous disease."[276] Indeed, these powers have allowed the restriction of important U.S. rights, such as freedom of movement under the millennia-old practice of quarantining. *Jacobson* does

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[270] *Id.* at 142.

[271] *Id.* at 149 (stating that courts should not apply the presumption of constitutionality when reviewing legislation that " 'appears on its face' to violate 'a specific prohibition of the Constitution' ") (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

[272] Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179, 183 (2020).

[273] Ben Horowitz, Comment, *A Shot in the Arm: What a Modern Approach to* Jacobson v. Massachusetts *Means for Mandatory Vaccinations During a Public Health Emergency*, 60 AM. U. L. REV. 1715, 1730–40 (2011).

[274] Blackman examines what little jurisprudence has been issued for *Jacobson* and the First and Second Amendments, as well as the right to abortion, but *Jacobson* is examined in little detail in these cases and, as Blackman admits, usually used for a different purpose than the actual holding. *See generally* Blackman, *supra* note 269, at 190–267.

[275] Jacobson v. Massachusetts, 197 U.S. 11, 39 (1905).

[276] *Id.*

not offer carte blanche authority to override fundamental rights, but recent COVID-19 Supreme Court cases appear to have endorsed the view that the case suggests broader inherent powers over public health that allow the neutral restriction of acts for the benefit of public health, such as mandates to wear masks in public spaces.[277]

3. U.S. Emergency Powers During Public Health Crises

In addition to case precedent, Congress has also granted the President greater powers in the face of public health crises, such as by explicitly authorizing the President to deploy military personnel when civilian authorities are overwhelmed, including during a health quarantine.[278] The Public Health Service Act of 1994 grants the executive branch unilateral authorization to declare a national emergency, as well as broad discretion during a public health emergency to investigate the cause or treatment of a disease, enter into public health-related contracts, or impose a quarantine.[279] President Obama, for example, used the Public Health Service Act to declare a public health emergency for the H1N1 pandemic in 2009.[280] Similarly, in response to an influenza pandemic in 2005, President George W. Bush released the National Strategy for Pandemic Influenza, setting forth distribution protocols for limited amounts of vaccines and antiviral medication.[281] President Trump also used the Public Health Service Act to declare a public health emergency for COVID-19 in 2020.[282] This state of emergency has been repeatedly renewed under both the Trump and Biden administrations.[283]

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[277] *See Quarantine and the Limits of Government*, *supra* note 227 (discussing the legality of quarantines under current U.S. law).

[278] 10 U.S.C. § 252 (2016).

[279] Friedman, *supra* note 204, at 299–300.

[280] *Declaration of a National Emergency with Respect to the 2009 H1N1 Influenza Pandemic*, OBAMA WHITE HOUSE (Oct. 24, 2009), https://obamawhitehouse.archives.gov/realitycheck/the-press-office/declaration-a-national-emergency-with-respect-2009-h1n1-influenza-pandemic-0 [https://perma.cc/BMP2-S47P].

[281] HOMELAND SECURITY COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA IMPLEMENTATION PLAN (2006), https://www.cdc.gov/flu/pandemic-resources/pdf/pandemic-influenza-strategy-2005.pdf [https://perma.cc/RWJ6-NLU4].

[282] *President Trump Declares State of Emergency for COVID-19*, NAT'L CONF. STATE LEGISLATURES (Mar. 25, 2020), https://www.ncsl.org/ncsl-in-dc/publications-and-resources/president-trump-declares-state-of-emergency-for-covid-19.aspx [https://perma.cc/7GSM-VTD6].

[283] *See* Xavier Becerra, *Renewal of Determination That a Public Health Emergency Exists*, (July 19, 2021) https://www.phe.gov/emergency/news/healthactions/phe/

Emergency legislation has been passed on a wide range of aspects related to public health emergencies, including controlling communicable diseases, preventing the introduction and spread of foreign diseases and domestic diseases interstate, establishing quarantine rules and penalties for violations of those rules, preventing non-citizens with communicable diseases from entering the country, and grounding or cancelling air travel into the country, among others.[284] Legal scholar Joshua L. Friedman stressed that among the most important duties of the executive branch during public health crises are protecting the public by encouraging vaccination, testing, treatment, isolation, and quarantine, and authoritatively and unambiguously communicating about the crisis with the public.[285]

Scholars have defended extraordinary decisions by the federal government to act in the face of public health crises, following in the vein of the Supreme Court decision in *Jacobson*. Friedman concluded that there are no circumstances "more necessary or imminent than in a public health emergency scenario, where the smallest delay can cause extensive loss of life."[286] Law professor George P. Smith, II, identified a focus on "benefiting society at large" as a primary factor in taking public health actions.[287] He stressed the necessity of acquiescence to the restriction of civil liberties during public health crises, as failure to do so "courts the collapse of society itself."[288] Friedman took Smith's statement to its logical conclusion: "To prevent losses of this magnitude, the Executive may be required *to approve the infringement of individual liberties* in order to immediately safeguard the lives of the many."[289]

Pages/COVID-19July2021.aspx [https://perma.cc/KGW4-V74R] ("I, Xavier Becerra, Secretary of Health and Human Services, pursuant to the authority vested in me under section 319 of the Public Health Service Act, do hereby renew, effective July 20, 2021, the January 31, 2020, determination by former Secretary Alex M. Azar II, that he previously renewed on April 21, 2020, July 23, 2020, October 2, 2020, and January 7, 2021, and that I renewed on April 15, 2021, that a public health emergency exists . . . .").

[284] Friedman, *supra* note 204, at 301.

[285] *Id.* at 302.

[286] *Id.* at 296.

[287] George P. Smith, II, *Re-shaping the Common Good in Times of Public Health Emergencies: Validating Medical Triage*, 18 ANNALS HEALTH L. 1, 15 (2009).

[288] *Id.* at 34.

[289] Friedman, *supra* note 204, at 303 (emphasis added).

