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Beyond the Marketplace of Ideas: Bridging Theory and Doctrine to Promote Self-Governance

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Beyond the Marketplace of Ideas: Bridging Theory and Doctrine to Promote Self-Governance

David S. Ardia*

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INTRODUCTION

Social scientists who study the impact of the Internet, social media, and other forms of digital information sharing on our public sphere paint a disturbing picture of the health of American democracy. Our current media ecosystem produces too little high-quality information;¹ we tend to be attracted to information that confirms our existing biases about the world and

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¹ See David S. Ardia, Evan Ringel, Victoria Smith Ekstrand & Ashley Fox, *Addressing the Decline of Local News, Rise of Platforms, and Spread of Mis- and Disinformation Online: A Summary of Current Research and Policy Proposals*, U. OF N.C. CTR. FOR MEDIA L. & POL'Y 1, 9–21 (2020); Penelope Muse Abernathy, *News Deserts and Ghost Newspapers: Will Local News Survive?*, U. OF N.C. SCH. OF MEDIA & JOURNALISM CTR. FOR INNOVATION & SUSTAINABILITY IN LOC. MEDIA (2020); PEN AMERICA, *The Decimation of Local Journalism and the Search for Solutions* (Nov. 20, 2019), <https://pen.org/wp-content/uploads/2019/11/Losing-the-News-The-Decimation-of-Local-Journalism-and-the-Search-for-Solutions-Report.pdf> [<https://perma.cc/V2DS-YRDU>].

to share this information with little regard for its veracity;² and there are an increasing number of actors who seek to leverage these vulnerabilities to distort public discourse and undermine democratic decision-making.³

These observations force us to confront a question that has vexed First Amendment scholars for decades: Is the Constitution indifferent to whether Americans are informed about their government and the world? I believe the answer to this question is a resounding no; the Constitution, and the system of government it establishes, is predicated on an informed electorate. Without an informed electorate, sovereignty cannot reside in the people.⁴ As James Madison famously said, “[a] popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both.”⁵

But what does it mean to say that our constitutional system is predicated on an informed electorate? Does the Constitution therefore place affirmative obligations on the government to pass laws, develop policies, and act in ways that support an informed citizenry? Surprisingly, these questions have received minimal scrutiny by jurists. One reason is that judges in First Amendment cases largely eschew any deep analysis of whether their decisions advance specific constitutional values, relying instead on general ap-

² See Brian Southwell, *Why We Lie to Ourselves and Others About Misinformation*, MEDIUM (Mar. 28, 2018) (finding that false information tends to be shared more readily than accurate information), <https://medium.com/trust-media-and-democracy/why-we-lie-to-ourselves-and-others-about-misinformation-770165692747> [<https://perma.cc/FH9Z-HTQ6>]; Alice E. Marwick, *Why Do People Share Fake News? A Sociotechnical Model of Media Effects*, 2 GEO. L. TECH. REV. 474, 508 (2018) (explaining that fact-checking statements may actually cause a reader to “double down” on pre-existing beliefs); Axel Westerwick, Benjamin K. Johnson, & Silvia Knobloch-Westerwick, *Confirmation Biases in Selective Exposure to Political Online Information: Source Bias vs. Content Bias*, 84 COMM’N MONOGRAPHS 343, 343 (2017) (observing that “individuals select messages more frequently or spend disproportionately more time with messages that align with preexisting opinions over information that challenges preexisting views”).

³ See Alice Marwick & Rebecca Lewis, *Media Manipulation and Disinformation Online*, DATA & SOC’Y RSCH. INST. 1, 34–39 (2017) (discussing various techniques used to exploit information vulnerabilities of the public); Lee Rainie, Janna Anderson & Jonathan Albright, *The Future of Free Speech, Trolls, Anonymity, and Fake News Online*, PEW RSCH. CTR. 1, 13 (Mar. 29, 2017) (describing weaponization of social media during the 2016 election); Renee DiResta, Kris Shaffer, Becky Ruppel, David Sullivan & Robert Matney, *The Tactics & Tropes of the Internet Research Agency*, NEW KNOWLEDGE 1, 99 (Dec. 17, 2018) (reporting on how Russia’s Internet Research Agency “exploited social unrest and human cognitive biases” in the 2016 election).

⁴ The idea that sovereignty resides in the people derives support from a number of sources. See, e.g., U.S. CONST. pmbl. (“We the People of the United States . . . do ordain and establish this Constitution for the United States of America.”); JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 54–55 (1689) (T. Peardon ed. 1952) (writing that the state may exercise authority over the individual only with his or her consent and thus all power to make laws resides in the citizenry and it is only through the delegation of that authority that the state may act); John Stuart Mill, *Considerations on Representative Government* 6–9 (1861) (C. Shields ed. 1958) (concluding that government may govern only with the acceptance of its citizens).

⁵ Letter from J. Madison to W.T. Barry (Aug. 4, 1822), reprinted in 9 THE WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910). Madison went on to warn that “[k]nowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.” *Id.*

peals to the “marketplace of ideas” and concluding that “more speech” is the answer to nearly all First Amendment problems.⁶

While it may be true that more speech is the best solution in many instances the exclusive focus on more speech confuses the means with the ends. What is it that we are hoping to achieve with more speech? Judges—and many scholars—typically point to the “search for truth” as the ultimate objective,⁷ echoing Justice Oliver Wendell Holmes’ dissent in *Abrams v. United States* that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”⁸ Driven in large part by laissez-faire economic principles, proponents of what is known as the “marketplace of ideas theory” argue that competition in the “marketplace for speech” will inexorably produce truth and that government should have little, if any, role in supporting or influencing public discourse.⁹

I push back strongly against this view, noting that the marketplace for speech is riddled with systemic failures.¹⁰ Due to a host of cognitive and behavioral factors, the assertion that speech occurs within a self-regulating market that needs only the presence of more speech to produce “truth” has not held up to empirical scrutiny.¹¹ Moreover, the First Amendment is con-

⁶ See, e.g., *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If 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.”); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) (“However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”); *McConnell v. FEC*, 540 U.S. 93, 258–59 (2003) (Scalia, J., concurring in part and dissenting in part) (invalidating portions of the Bipartisan Campaign Reform Act of 2002 and remarking that “[g]iven the premises of democracy, there is no such thing as too much speech”).

⁷ See, e.g., LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 45 (1986) (“The end result of this process [of open discussion], we hope, is that we will arrive at as close to an approximation of the truth as we can.”); Eugene Volokh, *In Defense Of The Marketplace Of Ideas / Search For Truth As A Theory Of Free Speech Protection*, 97 VA. L. REV. 595, 600–01 (2011) (arguing that two primary rights derived from the right to free speech are “the right to uncover the truth for oneself” and “to participate in the continuing development of human knowledge”); Brian C. Murchison, *Speech and the Truth-Seeking Value*, 39 COLUM. J.L. & ARTS 55, 112 (2015) (“[T]he truth-seeking value lies behind cautious exploration of the past; it fuels resistance to silencing forces in the present; and it prompts the creation of legal rules to ensure a steady flow of accurate information in the future.”); Frederick Schauer, *Free Speech, the Search for Truth, and the Problem of Collective Knowledge*, 70 SMU L. REV. 231, 231 (2017) (noting that the “basic concept of freedom of speech as enabling a society to increase its level of knowledge, to facilitate its identification of truth, and to expose error has a wide and persistent currency”).

⁸ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁹ See *infra* Part I.C.

¹⁰ See *infra* Part III.A.

¹¹ See, e.g., Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1163 (2015) (noting that “a considerable amount of existing empirical research . . . justifi[es] skepticism about the causal efficacy of establishing an open marketplace of ideas in identifying true propositions and rejecting false ones”); Lyriisa Barnett Lidsky, *Nobody’s Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 802 (“Empirical work in the fields of cognitive psychology and behavioral economics suggests that both the rational audience and the more-is-better assumptions may be demonstrably false in some commonplace settings.”); Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 696 (2006) (“The fact that cognitive biases interfere with our ability to make good decisions has serious conse-

cerned with far more than preserving free competition within a metaphorical speech marketplace. The First Amendment plays a vital role in the American constitutional system, facilitating self-governance by ensuring that citizens are capable of participating in the deliberative processes that are essential to a representative democracy.

This article proceeds in three parts. Part I examines the longstanding debate over the First Amendment's purpose and explains why the marketplace of ideas theory has come to dominate both judicial and public understanding of the First Amendment's speech and press clauses.¹² The marketplace theory's ascendancy, however, has proven to be problematic. It rests on an overly simplified account of public discourse, treating speech as merely a commodity that can be allocated through market-style transactions, and it has come to embody an extreme version of libertarian economic thinking that is undermining the very democratic processes the First Amendment was intended to serve and strengthen.

Part II looks beyond the superficial appeal of the marketplace theory to highlight the structural role the First Amendment plays in the American constitutional system. Building on the work of Charles Black, John Hart Ely, Alexander Meiklejohn, and Robert Post,¹³ I maintain that whatever else the First Amendment was meant to achieve, a core function of its speech, press, assembly, and petitioning clauses was to ensure that citizens could effectively exercise their right of self-governance. As an increasing number of First Amendment scholars are beginning to recognize, unbridled faith in a supposedly self-correcting speech marketplace is a dangerous foundation for a democracy.

Part III considers how the First Amendment can foster self-governance. It lays out three principles that should guide the development of legal doctrines that support an informed and empowered electorate. First, we need to move beyond the idea that the First Amendment's only function is to enshrine free market ideology. Second, the First Amendment does not bar the government from addressing market failures in the actual markets in which communication takes place, especially when those failures undermine the public's capacity for self-governance. Third, the capacity for self-governance turns, at least in part, on whether the public has the information it needs to effectively evaluate issues of public policy.

Building on this last point, Part III proposes several ways to bridge theory and doctrine to promote self-governance, including using antitrust

quences for the marketplace of ideas model for regulating communications.”). For a discussion of the cognitive and behavioral factors that impede the search for truth, *see infra* notes 90–95 and accompanying text.

¹² Although the First Amendment contains six clauses that prohibit the government from creating laws that establish a national religion, impede the free exercise of religion, abridge the freedom of speech, infringe upon the freedom of the press, interfere with the right to peaceably assemble, and prohibit citizens from petitioning for governmental redress of grievances, *see* U.S. CONST. amend. I, my focus here is primarily on the First Amendment's protections for speech and the press.

¹³ *See infra* notes 109–137 and accompanying text.

law to address concentrated economic power in communication markets, expanding and enforcing privacy and consumer protection laws to create more competition among speech platforms, and initiating programs that support journalism and other knowledge institutions within society. It also argues that as an influential participant in public discourse, the government should have an obligation to wield its influence in ways that support self-governance, not undermine it by misleading its citizens or starving them of the information they need. Part III therefore proposes two new rights that should be recognized under the First Amendment: a right not to be lied to by the government when it undermines the public's capacity for self-governance and a right to information in the government's possession that can assist the public in its efforts to understand and evaluate issues of public policy.

I. COMPETING THEORIES OF THE FIRST AMENDMENT

Scholars and historians have long debated why the Constitution proscribes that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”¹⁴ The text of the First Amendment is silent about its purpose and the historical record is largely mute about the meaning of its clauses.¹⁵ This has spawned what might be described as a cottage industry among First Amendment scholars to identify every possible justification for protecting speech and to articulate, so far without success, a single unifying theory of the First Amendment.¹⁶

Part of the reason scholars continue to disagree over the First Amendment's purpose is that the values advanced by expressive freedoms are contested.¹⁷ As Thomas Emerson lamented in 1963, “[d]espite the mounting number of [First Amendment] decisions and an even greater volume of comment, no really adequate or comprehensive theory of the first amendment has been enunciated, much less agreed upon.”¹⁸ For Emerson, the failure to develop a satisfactory theory “is hardly surprising,” given that the

¹⁴ U.S. CONST. amend. I.

¹⁵ See 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW—SUBSTANCE & PROCEDURE § 20.5(a) (5th ed. 2012) (“There is little that anyone can draw from the debates within the House concerning the meaning of the First Amendment. In addition, there is the absence of useful records of debates in the Senate—or the states—on its ratification.” (footnotes omitted)); Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1101 (2016) (“[T]he Free Speech Clause has the most shallow and obscure history of any provision of the First Amendment.”).

¹⁶ See Thomas I. Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 877 (1963) [hereinafter Emerson, *General Theory of the First Amendment*] (observing that “no really adequate or comprehensive theory of the first amendment has been enunciated, much less agreed upon”); David S. Han, *The Value of First Amendment Theory*, 2015 U. ILL. L. REV. SLIP OPS. 87, 87 (noting that “First Amendment scholars have long struggled to articulate a grand unified theory underlying the protection of free speech”).

¹⁷ See David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 880 (2017).

¹⁸ Emerson, *supra* note 16, at 877.

“issues are controversial and the problems complex.”¹⁹ In a body of work that continues to influence scholars today, Emerson set out to bring some clarity to the job, remarking that the “first task” is to examine the various elements that are necessary to support an effective system of free expression “in a modern democratic society.”²⁰

A. *The Debate Over the First Amendment’s Purpose*

The effort to identify a justificatory theory for the First Amendment is largely driven by the desire for determinacy in First Amendment cases and consistency in First Amendment doctrine.²¹ In the words of David Han, “First Amendment theory provides tangible ‘cash value’ insofar as it gives courts concrete predictive or prescriptive guidance in deciding individual cases.”²² The goal of ascertaining a single, universally applicable theory holds particular allure to scholars because it would offer “a set of consistent normative principles that would explain and justify First Amendment doctrine.”²³

Although a unified theory of the First Amendment has so far proven to be elusive,²⁴ scholars have largely coalesced around four theories explaining the First Amendment’s protections for speech.²⁵ The first and most widely recognized justification for protecting speech is the advancement of knowl-

¹⁹ *Id.*

²⁰ *Id.* at 878. Emerson identified three elements that he felt should be analyzed: “(I) what it is that the first amendment attempts to maintain: the function of freedom of expression in a democratic society; (II) what the practical difficulties are in maintaining such a system: the dynamic forces at work in any governmental attempt to restrict or regulate expression; and (III) the role of law and legal institutions in developing and supporting freedom of expression.” *Id.*

²¹ See Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 U.C.L.A. L. REV. 1405, 1417 (1987) (writing that the “principal goal” of First Amendment theorists is to “replace uncertainty with certainty,” which would involve giving “clear guidelines for decisionmakers” and “clear rules for decision”); Lawrence B. Solum, *The Value of Dissent*, 85 CORNELL L. REV. 859, 859 (2000) (“One ambition of [First Amendment] theorizing is the production of a comprehensive theory of the freedom of expression, a set of consistent normative principles that would explain and justify First Amendment doctrine.”); Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1019 (2015) (stating that a “unified theory of representative democracy can provide aspirational guidance and predictive consistency, which legislators can then translate into policy and judges can interpret into doctrine”).

²² Han, *supra* note 16, at 89.

²³ Solum, *supra* note 21, at 859.

²⁴ See, e.g., Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1626 (1987) (surveying attempts to formulate a “grand theory” of the First Amendment and concluding that “[n]one of them . . . is acceptable as a general theory of the first amendment”); Solum, *supra* note 21, at 859 (observing that “despite an outpouring of scholarly effort” to identify a comprehensive theory of freedom of expression, “the consensus is that free speech theory has failed to realize this imperial ambition”).

²⁵ See Ardia, *supra* note 17, at 882; Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CAL. L. REV. 1, 32 (2012); Tsesis, *supra* note 21, at 1016. Because the Supreme Court has largely eschewed giving the First Amendment’s Free Press Clause independent meaning, see David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430 (2002) (“[A]s a matter of positive law, the Press Clause actually plays a rather minor role in protecting the freedom of the press.”), I focus primarily on the theoretical justifications for the Free Speech Clause.

edge or truth,²⁶ which has come to be encapsulated by the metaphor of a “marketplace of ideas.”²⁷ A second theory asserts that the First Amendment’s purpose is to facilitate the democratic processes necessary for self-governance.²⁸ A third theory posits that speech should be protected because it advances individual autonomy and self-fulfillment.²⁹ A fourth theory justifies protection for speech on the ground that it is necessary to serve as a check on government.³⁰ Other theories have also been proposed, including promoting tolerance and acting as a “safety valve” to let off societal tensions,³¹ and some scholars argue that the First Amendment should be understood as encompassing an eclectic set of overlapping and sometimes conflicting rationales.³²

The Supreme Court, for its part, has never expressly adopted one theory over the others and there are echoes of most of them in the Court’s First

²⁶ See, e.g., *Davis v. FEC*, 554 U.S. 724, 755–56 (2008) (Stevens, J., concurring in part and dissenting in part) (“[I]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.” (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969))).

²⁷ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (re-marking that “the best test of truth is the power of the thought to get itself accepted in the competition of the market”). Holmes did not actually use the phrase “marketplace of ideas” in his dissent in *Abrams*, but he is typically credited with having injected the idea into First Amendment jurisprudence. See *infra*, Part I.B.

²⁸ See, e.g., ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 24–28 (1979); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 121–65 (1993) (contending that free speech is a “precondition” for democracy); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 20–21 (1971) (arguing that freedom of speech is necessary for “democratic organization”); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 *CALIF. L. REV.* 2353, 2362 (2000) (“The democratic theory of the First Amendment. . . protects speech insofar as it is required by the practice of self-government.”); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 *VA. L. REV.* 491, 497 (2011) (“[T]he value that best explains the pattern of free speech decisions is a commitment to democratic self-governance.”).

²⁹ See, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 47–69 (1989) (arguing that speech is protected because it promotes both the speaker’s “self-fulfillment” and “participation in change”); Emerson, *General Theory of the First Amendment*, *supra* note 16, at 879 (describing freedom of expression’s role in “[t]he achievement of self-realization”). Although the protection of autonomy interests has influenced First Amendment doctrine, see, e.g., *Bd. of Airport Comm’rs of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987); *Stanley v. Georgia*, 394 U.S. 557 (1969), most constitutional scholars do not see it as a primary justification for the First Amendment’s speech protections. See ROBERT C. POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* xi (2012) (“[T]he fundamental constitutional commitments of the nation, as reflected in the actual scope of First Amendment coverage, do not suggest that the protection of autonomy can be deemed a basic purpose of the judicially enforced First Amendment.”); Weinstein, *supra* note 28, at 503 (“Although autonomy is not a core free speech value, this does not mean that it has no role to play in current doctrine.”).

³⁰ See, e.g., Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 *AM BAR FOUND. RES. J.* 521, 527 (1977).

³¹ See, e.g., GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, *THE FIRST AMENDMENT* 15–16 (2d ed. 2003).

³² See, e.g., Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 *NW. U. L. REV.* 1212, 1251–52 (1983); Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 *U.C.L.A. L. REV.* 1405, 1422 (1987); Han, *supra* note 16, at 87.