C. Censoring of Speech During Wartime

Perhaps the most apt comparison for restricting free speech in extraordinary circumstances is the censoring of free speech during times of war. Censorship has been a long-standing practice of governments, from ancient Greece through today.[290] In the United States, freedom of speech is one of the most sacred of rights enshrined in the Bill of Rights.[291] Yet during times of war, the need for authority and victory have rivaled or even outweighed individual civil liberties.[292] This U.S. practice matches the international trend, which includes more restrictive censorship during times of war.[293] For example, Great Britain censored free speech during World War I and World War II; in fact, widespread censorship was the norm in every military combatant country.[294]

U.S. law on wartime censorship has changed considerably since the founding of the United States. Briefly recounting the history of censorship in the United States is essential to understanding the possibilities for censorship of fake news in the public health context today. The Sedition Act of 1798, instituted during the so-called " 'Half War' with France," prohibited the publication of "any false, scandalous[,] and malicious writing" against the government.[295] The Act was defended on the basis of seditious agents endangering "the very existence of the nation" through "fomenting hostilities."[296] Although the Supreme Court never ruled on the constitutionality of the Sedition Act, in 1840, Congress noted that the Act had been a "mistaken exercise" and was "null[ ] and void."[297] The Supreme Court went on to categorize the Act as being held unconstitutional "in the court of history."[298]

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[290] Mette Newth, *The Long History of Censorship*, BEACON FOR FREEDOM (2010), http://www.beaconforfreedom.org/liste.html?tid=415&art_id=475 [https://perma.cc/72GM-KJEC].

[291] *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 5–7, 14 (2004).

[292] *See* DANIEL C. HALLIN, THE "UNCENSORED WAR": THE MEDIA AND VIETNAM 215 (1986) (asserting that "every society must maintain a balance between democracy and authority").

[293] Newth, *supra* note 290.

[294] *Id.*

[295] An Act for the Punishment of Certain Crimes Against the United States, ch. 74, §§ 2, 4, 1 Stat. 596, 596–97 (1798) (expired 1801); Geoffrey R. Stone, *Free Speech and National Security*, 84 IND. L.J. 939, 940–41 (2009).

[296] Stone, *supra* note 295, at 941.

[297] CONG. GLOBE, 26th Cong., 1st Sess. 411 (1840).

[298] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

Yet similar laws were passed throughout U.S. history. During the Civil War, President Lincoln took several extraordinary measures due to the risk the Civil War posed to the Union, such as suspending habeas corpus, as previously mentioned.[299] In the area of free speech, the most famous case was that of Clement Vallandigham, a leader of the Copperheads—Union Democrats who wanted immediate peace—who gave a speech in 1863 to an audience 15,000 strong on how the war was "wicked, cruel, and unnecessary," and Vallandigham urged those present to vote President Lincoln out of office.[300] He was ultimately convicted of "declaring disloyal sentiments and opinions, with the object and purpose of weakening the power of the government in its efforts to suppress an unlawful rebellion."[301] Despite criticism, President Lincoln defended the decision on the basis of preventing "further injury to the [Union] military."[302]

In 1917, "[s]hortly after the United States entered [World War I], Congress enacted the Espionage Act . . . ."[303] This was the first federal legislation since the Sedition Act of 1798 to expressly criminalize disloyal expression.[304] The Act made it a crime to "willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States" or "obstruct the recruiting or enlistment service of the United States."[305] Prosecutors and federal judges soon expanded the Act to include any criticism of war.[306] The Supreme Court consistently upheld the convictions of anti-war dissenters under the Act.[307] As legal scholar Harry Kalven, Jr., concluded,

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[299] *See supra* notes 210–13 and accompanying text.

[300] Stone, *supra* note 295, at 98, 100–01.

[301] *Ex parte* Vallandigham, 28 F. Cas. 874, 884 (C.C.S.D. Ohio 1863) (No. 16,816).

[302] Stone, *supra* note 295, at 943.

[303] *Id.* at 944.

[304] *Id.*

[305] Espionage Act of 1917, ch. 30, tit. I, § 3, 40 Stat. 217, 219.

[306] Stone, *supra* note 295, at 944–45.

[307] Gilbert v. Minnesota, 254 U.S. 325, 333 (1920) ("[E]very word that he uttered in denunciation of the war was false, was deliberate misrepresentation of the motives which impelled it, and the objects for which it was prosecuted."); Pierce v. United States, 252 U.S. 239, 252 (1920) (rejecting a critical interpretation of the Act because that interpretation "would allow the professed advocate of disloyalty to escape responsibility for statements however audaciously false"); Schaefer v. United States, 251 U.S. 466, 481 (1920) ("[I]ts statements were deliberate and willfully false; the purpose being to represent that the war was not demanded by the people but was the result of the machinations of executive power . . . ."); Abrams v. United States, 250 U.S. 616, 624 (1919) ("[T]he defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing

these Court decisions contained the clear message that "[w]hile the nation is at war, serious, abrasive criticism . . . is beyond constitutional protection."[308]

Following World War I, First Amendment protections grew in the face of national security concerns. During World War II, although the Espionage Act remained on the books, the Attorneys General that served under President Franklin D. Roosevelt discouraged prosecuting subversive activities and indeed dismissed charges when they occurred.[309] When William Dudley Pelley, a major American fascist leader, was prosecuted under the Espionage Act, he was charged with making "false statements" rather than disloyalty, which had been the asserted charge in the prosecutions during World War I.[310]

After World War II, in the midst of the Cold War, both the infamous House Committee on Un-American Activities ("HUAC") and the Communist Control Act of 1954 restricted free speech by communists.[311] In *Dennis v. United States*, the Supreme Court upheld the conviction of leaders of the American Communist Party, holding that the violent overthrow of government is an overriding concern that did not violate the First Amendment.[312] In subsequent decisions, the Court upheld investigations of " 'subversive' organizations and individuals" and the systematic freezing out of the Communist Party.[313]

By the end of the 1960s, the Supreme Court started to reel back these broad powers of Congress, limiting the power to investigate and publicly discriminate on the basis of political

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the production of ordnance and munitions necessary and essential to the prosecution of the war as is charged in the fourth count."); Frohwerk v. United States, 249 U.S. 204, 209 (1919) ("The overt acts are alleged to have been done to effect the object of the conspiracy and that is sufficient under section 4 of the Act of 1917."); Schenck v. United States, 249 U.S. 47, 52 (1919) ("When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."); Debs v. United States, 249 U.S. 211, 216 (1919) ("Without going into further particulars we are of opinion that the verdict on the fourth count, for obstructing and attempting to obstruct the recruiting service of the United States, must be sustained.").

[308] HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 147 (Jamie Kalven ed., 1988).

[309] Stone, *supra* note 295, at 947.

[310] *Id.* at 948.

[311] *Id.* at 949–50.

[312] 341 U.S. 494, 510–11 (1951).

[313] Stone, *supra* note 295, at 950.

affiliation.[314] In 1969, in *Brandenburg v. Ohio*, the Supreme Court overturned *Dennis*, holding that states cannot punish advocacy of unlawful conduct alone, unless it is intended and likely to incite "imminent lawless action."[315] Meanwhile, beginning in the 1950s, the Federal Bureau of Investigation ("FBI") operated its Counter Intelligence Program ("COINTELPRO"), which engaged in extralegal harassment and infiltration of dissenting political organizations.[316] But in 1976, when these activities were revealed, they were condemned by both congressional committees and the Attorney General.[317]

This trend of increased First Amendment rights appeared to face a setback in the wake of the terrorist attacks of September 11, 2001, when President Bush "claimed far-reaching powers" to meet the crisis.[318] Immediately after the attacks, Americans were indeed more willing to accept encroachments on their civil liberties for the good of national security.[319] Attorney General John Ashcroft authorized the FBI to once again "monitor political and religious activities."[320] But compared to previous eras, the restrictions on free speech had relaxed significantly; unlike during World Wars I and II, the government did not prosecute any individuals for criticizing the war.[321]

Constitutional law scholar Geoffrey Stone has argued that the United States has significantly progressed in allowing the full range of free speech during wartime.[322] He also critiques historical restrictions that were justified on the "perceived danger of wartime," castigating them as "overreactions."[323] As shown in this section, it is undoubtedly true that courts and the government's

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[314] *See* United States v. Robel, 389 U.S. 258, 266 (1967) (limiting restrictions on public employment due to political affiliation or beliefs); Lamont v. Postmaster Gen., 381 U.S. 301, 306–07 (1965) (prohibiting restrictions on mailing communist political propaganda); Gibson v. Fla. Legis. Investigation Comm., 372 U.S. 539, 557–58 (1963) (limiting ability of legislative committees to investigate political beliefs).

[315] 395 U.S. 444, 447 (1969).

[316] Stone, *supra* note 295, at 952.

[317] *Id.*

[318] *Id.* at 953.

[319] *Id.*

[320] *Id.* at 954; *see also* JOHN ASHCROFT, THE ATTORNEY GENERAL'S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS 21–22 (2002), https://epic.org/privacy/fbi/FBI-2002-Guidelines.pdf [https://perma.cc/XS9V-TQQ7] (authorizing specific proactive counterterrorism monitoring strategies and practices).

[321] Stone, *supra* note 295, at 955.

[322] *Id.*

[323] *Id.*

acceptance of restricting free speech during wartime has decreased precipitously. Yet some legal scholars have emphasized that there is a traceable historical practice of censorship during war which can be applied to new challenges.[324] However, these historical examples still show an overarching theme: constitutional rights, even free speech, can be overcome during times of national emergencies by countervailing interests.[325] Even if the level of acceptable restrictions is much less than those under the Sedition or Espionage Acts, courts have provided a precedent for restricting speech in circumstances such as public health crises.

IV. INHERENT POWERS AS A LIMIT ON PUBLIC HEALTH FAKE NEWS

Having laid the necessary groundwork on inherent powers in the previous section, this Part will now address the issue at bar: whether the federal government can restrict patently false information about COVID-19 in a manner consistent with the First Amendment. This is a novel question in U.S. law that has thus far not been addressed in scholarly literature or by the courts. However, a framework for a public health fake news carveout from the First Amendment emerges from the related precedents and scholarship on inherent and emergency powers that were discussed in the previous section. First, this Part will address why traditional First Amendment concerns are a poor fit for false information about COVID-19. Then, having shown a lower need for protecting this speech, this section will continue by showing how the restriction of COVID-19 fake news is a strong fit for all three models of inherent powers recognized in the United States: (1) long-standing practice by nations, (2) powers necessary or incidental to constitutionally enumerated powers, and (3) emergency situations.

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[324] *See, e.g.*, Melissa J. Morgans, Note, *Freedom of Speech, the War on Terror, and What's YouTube Got to Do with It: American Censorship During Times of Military Conflict*, 69 FED. COMMC'NS L.J. 145, 151–55 (2017) (applying the historical censorship argument to terrorist speech on the Internet, particularly in the case of the Islamic State).

[325] *See generally* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 218 (1998).

A. *First Amendment Weaknesses with COVID-19 Fake News*

As explained in Part II, false statements are protected under the First Amendment.[326] The traditional rationales for why false information should be justified are the marketplace of ideas and counterspeech. But, as also explained in Part II, these justifications have been increasingly criticized in the context of fake news in legal scholarship.[327] In relation to fake news surrounding COVID-19, these justifications are weaker and countervailing interests in favor of speech restrictions are stronger.

The purpose of the marketplace of ideas has been subject to considerable debate. As law and computer science professor Ari Ezra Waldman has argued, the marketplace of ideas is about the circulation of different ideas and opinions.[328] Prior critiques of censorship were related to opinions; however, fake news is about facts.[329] The marketplace of ideas is not intended to be a marketplace of alternative facts.[330] Yet the seminal cases are a bit more mixed. In *Abrams*, Justice Holmes noted that the courts should be "vigilant against attempts to check the expression of *opinions*."[331] Yet both Justice Holmes, in *Abrams*, and Justice Brandeis, in *Whitney*, stressed that the marketplace of ideas was the "best test of truth" and "the fitting remedy for evil counsels is good ones."[332] These statements implicate counterspeech as the necessary tonic for false information.