Amendment jurisprudence, with the justices drawing on different justifications for protecting speech depending on the nature of the First Amendment conflict at issue.³³

B. *The Rise of the “Marketplace of Ideas” Theory*

Although the Supreme Court has not adopted a unitary theory of the First Amendment, no theory dominates both judicial and public understanding of the First Amendment in the same way as the “marketplace of ideas.”³⁴ Typically mentioned in combination with the search for truth,³⁵ the desire to sustain a marketplace of ideas has been invoked dozens of times by the Supreme Court in cases involving a wide variety of issues ranging from trademark law to government subsidies for the arts.³⁶ At bottom, the marketplace

³³ See, e.g., Post, *supra* note 28, at 2372 (“First Amendment jurisprudence contains several operational and legitimate theories of freedom of speech, so that it is quite implausible to aspire to clarify First Amendment doctrine by abandoning all but one of these theories.”); Tsesis, *supra* note 21, at 1017 (“The Supreme Court has been inconsistent in its application [of free speech theory], and, indeed, has never definitively adopted one over the others.”).

³⁴ See THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA 7 (2013) (“[I]t is no exaggeration to say that Holmes’s [allusion to a free trade in ideas] gave birth to the modern era of the First Amendment, in which freedom to express oneself is our preeminent constitutional value.”); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 823–24 (2008) (“Justice Holmes—joined by Justice Brandeis—conceptualized the purpose of free speech so powerfully that he revolutionized not just First Amendment doctrine, but popular and academic understandings of free speech.”); William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 1 (1995) (“In Speech Clause jurisprudence, . . . the oft-repeated metaphor that the First Amendment fosters a marketplace of ideas that allows truth to ultimately prevail over falsity has been virtually canonized.”).

³⁵ For readability, I will refer to both the search for truth and marketplace of ideas justifications for protecting speech as the “marketplace of ideas” theory or simply “marketplace” theory.

³⁶ See, e.g., *Matal v. Tam*, 137 S. Ct. 1744, 1762 (2017) (trademark law); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2237 (2015) (Kagan, J., concurring) (town ordinances restricting temporary signs); *United States v. Alvarez*, 567 U.S. 709, 727–28 (2012); *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 188 (2007) (expenditure of non-member union fees); *Randall v. Sorrell*, 548 U.S. 230, 280 (2006) (Stevens, J., dissenting) (expenditure limits for political candidates); *McCreary County v. American Civil Liberties Union*, 545 U.S. 844, 883 (2005) (O’Connor, J., concurring) (religious display of the Ten Commandments); *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (distribution of leaflets in public housing developments); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (process for awarding artistic grants); *Reno v. Am. C.L. Union*, 521 U.S. 844, 885 (1997) (speech on the internet); *44 Liquormart v. Rhode Island*, 517 U.S. 484, 496 (1996) (alcohol advertisements); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (parodies of public figures); *Bd. of Educ. v. Pico*, 457 U.S. 853, 866–67 (1982) (book selection by public school libraries); *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (use of public university buildings by student religious organizations); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981) (contribution limits to committees supporting or opposing ballot measures); *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 537–38 (1980) (informational inserts in utility bills); *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978) (regulation of radio broadcasts); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 760 (1976) (prescription drug advertisement); *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975) (editorial control over newspaper advertisements); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 248 (1974) (editorial

of ideas theory embodies the proposition that “the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market,”³⁷ and that truth should be determined through “uninhibited, robust, and wide-open” public debate.³⁸

While the marketplace of ideas theory holds outsized influence on popular understanding of the First Amendment, it is a relatively recent addition to American free speech jurisprudence.³⁹ In fact, prior to the twentieth century, the Supreme Court had little cause to even consider the theoretical justifications for the First Amendment’s protections for speech. This changed in 1918, when the Court took up a series of cases brought by individuals who had been convicted under the Espionage Act of 1917 for speech that opposed U.S. involvement in World War I.⁴⁰ In three unanimous opinions authored by Justice Oliver Wendell Holmes, the Court held that it is within Congress’s power to criminalize seditious speech, adopting the view that the First Amendment does not prohibit the government from punishing speakers when their speech presents a clear and present danger to the nation.⁴¹

A mere eight months after this first set of cases was decided, however, Holmes dissented in a fourth anti-war case, *Abrams v. United States*, in which a 7-2 majority on the Court upheld the conviction of several individuals for the distribution of leaflets advocating resistance to the war effort.⁴² Joined by Justice Louis Brandeis, Holmes wrote what many consider to be

control over op-ed columns); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (editorial control over discussion of public issues on TV and radio broadcasts); *Time, Inc. v. Hill*, 385 U.S. 374, 406–07 (1967) (Harlan, J., concurring in part and dissenting in part) (false light claim).

³⁷ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

³⁸ *Sullivan*, 376 U.S. at 270.

³⁹ Although Justice Holmes is typically credited with coining the phrase in 1919 in his dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), the first reference to a “marketplace of ideas” in a Supreme Court opinion was in Justice Brennan’s majority opinion in *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965), forty-six years after *Abrams*. The first articulation of the importance of fostering competition among ideas, however, has been attributed to the poet John Milton, who criticized the English system of licensing in *AREOPAGITICA* in 1644 and wrote:

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?

JOHN MILTON, *AREOPAGITICA* 35 (Jim Miller & Dover Thrift eds. 2016) (1644).

⁴⁰ See *Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616 (1919).

⁴¹ See *Schenck*, 249 U.S. at 52; *Frohwerk*, 249 U.S. at 208–09; *Debs*, 249 U.S. 211. Summarizing the Court’s approach in these cases, Holmes wrote in *Schenck v. United States*: “The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” 249 U.S. at 52.

⁴² 250 U.S. 616 (1919).

the most important dissent in American constitutional history.⁴³ While Holmes's central disagreement with the majority involved their loose application of the clear and present danger test—Holmes thought Abrams's actions presented no immediate danger, dismissing the leaflets as the “silly” actions of an “unknown man”⁴⁴—his dissent in *Abrams* is remembered and celebrated for its allusion to what has since become known as the marketplace of ideas rationale for protecting speech.⁴⁵

Holmes, who had previously shown little desire to use the First Amendment to limit government power, prefaced his invocation of the need for the “free trade in ideas” with language that seemed to support the government's suppression of speech:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition.⁴⁶

Whereas Holmes regarded the government's effort to suppress dissident speech as “perfectly logical,” his service in the Civil War and experience watching American society split apart over World War I, had shown him the danger of attempting to sweep away all opposing viewpoints:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment.⁴⁷

As Holmes historian and law professor Thomas Healy observes, “Holmes's dissent in *Abrams* marked not just a personal transformation but the start of a national transformation as well.”⁴⁸ Healy notes that Holmes's reference to a free trade in ideas became not only a “cultural catchphrase” but also an influential intellectual seed in the Supreme Court's expanding First

⁴³ HEALY, *supra* note 34, at 7; Blocher, *supra* note 34, at 823–24 (“In a single passage of his dissenting opinion in *Abrams v. United States*, Justice Holmes—joined by Justice Brandeis—conceptualized the purpose of free speech so powerfully that he revolutionized not just First Amendment doctrine, but popular and academic understandings of free speech.”).

⁴⁴ *Abrams*, 250 U.S. at 628 (Holmes, J. dissenting).

⁴⁵ Holmes never actually used the phrase “marketplace of ideas” in his dissent in *Abrams*. See *supra* note 39. As Vincent Blasi explains, “[t]hat is a paraphrase supplied by his interpreters.” Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 24 (2004).

⁴⁶ *Abrams*, 250 U.S. at 630 (Holmes, J. dissenting).

⁴⁷ *Id.*

⁴⁸ HEALY, *supra* note 34, at 7.

Amendment jurisprudence.⁴⁹ As other scholars have similarly concluded, Healy writes that “it is no exaggeration to say that Holmes’s dissent [in *Abrams*] gave birth to the modern era of the First Amendment nor can it be disputed that, nearly a century later, his dissent continues to influence our thinking about free speech more than any other single document.”⁵⁰

C. *Criticisms of the Marketplace of Ideas Theory*

The idea that the ultimate good for society is best reached by the free trade in ideas rests on certain assumptions about how public discourse actually takes place and the capacity of individuals to engage with ideas in the “competition of the market.” Many scholars have questioned these assumptions, pointing to obvious market failures and to contradictions within the theory itself. Criticism of the marketplace of ideas as a justification for the protection for speech generally falls into two categories. The first challenges the very notion that a “marketplace” is a valid construct for understanding public discourse. A second vein of criticism accepts some aspects of market ideology, but argues that the marketplace for speech, as currently constituted, simply is not working.

Critics who challenge the notion that a “marketplace” is a valid construct for understanding public discourse point out that modern communication practices bear little resemblance to the economist’s model of an idealized market where ideas compete with each other through barter-style transactions.⁵¹ For neoclassical economists, a market is a mechanism that reflects, in terms of prices and quantities, aggregated individual preferences.⁵²

⁴⁹ *Id.*

⁵⁰ HEALY, *supra* note 34, at 7; see also Blocher, *supra* note 34, at 823–24 (“Justice Holmes—joined by Justice Brandeis—conceptualized the purpose of free speech so powerfully that he revolutionized not just First Amendment doctrine, but popular and academic understandings of free speech.”); Marshall, *supra* note 34, at 1 (“In Speech Clause jurisprudence, . . . the oft-repeated metaphor that the First Amendment fosters a marketplace of ideas that allows truth to ultimately prevail over falsity has been virtually canonized.”).

⁵¹ See, e.g., Post, *supra* note 29, at xi (“The very concept of a marketplace of ideas has long been subject to devastating objections based upon its various imperfections, inefficiencies, and internal contradictions.”); Blocher, *supra* note 34, at 831 (noting that “the marketplace of ideas metaphor also has explanatory weaknesses and normative difficulties, almost all of which track the shortcomings of its idealized view of an uninhibited, costless, and perfectly efficient free market”); Darren Bush, *The “Marketplace of Ideas”: Is Judge Posner Chasing Don Quixote’s Windmills?*, 32 ARIZ. ST. L.J. 1107, 1110 (2000) (describing the “(in)appropriateness of the economic interpretation of Holmes’ metaphor as a tool for legal analysis”); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 348–50 (1991) (“No matter how we define the ground rules, there is no theory that explains why competition in the realm of ideas will systematically produce good or truthful or otherwise desirable outcomes.”); Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 897 (2002) (“[The] marketplace of ideas theory is fundamentally unsound both normatively and descriptively.”).

⁵² Summarizing several basic economics textbooks, John Mixon writes that the fundamental assumptions of neoclassical economics are that: “(1) resources are scarce; (2) people are rational; (3) people pursue their own goals and welfare; (4) people have perfect information, or at least enough to make a rational decision; (5) market participants make voluntary exchanges they deem beneficial; (6) in a competitive market, supply and demand reliably set correct

In other words, competition among ideas boils down to the application of basic supply and demand principles: how much are people willing to “pay” for “truth”? Stated in this way, it becomes clear that a marketplace is a poor analogy for describing what actually takes place when people speak. As Paul Brietzke notes, “[s]ociety is not a debating club like the Oxford Union, not a ‘town meeting or . . . a group of scientists interested in figuring out some truth.’”⁵³ Ideas, both true and false, are not a scarce resource subject to supply and demand equilibrium. In fact, ideas are non-excludable and non-rivalrous.⁵⁴ “Even if we consume more than we can use, we cannot prevent anyone else from doing the same—ideas are free as the air.”⁵⁵

Others who challenge the conceptual validity of the marketplace of ideas metaphor question whether “truth” even exists in a heterogeneous society. These critics assert that truth is “a constitutively social category” that depends on how “a private sensory experience is transformed into a publicly witnessed and agreed fact of nature.”⁵⁶ Truth cannot be objective because “knowledge depends on how people’s interests, needs, and experiences lead them to slice and categorize an expanding mass of sense data.”⁵⁷

As Frederick Schauer observes, the notion that truth should be defined as any idea that can survive in the competition of the market “is implausible in the context of factual, scientific, and other ideas—including many moral ones—in which there is a conception of truth that is independent of what the marketplace of ideas at any particular time may happen to accept.”⁵⁸ He points to the fact that the earth was round even when almost all people thought it was flat and the widespread belief that a person’s personality is dictated by the shape of his or her skull, as examples of the limits of the marketplace of ideas’ truth-defining function.⁵⁹

prices and quantities; [and] (7) left alone, a frictionless (perfect) market produces maximum personal and public utility . . .” John Mixon, *Neoclassical Economics and the Erosion of Middle-Class Values: An Explanation for Economic Collapse*, 24 NOTRE DAME J.L., ETHICS & PUB. POL’Y 327, 345–46 (2010) (footnotes omitted).

⁵³ Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951, 962 (1997) (quoting LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 229 (1986)).

⁵⁴ See, e.g., Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137, 178 (2010). “A resource is said to be non-rivalrous when its use by one person does not interfere with its use by another (or in other words, when such additional use entails no marginal cost) and non-excludable when it cannot easily be controlled in such a way as to exclude others from using it.” Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL’Y 593, 627 (2008).

⁵⁵ Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. J.L. & PUB. POL’Y 891, 922–23 (2006).

⁵⁶ Steven Shapin & Simon Schaffer, *Leviathan and the Air-Pump* 225 (1989); see also STEVEN K. WHITE, *SUSTAINING AFFIRMATION: THE STRENGTHS OF WEAK ONTOLOGY IN POLITICAL THEORY* 8 (2000) (describing the acceptance of “weak ontologies” that take “all fundamental conceptualizations of self, other, and world” to be “contestable”).

⁵⁷ C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 974 (1978).

⁵⁸ Schauer, *supra* note 7, at 236.

⁵⁹ *Id.* at 236.

Schauer finds it more plausible that the marketplace of ideas does not define “truth” but instead provides “a comparatively reliable social mechanism for identifying error, for locating truth, and thus, in the aggregate, for advancing social knowledge.”⁶⁰ In other words, if we accept that truth exists independent of any process for identify it, then the argument is that “freedom of speech is the best method of locating those independently defined truths or is at least a method for doing so that it is superior to any or most other available alternative methods.”⁶¹ Bill Marshall offers a similar perspective, remarking that the “value that is to be realized is not in the possible attainment of truth, but rather, in the existential value of the search itself.”⁶²

Due in part to the difficulty of defining “truth” and identifying a reliable method for its ascertainment, the Supreme Court has never stated that lies are entirely outside First Amendment protection.⁶³ To the contrary, the Court has repeatedly stated that the First Amendment protects some types of false speech based on the view that “erroneous statement is inevitable in free debate” and that false speech “must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”⁶⁴ Most recently, in *United States v. Alvarez*, Justice Kennedy reaffirmed that “[a]bsent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements.”⁶⁵ Robert Post writes that “[t]his strongly suggests that First Amendment doctrine is not in fact organized around epistemic concerns.”⁶⁶

Putting aside the debate about whether the goal of fostering competition among ideas is the ascertainment of “truth” or merely the benefits that come from the search itself, a second vein of criticism accepts some aspects of market ideology but argues that the marketplace for speech, as currently

⁶⁰ *Id.* at 237.

⁶¹ *Id.*

⁶² Marshall, *supra* note 34, at 4; *see also* Murchison, *supra* note 7, at 58 (distinguishing the value in the process of searching for truth from the value of attaining truth); Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 473 (2019) (noting that the First Amendment “emphasizes not just the outcomes of free speech, but also the value of certain modes and habits of thinking”).

⁶³ *See* Erwin Chemerinsky, *False Speech and the First Amendment*, 71 OKLA. L. REV. 1, 6 (2018); Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1437 (2015); Catherine J. Ross, *Ministry of Truth? Why Law Can’t Stop Prevarications, Bullshit, and Straight-Out Lies in Political Campaigns*, 16 FIRST AMEND. L. REV. 367, 406 (2017). Nevertheless, there are some contexts in which the Court has refused to provide any First Amendment protection for false speech, including false and deceptive advertisements, *see, e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980), and false statements given under oath, *see United States v. Alvarez*, 567 U.S. 709, 720 (2012).

⁶⁴ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)); *see also Garrison v. Louisiana*, 379 U.S. 64, 73 (1964); *Alvarez*, 567 U.S. at 718.

⁶⁵ 567 U.S. at 718.

⁶⁶ Robert Post, *Understanding the First Amendment*, 87 WASH. L. REV. 549, 556 (2012); *see also* Paul Horwitz, *The First Amendment’s Epistemological Problem*, 87 WASH. L. REV. 445, 471 (2012).

constituted, simply is not working in achieving either of these goals.⁶⁷ These critics suggest that there are reasons to be skeptical that our public sphere, as currently fashioned, provides the best—or even a reliable—method for advancing either social knowledge or finding “truth,” however we might define that term.

Traditional markets operate on the theory that participants, pursuing their own self-interests, will lead to an efficient exchange of goods and services.⁶⁸ The idea, widely credited to Adam Smith, is that “individuals pursuing their own self-interest are led by an invisible hand to promote the interest of the public, even though promotion of the public interest was no part of their original intention.”⁶⁹ Supporters of the marketplace of ideas theory similarly invoke, often implicitly, the premise that the “invisible hand” of competition among ideas will guide society to “truth.”⁷⁰ Yet the touchstone of these theories—that individuals are rational self-interested participants—has come under fierce attack by behavioral economists who study traditional markets⁷¹ and by communication scholars who study public discourse,⁷² both of whom note that research is showing that human behavior is characterized by bounded rationality, lack of willpower, and distorted self-interest.

⁶⁷ See, e.g., Brietzke, *supra* note 53, at 965 (“If it can be said to exist, the ideas marketplace is shot through with ‘market failures.’”); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5 (“[R]eal world conditions also interfere with the effective operation of the marketplace of ideas: sophisticated and expensive communication technology, monopoly control of the media, access limitations suffered by disfavored or impoverished groups, techniques of behavior manipulation, irrational responses to propaganda, and the arguable nonexistence of objective truth, all conflict with marketplace ideals.”); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1647–48 (1967) (“The ‘marketplace of ideas’ view has rested on the assumption that protecting the right of expression is equivalent to providing for it. But changes in the communications industry have destroyed the equilibrium in that marketplace.”).

⁶⁸ See, e.g., Maurice E. Stucke, *Money, Is That What I Want?: Competition Policy and the Role of Behavioral Economics*, 50 SANTA CLARA L. REV. 893, 899–905 (2010).

⁶⁹ See, e.g., Robin Paul Malloy, *Adam Smith in the Courts of the United States*, 56 LOY. L. REV. 33, 36 (2010) (citing ADAM SMITH, I AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, BOOK IV, at 477–78 (Edwin Cannan ed. 1976) (1776)). As Professor Malloy notes, people have used Smith’s idea to support the argument that “law should facilitate and incentivize individual action and little need exists for so-called ‘big government,’ or for government intervention into the free market.” *Id.* at 36–37.

⁷⁰ See, e.g., *Abrams*, 250 U.S. at 630 (Holmes, J. dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”); *Time, Inc. v. Hill*, 385 U.S. 374, 406 (1967) (Harlan, J., concurring in part and dissenting in part) (“The marketplace of ideas’ where it functions still remains the best testing ground for truth.”); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”).

⁷¹ See, e.g., Stucke, *supra* note 68, at 908 (citing relevant research and concluding that “behavioral economists find that people systematically and predictably do not behave under certain scenarios as neoclassical economic theory predicts”).

⁷² See, e.g., Brietzke, *supra* note 53, at 962 (“The deep (economic) rationality assumption characteristic of the ideas marketplace, and of other markets as well, cannot hold in the real world.”); Lidsky, *supra* note 11, at 828–33 (citing relevant research and concluding that humans suffer from bounded rationality, are predictably irrational, and systematically err in filtering available information).

Communication scholars also point out that ideas rarely succeed based solely on their merits, with most people “unable to compete with the wealthy corporations and organized interest groups that have access to sophisticated public relations tools and communications technologies.”⁷³ As Stanley Ingber notes:

[R]eal world conditions. . . interfere with the effective operation of the marketplace of ideas: sophisticated and expensive communication technology, monopoly control of the media, access limitations suffered by disfavored or impoverished groups, techniques of behavior manipulation, irrational responses to propaganda, and the arguable nonexistence of objective truth, all conflict with marketplace ideals.⁷⁴

The observation that modern communication practices have not produced a well-functioning marketplace of ideas is not new. Jerome Barron warned more than 50 years ago that technology and media concentration had made private barriers to expression a formidable constraint on the speech marketplace.⁷⁵ As he and others pointed out, money and entrenched power are often far more influential in the competition of the market than an idea’s intrinsic merits.⁷⁶ Even from the vantage point of the mid-twentieth century, Barron concluded that “if ever there were a self-operating marketplace of ideas, it has long ceased to exist.”⁷⁷

Many scholars who were critical of the twentieth-century media ecosystem argued that “more speech” was the solution to the problems they were seeing.⁷⁸ Perhaps the most well-known judicial articulation of this view is Justice Brandeis’ eloquent concurrence in *Whitney v. California*, where he wrote 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.”⁷⁹

⁷³ Brietzke, *supra* note 53, at 965.

⁷⁴ Ingber, *supra* note 67, at 5; *see also* Brietzke, *supra* note 53, at 965 (“If it can be said to exist, the ideas marketplace is shot through with ‘market failures.’”); Barron, *supra* note 67, at 1648 (“[C]hanges in the communications industry have destroyed the equilibrium in that marketplace.”); *see generally* Claudio Lombardi, *The Illusion of a “Marketplace of Ideas” and the Right to Truth*, 3 AM. AFFS. 198 (2019).

⁷⁵ *See* Barron, *supra* note 67, at 1647–50.

⁷⁶ *See e.g.*, Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 86–92 (2004) (discussing the effect that wealth has on successful political campaigns); Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 276–78 (1992) (explaining how disparities in access impact the marketplace of ideas); Ingber, *supra* note 67, at 5 (describing how “real world conditions. . . interfere with the effective operation of the marketplace of ideas”).

⁷⁷ Barron, *supra* note 67, at 1641.

⁷⁸ *See, e.g.*, Barron, *supra* note 67, at 1644; Sunstein, *Free Speech Now*, *supra* note 76, at 292–93; Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1410 (1986); Dominic Caristi, *The Concept of a Right to Access to the Media: A Workable Alternative*, 22 SUFFOLK U. L. REV. 103, 108–10 (1988).

⁷⁹ 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). This idea has become known as the “counterspeech doctrine.” *See, e.g.*, Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for “Bad” Speech*, 2000 B.Y.U. L. REV. 553, 556 (2000) (describing

The marketplace of ideas theory was a natural fit for those who wished to improve the functioning of the public sphere, as it “presupposes an information-poor world” where the First Amendment’s role is to protect speakers from government interference.⁸⁰ The origin of the doctrine in the Supreme Court’s World War I seditious speech cases make this clear and later cases continue to invoke this theme.⁸¹

Unlike the twentieth century, however, it is no longer speech that is scarce, but the public’s attention and capacity to make sense of the cacophony that characterizes modern public discourse.⁸² The Internet, which was supposed to democratize communication practices and lead us to new vistas of social knowledge,⁸³ has not been the savior we had hoped for.⁸⁴ We are now awash in information, but this has counterintuitively led to a “poverty of attention.”⁸⁵ With attention becoming increasingly scarce, a small number of private entities have cornered the market in the new attention economy. As antitrust experts are beginning to recognize, and I discuss more fully in Part III, existing communication markets “exhibit highly concentrated structures, with a single dominant firm possessing a massive share” of

how courts rely on “counter” speech as a remedy for “bad” speech); Philip M. Napoli, *What If More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L.J. 55, 57 (2018) (examining courts’ application of the counterspeech doctrine).

⁸⁰ Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMEND. INST. (Sept. 1, 2017), <https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete> [https://perma.cc/ZB3G-RW2C].

⁸¹ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (challenging conviction for advocating violence under state criminal syndicalism statute); *Gitlow v. New York*, 268 U.S. 652 (1925) (challenging conviction under New York’s “criminal anarchy” statute for printing and promoting socialist manifesto); *Dennis v. United States*, 341 U.S. 494 (1951) (challenging conviction for conspiring and organizing for the overthrow and destruction of the U.S. government).

⁸² See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 7 (2004) (“The digital revolution made a different kind of scarcity salient. It is not the scarcity of bandwidth but the scarcity of audiences, and, in particular, scarcity of audience attention.”).

⁸³ See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 32 (2006) (observing that, in part because of the Internet, “[b]oth the capacity to make meaning—to encode and decode humanly meaningful statements—and the capacity to communicate one’s meaning around the world, are held by, or readily available to, at least many hundreds of millions of users around the globe”); ANDREW L. SHAPIRO, *THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW* 55 (1999) (“Disintermediation is the somewhat ungainly word that is used to describe this circumventing of middlemen The control revolution allows us to take power from these intermediaries and put it in our own hands.”).

⁸⁴ See, e.g., Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200 (2017) (noting that the economics of “cheap speech” made possible by the Internet has undermined mediating and stabilizing institutions of American democracy).

⁸⁵ Herbert A. Simon, *Designing Organizations for an Information-Rich World*, in *COMPUTERS, COMMUNICATIONS, AND THE PUBLIC INTEREST* 40 (M. Greenberger ed. 1971) (remarking that “a wealth of information creates a poverty of attention”). Nobel Laureate Herbert Simon warned that a “wealth of information means a dearth of something else: a scarcity of . . . attention.” *Id.*

its relevant market.⁸⁶ In practical terms, “we have simply exchanged one set of intermediaries (e.g., newspaper publishers and broadcast stations) for another set of intermediaries (e.g., Internet service providers, content hosts, and search providers).”⁸⁷ In our electronically mediated public sphere, these private gatekeepers have more power to manipulate public attention—and distort public discourse—than any government has ever had.⁸⁸

In addition to the power imbalances in the current media ecosystem, there are reasons to be skeptical that even a highly competitive speech marketplace will produce a reliable mechanism for locating truth and advancing social knowledge. Due to a host of sociotechnical factors, the assertion that the marketplace for speech is a self-regulating institution that needs only the presence of more speech to produce “truth” has not held up to sustained empirical scrutiny.⁸⁹ Over the past half-century, research has increasingly shown that human decision making is often irrational.⁹⁰ Psychologists and behavioral economists see this so often they refer to the departure from optimal decision making as “bounded rationality.”⁹¹ As Lyrissa Lidsky explains, “[i]ndividuals become boundedly rational when complex decision-making environments tax their cognitive faculties” and in response to such conditions they employ “mental shortcuts.”⁹² These mental shortcuts create a number of problems, including motivating people to “seek[] out information that supports their preconceptions and avoid[] evidence that undercuts their beliefs”⁹³ thus allowing them “to maintain false beliefs in the face of seemingly incontrovertible evidence.”⁹⁴ In fact, humans appear to have “an evolu-

⁸⁶ See, e.g., John M. Newman, *Antitrust in Attention Markets: Objections and Responses*, 59 SANTA CLARA L. REV. 743, 751–52 (2020) (characterizing these firms as “attention merchants” and describing the substantial market share of Google, Amazon, and Facebook); Tim Wu, *Blind Spot: The Attention Economy and the Law*, 82 ANTITRUST L.J. 771, 793–805 (2019) (lamenting antitrust law’s “blind spot” for the attentional markets that Facebook, Google, and the major television networks compete in).

⁸⁷ David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 383–84 (2010).

⁸⁸ See, e.g., SIVA VAIDHYANATHAN, *ANTISOCIAL MEDIA: HOW FACEBOOK DISCONNECTS US AND UNDERMINES DEMOCRACY* 5-9 (2018); ROBERT W. MCCHESENEY, *DIGITAL DISCONNECT: HOW CAPITALISM IS TURNING THE INTERNET AGAINST DEMOCRACY* 109–29 (2013); EVGENY MOROZOV, *THE NET DELUSION: THE DARK SIDE OF INTERNET FREEDOM* 215–25 (2011).

⁸⁹ See, e.g., Ho & Schauer, *supra* note 11, at 1163; Lidsky, *supra* note 11, at 802; Bambauer, *supra* note 11, at 696.

⁹⁰ See, e.g., Daniel Kahneman, Oliver Sibony & Cass R. Sunstein, *Noise: A Flaw in Human Judgment* 161–75 (2021) (describing the “psychological mechanisms that explain both the marvels and the flaws of intuitive thinking”).

⁹¹ See HERBERT A. SIMON, *INTRODUCTORY COMMENT*, IN *ECONOMICS, BOUNDED RATIONALITY AND THE COGNITIVE REVOLUTION* 3, 3–7 (Herbert A. Simon, Massimo Egidi, Riccardo Viale & Robin Marris eds., 1992).

⁹² Lidsky, *supra* note 11, at 829.

⁹³ Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 307 (2010) (“[R]espondents may engage in a biased search process, seeking out information that supports their preconceptions and avoiding evidence that undercuts their beliefs.”).

⁹⁴ R. Kelly Garrett, Erik C. Nisbet, & Emily K. Lynch, *Undermining the Corrective Effects of Media-Based Political Fact Checking? The Role of Contextual Cues and Naïve Theory*, 63 J.

tionary tendency towards gullibility and wanting to believe what people are telling them.”⁹⁵

Despite these normative and descriptive criticisms of the marketplace of ideas theory, the conviction that the First Amendment’s purpose is to ensure a free trade in ideas has had remarkable staying power.⁹⁶ Joseph Blocher, who maintains that the marketplace of ideas can be improved by focusing on certain speech-enhancing institutions, writes that although market failure rhetoric has often been employed to justify government involvement in economic markets, it has not had a similar impact on First Amendment doctrine or theory.⁹⁷ He laments that “[c]ourts have clung to an idealized, neoclassical view of the marketplace of ideas far more tenaciously than economists have . . . when it comes to the ‘real-world’ market.”⁹⁸ As a result, the courts have repeatedly rejected interventions that target market failures in an effort to preserve the laissez-faire ideal of an unregulated marketplace for speech,⁹⁹ a point I will take up more fully in Part III.

A theory that holds that the First Amendment’s only role is to preserve an unfettered marketplace for speech begs the question First Amendment scholars have grappled with for nearly a century: what were the Framers ultimately trying to achieve by granting near absolute protection for speech and the press (“Congress shall make no law . . .”)? Surely, perfect competition among ideas in a fictional marketplace was not the end goal. Free markets are not a constitutional value. Justice Holmes warned in his dissenting opinion in *Lochner v. New York* that the Constitution “does not enact Mr. Herbert Spencer’s *Social Statics*” and thereby enshrine laissez-faire econom-

COMM. 617, 617 (2013) (“Detailed reporting based on thorough research is not always enough to unseat inaccurate political ideas, as people are able to maintain false beliefs in the face of seemingly incontrovertible evidence.”).

⁹⁵ Parmy Olson, *Why Your Brain May Be Wired to Believe Fake News*, *Forbes* (Feb. 1, 2017), <https://perma.cc/UN3J-DFAC> (“Humans have an evolutionary tendency towards gullibility and wanting to believe what people are telling them.”); see also THE SOCIAL PSYCHOLOGY OF GULLIBILITY: CONSPIRACY THEORIES, FAKE NEWS, AND IRRATIONAL BELIEFS 3 (Joseph P. Forgas & Roy Baumeister eds., 2019) (“In an attempt to understand, predict and control the social and physical world, humans have created an amazing range of absurd and often vicious and violent gullible beliefs.”).

⁹⁶ See Blocher, *supra* note 34, at 836 (“Despite the power of the market failure critique, and notwithstanding the exceptions announced in *Schenck*, *Brandenburg*, *Miller*, and other cases, the Court continues to invoke the marketplace of ideas metaphor as generally justifying broad speech protections, not limitations.”); Ho & Schauer, *supra* note 11, at 1164–65 (“But even in the face of relatively longstanding skepticism, the [concept of a marketplace of ideas] endures.”).

⁹⁷ Blocher, *supra* note 34, at 836; see also Shiffrin, *supra* note 32, at 1281 (noting that “arguments about market failure have limited appeal to the current Court.”).

⁹⁸ Blocher, *supra* note 34, at 836.

⁹⁹ See Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1, 8 (1964) (noting that in terms of market regulation, free speech is “the only area where laissez-faire is still respectable”); Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 854 (2018) (“[T]he marketplace of ideas sits behind the First Amendment’s hands-off doctrines. It is this laissez-faire approach that makes regulating fake news so difficult: any attempt to stop fake news, the argument goes, inhibits a public sphere that is supposed to be robust, active, and free of government intervention.”).

ics.¹⁰⁰ As the Supreme Court ultimately came to realize,¹⁰¹ “a constitution is not intended to embody a particular economic theory.”¹⁰²

Apart from the failings of the marketplace of ideas as both a description of public discourse and as a reliable mechanism for increasing social knowledge, there is a deeper problem with judicial reliance on a theory that elevates market rhetoric over democratic values. Indeed, this gets to the core of why some scholars reject the very notion that the “marketplace of ideas” is a valid explanatory theory for understanding the First Amendment.¹⁰³ They point out that applying the rhetoric of economists misdirects the inquiry and unnecessarily constrains the First Amendment’s reach. Darren Bush powerfully captures this view:

Acknowledging that speech is not a market in any real sense frees society, academics, and the courts to view speech cases jurisprudentially; that is, it frees the courts to examine the facts in light of the policies of the First Amendment and the consequences of ruling a certain way instead of analyzing the facts in light of the economic model. In Chicago School jurisprudence, the model is the surrogate for policy. The sole ethical and legal consideration for the model is efficiency. And, while efficiency rings of something scientific, it is a value-laden construct whose premise is that resources should be in the hands of those that value them the most, as indicated by their willingness and ability to pay. But these ethical considerations are well hidden by economists shrouded in the trappings of science. By eliminating the economic model from the realm of free speech, ethical considerations are permitted to “come out of hiding.”¹⁰⁴

¹⁰⁰ 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

¹⁰¹ See, e.g., *Ferguson v. Skupra*, 372 U.S. 726, 729–30 (1963) (“Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. . . The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely— long since been discarded.”); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 669 (1966) (“We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment ‘does not enact Mr. Herbert Spencer’s Social Statistics.’ Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era.”); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 470–71 (1985) (Marshall, J., concurring) (“As a matter of substantive policy, therefore, government is free to move in any direction or change directions, in the economic and commercial sphere. The structure of economic and commercial life is a matter of political compromise, not constitutional principle, and no norm of equality requires that there be as many opticians as optometrists.”).

¹⁰² *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

¹⁰³ See sources cited *supra* in note 51.

¹⁰⁴ Bush, *supra* note 51, at 1147 (quoting PHILIP MIROWSKI, *MORE HEAT THAN LIGHT: ECONOMICS AS SOCIAL PHYSICS, PHYSICS AS NATURE’S ECONOMICS* (1989)); see also Gregory P. Magarian, *Market Triumphalism, Electoral Pathologies, and the Abiding Wisdom of First Amendment Access Rights*, 35 HOFSTRA L. REV. 1373, 1401 (2007) (remarking that market triumphalism “substitutes blind fealty to the market for any consideration of the value judgments that necessarily underlie any policy choice, including laissez-faire distribution of expressive opportunities”).

Indeed, when we look past the economic rhetoric that currently dominates free speech jurisprudence, what comes of out hiding is the First Amendment's preeminent structural role supporting self-governance.

II. THE FIRST AMENDMENT'S STRUCTURAL ROLE SUPPORTING SELF-GOVERNANCE

To fully grasp the First Amendment's purpose, we must consider how its protections for speech and the press fit within the overall constitutional structure that underlies the American system of government.¹⁰⁵ This requires that we acknowledge the kind of instrument the Constitution is: a constitutive text that purports, in the name of the People of the United States, to create a number of distinct but interrelated institutions and practices, both legal and political, and to define the rules governing these institutions and practices. While the historical record surrounding the First Amendment is limited, "[t]he framers did, after all, exercise intentional and deliberate choices in establishing that basic structure [of the federal government], which they embodied in a document intended to have enduring organic and operative effects for an unknowable future."¹⁰⁶

When we examine how the First Amendment fits into these interrelated institutions and practices, it becomes obvious that the First Amendment was intended to do more than simply enshrine free market ideology.

A. Structural Constitutional Law

The idea that we should interpret the First Amendment by examining how its protections fit within our overall constitutional structure invokes a mode of constitutional interpretation known as structuralism.¹⁰⁷ The emphasis on constitutional structure goes beyond merely the structure of the Constitution's text, but instead focuses on "the constitutional relationships between the national government and the states, the branches of the national government, the government and the people and, in sum, the general arrangement of offices, powers, and relationships allegedly manifest in the

¹⁰⁵ See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1147 (1991) (writing that the First Amendment's limitations on Congress "obviously sounds in structure"); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 308 (1978) ("Structural analysis of the Constitution is significantly more useful for determining the basic meaning of the first amendment.").

¹⁰⁶ BeVier, *supra* note 105, at 308.

¹⁰⁷ See Sotirios A. Barber & James E. Fleming, *Constitutional Interpretation: The Basic Questions* 120 (2007); PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 74 (1982). Proponents of constitutional structuralism contend that this method produces clearer justifications for decisions that require interpretation and application of imprecise provisions of the Constitution than textualism alone. See, e.g., CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 13, 22 (1969); Bobbitt, *supra*, at 74.

Constitution's text and the settled facts of constitutional history.”¹⁰⁸ Although structural arguments may not always be formally invoked, a structuralist approach to divining the meaning of the Constitution is a common mode of constitutional interpretation, having informed our understanding of a number of fundamental doctrines within constitutional law, including the relationships among the three branches of the federal government (commonly called separation of powers); the relationship between the federal and state governments (known as federalism); and the relationship between citizens and the government.