Counterspeech is a worthy constraint on the spread of false information if the proper conditions exist. As Justice Brandeis argued in *Whitney*, "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more free speech, not enforced silence. Only an emergency can justify repression."[333] Justice Holmes similarly stated that the First Amendment is subject to limitation only when there is an "emergency that makes it immediately dangerous to leave the correction of evil counsels to

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[326] *See supra* notes 61–68 and accompanying text.

[327] Napoli, *supra* note 73, at 61–63; Waldman, *supra* note 12, at 848.

[328] Waldman, *supra* note 12, at 848.

[329] *Id.*

[330] *Id.*

[331] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (emphasis added).

[332] *Id.*; Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[333] *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

time."[334] The lack of proper conditions, especially in an emergency situation, as Justice Brandeis noted, can justify restrictions on freedom of speech. In the case of false information, law professor Eugene Volokh found Justice Brandeis' extolling of counterspeech lacking: "Perhaps the counterspeech might undo some of the harm, but it seems quite unlikely that it will undo all or even most of it."[335] Even Supreme Court precedent has acknowledged that false statements deserve less First Amendment protection than true ones, even if only in the context of legally cognizable harms.[336]

COVID-19 poses a special challenge to these justifications due to the changed nature of the spread of information, access to the marketplace, and the type of information that is being debated. The main purpose of the marketplace of ideas is to allow different opinions and ideas to circulate in the public.[337] When Justices Holmes and Brandeis were discussing the marketplace of ideas, they were rendering their judicial opinions in a time before the Internet or social media.[338] Information traveled relatively slowly and access to public forums were limited.[339] In 2020, the landscape of information access and promulgation has transformed practically beyond recognition. Almost anyone can spread

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[334] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

[335] Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 PA. L. REV. 2417, 2434 (1996).

[336] Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas . . . ."); Brown v. Hartlage, 456 U.S. 45, 60–61 (1982) (explaining that false statements "are not protected by the First Amendment in the same manner as truthful statements"); *see also* United States v. Alvarez, 567 U.S. 709, 732 (2012) (Breyer, J., concurring) ("Such false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas."); *id.* at 746 (Alito, J., dissenting).

[337] Waldman, *supra* note 12, at 848.

[338] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); *see also Whitney*, 274 U.S. at 377 (Brandeis, J., concurring); Sarah Pruitt, *Who Invented TV?*, HISTORY (June 29, 2021), https://www.history.com/news/who-invented-television [https://perma.cc/YJ26-4ATY] (discussing when television was invented); *see also* Evan Andrews, *Who Invented the Internet?,* HISTORY, (Oct. 28, 2019), https://www.history.com/news/who-invented-the-internet [https://perma.cc/F5N2-GDUB] (discussing when the internet was invented); Matthew Jones, *The Complete History of Social Media: A Timeline of the Invention of Online Networking,* HISTORY COOP. (June 16, 2015), https://historycooperative.org/the-history-of-social-media/ [https://perma.cc/T3SW-EX3P] (discussing when social media began).

[339] *See* Manuel Castells*, The Impact of the Internet on Society: A Global Perspective,* MIT TECH. REV. (Sept. 8, 2014), https://www.technologyreview.com/2014/09/08/171458 /the-impact-of-the-internet-on-society-a-global-perspective/ [https://perma.cc/GW3B-VRWL].

information by themself over the Internet.[340] While Justices Holmes and Brandeis envisioned open discussions of new ideas,[341] there is no evidence that they envisioned the type of spread of "alternative facts" that exists in the contemporary United States.[342]

But these challenges, while significant, are issues with fake news in general. Fake news in relation to COVID-19 poses especially poignant problems. Public health information is undoubtedly of prime importance to the U.S. populace.[343] There is little value of including patently false information about health in the marketplace of ideas.[344] False information relating to COVID-19 will only cause harm through the spread and improper treatment of the coronavirus. Justices Holmes and Brandeis' standard for restricting free speech is met here: it is dangerous to leave this deadly false information in the public space to be corrected by the passage of time when the virus kills in real time. The spread of incorrect information about the danger of the virus and the importance of social distancing measures has already contributed to the hundreds of thousands of COVID-19 deaths in the United States.[345] If there is little value to false COVID-19 information, the countervailing public interest in public health may outweigh the need for First Amendment protection. Even if the robust marketplace of ideas and counterspeech that the Supreme Court has endorsed for nearly a century are intact, false COVID-19 information is at the outer extreme of even this broad reading of the First Amendment and its rationales, given the obvious harms such circulation could cause and the problems with letting counterspeech play out at its natural, slower speed. Given this reality, First Amendment rationales would likely, at the very

[340] *See* Jason Riddle, *All Too Easy: Spreading Information Through Social Media*, ARK. J. SOC. CHANGE & PUB. SERV. (Mar. 1, 2017), https://ualr.edu/socialchange/2017/03/01/blog-riddle-social-media/ (discussing how the purpose of social media is for people to share information).

[341] *See* Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 45 (describing Holmes's marketplace of ideas as primarily rooted in an oppositional logic that strongly values new ideas).

[342] *See generally* Waldman, *supra* note 12 (arguing that the marketplace of ideas, since the beginning, has been about the protection of ideas, not facts).

[343] Areeb Mian & Shujhat Khan, *Coronavirus: The Spread of Misinformation*, 18 BMC MED. 89, 90 (2020).

[344] *See* Waldman, *supra* note 12, at 850–51 ("Although some misinformation can be relatively innocuous . . . fake news has significant social costs.").

[345] *See* Mian & Khan, *supra* note 343, at 89–90 (describing how misinformation has exacerbated the COVID-19 pandemic).

least, be weaker for fake COVID-19 information than they are for more traditional free speech concerns related to politics or beliefs.

Given that the First Amendment is likely less robust in protecting fake news related to COVID-19, there is a lower bar to using inherent powers to restrict the promulgation of COVID-19 fake news. This makes available to the government an avenue of regulation through inherent powers. In the following sections, this Article will explain how the restriction of fake COVID-19 news is an untested but strong match for all three models of inherent federal powers.