Charles Black and John Hart Ely, two influential proponents of structuralism have both offered persuasive arguments for interpreting the First Amendment within a broader, structural context.¹⁰⁹ For Black and Ely, “[t]he question is not whether the [Constitution's] text shall be respected, but rather how one goes about respecting a text of that high generality and consequent ambiguity.”¹¹⁰ In a series of lectures in the 1960s, Black observed that difficult constitutional cases are resolved “not fundamentally on the basis of . . . textual exegesis which we tend to regard as normal, but on the basis of reasoning from the total structure which the text has created.”¹¹¹ For Black, this meant a “method of inference from the structures and relationships created by the Constitution in all its parts or in some principal part.”¹¹² As Michael Dorf explains: “The Structure in which Black was most interested is the structure of the government of the United States of America. The Relationship is the relationship of its component parts: the federal government; the state governments; citizens; aliens; local officials; Congress; the President; the Supreme Court; and so forth.”¹¹³

Even committed originalists rely on structural arguments when interpreting the Constitution.¹¹⁴ “The Rehnquist and Roberts Courts have re-

¹⁰⁸ BARBER & FLEMING, *supra* note 107, at 120; *see also* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1236 (1995) (“I put such great emphasis upon text *and* structure, both the structure *within* the text—the pattern and interplay in the language of the Constitution itself and its provisions—and the structure (or architecture) *outside* the text—the pattern and interplay in the governmental edifice that the Constitution describes and creates, and in the institutions and practices it propels.” (emphasis added)).

¹⁰⁹ *See generally* BLACK, *supra* note 107; JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). Cass Sunstein has made similar arguments. *See* Sunstein, *supra* note 28, at 119–22, 259–61.

¹¹⁰ BLACK, *supra* note 107, at 30; ELY, *supra* note 109, at 13 (noting that “[c]onstitutional provisions exist on a spectrum ranging from the relatively specific to the extremely open-textured”). Anticipating the potential criticism that structural interpretation is too imprecise and speculative, Black responded: “I submit that the generalities and ambiguities are no greater when one applies the method of reasoning from structure and relation.” BLACK, *supra* note 107, at 30–31.

¹¹¹ BLACK, *supra* note 107, at 15.

¹¹² *Id.* at 7.

¹¹³ Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 835–36 (2004).

¹¹⁴ Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 755 n.253 (2011) (commenting that originalists “often endorse structural arguments that are not clearly

peatedly invalidated statutory programs, but not because those programs violated some particular constitutional provision,” John Manning writes.¹¹⁵ Instead, Manning points to the Courts’ “new structuralism,” which “rests on freestanding principles of federalism and separation of powers [and] is not ultimately tied to the understood meaning of any particular constitutional text.”¹¹⁶ Examining a wide range of cases addressing federalism, state sovereign immunity, presidential removal power, and standing, Manning concludes that what underlies many of the Supreme Court’s decisions is a “free-form” version of Charles Black’s “method of inference from the structures and relationships created by the Constitution.”¹¹⁷ This method of structural inference, he goes on to summarize, “first shifts the Constitution’s level of generality upward by distilling from diverse clauses an abstract shared value—such as property, privacy, federalism, nationalism, or countless others—and then applies that value to resolve issues that sit outside the particular clauses that limit and define the value.”¹¹⁸

Black applied this structural approach to the First Amendment in the second of his three lectures that comprised *Structure and Relationship in Constitutional Law*, concluding that protection for freedom of speech against state interference finds support from the relationship of citizens to their government that is “quite as strong” as the textual basis normally offered, which rests on the words of the First Amendment and its incorporation through the Fourteenth Amendment’s Due Process Clause.¹¹⁹ Black arrived at this view by examining the relationship between citizens and the state and federal governments, asking: “Is it conceivable that a state, entirely aside from the Fourteenth or for that matter the First Amendment, could permissibly forbid public discussion of the merits of candidates for Congress, or of issues which have been raised in the congressional campaign . . . ?”¹²⁰ According to Black, the answer is obvious; “I cannot see how anyone could think our national government could run, or was by anybody at any time ever expected to run, on any less openness of public communication than that.”¹²¹ From this “hard core” of protection for speech on matters of federal lawmaking, Black expands outward to a general right of communication that “eventuate[s] in

grounded in constitutional text”); James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 5 (1995) (noting “even narrow originalists such as Bork and Scalia today accept the trilogy of ‘text, history, and structure’ as legitimate sources of constitutional values”).

¹¹⁵ John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 4 (2014) (describing the Supreme Court’s “[n]ovel approaches to both statutory interpretation and structural constitutional law”).

¹¹⁶ *Id.* at 4, 31.

¹¹⁷ *Id.* at 31–32 (quoting BLACK, *supra* note 107, at 7); see also Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. L. REV. 1297, 1299 (2019) (“The decisions in these cases are grounded in abstract notions of constitutional structure, rather than the original meaning of the constitutional text.”).

¹¹⁸ Manning, *supra* note 115, at 32.

¹¹⁹ BLACK, *supra* note 107, at 39.

¹²⁰ *Id.* at 42.

¹²¹ *Id.* at 42–43. Robert Bork makes a similar point when he writes that the Constitution establishes a representative democracy, “a form of government that would be meaningless without freedom to discuss government and its policies.” Bork, *supra* note 28, at 23.

the conclusion that most serious public discussion of political issues is really a part, at least in one aspect, of the process of national government, and hence ought to be invulnerable to state attack.”¹²²

John Hart Ely made a similar argument about looking beyond the Constitution’s text in his influential book *Democracy and Distrust: A Theory of Judicial Review*. According to Ely, the Constitution and Bill of Rights were intended to be blueprints for government rather than repositories of specific values.¹²³ Ely points out that “the body of the original Constitution is devoted almost entirely to structure.”¹²⁴ It does not “try[] to set forth some governing ideology,” but instead seeks to “ensur[e] a durable structure for the ongoing resolution of policy disputes.”¹²⁵

Black and Ely’s focus on supporting the *processes* of deliberative democracy should be distinguished from other scholars who have used structural insights to argue for the recognition of unenumerated rights.¹²⁶ For example, Stephen Fleming, expanding on the work of John Rawls and Ronald Dworkin, criticizes Ely for limiting himself to “process-perfecting theori[es].”¹²⁷ Applying what he calls “constitutional constructivism,” a method of constitutional interpretation that “requir[es] the construction of a substantive political theory (or scheme of principles) that best fits and justifies our constitutional document and underlying constitutional order as a whole,” Fleming argues that courts should recognize certain substantive liberties, particularly those associated with individual autonomy, because they are “implicit in our underlying constitutional order.”¹²⁸

We need not go this far for purposes of situating the First Amendment within the American constitutional structure. Regardless of where one stands on the subject of *unenumerated* rights, the First Amendment expressly provides protections for speech, press, assembly, and petition—making up what Ashutosh Bhagwat calls the “Democratic First Amendment.”¹²⁹ Given that these rights are expressly stated in the text of the First Amendment, our task is not to create new rights, but rather to define the scope and substance of the aforementioned enumerated rights.

Moreover, focusing on the First Amendment’s role in supporting core democratic processes alleviates much of the concern that can come from in-

¹²² BLACK, *supra* note 107, at 44–45.

¹²³ ELY, *supra* note 109, at 90.

¹²⁴ *Id.*

¹²⁵ *Id.*; see also Jack W. Nowlin, *The Judicial Restraint Amendment: Populist Constitutional Reform in the Spirit of the Bill of Rights*, 78 NOTRE DAME L. REV. 171, 228 (2002) (citing Ely and remarking that “[n]ot surprisingly, then, the debates in Philadelphia concerning the framing of the Constitution dealt almost entirely with structural-procedural questions of governmental architecture involving these and related principles”).

¹²⁶ See, e.g., RONALD DWORIN, *LAW’S EMPIRE* (1986); JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* (2006); James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211 (1993).

¹²⁷ James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 5 (1995).

¹²⁸ *Id.* at 14.

¹²⁹ Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1099 (2016).

interpreting ambiguous constitutional provisions. Judicial enforcement of the Constitution, Cass Sunstein explains, “is most readily defensible when democratic concerns come to the fore.”¹³⁰ Citing approvingly to Ely, Sunstein argues that unlike the recognition of unenumerated rights, which he says “are highly contested in our society,”¹³¹ the use of structural insights to ensure that fundamental democratic processes can operate raises fewer concerns: “When courts are protecting democratic deliberation—an ideal built deeply into American constitutionalism and unusually susceptible to both definition and development—the benefits are likely to be great, and the risks are far lower.”¹³²

For many constitutional scholars, the fact that the Constitution is devoted almost entirely to structure indicates that the First Amendment was intended to support the deployment of this structure: *i.e.*, to ensure the functioning of a representative form of government.¹³³ For Ely, this insight led him to conclude that the First Amendment was “intended to help make our governmental processes work, to ensure the open and informed discussion of political issues, and to check our government when it gets out of bounds.”¹³⁴ The First Amendment serves these structural functions in a number of ways. The amendment’s speech and press protections prevent the government from stifling criticism of public officials and ensure that debate on public issues can be “uninhibited, robust, and wide-open.”¹³⁵ Other provisions, such as the rights of assembly, association, and petition, serve similar ends by helping to alleviate collective-action problems that can undermine the effec-

¹³⁰ Cass R. Sunstein, *Liberal Constitutionalism and Liberal Justice*, 72 TEX. L. REV. 305, 310 (1993).

¹³¹ *Id.* at 311. Sunstein writes:

It is important in this connection to note that the category of fundamental rights is highly contested in our society . . . Even if we think that Professor Fleming’s version of constitutional constructivism has it about right, we might believe that the judicial definition of fundamental rights under the Due Process Clause—a definition operating without much textual or historical help—ought to be very cautious, in part because of the difficulty of obtaining broad social agreement on these questions. When we are dealing with judicial protection of non-democratic rights, the risks of error—its likelihood and cost—are very high, and the potential benefits are highly speculative.

Id.

¹³² *Id.*

¹³³ See, e.g., Amar, *supra* note 105, at 1147 (writing that the First Amendment’s limitations on Congress “obviously sounds in structure, and focuses (at least in part) on the representational linkage between Congress and its constituents”); Nowlin, *supra* note 125, at 228, 233 (noting that “the debates in Philadelphia concerning the framing of the Constitution dealt almost entirely with structural-procedural questions” and concluding that the rights enumerated in the First Amendment “are directly related to the healthy functioning of a representative form of government and thus to what the Founders viewed as the fundamental and preeminent right to representation”).

¹³⁴ ELY, *supra* note 107, at 93–94.

¹³⁵ N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

tive exercise of popular sovereignty.¹³⁶ Taken together, the interrelated freedoms in the First Amendment serve essential structural purposes in our constitutional system by ensuring a framework for the ongoing resolution of policy and governance disputes.¹³⁷

B. *The Preeminent Constitutional Value of Self-Governance*

As discussed in the previous section, we gain a much deeper understanding of the First Amendment by examining its role within our constitutional structure. While the marketplace of ideas theory is grounded on the premise that the amendment's protections for speech and the press were intended solely to safeguard free competition—this ignores the essential role that speech plays in fostering self-governance. Akhil Reed Amar and other constitutional scholars point out that the First Amendment, as originally understood by the Framers, was not designed only “to vest individuals and minorities with substantive rights against popular majorities” but instead reflected the original Constitution's focus “on issues of organizational structure and democratic self-governance.”¹³⁸ Amar goes on to note:

A close look at the Bill [of Rights] reveals structural ideas tightly interconnected with the language of rights; states' rights and majority rights alongside individual and minority rights; and protection of various intermediate associations—church, militia, and jury—designed to create an educated and virtuous citizenry. The main thrust of the Bill was not to downplay organizational structure, but to deploy it; not to impede popular majorities, but to empower them.¹³⁹

The First Amendment's role in supporting self-governance is further demonstrated by the “cognate” rights included in the amendment's related clauses.¹⁴⁰ The First Amendment, in its entirety, reads as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Govern-

¹³⁶ See Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 543 (2009); Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 743 (2002); Ozan O. Varol, *Structural Rights*, 105 GEO. L.J. 1001, 1034 (2017).

¹³⁷ See Nowlin, *supra* note 125, at 233 (“[T]he rights themselves—speech, press, assembly, and petition—are directly related to the healthy functioning of a representative form of government and thus to what the Founders viewed as the fundamental and preeminent right to representation.”).

¹³⁸ Amar, *supra* note 105, at 1132; see also Nowlin, *supra* note 125, at 232.

¹³⁹ Amar, *supra* note 105, at 1132.

¹⁴⁰ See *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (“It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights.”); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (“The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.”).

ment for a redress of grievances.”¹⁴¹ Putting aside the Religion Clauses, which were added late in the drafting process,¹⁴² the other clauses were joined together early on and were considered collectively throughout most of the debates over the Bill of Rights.¹⁴³ The Supreme Court remarked in *Thomas v. Collins* that this was not coincidental: “It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable.”¹⁴⁴ Put simply, the rights expressed in the First Amendment “are fundamentally political in the sense that they are closely tied to democratic citizenship.”¹⁴⁵

In fact, the First Amendment is not the only provision in the Constitution that protects speech in order to facilitate democratic processes. Even before the Bill of Rights was added in 1791, the Framers evidenced concern for an engaged and informed public in a number of the Constitution’s provisions. Article I, Section 8, for example, gave Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁴⁶ In adding this clause, the Framers sought to decentralize and democratize innovation and information production.¹⁴⁷ Article I, Section 8 also gave Congress the power “[t]o establish Post Offices and post Roads.”¹⁴⁸ Jack Balkin, who has written that the First Amendment should be understood broadly as “an information policy,” notes that the new American republic, extending over such a large area, clearly needed infrastructure to ensure that people could communicate with each other: “Good roads and a good mail system were essential to self-government in a large republic.”¹⁴⁹

We see further evidence of the importance the Framers placed on protecting public discourse in other parts of the Constitution that do not expressly implicate freedom of expression. Ely points out that provisions in the Constitution that appear at first glance to be “primarily designed to assure or preclude certain substantive results seem on reflection to be principally con-

¹⁴¹ U.S. CONST. amend. I.

¹⁴² See Ashutosh Bhagwat, *When Speech Is Not “Speech”*, 78 OHIO ST. L.J. 839, 872 (2017) [hereinafter Bhagwat, *When Speech is Not “Speech”*] (noting that “the Religion Clauses were not combined with the rest of the First Amendment until September 9, 1789, very late in the drafting process, when the Senate did so without explanation”).

¹⁴³ *Id.* (citing THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 148 (Neil H. Cogan ed., 2d ed. 2015)).

¹⁴⁴ 323 U.S. 516, 530 (1945).

¹⁴⁵ Bhagwat, *supra* note 142, at 873.

¹⁴⁶ U.S. CONST. art. I, § 8, cl. 8.

¹⁴⁷ See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 289 (1996) (“In adopting the Constitution’s Copyright Clause and enacting the first federal copyright statute, the Framers were animated by the belief that copyright’s support for the diffusion of knowledge is ‘essential to the preservation of a free Constitution.’”) (footnote omitted).

¹⁴⁸ U.S. CONST. art. I, § 8, cl. 7.

¹⁴⁹ Jack M. Balkin, *The First Amendment is an Information Policy*, 41 HOFSTRA L. REV. 1, 3 (2012).

cerned with process.”¹⁵⁰ He cites Article III, Section 3, which narrowly defines treason as “consist[ing] only in levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort.”¹⁵¹ That provision, Ely writes, can be viewed as “a precursor of the First Amendment, reacting to the recognition that persons in power can disable their detractors by charging disagreement as treason.”¹⁵²

The Supreme Court has repeatedly invoked structural insights to interpret the First Amendment. In fact, one cannot make sense of the evolution of First Amendment doctrine without acknowledging the Court’s reliance on the structural role of the First Amendment. For more than a century after ratification, the consensus among jurists and scholars was that the First Amendment’s reach was quite limited, prohibiting only the government’s imposition of prior restraints on speech.¹⁵³ Even Justice Holmes, in a decision that predated his strenuous defense of the First Amendment in *Abrams v. United States*,¹⁵⁴ initially believed that the Constitution imposed no limits on the government’s power to levy criminal penalties against publishers.¹⁵⁵

During the 1930s, the Court moved from this cramped understanding of the First Amendment and began striking down criminal penalties directed

¹⁵⁰ ELY, *supra* note 107, at 90.

¹⁵¹ U.S. CONST. art. III, § 3. Following passage of the Sedition Act in 1798, which criminalized certain forms of criticism of the federal government, James Madison argued that the Act was unconstitutional because it “exceeded the delegated and enumerated powers of the U.S. Congress, violated the constitutional principle of federalism, and was incompatible with the representative democratic and populist structure of the American constitutional design.” Nowlin, *supra* note 125, at 234; James Madison, *Report Accompanying the Virginia Resolution*, reprinted in 4 THE DEBATES IN THE STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546 (J. Elliot ed., 1866).

¹⁵² ELY, *supra* note 107, at 90. As William Mayton notes, an argument that the treason clause is a free speech provision was made during the debates that led to the “Virginia Remonstrance” against the constitutionality of the Alien and Sedition Acts. William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 129 (1984). According to Mayton, John Taylor, who introduced the remonstrance, “pointed out that sedition was but a ‘species constituting that genus called treason’ and that the Constitution’s treason clause could not therefore be properly avoided by the ‘sedition’ label.” *Id.* at 129–30 (citing THE VIRGINIA REPORT OF 1799–1800, at 121–22 (Richmond 1850)). Otherwise, Taylor warned, Congress might proceed “to punish acts heretofore called treasonable, under other names, by fine, confiscation, banishment, or imprisonment, until social intercourse shall be hunted by informers out of our country; and yet all might be said to be constitutionally done, if principle could be evaded by words.” *Id.* at 130.

¹⁵³ See David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1, 34 (2013) (discussing early American conceptions of the First Amendment).

¹⁵⁴ 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“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.”).