B. Long-Standing International Practice

As described in detail in Part III.B., the international community and the United States, in particular, have had a long history of expanded governmental powers in the area of public health.[346] The problem of widespread fake COVID-19 news is a novel issue in the international community, yet the precedent of inherent powers in public health, in general, provides substantial justification for similar restrictions on civil liberties in the face of fake news that threatens public health.

The populace of any country depends on the government to maintain public health.[347] Protection from disease is dependent on overarching control of a disparate populace to act for the greater good of public health.[348] The practice of quarantining one's population to restrict the spread of disease, even at the loss of civil liberties, is a national power stretching back millennia.[349] Today, there is undoubtedly international understanding that governments have extraordinary powers to act in the best interests of public health. Many treaties draw explicit exceptions for public health purposes. The World Trade Organization's ("WTO") General Agreement on Tariffs and Trade ("GATT"), General Agreement on Trade in Services ("GATS"), and the Agreement on Trade-Related Aspects of Intellectual Property

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[346] *See supra* Part III.B.

[347] Lawrence O. Gostin, *Public Health Theory and Practice in the Constitutional Design*, 11 HEALTH MATRIX: J. L.-MED. 265, 267 (2001) ("Individuals rely on government to organize social and economic life to promote healthy populations."); *see also* James D. Holt et al., *Legal Considerations*, THE CDC FIELD EPIDEMIOLOGY MANUAL, https://www.cdc.gov/eis/field-epi-manual/chapters/Legal.html [https://perma.cc/J4BK-94UF] (last updated 2018) ("A core duty and primary function of any government is protection of the public's health and safety.").

[348] Holt et al., *supra* note 347.

[349] *See supra* notes 229–35 and accompanying text.

Rights ("TRIPS"), for example, have exceptions that allow the adoption of otherwise infringing trade measures that are "necessary to protect human, animal, or plant life or health"[350] or that are "necessary to protect public health."[351] The International Covenant on Civil and Political Rights ("ICCPR") also provides that "[i]n time of public emergency which threatens the life of the nation . . . States Parties . . . may take measures derogating from their obligations under the present Covenant."[352] The ICCPR explicitly states that the right to freedom of expression and freedom of speech may be restricted "[f]or the protection of national security or of public order . . . or of *public health* or morals."[353] So a country can breach its usual international obligations, including the obligation to provide the right of freedom of speech for its citizens, if a public health necessity exists. In terms of COVID-19 specifically, the WHO called for countries to staunch the spread of fake news due to the considerable risk of aggravating the COVID-19 pandemic.[354]

This international trend to allow the restriction of civil liberties to protect public health has been reflected in U.S. law. The Supreme Court has long acknowledged that the government has substantial power to assure Americans' health.[355] Since at least *Gibbons v. Ogden* in 1824, the Supreme Court has implied that states have inherent powers to safeguard the public's health.[356] In the nineteenth century, courts generally allowed the government to engage in whichever actions they thought were best for preserving public health.[357] In *Jacobson v. Massachusetts*, the Supreme Court stressed that citizens have duties to one another,

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[350] General Agreement on Tariffs and Trade, art. XX(I)(b), Oct. 30, 1947, 64 U.N.T.S. 187; General Agreement on Trade in Services, art. XIV(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183.

[351] Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 8(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

[352] International Covenant on Civil and Political Rights, art. 4(1), Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

[353] *Id.* art. 19(3)(b) (emphasis added). Note that derogation does not apply even under these circumstances to articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16, and 18. *Id.* art. 4(2).

[354] *COVID-19 Pandemic*, *supra* note 48.

[355] Gostin, *supra* note 347, at 271–87.

[356] Gibbons v. Ogden, 22 U.S. 1, 205 (1824) ("[T]hey are treated as quarantine and health laws, are so denominated in the acts of Congress, and are considered as flowing from the acknowledged power of a State, to provide for the health of its citizens.").

[357] Gostin, *supra* note 347, at 295.

implying that actions should be taken for the greater societal good.[358] The *Jacobson* Court also held that individual liberties could be restrained in the interests of public health.[359]

But the *Jacobson* Court also placed limits on the government's public health powers, requiring that they be carried out in conformity with the four principles of public health: necessity, reasonable means, proportionality, and harm avoidance.[360] This limitation was implicitly reaffirmed in the three 2020 Supreme Court rulings on COVID-19 restrictions: *South Bay United Pentecostal Church v. Newsom*, *Cavalry Chapel Dayton Valley v. Sisolak*, and *Roman Catholic Diocese of Brooklyn v. Cuomo*.[361] Restrictions on COVID-19 fake news that are not applied equally or are extremely vague could be struck down.[362] A former version of Puerto Rico's law prohibiting fake news[363]—so far the sole example of such a law in the United States—could have been overruled for being overbroad or overly vague.[364] The law prohibited sharing fake news about emergencies in Puerto Rico, including COVID-19, but referred to emergencies broadly and left undefined the key terms "non-existing abnormalities" and "confusion."[365] In July 2020, the government of Puerto Rico revised the law, restricting it to prohibiting

> [g]iv[ing] a warning or false alarm, knowing that the information is false, in relation to the imminent occurrence of a catastrophe in Puerto Rico, or disseminat[ing] . . . a notice or a false alarm, knowing that the information is false, when as a result of its conduct it puts the life, health, bodily integrity or safety of one or

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[358] 197 U.S. 11, 26 (1905).

[359] *Id.* at 26–27.

[360] Gostin, *supra* note 347, at 297–99.

[361] *See supra* Part III.B.2.

[362] *See* S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 718 (2021) (statement of Gorsuch, J.).

[363] *See* Complaint for Declaratory & Injunctive Relief at 1–3, Rodríguez-Cotto v. Vázquez-Garced, No. 20-01235 (D.P.R. filed May 20, 2020) (claiming that Puerto Rico's fake news law, tit. 25, §§ 3654(a), (f), was unconstitutionally overbroad and vague).

[364] *See* Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

[365] *See* Complaint for Declaratory & Injunctive Relief at 1–3, Rodríguez-Cotto v. Vázquez-Garced, No. 20-01235 (D.P.R. filed May 20, 2020) (claiming that Puerto Rico's fake news law was unconstitutionally overbroad and vague); Eugene Volokh, *Puerto Rico "Fake News" Ban Challenged by ACLU*, REASON (May 20, 2020, 6:42 PM), https://reason.com/volokh/2020/05/20/puerto-rico-fake-news-ban-challenged-by-aclu [https://perma.cc/Y7TR-VWBS].

more persons at imminent risk, or endangers public or private property.[366]

While this law is still a broad prohibition on fake news, it is more narrowly tailored than the previous version and stands a better chance of surviving litigation.

The decision in *Jacobson* reflects an important principle that is also reflected in international custom: proportionality. A slight risk to public health would likely not justify a substantial restriction on civil liberties or a violation of international obligations.[367] Therefore, there is, in practice, a balancing test that weighs the public health necessity against individual rights. Such a test addresses the concerns of Justice Jackson in *Youngstown*, in which he worried that emergency powers would breed emergencies.[368] This test creates a viable route that balances public health and individual liberties, both for Congress and the Presidency, rather than creating a balancing system between the two branches like Justice Jackson did in *Youngstown*.[369]

As described in Part I, the COVID-19 pandemic has presented an unprecedented public health challenge in the United States.[370] As Justice Jackson noted in *Youngstown*, inherent powers are strongest during the greatest crises.[371] Historically, the U.S. government has issued emergency orders restricting liberties in the face of public health crises.[372] Likewise, the U.S. government declared a national emergency in response to COVID-19.[373] Indeed, over half of the world's democracies declared a state of emergency.[374] A tracker maintained by the International Center for Not-For-Profit Law indicates that, by April 2022, 112 countries

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[366] *See* Amended Complaint for Declaratory and Injunctive Relief at 1, 5, Rodríguez-Cotto v. Vázquez-Garced, No. 20-01235 (D.P.R. filed July 29, 2020).

[367] *Human Rights Dimensions of COVID-19 Response*, HUM. RTS. WATCH (Mar. 19, 2020, 12:01 AM), https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response [https://perma.cc/MG23-533E].

[368] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).

[369] *See id.* at 635–638 (describing the three-part test for the exercise of presidential power in relation to Congress).

[370] *See supra* Part I.

[371] *See Youngstown*, 343 U.S. at 659 (Jackson, J., concurring) (finding that there was no inherent seizure power in times of war, but that there might be in the face of a threatened invasion or imminent attack on the United States).

[372] *See supra* Part III.B.

[373] Proclamation No. 9994, 85 Fed. Reg. 15,337, 15,337 (Mar. 13, 2020).

[374] Oren Gross, *Emergency Powers in the Time of Coronavirus…and Beyond*, JUST SECURITY (May 8, 2020), https://www.justsecurity.org/70029/emergency-powers-in-the-time-of-coronaand-beyond [https://perma.cc/R74L-CWN3].

declared a state of emergency in response to the COVID-19 pandemic.[375] In response to this unprecedented pandemic, most people around the world have not challenged the medically sound restrictions on freedom of assembly and freedom of movement, or even the altruistic obligations to wear face masks.[376] International custom therefore permits certain restrictions of civil liberties due to COVID-19.

Restrictions on fake news regarding COVID-19 would also appear to fall squarely within this international custom. Quarantines and restrictions on movement are directly correlated to limiting the spread of the coronavirus—or "flattening the curve"[377]—even though they constrain Americans' constitutional rights. Restricting COVID-19 fake news would serve the same purpose. The proliferation of false information about the coronavirus has decreased social distancing and led to unnecessary further infections and deaths.[378] Yet there is an argument that restricting COVID-19 fake news is even better from a legal standpoint than quarantining, which could be overbroad. Freedom of movement and freedom of speech are both constitutional rights, but quarantining restricts practically all movement, no matter the purpose, while restricting fake news about COVID-19 only restricts freedom of speech for patently false information that would cause harm if it were allowed to circulate. As explained in the previous section, there would appear to be a strong countervailing public interest that arguably outweighs the First Amendment interest in fake news about COVID-19.[379] Better protecting the public during this unprecedented pandemic by restricting the circulation of fake news about COVID-19 would, therefore, be justified under existing international inherent

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[375] *COVID-19 Civic Freedom Tracker*, INT'L CTR. FOR NOT-FOR-PROFIT L., https://www.icnl.org/covid19tracker/?location=&issue=&date=&type= [https://perma.cc/3RX7-MZMZ] (last visited Apr. 9, 2022).

[376] *See id.*

[377] Siobhan Roberts, *Flattening the Coronavirus Curve*, N.Y. TIMES (Mar. 27, 2020), https://www.nytimes.com/article/flatten-curve-coronavirus.html.

[378] *See* Kris Hartley & Vu Minh Khuong, *Fighting Fake News in the COVID-19 Era: Policy Insights from an Equilibrium Model*, 53 POL'Y SCIS. 735, 736 (2020) ("In an illustrative episode from April 2020, the scientific community's largely consensus views about the need for social distancing to limit the spread of COVID-19 were challenged by protesters in the American states of Minnesota, Michigan, and Texas, who demanded in rallies that governors immediately relax social distancing protocols and reopen shuttered businesses.").

[379] *See supra* Part IV.A.

powers practice and the balancing test from *Jacobson* for the United States' inherent powers surrounding public health.

C. Powers Naturally Pursuant to Constitutionally Enumerated Powers

The second ground for finding inherent powers after international custom is to look for powers that are naturally pursuant to those enumerated in the Constitution. While public health is not directly addressed in the Constitution, it was likely intended to be included by the Founders under providing for the general welfare, and the broad reach of general welfare powers would appear to include regulating fake news about COVID-19.

The U.S. Constitution does not directly say anything about public health, yet it does mention the general welfare of the United States at two separate points. First, in the preamble to the Constitution, one of the reasons for establishing the United States is listed as to "promote the general Welfare."[380] Then in Article I, Section 8, the Constitution states that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ."[381] Although "general welfare" is quite broad, it has been interpreted to give the federal government the power to act to benefit public health,[382] which naturally improves the general welfare of the country.