¹⁵⁵ See *Patterson v. Colorado ex rel. Attorney Gen.*, 205 U.S. 454, 462 (1907) (affirming criminal contempt sanction against the publisher of the Rocky Mountain News and concluding “the main purpose of [the First Amendment’s free speech protections] is ‘to prevent all such previous restraints upon publications as had been practised by other governments’” (quoting *Commonwealth v. Blanding*, 20 Mass. 304, 313–14 (1825))).

at expressive activities.¹⁵⁶ In *Stromberg v. California*, where the Court first held that the First Amendment's protections extend to non-verbal symbolic speech, Chief Justice Hughes explicitly invoked a structuralist approach, remarking that "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system."¹⁵⁷ Six years later, writing for a unanimous Court, Hughes noted in *De Jonge v. Oregon* that "free political discussion" plays an essential role in "our constitutional system" and that in such discussion "lies the security of the Republic, the very foundation of constitutional government."¹⁵⁸

In the 1960s, the Court further expanded the reach of the First Amendment by imposing constitutional limitations on the common-law of defamation. Explicitly invoking the structural role that speech plays in a democracy, the Court proclaimed in *New York Times Co. v. Sullivan* that the First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."¹⁵⁹ Quoting extensively from the writings of James Madison, the Court observed in *Sullivan* that the "Constitution created a form of government under which 'The people, not the government, possess the absolute sovereignty.'"¹⁶⁰ Agreeing with Madison about the critical role that speech plays in self-government, the Court concluded: "The right of free public discussion of the stewardship of public officials was thus . . . a fundamental principle of the American form of government."¹⁶¹

The Supreme Court has continued to emphasize the structural role that the First Amendment plays in supporting self-governance.¹⁶² In *Snyder v. Phelps*, the Court held that the First Amendment provides a defense to a claim of intentional infliction of emotional distress when the speech at issue

¹⁵⁶ See *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) (invalidating criminal conviction for subversive speech); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (overturning conviction for displaying a reproduction of the red flag of the Soviet Union).

¹⁵⁷ 283 U.S. 359, 369 (1931) (holding that displaying a red flag was symbolic speech protected by the First Amendment).

¹⁵⁸ 299 U.S. 353, 365 (1937) (invalidating criminal conviction for subversive speech); *Stromberg*, 283 U.S. at 369 ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

¹⁵⁹ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

¹⁶⁰ *Id.* at 274.

¹⁶¹ *Id.* at 275.

¹⁶² See, e.g., *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) ("Our cases have often noted the close connection between our Nation's commitment to self-government and the rights protected by the First Amendment."); *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) ("At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed."); *Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976) (per curiam) ("[T]he central purpose of the Speech and Press Clauses was to assure a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish." (quoting *Sullivan*, 376 U.S. at 270)).

relates to “a matter of public concern.”¹⁶³ According to the Court, “[s]peech on ‘matters of public concern’ . . . is ‘at the heart of the First Amendment’s protection,’”¹⁶⁴ and “speech concerning public affairs is more than self-expression; it is the essence of self-government.”¹⁶⁵

As this discussion shows, the Supreme Court has not relied solely on the words of the First Amendment to determine its meaning. Instead, the Court has repeatedly applied structural insights to interpret the First Amendment’s scope, looking beyond the text to identify constitutional values, especially the preeminent value of self-governance, that the Court uses to resolve issues that the text does not directly address. Put simply, the words of the First Amendment are merely a pointer to the larger role that speech and the other cognate rights in the amendment play in supporting democratic self-governance.

C. *The Relationship Between Speech and Self-Governance*

Although the precise relationship between speech and self-governance remains contested—as does the definition of democracy itself¹⁶⁶—few would question that protection for speech (in some form) is essential for self-governance. Even if one holds a rather thin view of democracy as simply “majority rule,” protections for speech can have an instrumental benefit by making democracy more effective and resistant to anti-democratic pressures.¹⁶⁷ Thicker conceptions of democracy view freedom of speech as a defining feature of democracy, “such that a society with less freedom of speech is, for that reason, less democratic.”¹⁶⁸

Echoing the Supreme Court’s repeated statements that discussion of government affairs is at the core of the First Amendment’s protections, an increasing number of constitutional scholars have concluded that the primary purpose of the First Amendment’s speech and press clauses is to make self-governance possible.¹⁶⁹ This is not to say, however, that there is unanimity as

¹⁶³ 562 U.S. 443, 451–52 (2011).

¹⁶⁴ *Id.* (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (plurality opinion)).

¹⁶⁵ *Id.* at 452 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)).

¹⁶⁶ See Martin H. Redish & Abby Marie Mollen, *Understanding Post’s and Meiklejohn’s Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 Nw. U. L. REV. 1303, 1304 (2009) (noting that “‘democracy’ itself is an amorphous concept, both historically and theoretically”); Ingber, *supra* note 67, at 9–11 (discussing competing perspectives on how “democratic governance” takes place).

¹⁶⁷ Schauer, *supra* note 7, at 234 n.23; Redish & Mollen, *supra* note 166, at 1304 (“Every democratic theory of the First Amendment, though, in one way or another, views free speech as a means to a democratic end.”).

¹⁶⁸ Schauer, *supra* note 7, at 251 n.23; see also Bork, *supra* note 28, at 23 (writing that representative democracy “would be meaningless without freedom to discuss government and its policies.”).

¹⁶⁹ See, e.g., BeVier, *supra* note 105, at 502 (“[T]here is one principle [in the First Amendment area] which both commands widespread agreement and is derived from constitutional structure: the core first amendment value is that of the democracy embodied in our constitutionally established processes of representative self-government.”); Bhagwat, *supra* note 142, at

to the exact contours of the self-governance theory. Scholars continue to disagree over the precise relationship between speech and self-governance, with some arguing that speech educates the public and facilitates the informed decision-making that self-rule requires,¹⁷⁰ while others assert that speech furthers democracy by allowing individuals to recognize themselves as self-governing.¹⁷¹ For example, Alexander Meiklejohn, one of the more influential proponents of the self-governance theory, chose as his model for democratic decision making a New England town meeting, where discussion takes place as part of a moderated sharing of views with strictly enforced rules of procedure.¹⁷² For Meiklejohn, the purpose of such discourse is to educate citizens so that they can be better-informed voters.¹⁷³ As he later remarked, “What is essential is not that everyone shall speak, but that everything worth saying shall be said.”¹⁷⁴

Like Meiklejohn, Cass Sunstein also emphasizes the role that speech has in informing and educating the public, preferring the term “democratic deliberation” rather than public discourse.¹⁷⁵ Sunstein insists that a well-functioning system of free expression must be “designed to have an important deliberative feature, in which new information and perspectives influence social judgments about possible courses of action.”¹⁷⁶ Echoing Meiklejohn’s focus on the rationality of individuals and the benefits of ensuring broad communication about matters of public concern, Sunstein writes that “[t]hrough exposure to such information and perspectives, both collective and individual decisions can be shaped and improved.”¹⁷⁷

Robert Post offers a more nuanced view of the role of public discourse, describing what he calls the “participatory” theory of free speech, which “does not locate self-governance in mechanisms of decision making, but rather in the processes through which citizens come to identify a government

1102 (“[A] broad consensus has emerged over the past half-century regarding the fundamental reason why the Constitution protects free speech: to advance democratic self-governance.”); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011); Weinstein, *supra* note 28, at 497. *But see* Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 285–86 (2011) (rejecting democratic theories of free speech); C. Edwin Baker, *Is Democracy a Sound Basis for a Free Speech Principle?* 97 VA. L. REV. 515, 519–24 (2011) (questioning democracy as the sole basis for the First Amendment); Martin H. Reddish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 595–96 (1982) (arguing that all other theories of the First Amendment are subsets of “self-realization”).

¹⁷⁰ See, e.g., Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 26 (1979); Sunstein, *supra* note 28, at 18.

¹⁷¹ See, e.g., Post, *supra* note 29, at xiii; Post, *supra* note 28, at 2367; Weinstein, *supra* note 28, at 497.

¹⁷² Meiklejohn, *supra* note 170, at 24–25.

¹⁷³ *Id.* at 26 (stating that freedom of speech ensures that voters are “made as wise as possible”).

¹⁷⁴ *Id.*

¹⁷⁵ Sunstein, *supra* note 28, at 18.

¹⁷⁶ *Id.* at 19.

¹⁷⁷ Sunstein, *supra* note 28, at 19.

as their own.”¹⁷⁸ For Post, the First Amendment’s speech and press protections were intended to advance two distinct, but related, values associated with self-government: “democratic legitimation” and “democratic competence.”¹⁷⁹ According to Post, democratic legitimation rests on the view that “every person is entitled to communicate his own opinion,”¹⁸⁰ but it encompasses an idea far broader than just protections for majoritarian political decision-making. Post explains:

[M]ajoritarianism and elections are merely mechanisms for making decisions. American democracy does not rest upon decision-making techniques, but instead upon the value of self-government, the notion that those who are subject to law should also experience themselves as the authors of law.¹⁸¹

Freedom of speech is essential, Post contends, because “if persons are prevented even from the possibility of seeking to influence the content of public opinion, there is little hope of democratic legitimation in a modern culturally heterogeneous state.”¹⁸²

According to Ashutosh Bhagwat, both of these perspectives miss the mark.¹⁸³ Although he concludes that Post and Sunstein’s theories are “more convincing and more nuanced than Meiklejohn,” they share with Meiklejohn “a myopic focus on speech, ignoring the rest of the Democratic First Amendment.”¹⁸⁴ For Bhagwat, “[r]ational discourse is certainly (at least ideally) a part of our system of self-governance, but it is just a part.”¹⁸⁵ He goes on to point out that “[o]urs is a representative democracy” and that “[a]side from a handful of narrow exceptions. . . essentially all laws in this country are adopted by legislatures made up of elected representatives.”¹⁸⁶ This, Bhagwat says, raises a difficult question: what is the use of protecting public discourse if the public has no direct say over legislation?

¹⁷⁸ Post, *supra* note 28, at 2367; see also Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1116–18 (1993); Weinstein, *supra* note 28, at 497.

¹⁷⁹ Post, *supra* note 29, at xiii.

¹⁸⁰ *Id.* at xiii.

¹⁸¹ *Id.* at 17.

¹⁸² *Id.* at 18. According to Post, “democratic competence” involves “the cognitive empowerment of persons within public discourse.” *Id.* at 34. In his elaboration of the importance of democratic competence, Post gets at the heart of the problem we face today: “The First Amendment guarantees the free formation of public opinion[;] But public opinion is, in the end, merely opinion.” *Id.* at 27. For Post, democratic competence “is necessary both for intelligent self-governance and for the value of democratic legitimation.” *Id.* at 34. In other words, the capacity to engage in self-governance is a precondition for democratic legitimacy; without robust and informed public discourse, self-governance is not possible and thus participation in public discourse alone cannot create democratic legitimation. This is a point we will return to in Part III.

¹⁸³ Bhagwat, *supra* note 142, at 1113 (writing that Meiklejohn, Sunstein, and Post present a “radically incomplete vision of self-governance”).

¹⁸⁴ *Id.* at 1115.

¹⁸⁵ *Id.* at 1118.

¹⁸⁶ *Id.* at 1119.

In an article that deftly summarizes the founding era debate over the proper role of citizens in a representative democracy, Bhagwat draws insight from two major political crises of the 1790s: the creation of Democratic-Republican societies during the Washington Administration and the controversy over the Sedition Act during the first Adams Administration.¹⁸⁷ In both instances, Federalists, led by John Adams and Alexander Hamilton, asserted that in a representative democracy citizens should elect representatives based on their abilities, “but then leave deliberation over public issues to those representatives.”¹⁸⁸ Under this view, “[c]riticism of the work of representatives is generally suspect, and indeed, citizens and the press were not generally expected to consider the wisdom of legislation at all.”¹⁸⁹

On the other side, Republican supporters of the societies and opponents of the Sedition Act, including Thomas Jefferson and James Madison, espoused “a strong vision of citizenship which was much more active.”¹⁹⁰ Jeffersonian republicans saw speech and political associations “as vehicles through which citizens could safely and effectively articulate criticism of government policies.”¹⁹¹ In this regard they embraced the view of classical republicanism, which “emphasize[s] the role of the polis as the locus for achieving freedom through active citizenship.”¹⁹²

As Bhagwat points out, these two groups articulated very different conceptions of citizenship: “One, the Federalist model, envisioned a largely passive, respectful, and subordinate citizenry. The other, the Republican model, was much more active, collective, disrespectful, and even sometimes incendiary.”¹⁹³ These competing visions of citizenship—and American democracy—played out in the debate over the First Amendment, where “arguments in support of active citizenship were often tied directly and explicitly to First Amendment rights.”¹⁹⁴

Ultimately, the First Amendment and the Bill of Rights, which was championed by Jefferson and Madison, succeeded in ratification over the objections of the Federalists. Today, one would be hard pressed to find a jurist or scholar who holds the view that American democracy is predicated on a passive and subordinate citizenry.¹⁹⁵ In fact, the idea that citizens should simply defer to their elected representatives was not widely shared even dur-

¹⁸⁷ *Id.* at 1121–23. The Democratic-Republican societies, which existed between 1793 and 1795, “were private groups, supportive of the French Revolution.” *Id.*

¹⁸⁸ *Id.* at 1121.

¹⁸⁹ *Id.* (citing James P. Martin, *When Repression is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798*, 66 U. CHI. L. REV. 117, 129–30, 174 (1999); Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. REV. 1525, 1542–43 (2004)).

¹⁹⁰ *Id.* at 1122.

¹⁹¹ *Id.*

¹⁹² Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1547 (1988).

¹⁹³ Bhagwat, *supra* note 142, at 1123.

¹⁹⁴ *Id.* at 1122.

¹⁹⁵ See *id.* at 1123; Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People’s Elusive “Right to Know”*, 72 MD. L. REV. 1, 6 (2012) (concluding that “Madison’s view could command widespread adherence today.”).

ing the founding period.¹⁹⁶ To the contrary, as Henry Kammerer argued in 1793, “every citizen should be capable of judging the conduct of rulers, and the tendency of laws,” particularly given the “disposition in the human mind to tyrannize when clothed with power.”¹⁹⁷

Naturally, one’s view of the role that speech plays in a democracy will have an impact on how broadly speech relating to self-governance should be defined. Perhaps not surprisingly, even among those who support a self-governance theory, there continues to be disagreement over where to draw the line between speech that is germane to self-governance, which should be subject to rigorous First Amendment protection, and expressive activities outside the sphere of self-governance, which may not need similar protection.¹⁹⁸ At least initially for Meiklejohn such speech had to be explicitly political.¹⁹⁹ This exceedingly narrow definition faced immediate criticism from a number of quarters.²⁰⁰ What may appear to be primarily personal, for instance artistic and literary expressions, can make important political statements. It is impossible, for example, to imagine that George Orwell’s novels or Shakespeare’s plays are unprotected by the First Amendment because they are not explicitly political. Meiklejohn ultimately revised his theory, concluding that speech about education, philosophy, science, literature, and the arts also can be necessary for self-governance.²⁰¹

This broad understanding of the scope of speech germane to self-governance is now widely shared.²⁰² Indeed, speech does not even need to be

¹⁹⁶ See Martin, *supra* note 189, at 121 (noting that Federalist theories of citizenship “were already seriously eroding at the time the Sedition Act was passed and were thoroughly disowned in the early nineteenth century”).

¹⁹⁷ Henry Kammerer, *Friends and Fellow Citizens*, NAT’L GAZETTE (Philadelphia), Apr. 13, 1793, reprinted in *The Democratic-Republican Societies, 1790–1800: A Documentary Sourcebook Of Constitutions, Declarations, Addresses, Resolutions, and Toasts* 53–55 (Philip S. Foner ed., 1976).

¹⁹⁸ See C. Edwin Baker, *Is Democracy A Sound Basis for A Free Speech Principle?*, 97 VA. L. REV. 515, 516 (2011) (noting the “serious difficulty of identifying when the person is engaged in protected public discourse”); Post, *supra* note 29, at 24 (“Almost all democratic accounts of the First Amendment seek to differentiate a political domain of public opinion creation from non-political domains of civil society.”).

¹⁹⁹ See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNANCE* 105–07 (1948).

²⁰⁰ See, e.g., Zechariah Chafee, Jr., *Free Speech: And Its Relation to Self-Government*. By Alexander Meiklejohn. New York: Harper Bros., 1948, 62 HARV. L. REV. 891, 899 (1949) (book review) (“The most serious weakness in Mr. Meiklejohn’s argument is that it rests on his supposed boundary between public speech and private speech.”); Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 15–16.

²⁰¹ MEIKLEJOHN, *supra* note 199, at 256–57. Alexander Bickel, another proponent of the self-governance theory expanded Meiklejohn’s argument, concluding: “The social interest that the First Amendment vindicates is . . . the interest in the successful operation of the political process, so that the country may better be able to adopt the course of action that conforms to the wishes of the greatest number, whether or not it is wise or is founded in truth.” ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 62 (1975).

²⁰² See, e.g., Bhagwat, *supra* note 142, at 874 (“Scientific knowledge, cultural sharing and development, and more broadly the shaping of values are surely highly relevant to citizenship, especially if citizenship is defined more broadly than merely voting as the full text of the First Amendment suggests it must be.”); Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1160 (1983) (“To say that particular information or

“public” in the sense of being directed at large audiences for it to be relevant to self-governance: “After all, citizens develop and share their political and cultural values at least as much through private conversations as through public discourse.”²⁰³ For Robert Post and many other scholars who advance a self-governance theory, “First Amendment coverage should extend to all efforts deemed normatively necessary for influencing public opinion” and “[b]ecause public opinion can direct government action in an endless variety of directions, it is impossible to specify in advance which aspects of public opinion are ‘political’ and which are not.”²⁰⁴

III. BRIDGING THEORY AND DOCTRINE TO PROMOTE SELF-GOVERNANCE

My aim here is not simply to add another voice to the growing chorus of scholars who embrace a self-governance theory of the First Amendment. Instead, I wish to make three points that I will explicate in greater detail below. First, we must move beyond the idea that the First Amendment’s only function is to impose free market ideology on public discourse, but we should retain the core principle underlying the marketplace of ideas theory—that the government must be precluded from enforcing its view of what should and should not be subject to public discussion. Second, the First Amendment does not bar the government from addressing deficiencies in the actual markets in which communication takes place, especially when these deficiencies undermine the public’s capacity for self-governance. Third, the capacity for self-governance turns, at least in part, on whether the public has the information it needs to effectively evaluate issues of public policy. Accordingly, the government, which enjoys an outsized role in public discourse, should be prohibited from knowingly disseminating false and misleading information that undermines the public’s capacity for self-governance and it should be obligated to disclose information in its possession that makes it possible for the public to understand the actions of government.

ideas are useful in the pursuit and achievement of an ever better understanding, or vision, of reality (which entitles the information or ideas to protection under the epistemic conception) is to say that the information or ideas are useful in the pursuit and achievement of moral vision and therefore of political vision (which entitles the information or ideas to protection under the democratic conception).”); *but see* Bork, *supra* note 28, at 20 (arguing that First Amendment protection should only apply to speech that is explicitly political).

²⁰³ Bhagwat, *supra* note 142, at 874. Bhagwat notes that the Supreme Court has, in the context of speech by government employees, recognized that private conversations can constitute speech relevant to democratic self-governance. *Id.* at 874 n.247 (citing *Rankin v. McPherson*, 483 U.S. 378, 386 n.11 (1987); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414–16 (1979)).

²⁰⁴ Post, *supra* note 29, at 18–19.