As law professor Edward Richards has argued, the Founders of the United States would have naturally understood that police powers existed for public health purposes.[383] The United States at the end of the eighteenth century was rife with disease. As Professor Richards describes, "[t]he major cities were on rivers at or near the coast to have access to shipping and they were plagued with disease-carrying mosquitoes. Sewage ran in the streets and contaminated the drinking water wells. Shipping from foreign ports brought a constant threat of epidemic disease."[384]

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[380] U.S. CONST. pmbl.

[381] *Id.* art. I, § 8, cl. 1.

[382] *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012) (upholding the individual mandate of the Affordable Care Act, in part under the authority of the Spending Clause, which allows spending for the "general welfare"); *see also* Gostin, *supra* note 347, at 276; Holt et al., *supra* note 347.

[383] Eugene Volokh, *The Coronavirus and the Constitution*, VOLOKH CONSPIRACY (Feb. 10, 2020, 8:01 AM), https://reason.com/volokh/2020/02/10/the-coronavirus-and-the-constitution [https://perma.cc/W9YY-9ZKX].

[384] *Id.*

Many of the Founders had suffered from or lost loved ones to disease.[385] The dangers of disease were well known in eighteenth century America, so, from an original intent perspective, the Founders undoubtedly intended to maintain these police powers in the realm of public health in their new country.[386]

Furthermore, the Constitution does not place any limits on the legal power to protect the public from disease.[387] As held by the Supreme Court in *United States v. Jones*, enumerated restrictions in the Constitution, where they exist, act as constraints on inherent powers.[388] However, from a practical standpoint, the means likely have to be proportional and rationally related to the outcome.[389] Restrictive measures that have no basis in medical literature and practice would be beyond the scope of what was intended by the founders.[390] Thus, in acting to benefit the general welfare through public health measures, a similar balancing test to that in *Jacobson* emerges. Given this similar result to international custom, the outcome would likely be the same regarding the regulation of fake COVID-19 news. Restricting false information about COVID-19 would contribute to the general welfare through improving public health.

D. Emergency Situations

The final type of inherent powers are emergency powers that only emerge during crises. There is long-standing practice in the United States to declare national emergencies in the face of public health crises, although historically these have been primarily related to the restriction of movement rather than speech.[391] Another emergency situation, war, provides a corollary for the restriction of freedom of speech. The U.S. government has declared a public health emergency due to COVID-19, and thus the groundwork is already laid for a restriction of fake COVID-19 news through emergency powers.

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[385] *Id.*
[386] *Id.*
[387] Holt et al., *supra* note 347, at 2–3, 10.
[388] 109 U.S. 513, 518–19 (1883).
[389] Holt et al., *supra* note 347, at 2.
[390] *See id.*
[391] *See supra* Part III.B.

Since 2005, dozens of public health emergencies have been declared under Section 319 of the Public Health Service Act.[392] Under the Public Health Service Act, the Secretary of Health and Human Services may take extraordinary actions if "(1) a disease or disorder presents a public health emergency; or (2) a public health emergency, including significant outbreaks of infectious diseases or bioterrorist attacks, otherwise exists . . . ."[393] Public health emergencies have been declared in response to outbreaks of epidemics and pandemics prior to COVID-19, such as during the H1N1 Flu outbreak in 2009[394] and in response to the outbreak of Zika Virus in 2016.[395]

The Trump Administration similarly declared a public health emergency for COVID-19 pursuant to Section 319, with the Secretary of Health and Human Services announcing it on January 31, 2020.[396] President Trump followed this by issuing an executive order declaring a national emergency due to COVID-19.[397] Both the Trump and Biden administrations have extended this state of emergency.[398] The powers claimed by the Trump and Biden administrations during the national emergency are those that were commonly exercised during prior public health crises and are undoubtably inherent powers: quarantines, restrictions on travel, and research support.[399] Beyond these usual restrictions on civil liberties, the Trump administration did not attempt to claim any further emergency powers. The Biden administration's September executive order mandating vaccines for federal employeesalso likely falls within these historic norms.[400] The

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[392] *See Public Health Emergency Declarations*, PUB. HEALTH EMERGENCY, https://www.phe.gov/emergency/news/healthactions/phe/Pages/default.aspx [https://perma.cc/8AP4-6PTW] (last updated July 16, 2021).

[393] 42 U.S.C.A. § 247d(a) (2019).

[394] Charles E. Johnson, *Determination that a Public Health Emergency Exists*, PUB. HEALTH EMERGENCY (Apr. 26, 2009), https://www.phe.gov/emergency/news/healthactions/phe/Pages/h1n1.aspx [https://perma.cc/ABR2-VDL8].

[395] Sylvia M. Burwell, *Determination that a Public Health Emergency Exists in Puerto Rico as a Consequence of the Zika Virus Outbreak*, PUB. HEALTH EMERGENCY (Aug. 12, 2016), https://www.phe.gov/emergency/news/healthactions/phe/Pages/zika-pr.aspx [https://perma.cc/83HS-ZXMW].

[396] *President Trump Declares State of Emergency for COVID-19*, *supra* note 282.

[397] Novel Coronavirus Disease (COVID-19) Outbreak: Declaration of National Emergency, 85 Fed. Reg. 15337, 15337 (Mar. 13, 2020).

[398] *See* Becerra, *supra* note 283.

[399] *See* Novel Coronavirus Disease (COVID-19) Outbreak: Declaration of National Emergency, 85 Fed. Reg. at 15337; *supra* Part III.B.

[400] *See* Requiring Coronavirus Disease 2019 Vaccination for Federal Employees, 86 Fed. Reg. 50989, 50990 (Sept. 9, 2021); *Path Out of the Pandemic*, WHITE HOUSE,

Biden administration's attempt to require businesses with 100 or more employees to mandate vaccination or weekly testing through the Occupational Safety and Health Administration ("OSHA") Act was halted by the Supreme Court,[401] but it is unclear whether such a mandate would have passed constitutional muster if it had relied on inherent powers rather than a specific statute.

Restrictions on speech are possible through emergency powers too. As described in Part III.C., censorship of speech during times of military conflict has been a longstanding practice in the United States and internationally, although it has grown increasingly less robust over the course of the twentieth and twenty-first centuries.[402] The practice of wartime censorship presents an important baseline principle for emergency powers. Censorship was allowed due to the emergency situation in the United States, which was embroiled in military conflicts that threatened the security of the country. Yet limitations also accumulated over the past century that restricted the extent of censorship that was permissible. In cases during World Wars I and II, censorship of political speech, which is highly protected under the First Amendment, was allowed.[403] Later, such draconian restrictions were no longer attempted.[404] This sets up a balancing system of the emergency interest versus the interest in civil liberties.[405] This effectively creates a similar test to that used in *Jacobson* for customary international inherent powers and as would be understood through an original intent reading of the Constitution's general welfare clauses.

A comparison with the conflicting interests of wartime censorship demonstrates that a restriction on fake COVID-19 news is likely to meet this bar for emergency powers. When the U.S. government acts in the interests of public health, it frequently must restrict personal or economic liberties of individuals.[406] Furthermore, the collective good of public health is one of the

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https://www.whitehouse.gov/covidplan (last visited Oct. 8, 2021) (presenting President Biden's proposed plan for countering the ongoing COVID-19 pandemic); *see also* Dershowitz, *supra* note 14 (explaining that "a properly enacted statute mandating vaccination or conditioning employment and other benefits on vaccination or testing would be upheld" as constitutional).

[401] *See Nat'l Fed. of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin.*, 142 S. Ct. 661, 666 (2022).

[402] *See supra* Part III.C.

[403] *See supra* notes 305–12 and accompanying text.

[404] *See supra* notes 313–20 and accompanying text.

[405] *See supra* Part III.C.

[406] Gostin, *supra* note 347, at 267.

utmost importance.[407] Unlike wartime censorship, this emergency power has not been weakened over time; the Trump administration invoked the same quarantine and travel restriction powers that have been invoked in the United States since colonial times. Furthermore, the speech at stake with wartime censorship was core political speech that the First Amendment is designed to protect. Fake news about COVID-19, even if it is clearly protected under the First Amendment following the Supreme Court decision in *United States v. Alvarez*, should not be as important given its more minor contributions—or even complete lack of value—to U.S. society. [408] Indeed, fake COVID-19 news has actively harmed U.S. citizens by leading to poor public health practices and greater rates of COVID-19 transmission and deaths than in other countries. Given the greater governmental interest in restricting fake COVID-19 news, the federal government's broad public health emergency powers should permit restrictions on the circulation of false information related to COVID-19 in a manner consistent with the First Amendment.

CONCLUSION

Until recently, inherent powers have been a neglected source of constraints on fake news. Yet in the context of COVID-19, inherent powers are a powerful model for restricting harmful fake news about the coronavirus, public health measures, and vaccines. The three models for inherent powers—international custom, pursuant to constitutionally enumerated powers, and emergency powers—are ultimately focused on balancing tests that weigh the government's necessity against the importance of the civil liberties being restricted. Based on historic inherent powers related to public health and the censorship of speech during wartime in both the United States and other countries, restricting COVID-19 fake news would appear to be a strong fit for inherent powers.

The use of inherent powers is not without risk. Broad inherent and emergency powers could erode rights more permanently, as happened historically in the United States with sterilization a century ago[409] and has more recently been the case

[407] *Id.* at 321 ("Undoubtedly, personal autonomy, privacy, and liberty are exceptionally important values. However, they do not necessarily trump the equally important collective value of community health and wellbeing.").

[408] *See supra* Part IV.A.

[409] Buck v. Bell, 274 U.S. 200, 207 (1927) (citation omitted) ("The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.

in Hungary under Prime Minister Viktor Orban.[410] But even if courts have done an inadequate job of restraining the President's inherent powers in the past,[411] the balancing tests identified in Parts III and IV provide a model for how to constrain an overgrowth of the federal government. Fake news about COVID-19 poses a serious threat to the health of Americans. Notwithstanding the self-regulation of some major online platforms regarding fake news,[412] the government can have a role in regulating fake news in relation to public health. Governments have always been the ultimate protector of society from public health crises; the emergence of fake news as a novel threat to public health does not change this long-standing precedent of inherent powers.

The utilization of inherent powers to restrict the circulation of fake COVID-19 news should also force scholars and judges to reconsider fake news more broadly. The COVID-19 pandemic has highlighted how dangerous fake news can be and the fatal flaws of relying on the marketplace of ideas and counterspeech models to nullify it. In the field of public health, the risks are high. The dangers of fake news in general have become much more apparent since the Supreme Court decided *United States v. Alvarez* in 2012. Scholars and legislators alike should, like with the balancing analysis under inherent powers, query what the value of fake news is under the First Amendment and what risks it poses to U.S. society as a whole.

Three generations of imbeciles are enough."); *see also Quarantine and the Limits of Government*, *supra* note 227 (cautioning listeners about the dangers of unfettered government powers during a public health crisis).

[410] *See* Gross, *supra* note 374 (describing how Orban's government declared a "state of danger because of the pandemic" and then passed laws that allow the government to suspend statutes and criminalize statements that interfere with the vaguely worded " 'successful protection' of the public").

[411] *See, e.g.*, Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 910 (1983) (arguing that the Supreme Court has employed an "ad hoc, unprincipled approach to this power," greatly contributing to the development of an "Imperial Presidency").

[412] Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1601–02, 1632 (2018) (describing some of the self-regulation procedures adopted by major social media platforms). Social media platforms have specifically regulated fake news in the public health context. *E.g.*, EJ Dickson, *Will the Internet's War on Anti-Vaxxers Work?*, ROLLING STONE (Mar. 28, 2019, 1:40 PM), https://www.rollingstone.com/culture/culture-features/anti-vaxxers-facebook-youtube-instagram-806504 [https://perma.cc/BK7F-6A8C] (describing how major online media platforms have been attempting to restrict fake news about COVID-19).