A. Tempering Our Faith in the Competition of the Market

The marketplace of ideas theory should not be entirely abandoned. At its core, it stands for the proposition that the government must be precluded from enforcing its view of what should and should not be subject to public discussion and by extension, what is true and false. Understood in this way, it is apparent that the desire to ensure a free trade in ideas is not incompatible with a self-governance centered justification for the protection of speech. Nearly all government speech restrictions that limit what topics are open to public discussion also interfere with self-governance. As the social theorist Michael Warner writes, “[i]f it were not possible to think of the public as organized independently of the state . . . the public could not be sovereign with respect to the state.”²⁰⁵ Robert Post makes the same point when he warns that “[t]he public sphere can sustain democratic legitimation only insofar as it is beyond the grasp of comprehensive state managerial control.”²⁰⁶

Although the self-governance and marketplace theories are in this respect complimentary, they are not coterminous in what they require. While speech that is protected under the marketplace theory would still be protected from government interference under a self-governance theory, the narrow focus on preserving the opportunity to speak is insufficiently protective of the *processes* by which public opinion is constantly being formed and reformed. This limited focus is the natural outgrowth of a theory that took root in the early twentieth century when the primary threat to public discourse was government suppression of anti-war and other anti-government speech.²⁰⁷ While we should remain vigilant in preventing government censorship of speech, the primary challenge facing society today is the public’s ability to make sense of the speech of others and the declining quality of public discourse.

Expanding our attention to the role that speech plays in fostering the conditions for self-governance means that we cannot wash our hands of the problems we are seeing and fall back on the time-worn adage that “the market will sort it out.” If the First Amendment is to serve its vital function supporting self-governance, we need to concede that competition in the marketplace of ideas has not been the truth engine many theorists asserted it would be. This should not be a surprise, given that markets of all kinds

²⁰⁵ MICHAEL WARNER, *PUBLICS AND COUNTERPUBLICS* 11 (2002).

²⁰⁶ Post, *supra* note 29, at 18; *see also* THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 21 (1970) (“The effort to coerce belief . . . is the hallmark of a feudal or totalitarian society.”); Weinstein, *supra* note 28, at 497 (“In its narrowest but most powerful conception, this core precept recognizes the right of every individual to participate freely and equally in the speech by which we govern ourselves.”); Marshall, *supra* note 34, at 20 (“[E]pistemological humility imposed by the prohibition upon state orthodoxy is necessary for popular sovereignty.”).

²⁰⁷ In fact, First Amendment jurisprudence overall has been shaped to a large extent by conflicts over government efforts to restrict speech critical of the government. *See supra* notes 40–47 and accompanying text.

invariably require some government intervention to function efficiently.²⁰⁸ Despite the fact that evidence of market failures has often been employed to justify government involvement in traditional markets, it has not had a similar impact on efforts to improve the functioning of the speech marketplace.²⁰⁹ Part of the reason for this is the belief that the marketplace for speech, unlike other markets, will take care of itself.

We see the ramifications of this unbridled faith in competition among ideas in a wide range of First Amendment cases, but it is particularly obvious in cases that deal with misinformation and other forms of harmful speech. In fact, other than in a few narrow categories of unprotected or lesser-protected speech,²¹⁰ most First Amendment doctrines evidence a surprising ambivalence as to whether speech is actually informative or misleading, or even true or false.²¹¹ Fredrick Schauer writes that this ambivalence is likely due to the assumption that “the power of the marketplace of ideas to select truth was as applicable to factual as to religious, ideological, political, and social truth, but rarely is the topic mentioned.”²¹² Schauer laments that the consequences of this epistemic agnosticism are clear: “we have . . . arrived at a point in history in which an extremely important social issue about the proliferation of demonstrable factual falsity in public debate is one as to which the venerable and inspiring history of freedom of expression has virtually nothing to say.”²¹³ Phil Napoli puts an even sharper point on this, warning that because

²⁰⁸ See, e.g., CLIFFORD WINSTON, GOVERNMENT FAILURE VERSUS MARKET FAILURE: MICROECONOMICS POLICY RESEARCH AND GOVERNMENT PERFORMANCE 73 (2007) (“Economic theory identifies many situations where a market failure may arise and suggests how the government could correct the failure and improve economic efficiency.”); James M. Poterba, *Government Intervention in the Markets for Education and Health Care*, in INDIVIDUAL AND SOCIAL RESPONSIBILITY: CHILD CARE, EDUCATION, MEDICAL CARE, AND LONG-TERM CARE IN AMERICA 277, 277–308 (Victor R. Fuchs ed., 1996) (describing the basis for government interventions in the U.S. education and health care markets); Joseph E. Stiglitz, *The Role of the State in Financial Markets*, 7 WORLD BANK ECON. REV. 19, 20–21 (1993) (noting that “massive interventions in financial markets are common . . . includ[ing] banking and securities regulations as well as direct government involvement in lending activities”).

²⁰⁹ Blocher, *supra* note 34, at 836; Shiffrin, *supra* note 32, at 1281.

²¹⁰ The most salient of these categories is commercial speech. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

²¹¹ See Erwin Chemerinsky, *False Speech and the First Amendment*, 71 OKLA. L. REV. 1, 10 (2018) (concluding that “it always will be impossible to say either that false speech is always protected by the First Amendment or that it never is protected by the First Amendment”); Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 907 (2010) (noting that “nearly all of the components that have made up our free speech tradition . . . have had very little to say about the relationship between freedom of speech and questions of demonstrable fact”); Post, *supra* note 66, at 556 (concluding that “First Amendment doctrine is not in fact organized around epistemic concerns”).

²¹² Schauer, *supra* note 211, at 907; see also Murchison, *supra* note 7, at 60 (observing that courts “have seldom invoked the [truth-seeking] value in more than a perfunctory way”); Paul Horwitz, *The First Amendment’s Epistemological Problem*, 87 WASH. L. REV. 445, 488 (2012) (noting that “[w]here deep questions about the nature of truth and falsity are concerned, courts will rely on general statements and incompletely theorized agreements and leave the theorizing to others”).

²¹³ Schauer, *supra* note 211, at 908.

First Amendment doctrine fails to address the relationship between freedom of speech and the goal of increasing public knowledge, “the First Amendment has essentially facilitated the type of speech that, ironically, undermines the very democratic process that the First Amendment is intended to serve and strengthen.”²¹⁴

The response to this disturbing state of affairs, however, is not to grant the government greater leeway to *directly* regulate truth. Such an approach would undermine democratic legitimation and thus be anathema to any self-governance centered theory of the First Amendment.²¹⁵ Even with regard to demonstrably false factual statements it is likely that “any cure could be substantially worse than the disease.”²¹⁶ Instead, the response should be to identify ways that the First Amendment can support the processes underlying democratic deliberation, including the creation and dissemination of speech that advances social knowledge. After all, not all speech is equal in fostering an informed and empowered society.

To do this, we must start by addressing some obvious problems in the “speech marketplace.” Although neoclassical economic theory pervades much of the rhetoric associated with the marketplace of ideas, the speech marketplace has not been subject to the same degree of critical examination in terms of market failures that the market for goods has received.²¹⁷ As Joseph Blocher notes, “[c]ourts have clung to an idealized, neoclassical view of the marketplace of ideas far more tenaciously than economists have . . . when it comes to the ‘real-world’ market.”²¹⁸

Nobel Prize-winning economist Ronald Coase condemned this differential treatment in an influential paper in 1974, writing that “[t]here is no fundamental difference between these two markets, and in deciding on public policy with regard to them, we need to take into account the same considerations.”²¹⁹ Coase clarified that “[i]t may not be sensible to have the same legal arrangements governing the supply of soap, housing, automobiles, oil, and books . . . [but] we should use the same *approach* for all markets when deciding on public policy.”²²⁰ Applying the methodology he advocated, Coase concluded: “if we . . . use for the market for ideas the same approach which has commended itself to economists for the market for goods, it is

²¹⁴ Napoli, *supra* note 79, at 88.

²¹⁵ See Schauer, *supra* note 211, at 915 (“Whatever the harms of public noncommercial factual falsity (and it seems hard to deny that they are many and substantial), there is, in the United States, little basis for arguing that dealing with these harms through government restriction is constitutionally permissible.”); Post, *supra* note 28, at 2368 (noting that “the participatory approach [of self-governance] views the function of the First Amendment to be the safeguarding of public discourse from regulations that are inconsistent with democratic legitimacy”).

²¹⁶ See Schauer, *supra* note 211, at 915.

²¹⁷ See, e.g., Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 2–3 (1986); R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 385 (1964); Director, *supra* note 99, at 8.

²¹⁸ Blocher, *supra* note 34, at 836.

²¹⁹ Coase, *supra* note 217, at 389.

²²⁰ *Id.* (emphasis in original).

apparent that the case for government intervention in the market for ideas is much stronger than it is, in general, in the market for goods.”²²¹

According to economists, a market failure occurs when the market on its own fails to produce an efficient allocation of resources.²²² Market failure can be caused by many factors, including externalities, barriers to entry, lack of property rights, market power, or the inability to monetize.²²³ Markets for public goods, such as journalism, education, and a clean environment, have proven to be especially prone to market failure.²²⁴ These public goods tend to be under-produced relative to their full value to society because individuals have an incentive to “free ride” given that they can enjoy the benefits without helping to produce them.²²⁵ In the language of economists, public goods such as an informed citizenry and a functioning democracy are “positive externalities.” Externalities, whether positive or negative, are understood to be a type of market failure because “externalities generally are not fully factored into a person’s decision about whether and how to engage in an activity and consequently may have a distorting effect on market coordination and allocation of resources.”²²⁶

Phil Napoli, who has extensively studied the production of journalism, points out that journalism “produces value for society as a whole (positive externalities) that often is not captured in the economic transactions between news organizations and news consumers, and/or between news organizations and advertisers,” which he concludes “leads to market inefficiency in the form of the underproduction of journalism.”²²⁷ Indeed, the current situation

²²¹ *Id.* at 389–90. Coase goes on to identify a number of spillover effects or “externalities” in the speech marketplace that he believes would justify government intervention.

²²² See N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS* 814 (8th ed. 2017); Kenneth A. Shepsle & Barry R. Weingast, *Political Solutions to Market Problems*, 78 AM. POL. SCI. REV. 417 (1984) (“According to the market failure orthodoxy, inefficiency in the marketplace provides a prima facie case for public intervention.”).

²²³ See generally Justin M. Ross, *What Should Policy Makers Know When Economists Say “Market Failure”?*, 14 GEO. PUB. POL’Y REV. 27 (2009).

²²⁴ See Napoli, *supra* note 79, at 89; Brett M. Frischmann, *Speech, Spillovers, and the First Amendment*, 2008 U. CHI. LEGAL F. 301, 310 (2008).

²²⁵ JAMES T. HAMILTON, *ALL THE NEWS THAT’S FIT TO SELL: HOW THE MARKET TRANSFORMS INFORMATION INTO NEWS* 8 (2004) (“A person can consume a public good without paying for it, since it may be difficult or impossible to exclude any person from consumption”); Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 555 (1991) (observing that “because information is a public good, it is likely to be undervalued by both the market and the political system”); Victor Pickard, *The Great Evasion: Confronting Market Failure in American Media Policy*, 31 CRITICAL STUD. MEDIA COMM. 153, 154 (2014) (“Because public goods are non-rivalrous (one person’s consumption does not detract from another’s) and non-excludable (difficult to monetize and to exclude from free riders), they differ from other commodities, like cars or clothes, within a capitalistic economy.”).

²²⁶ See Frischmann, *supra* note 224, at 306. According to Frischmann, “Speech is an activity that regularly generates externalities—costs or benefits realized by parties other than the speaker or listener that are not fully accounted for in the decision to speak or transactions related to the speech.” *Id.* at 310.

²²⁷ Napoli, *supra* note 79, at 89; see also HAMILTON, *supra* note 225, at 13 (“[S]ince individuals do not calculate the full benefit to society of their learning about politics, they will express less than optimal levels of interest in public affairs coverage and generate less than

for journalism in the United States is dire. Technological and economic assaults have destroyed the for-profit business model that sustained local journalism in this country for two centuries.²²⁸ While the advertising-based model for news has been under threat for many years, the COVID-19 pandemic and the increasing percentage of advertising revenue being captured by a small number of online platforms have created what some experts describe as an “extinction level” threat for local newspapers and other struggling news outlets.²²⁹ Since 2004, more than one-fourth of the country’s newspapers have disappeared, leaving residents in thousands of communities living in news deserts.²³⁰ A recent article in the *Harvard Business Review* refers to the market failure of local journalism as a “crisis for democracy.”²³¹

Coase, to his credit, was clear eyed in his assessment of why economists and policymakers ignore externalities in the marketplace of ideas, writing that there is a general view that if the government were to attempt to regulate the marketplace of ideas, the government “would be inefficient and its motives would, in general, be bad, so that, even if it were successful in achieving what it wanted to accomplish, the results would be undesirable.”²³² Coase remarked with some sarcasm that this skepticism regarding the government was bolstered by the belief that “[c]onsumers, on the other hand, if left free, exercise a fine discrimination in choosing between the alternative views placed before them, while producers [of speech], whether economically powerful or weak, who are found to be so unscrupulous in their behavior in other markets, can be trusted to act in the public interest” when it comes to democratic discourse.²³³ Joseph Blocher wryly notes that Aaron Director, also a leading figure in the Chicago School of Economics, “argued the same thing a decade earlier, but with a similarly negligible impact” on law and economic policy.²³⁴

From a self-governance perspective, concern over failures in the speech marketplace go well beyond the desire to increase market efficiency. The Internet has laid bare the deep dysfunction within modern public discourse. Our current media ecosystem produces too little high-quality information, we have a tendency to be attracted to information that confirms our existing biases, and we share this information with little regard for its veracity.²³⁵ The results and aftermath of the 2016 U.S. presidential election have made these

desirable demands for news about government.”); Pickard, *supra* note 225, at 155 (“The inadequacy of commercial support for democracy-sustaining infrastructures suggests what should be obvious by now: the systematic underproduction of vital communications like journalistic media.”).

²²⁸ Ardia, et al., *supra* note 1, at 13–16.

²²⁹ Abernathy, *supra* note 1, at 9.

²³⁰ *Id.* at 10.

²³¹ Victor Pickard, *The Big Idea: Journalism’s Market Failure Is a Crisis for Democracy*, HARV. BUS. REV. (March 12, 2020), <https://hbr.org/2020/03/journalisms-market-failure-is-a-crisis-for-democracy> [<https://perma.cc/Y39Q-GVKT>].

²³² Coase, *supra* note 217, at 384.

²³³ *Id.* at 384–85.

²³⁴ Blocher, *supra* note 34, at 837 (citing Director, *supra* note 99, at 6).

²³⁵ See *supra* notes 1–3.

concerns all the more pressing, as researchers continue to warn about the potential for political bias in the content moderation practices of online platforms,²³⁶ the extent to which public discourse is polluted by the spread of misinformation,²³⁷ and the increasing efforts by some individuals, both inside and outside government, to inflame political discourse.²³⁸

Even a casual observer of today's speech marketplace can see the proliferation of conspiracy theories, "fake news," and other forms of misinformation.²³⁹ Combined with the declining availability of effective counter

²³⁶ See, e.g., Juhi Kulshrestha, Motahhare Eslami, Johnnatan Messias, Muhammad Bilal Zafar, Saptarshi Ghosh, Krishna P. Gummadi & Karrie Karahalios, *Search Bias Quantification: Investigating Political Bias in Social Media Web Search*, 22 INFO. RETRIEVAL J. 188, 189 (2019) ("[W]e observe that the top Twitter search results display varying degrees of political bias that depends on several aspects; such as the topic (event/person) being searched for, the exact phrasing of the query (even for semantically similar queries), and also the time at which the query is issued."); Robert Gorwa, Reuben Binns & Christian Katzenbach, *Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance*, BIG DATA & SOC'Y, Jan.–June 2020, at 12 (noting that although Facebook's algorithmic moderation allows for removal of terrorist propaganda, "this elides the hugely political question of who exactly is considered a terrorist group"); Daphne Keller and Paddy Leerssen, *Facts and Where to Find Them: Empirical Research on Internet Platforms and Content Moderation*, in SOCIAL MEDIA AND DEMOCRACY 220, 236 (Nathaniel Persily & Joshua A. Tucker, eds., 2020) (describing leaked information from Facebook revealing the potential for political bias in content moderation, including instructions to employees to "escalate" certain political content in response to public pressure from the Turkish government).

²³⁷ See Napoli, *supra* note 79, at 57 (describing the spread of misinformation online and the inability of counter speech to combat it); Michel Martin & Will Jarvis, *Far-Right Misinformation Is Thriving on Facebook. A New Study Shows Just How Much*, NPR (Mar. 6, 2021), <https://www.npr.org/2021/03/06/974394783> [<https://perma.cc/ZJ3R-6XLR>] (reporting that "far-right accounts known for spreading misinformation are not only thriving on Facebook, they're actually more successful than other kinds of accounts at getting likes, shares and other forms of user engagement"),

²³⁸ See, e.g., Alistair Somerville & Jonas Heering, *The Disinformation Shift: From Foreign to Domestic*, GEO. J. INT'L AFFS., (Nov. 28, 2020), <https://gja.georgetown.edu/2020/11/28/the-disinformation-shift-from-foreign-to-domestic/> [<https://perma.cc/4Z2M-WBXW>] ("Domestic actors, led by the Trump campaign and White House officials, are exploiting [the] uncertainty [about the 2020 election results] by spreading disinformation about supposed electoral fraud, glitches in voting machines, and late voting to muddy the waters and undermine citizens' faith in the electoral process."); Paul M. Barrett, NYU STERN CTR. FOR BUS. & HUM. RIGHTS, *Tackling Domestic Disinformation 1–4* (March 2019) (reporting that the majority of "junk news" shared on social media in the lead-up to the 2018 midterm elections came from domestic U.S. sources as opposed to foreign actors); Gred Myre & Shannon Bond, *Russia Doesn't Have to Make Fake News: Biggest Election Threat Is Closer To Home*, NPR: ALL THINGS CONSIDERED (Sept. 29, 2020), <https://www.npr.org/2020/09/29/917725209/> [<https://perma.cc/3PCL-SNMH>] (reporting on the increased threat of domestic disinformation and noting that "would-be foreign meddlers need only amplify falsehoods being spread by U.S. social media users").

²³⁹ See FAKE NEWS: UNDERSTANDING MEDIA AND MISINFORMATION IN THE DIGITAL AGE 1–2 (Melissa Zimdars & Kembreu McLeod eds., 2020) (writing that the proliferation of fake news represents "a confluence of issues, including the coordinated politicization and weaponization of information, public distrust of news organizations, and . . . failures of technology and information platforms to acknowledge their role in both exacerbating and solving the spread of misinformation"); Michael Del Vicario, Alessandro Bessi, Fabiana Zollo & Walter Quattrociocchi, *The Spreading of Misinformation Online*, 113 PROC. NAT'L ACAD. SCI. 554, 554 (2015) (noting that the World Economic Forum has deemed digital misinformation as among the main threats to society); Cecilia Kang & Sheera Frenkel, *PizzaGate' Conspiracy Theory Thrives Anew in the TikTok Era*, N.Y. TIMES (July 14, 2020) <https://>

speech and the increasing use of algorithmic “filter bubbles,”²⁴⁰ there is reason to be concerned that the public sphere, as currently constituted, will not be able to support informed democratic decision-making. Lyrissa Lidsky warns that this would make self-governance impossible:

The ideal of democratic self-governance . . . makes no sense unless one assumes that citizens will generally make rational choices to govern the fate of the nation. If the majority of citizens make policy choices based on lies, half-truths, or propaganda, sovereignty lies not with the people but with the purveyors of disinformation. If this is the case, democracy is both impossible and undesirable.²⁴¹

It is beyond the scope of this paper to present a detailed analysis of the many failures in the communication markets that facilitate public discourse. Others are already doing this important work.²⁴² My point in summarizing the more obvious problems is to highlight the fact that even within the economic postulates of the marketplace theory itself, which prizes competition and market efficiency, there are reasons to countenance government interventions to improve the functioning of the speech marketplace. In fact, as Coase points out, the conventional understanding of the First Amendment has tended to obscure the fact that there is already “a good deal of government intervention in the market for ideas.”²⁴³

www.nytimes.com/2020/06/27/technology/pizzagate-justin-bieber-qanon-tiktok.html [https://perma.cc/B6M4-CH35] (reporting on how the baseless claim that Hillary Clinton and Democratic elites were running a child sex-trafficking ring out of a Washington pizzeria spread across the internet in 2016 and is resurging on new forms of social media); Daniel Romer & Kathleen Hall Jamieson, *Conspiracy Theories as Barriers to Controlling the Spread of COVID-19 in the U.S.*, 263 SOC. SCI. & MED. 1, 1–2 (2020) (concluding that conspiracy theories spread through social and traditional media channels about COVID-19 posed a barrier to responding to the pandemic). As Ari Waldman points out, “fake news” is simply a “new name for an old problem” that has significant social costs. Waldman, *supra* note 99, at 846, 850–51.

²⁴⁰ See, e.g., Napoli, *supra* note 79, at 90–91 (describing the declining effectiveness of counterspeech in today’s media ecosystem); Brent Kitchen, Steven L. Johnson & Peter Gray, *Understanding Echo Chambers and Filter Bubbles*, 44 MGMT. INFO. SYS. Q. 1619, 1620 (2020) (observing that “researchers have long expressed concern about the potential for algorithmic filtering to reduce the diversity of information sources that individuals are exposed to, engage with, or consume); Alessandro Bessi, Fabiana Zollo, Michela Del Vicario, Michelangelo Puglita, Antonio Scala, Guido Caldarelli, Brian Uzzi & Walter Quattrociocchi, *Users Polarization on Facebook and Youtube*, 11(8) PLOS ONE 1, 1 (2016) (noting how social media algorithms such as Facebook’s News Feed and YouTube’s Watch Time create “echo chambers” by presenting users with content that reinforces their existing viewpoints).

²⁴¹ Lidsky, *supra* note 11, at 839 (2010).

²⁴² See generally Pickard, *The Great Evasion*, *supra* note 225; Frischmann, *supra* note 225; Blocher, *supra* note 34; Bush, *supra* note 51; Napoli, *supra* note 79.

²⁴³ Coase, *supra* note 217, at 390. Although the Supreme Court has generally avoided using the term “market failure” in the First Amendment context, the Court “has long been attuned to the possibility of certain speech-related market failures.” Blocher, *supra* note 34, at 833. Joseph Blocher points to a number of cases as examples, including the clear and present danger test announced in *Schenck v. United States*, 249 U.S. 47, 52 (1919); limitations on corporate spending in elections in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259 (1986); and the “fighting words” doctrine in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

B. Potential Market Interventions

Although the marketplace metaphor is an inapt description of how individuals actually participate in public discourse, most speech does take place within a communication ecosystem comprised of profit-seeking entities operating in traditional economic markets. Focusing on these markets should be a central part of any effort to support the public's capacity for self-governance. But what can be done, consistent with the First Amendment, to improve the functioning of these markets? Quite a bit actually. Over the past two years I have worked with social scientists, economists, journalists, lawyers, and others to study potential solutions to the problems plaguing public discourse, particularly the decline of journalism and spread of misinformation. Our work has identified proposals that range from increasing the supply of—and demand for—news to market reforms that respond to the growing power disparities between news producers and online platforms as well as between platforms and their users.²⁴⁴ I will highlight some of the more significant proposals here.

One of the most frequently mentioned solutions is for the government to increase its support for news organizations so that they can fulfill their historically important role as the “Fourth Estate.”²⁴⁵ As Sonja West explains, “a free press [is] vital to the country’s survival by checking government tyranny and corruption and by monitoring laws and public policies through an informed citizenry.”²⁴⁶ Martha Minow, former dean of Harvard Law School, recently championed this approach in her book *Saving the News: Why the Constitution Calls for Government Action to Preserve Freedom of Speech*.²⁴⁷ This support can range from direct government funding such as the Corporation for Public Broadcasting to indirect support in the form of government subsidies that operate through regulatory, tax, and other government policies that strengthen journalism and allow news organizations to thrive.²⁴⁸

In fact, government support for news is as old as the nation itself. One of Congress’ first priorities was to pass the Post Office Act of 1792, which, among other things, provided postal subsidies for the distribution of newspa-

²⁴⁴ See generally Ardia et al, *supra* note 1 (summarizing a 2019 workshop and evaluating potential solutions to the decline of local news, rise of platforms, and spread of misinformation).

²⁴⁵ This term is commonly used to refer to news organizations. Leonard Levy, in his seminal work, *EMERGENCE OF A FREE PRESS*, writes that a “free press meant the press as the Fourth Estate, or, rather, in the American scheme, an informal or extraconstitutional fourth branch that functioned as part of the intricate system of checks and balances that exposed public mismanagement and kept power fragmented, manageable, and accountable.” LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 273 (1985).

²⁴⁶ Sonja R. West, *Favoring the Press*, 106 CALIF. L. REV. 91, 108 (2018).

²⁴⁷ MARTHA MINOW, *SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH* 138–44 (2021).

²⁴⁸ See Ardia et al, *supra* note 1, at 42–47 (describing proposals to support journalism through changes in tax, bankruptcy, and pension laws).

pers.²⁴⁹ Thomas Jefferson felt so strongly about the importance of newspapers that he once wrote: “were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.”²⁵⁰ Jefferson was clearly on to something as studies have confirmed that the decline of local news negatively affects the ability of communities to engage in democratic self-governance.²⁵¹

The disappearance of local news sources not only leads to less engaged communities, it also creates an information vacuum that aids the spread of inaccurate information which can undermine public trust in government and other important institutions.²⁵² Although misinformation in media is not new, it spreads especially rapidly on social media, which has become a key source of news for most Americans.²⁵³ In her important work examining why

²⁴⁹ Act of Feb. 20, 1792, 1 Stat. 232, 236 (expired 1794). Anuj Desai writes that these subsidies “were premised on the underlying educational rationale espoused by Rush, Washington, Madison, Jefferson, and others: if the ‘people’ are to be sovereign, it is vital that they be informed about public affairs, and it is part of the government’s affirmative responsibility to ensure that the people can in fact secure access to such information.” Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671, 694–95 (2007) (quoting RICHARD B. KIELBOWICZ, NEWS IN THE MAIL: THE PRESS, POST OFFICE AND PUBLIC INFORMATION, 1700–1860s, at 16 (1989)).

²⁵⁰ 5 THOMAS JEFFERSON, THE WORKS OF THOMAS JEFFERSON 253 (Paul Leicester Ford ed. 1905). John Nichols and Robert McChesney calculated that the level of government subsidy given to the press in the 1840s was the equivalent of \$30 billion dollars, which far exceeds the support government provided to the press in 2010. JOHN NICHOLS & ROBERT D. MCCHESENEY, THE DEATH AND LIFE OF AMERICAN JOURNALISM: THE MEDIA REVOLUTION THAT WILL BEGIN THE WORLD AGAIN 84–85 (2010).

²⁵¹ See Jackie Filla & Martin Johnson, *Local News Outlets and Political Participation*, 45 URB. AFFS. REV. 5, 679–92 (2010) (finding that respondents living in suburban Los Angeles County who had access to a daily local newspaper were more likely to vote regularly than those living in communities without one); Jay Jennings & Meghan Rubado, *Newspaper Decline and the Effect on Local Government Coverage*, ANNETTE STRAUSS INST. FOR CIVIC LIFE (2019) (concluding that mayoral elections are less competitive in communities where newspaper staffing cuts are the most severe), <https://tinyurl.com/JenningsNewspaperDecline> [<https://perma.cc/2HZF-5JNF>].

²⁵² See VICTOR PICKARD, DEMOCRACY WITHOUT JOURNALISM?: CONFRONTING THE MISINFORMATION SOCIETY 87 (2020); Danny Hayes and Jennifer L. Lawless, *The Decline of Local News and its Effects: New Evidence from Longitudinal Data*, 80 J. POL. 332, 332 (2018); Joshua P. Darr, Matthew P. Hitt & Johanna L. Dunaway, *Newspaper Closures Polarize Voting Behavior*, 68 J. COMM. 1007, 1008 (2018).

²⁵³ In 2019, the Pew Research Center found that over half of Americans (54%) either got their news “sometimes” or “often” from social media. Elisa Shearer & Elizabeth Grieco, *Americans Are Wary of the Role Social Media Sites Play in Delivering the News*, PEW RSCH. CTR. (Oct. 2, 2019), <https://www.journalism.org/2019/10/02/americans-are-wary-of-the-role-social-media-sites-play-in-delivering-the-news/> [<https://perma.cc/88S6-3TVZ>]. Pew also found that Facebook is far and away the social media site Americans use most for news; more than half (52%) of all U.S. adults get news there. *Id.* The next most popular social media site for news is YouTube, which is owned by Google (28% of adults get news there), followed by Twitter (17%) and Instagram, which is owned by Facebook, (14%). *Id.* By 2018, social media had surpassed print newspapers as a news source for most Americans. See Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEW RSCH. CTR. (Dec. 10, 2018), <https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/> [<https://perma.cc/MMU7-6SKH>].

people share fake news, Alice Marwick notes that social media have several significant differences from traditional media that aid in the spread of misinformation: “(1) Anyone can produce and distribute content; (2) Content is shared through social networks and in social contexts; and (3) Social media platforms promote content algorithmically, based on complex judgments of what they think will keep you on the platform.”²⁵⁴ As her research and the research of others is showing, we tend to be attracted to information that confirms our existing biases about the world and “problematic information is prioritized on social media sites because it garners more engagement.”²⁵⁵ According to a 2018 study, *The Spread of True and False News Online*, researchers at the Massachusetts Institute of Technology found that false news stories on Twitter “diffused significantly farther, faster, deeper, and more broadly than the truth in all categories of information.”²⁵⁶

Opportunistic actors have been quick to fill the information vacuums left from the decline of traditional news sources by leveraging the affordances of social media to engage in *disinformation* campaigns.²⁵⁷ In early 2021, when Facebook banned users in Australia from sharing news content on the company’s social media service, the void was filled by “fringe self-described news websites, some already known for spreading misinformation,” leading to concerns about a “spike in vaccine scare stories and anti-vaccine sentiment.”²⁵⁸ The rapid spread of misinformation about the COVID-19 virus has provided researchers with a disturbing window into how information vacuums and networked communication technology can combine to thwart public health initiatives.²⁵⁹ As this research reveals, it is

²⁵⁴ Marwick, *supra* note 2, at 503.

²⁵⁵ *Id.* at 506; see also sources cited *supra* in note 2.

²⁵⁶ See Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, 359 SCI. MAG. 1146, 1146 (2018). The researchers found that falsity traveled six times faster than the truth online, and, while accurate news stories rarely reached more than 1,000 people, false news stories “routinely diffused to between 1,000 and 100,000 people.” *Id.* Similarly, a 2017 study found that the lifecycle of political misinformation on social media was longer than that of accurate factual information and political misinformation tended to reemerge multiple times. See Jieun Shin, Lian Jian, Kevin Driscoll & Francois Bar, *The Diffusion of Misinformation on Social Media: Temporal Pattern, Message, and Source*, 83 COMP. HUM. BEHAV. 278, 279 (2018).

²⁵⁷ Generally speaking, misinformation is false information that is created and spread regardless of an intent to harm or deceive, whereas disinformation is deliberately deceptive. See Deen Freelon & Chris Wells, *Disinformation as Political Communication*, 37 POL. COMM. 145, 145 (2020) (explaining that disinformation includes “three critical criteria: 1) deception, 2) potential for harm, and 3) intent to harm”). A 2020 report from Jessica Mahone and Philip Napoli warns of the growth of partisan media outlets “masquerading” as local news sources. Jessica Mahone & Philip Napoli, *Hundreds of Hyperpartisan Sites Are Masquerading as Local News. This Map Shows If There’s One Near You*, NEIMAN LAB (July 13, 2020), <https://tinyurl.com/MahoneNapoli> [<https://perma.cc/2JFW-5R8C>].

²⁵⁸ James Purtill *Facebook News Ban Sees Anti-Vaccine Misinformation Pages Unaffected and Posting in ‘Information Vacuum’*, ABC NEWS (Feb. 18, 2021), <https://www.abc.net.au/news/science/2021-02-18/facebook-news-ban-misinformation-spread-covid-vaccine-rollout/13167318> [<https://perma.cc/6CGG-HWTB>].

²⁵⁹ See, e.g., Howard A. Zucker, *Tackling Online Misinformation: A Critical Component of Effective Public Health Response in the 21st Century*, 110 AM. J. PUB. HEALTH S269, S269 (October 1, 2020): pp. S269-S269 (“[M]isinformation is especially dangerous today because of

exceedingly difficult to reverse the harms arising from exposure to misinformation: “Using medical terms, one might say misinformation is widely prevalent, incredibly infectious, and highly resistant to currently available treatment.”²⁶⁰

While the advertising-based model for local news has been under threat for many years, the growth of online platforms—which are in a unique position to amass and monetize data from their users—has made the competitive environment for news organizations especially challenging.²⁶¹ Most online platforms collect extraordinary amounts of personal information and behavioral data from their users that they combine to create detailed profiles on individual users; the platforms use this information to influence the behavior of their users while at the same time offering advertisers the ability to precisely target consumers who are most likely to purchase the advertiser’s products or services.²⁶²

The data-leveraging practices of platforms have several effects on the market for news. First, the ability to precisely target users gives online platforms a significant economic advantage over traditional media outlets, which do not have access to this information and cannot provide the same level of targeting for advertisers.²⁶³ Not surprisingly, a growing proportion of the money advertisers once spent on advertising through newspapers, television and radio is now directed to online platforms. 2019 marked a major milestone in this regard, as online advertising spending for the first-time surpassed advertising spending through traditional media, with most of this digital ad revenue going to Google and Facebook who, together, accounted for about 60% of the digital advertising market in 2019.²⁶⁴ This shift in advertising spending has been especially disastrous for newspapers, which saw

declining trust in institutions, including government, medical systems, and the press, which has created a vacuum in which science is pushed to the margins and misinformation more easily takes hold.”).

²⁶⁰ *Id.*

²⁶¹ See Ardia et al., *supra* note 1, at 21–28.

²⁶² *Id.*

²⁶³ See *Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee*, STIGLER CTR. FOR THE STUDY OF THE ECONOMY AND THE STATE 1, 37 (July 1, 2019) [hereinafter “Stigler Report”] (stating that machine learning and big data have transformed the advertising industry to make advertising dollars work more efficiently for online platforms “at a scale that goes far beyond what is possible in traditional markets”), <https://tinyurl.com/StiglerMarketStructureReport> [<https://perma.cc/2PKQ-RTLY>]; Staff of H.R. Subcomm. on Antitrust, Com. and Admin. L. of the Comm. on the Judiciary, 116th Cong., *Investigation of Competition in Digit. Mkts.*, at 388 (2020) [hereinafter “Competition in Digit. Mkts.”] (concluding that Google and Facebook have monopolized control over the circulation of trustworthy news by “dominating both digital advertising and key communication platforms”).

²⁶⁴ See Jasmine Enberg, *Global Digital Ad Spending 2019*, eMARKETER (Mar. 28, 2019) (reporting that in 2019, digital advertising accounted for 50.1% of total media ad spending worldwide), <https://tinyurl.com/eMarketerAds2019> [<https://perma.cc/XD4Z-Q2BH>].

advertising revenue decline 62% between 2008 and 2018 from \$37.8 billion to \$14.3 billion.²⁶⁵

Second, with a rich revenue stream from advertising, platforms can offer their services to users without charging a fee, giving platforms another advantage over news organizations that typically must rely on a subscription-based model to cover the costs of newsgathering and publication. In the competition for users/viewers/readers, traditional news organizations have had difficulty retaining and attracting subscribers who have become increasingly accustomed to accessing content for free through social media.

In economic terms, online platforms like Facebook and Google operate in “multi-sided markets,” where their interactions with users is just one aspect of the company’s business model.²⁶⁶ As the old aphorism goes, “If you are not paying for it, you’re not the customer; you’re the product being sold.”²⁶⁷ Leveraging their position as an essential intermediary between users, advertisers, news providers, and other parties who seek to gain access to users or their data, online platforms have been able to force these parties into asymmetrical relationships that are highly favorable to the platform and difficult for traditional antitrust models to account for and control.²⁶⁸

The problem with pervasive data collection, however, goes far beyond the anti-competitive effects on news organizations. These data make possible a host of powerful algorithms that social media companies employ to retain and influence users. It has long been an open secret that platforms use algorithms to determine what content to display to users and how it is presented.²⁶⁹ What has been less apparent is that platforms use these algorithms to manipulate users in ways that potentially impact democratic participation. In 2014, it was revealed that Facebook performed experiments on its users without their knowledge by changing its algorithmically curated news feed to reduce the number of positive or negative posts shown to users,

²⁶⁵ See Elizabeth Grieco, *Fast Facts About the Newspaper Industry’s Financial Struggles as McClatchy Files for Bankruptcy*, FACT TANK (Feb. 14, 2020), <https://tinyurl.com/FctTnk2020> [<https://perma.cc/K9WN-T88U>].

²⁶⁶ See Kenneth A. Bamberger & Orly Lobel, *Platform Market Power*, 32 BERKELEY TECH. L.J. 1051, 1053 (2017) (noting that “Amazon, eBay, Facebook and Google . . . use the power and networking capacity of online technology and data analytics to create multisided markets that can quickly scale and achieve market dominance.”).

²⁶⁷ The source of this quote has long been debated, but the idea certainly predates social media. See Will Oremus, *Are You Really the Product?*, SLATE (Apr. 27, 2018), <https://slate.com/technology/2018/04/are-you-really-facebooks-product-the-history-of-a-dangerous-idea.html> [<https://perma.cc/7KCY-S8H9>].

²⁶⁸ See Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 94 (2016) (“Platform companies defy traditional regulatory theory the same way they defy traditional definition—by varying the products, services, and methods they employ to connect buyers and sellers, workers and those in need of services.”); David S. Evans, *Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-Based Firms*, 753 COASE-SANDOR WORKING PAPER SERIES IN L. & ECON. 1, 24–25 (2016).

²⁶⁹ In fact, a surprisingly large percentage of U.S. adults who use Facebook (53%) say they do not understand why certain posts and not others are included in their news feed. See Aaron Smith, *Many Facebook users don’t understand how the site’s news feed works*, Pew Research Center (Sept. 5, 2018), <https://www.pewresearch.org/fact-tank/2018/09/05/many-facebook-users-dont-understand-how-the-sites-news-feed-works/> [<https://perma.cc/4KS2-CDMJ>].

which had a measurable impact on users' emotional states.²⁷⁰ As Zeynep Tufekci explains, “[t]he researchers positively showed that news and updates on Facebook influence the tenor of the viewing Facebook-user’s subsequent posts—and that Facebook itself was able to tweak and control this influence by tweaking the algorithm.”²⁷¹ Tufekci notes that the Facebook experiment raises important questions, “including whether Facebook might algorithmically throw elections—a possibility which, to the alarm of activists and some academics, was revealed in an earlier separate study”²⁷² in which “Facebook demonstrated that it could alter the U.S. electoral turnout by hundreds of thousands of votes, merely by nudging people to vote through slightly different, experimentally manipulated, get-out-the-vote messages.”²⁷³

Several solutions have been offered to limit the power of the “data oligarchy” comprised of a handful of technology companies, including Google, Facebook, and Amazon, who wield outsize control over public discourse.²⁷⁴ One approach is to mandate that platforms disclose the data they collect and allow users to access their data and take it with them to another platform or use it on multiple platforms at once, thus opening more opportunities for competition among platforms.²⁷⁵ This idea, known as “data portability,” has been gaining acceptance across the world. In April 2016, the European Union passed the General Data Protection Regulation (GDPR), which includes the right to data portability as one of eight rights enforced by the law.²⁷⁶ Similarly, the California Consumer Privacy Act (CCPA), which went

²⁷⁰ Adam D.I. Kramer, Jamie E. Guillory & Jeffery T. Hancock, *Experimental Evidence of Massive Scale Emotional Contagion Through Social Networks*, 111 PROC. NAT'L ACAD. SCI 8788, 8788–90 (2014), <https://www.pnas.org/content/pnas/111/24/8788.full.pdf> [<https://perma.cc/D2QR-LGV6>].

²⁷¹ Zeynep Tufekci, *Algorithmic Harms Beyond Facebook and Google: Emergent Challenges of Computational Agency*, 13 COLO. TECH. L.J. 203, 204 (2015).

²⁷² *Id.* at 204–05 (citing Micah L. Sifry, *Facebook Wants You to Vote on Tuesday. Here's How it Messed with Your Feed in 2012*, MOTHER JONES (Oct. 31, 2014), <http://www.motherjones.com/politics/2014/10/can-voting-facebook-button-improve-voter-turnout>; Zeynep Tufekci, *Engineering the Public: Big Data, Surveillance and Computational Politics*, 19 FIRST MONDAY 7 (July 7, 2014), <http://journals.uic.edu/ojs/index.php/fm/article/view/4901/4097> [<https://perma.cc/7LZ9-WGW3>]; Jonathan Zittrain, *Engineering an Election*, 127 HARV. L. REV. F. 335 (Jun. 20, 2014); Jonathan Zittrain, *Facebook Could Decide an Election Without Anyone Ever Finding Out*, NEW REPUBLIC (June 1, 2014), <http://www.newrepublic.com/article/117878/information-fiduciary-solution-facebook-digital-gerry-mandering> [<https://perma.cc/U8SP-CA85>].

²⁷³ Tufekci, *supra* note 271, at 215.

²⁷⁴ See generally Duncan McCann, *The Rise of the Data Oligarchs*, NEW ECON. FOUND. (May 25, 2018), <https://neweconomics.org/uploads/files/Rise-of-the-data-oligarchs.pdf> [<https://perma.cc/W9V9-ECXE>].

²⁷⁵ See Ardia, et al., *supra* note 1, at 47–50 (describing proposals to impose data portability requirements that would increase competition and reduce market concentration among online platforms). To be effective, this so called right of “data portability” should be combined with a requirement that platforms allow users to communicate across platforms and networks rather than being locked into a single platform’s proprietary architecture (called “interoperability”). *Id.* at 48.

²⁷⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27 on the protection of natural persons with regard to processing of personal data and on the free movement of such data and repealing Directive 95/46/EC [2016] OJ L 119/1, art. 20. The GDPR allows data subjects to obtain data related to them that is held by a “data controller”

into effect on January 1, 2020, provides for data portability for consumers in California.²⁷⁷

Data portability can be even more effective in spurring competition if it is implemented in conjunction with comprehensive data privacy protections for users.²⁷⁸ Robust privacy laws would lessen the pervasive data collection by platforms and reduce the competitive advantage platforms currently enjoy.²⁷⁹ Moreover, unlike policies designed to directly support journalism, privacy laws can target key parts of the business model of platforms; by limiting the data platforms can collect from their users, privacy regulation would lessen the effectiveness of specific types of microtargeting and potentially loosen the stranglehold data-rich platforms hold over the advertising market.²⁸⁰

Many critics of the current media system assert that data portability and privacy protections will not be enough to rein in the power of the dominant platforms.²⁸¹ They point to the explosive growth of Google in search and advertising, Facebook in social networking, and Amazon in online retailing as demonstrating that these digital markets have winner-take-all characteristics that tend to leave just one dominant player.²⁸² Accordingly, even if users are given the right to take their data with them to a new platform, the high degree of concentration in many digital markets means that consumers

and to reuse it for their own purposes. Individuals are free to either store the data for personal use or to transmit it to another data controller. In addition, the GDPR requires that the data must be received “in a structured, commonly used and machine-readable format.” *Id.*

²⁷⁷ California Consumer Privacy Act of 2018 (CCPA), CAL. CIV. CODE § 1798.100(d).

²⁷⁸ Although state legislatures have been active in developing new privacy laws, including the recently enacted CCPA, the U.S. currently lacks comprehensive federal privacy rules. Instead, privacy protections in the U.S. are drawn from a complex patchwork of sector-specific and medium-specific privacy laws, including laws and regulations that address telecommunications, health information, credit information, financial institutions, and marketing. See David S. Ardia & Anne Klinefelter, *Privacy and Court Records: An Empirical Study*, 30 BERKELEY TECH. L.J. 1807, 1832–34 (2015) (describing the piecemeal U.S. approach to privacy).

²⁷⁹ See Revisiting the Need for Federal Data Privacy Legislation, Hearing Before the Comm. on Com., Sci., and Transp., 116th Cong. (2020); Charlotte Slaiman, *Data Protection is About Power, Not Just Privacy*, PUB. KNOWLEDGE (Mar. 3, 2020), <https://www.publicknowledge.org/blog/data-protection-is-about-power-not-just-privacy/> [<https://perma.cc/9XUC-6N4H>] (describing how privacy protections can reduce the competitive advantage of online platforms).

²⁸⁰ Privacy legislation could allow users to place specific limits on data collection (for example, opting out of tracking across the Internet or tracking for behavioral advertising) without completely eliminating the ability of news organizations and platforms to monetize the data they collect.

²⁸¹ See Gene Kimmelman, *The Right Way to Regulate Digital Platforms*, HARV. SHORENSTEIN CTR. (Sept. 18, 2019), <https://tinyurl.com/HarvRptDigPlat> [<https://perma.cc/3F8N-3TYH>] (“Based on growing evidence that these [dominant tech] platforms are tipping toward monopoly in key market functions, it is very likely that antitrust is not enough of a solution without targeted regulation that opens markets to new competition.”); Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1035 (arguing that current antitrust law provides “a highly enfeebled and impoverished set of tools for confronting dominant intermediaries in network industries”).

²⁸² See Competition in Digit. Mkts., *supra* note 263, at 37 (noting that digital markets are particularly prone to “winner-take-all economics”); Stigler Report, *supra* note 263, at 11–12 (stating that digital markets “are prone to tipping—a cycle leading to a dominant firm and high concentration”).

would still lack viable alternatives to the small number of technology companies that dominate online communications.

A more ambitious set of policy interventions focus on antitrust and competition laws. Proposals in this area take many forms, ranging from more vigorous use of existing antitrust law to imposing structural separations and prohibiting dominant platforms from entering adjacent lines of business. One proposal that has recently gained traction in Congress is to create an antitrust exemption for news organizations that would permit them to negotiate jointly with the platforms over licensing fees for their content.²⁸³ This would allow these organizations to form a unified negotiating bloc, which would otherwise be an illegal form of collusion, and demand higher licensing fees from platforms that distribute their copyrighted work, thus capturing a larger percentage of the advertising revenue associated with their content.²⁸⁴

Other proposals seek to effect broader, systemic change in the American technology and media ecosystem. For example, a recent bill in Congress would instruct federal agencies to presume that acquisitions and mergers by certain platforms are anticompetitive.²⁸⁵ The dominant positions that the largest platforms enjoy is due in part to their acquiring or merging with potential competitors, with some platforms having built entire lines of business through acquisitions while others used acquisitions to neutralize competitive threats.²⁸⁶ Because of rapid technological development in online

²⁸³ See Journalism Competition and Preservation Act, H.R. 5190, 115th Cong. (2018); Competition in Digit. Mkts., *supra* note 263, at 388 (“To address this imbalance of bargaining power, we recommend that the Subcommittee [on Antitrust, Commercial and Administrative Law] consider legislation to provide news publishers and broadcasters with a narrowly tailored and temporary safe harbor to collectively negotiate with dominant online platforms.”).

²⁸⁴ See Jessica Melugin, *It’s Time to Exempt News Organizations from Antitrust Restrictions*, NAT’L REV. (May 18, 2021), <https://www.nationalreview.com/2021/05/its-time-to-exempt-news-organizations-from-antitrust-restrictions/> [<https://perma.cc/KJ6P-AB4D>]. Not all commentators think this exemption would actually help local news organizations who would still have difficulty forcing online platforms to pay more. See, e.g., Rachel Chiu, *Media safe harbor bill won’t actually help local news*, HILL (May 24, 2021), <https://thehill.com/opinion/technology/555043-media-safe-harbor-bill-wont-actually-help-local-news> [<https://perma.cc/T6D9-4C8N>].

²⁸⁵ See Competition in Digit. Mkts., *supra* note 263, at 399 (suggesting that “any acquisition by a dominant platform would be presumed anticompetitive unless the merging parties could show that the transaction was necessary for serving the public interest and that similar benefits could not be achieved through internal growth and expansion”).

²⁸⁶ Facebook’s purchase of Instagram and WhatsApp are examples of the elimination of competition through acquisition. With 27 million registered users on iOS alone, Instagram “was increasingly positioning itself as a social network in its own right—not just a photo-sharing app”—when Facebook acquired the company in 2012 and eliminated a nascent competitor. *Facebook Buys Instagram For \$1 Billion, Turns Budding Rival Into Its Standalone Photo App*, TECHCRUNCH (Apr. 9, 2012), <https://tinyurl.com/FbInstaTC> [<https://perma.cc/7SNA-5UAB>]. Two years later, Facebook purchased WhatsApp for \$19 billion even though WhatsApp that made little money; Based on confidential internal company emails and documents subsequently released by the United Kingdom Parliament’s Digital, Culture, Media, and Sport Committee which investigated the acquisition, BuzzFeed News reported in 2018 that WhatsApp’s rise came at a crucial moment—just as Facebook was attempting to transition to a mobile-first company with messaging as a core service: “WhatsApp was quickly demonstrating that it could compete with Facebook on its most important battleground,” which drove Facebook to acquire the company behind the messaging app. Charlie Warzel and Ryan Mac,

services, competition can often come from innovative upstarts that may take several years to develop. In this context, acquisition by a dominant platform of a smaller firm could be very damaging to competition if, absent the acquisition, the smaller firm would develop into a competitive threat or would lead to significant change in the nature of the market. In a concentrated market structure, potential competition from small entrants may be the most important source of competition faced by the incumbent firm.²⁸⁷

Stricter merger controls, however, may not be enough to address the durable monopoly power of the dominant platforms. As a result, a growing chorus of economists have been arguing that antitrust and competition laws should be expanded to deal with the challenges that platforms present for antitrust enforcement.²⁸⁸ With online platforms like Facebook and Google, it is often difficult to identify and quantify the harms that consumers and other market participants experience as a result of monopolies or near-monopolies, thus making antitrust enforcement difficult.²⁸⁹

In October 2020, the Majority Staff of the House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law (“Judiciary Subcommittee”) released a report stating that Congress should affirm that existing antitrust laws limit some of the practices of online platforms, “clarifying that [antitrust laws] are designed to protect not just consumers but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals.”²⁹⁰ The Judiciary Subcommittee also offered a number of specific antitrust reforms, including recommending that the Sherman Antitrust Act be extended to explicitly target the abuses of dominance by online platforms and prohibit the use of monopoly power in one market to harm competition in a second market, even if the conduct does not result in monopolization of the second market.²⁹¹ In addition, the Judiciary Subcommittee recommended that Congress apply the “essential facilities” doctrine to online platforms, which would impose a requirement that dominant platforms provide access to their data, infrastructure services, and facilities on a nondiscriminatory basis.²⁹² The Subcommittee’s investigation uncovered several instances in which a dominant platform used the threat of delisting or refusing service to a third party as leverage to acquire more data or to

These Confidential Charts Show Why Facebook Bought WhatsApp, BUZZFEED NEWS (Dec. 5, 2018), <https://tinyurl.com/BzfdNwsFB> [<https://perma.cc/T2Z2-RSDZ>].

²⁸⁷ See Stigler Report, *supra* note 263, at 66–68.

²⁸⁸ See, e.g., Kimmelman, *supra* note 281; Khan, *supra* note 281; Steven Waldman, *Curing Local News for Good*, Colum. Journalism Rev. (Mar. 31, 2020), <https://tinyurl.com/WldmnCJR> [<https://perma.cc/PZ9P-H295>]. In a report issued in July 2019 by the George J. Stigler Center for the Study of the Economy and the State (“Stigler Report”), a number of economists and antitrust experts concluded that online platforms present especially difficult challenges for antitrust enforcement and that antitrust law needs better analytical and regulatory tools to adequately deliver competition to consumers. Stigler Report, *supra* note 263, at 8–9.

²⁸⁹ See Stigler Report, *supra* note 263, at 35–44.

²⁹⁰ Competition in Digit. Mkts., *supra* note 263, at 391, 395.

²⁹¹ See *id.* at 395.

²⁹² See *id.* at 396–98.

secure an advantage in a distinct market: “Because the dominant platforms do not face meaningful competition in their primary markets, their threat to refuse business with a third party is the equivalent of depriving a market participant of an essential input. This denial of access in one market can undermine competition across adjacent markets, undermining the ability of market participants to compete on the merits.”²⁹³

While many of the initiatives described above face significant industry and political opposition, recent congressional hearings directed at technology companies and the 2020 report on *Competition in Digital Markets* by the Judiciary Subcommittee recommending changes to U.S. antitrust law may mark a turning point in terms of support for significant government action to assist news organizations and limit the power of online platforms to control public discourse.²⁹⁴ The antitrust lawsuit against Google, which was filed by the U.S. Department of Justice and eleven state Attorneys General in October 2020,²⁹⁵ is further evidence of this shift to a more aggressive posture by the government.

This sampling of potential market interventions shows the wide range of regulatory and policy options available to the government to support a healthy public sphere.²⁹⁶ Even under existing caselaw, the First Amendment would not foreclose the government from using antitrust law to address concentrated economic power in the communication markets,²⁹⁷ expanding and

²⁹³ *Id.* at 396.

²⁹⁴ See generally *Competition in Digit. Mkts.*, *supra* note 263. It should be noted that Republican lawmakers on the Judiciary Subcommittee refused at the last minute to sign the report with their Democratic colleagues. See Cecilia Kang and David McCabe, *Big Tech Was Their Enemy, Until Partisanship Fractured the Battle Plans*, N.Y. TIMES (Oct. 6, 2020), <https://tinyurl.com/NYTHsComm> [<https://perma.cc/Q5RX-AD56>]. Instead, Rep. Ken Buck (R-CO) issued his own report, with support from Reps. Doug Collins (R-GA), Matt Gaetz (R-FL) and Andy Biggs (R-AZ). Rep. Buck’s report largely agrees with the Judiciary Subcommittee’s conclusion that Apple, Amazon, Facebook and Google have amassed too much power, but he was unwilling to endorse all of the legislative recommendations offered by the majority. Instead, Buck called on Congress to fund and empower regulatory agencies like the Federal Trade Commission (FTC) and Department of Justice (DOJ) to increase enforcement under existing laws. See Press Release, Rep. Ken Buck, *Rep. Buck Pens Antitrust Report that Presents a “Third Way” to Take on Big Tech* (Oct. 6, 2020), <https://tinyurl.com/BuckReport2020> [<https://perma.cc/5TDP-R6AA>].

²⁹⁵ Complaint, *United States v. Google LLC*, No. 1:20-cv-03010 (D.D.C. filed Oct. 20, 2020).

²⁹⁶ In some instances, these non-constitutional approaches may even be preferable to directly invoking the First Amendment. See Gregory P. Magarian, *The First Amendment, The Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 168–69 (2004) (“Congress as well as courts can safeguard constitutional values. . . Statutes have normative and practical advantages over the judicial process because Congress is a politically accountable institution with the mandate and resources to make difficult policy decisions.” (footnotes omitted)).

²⁹⁷ See, e.g., *Associated Press v. United States*, 326 U.S. 1, 7 (1945) (allowing application of the Sherman Antitrust Act to the publishing activities of the Associated Press); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375–77 (1969) (upholding “fairness doctrine” requiring broadcasters to devote airtime to discussing controversial matters of public interest and to air contrasting views regarding those matters).

enforcing privacy and consumer protection laws,²⁹⁸ or initiating programs that support journalism and other knowledge institutions within society, such as universities and libraries.²⁹⁹ As the Supreme Court observed in *Associated Press v. United States*, “[i]t would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom.”³⁰⁰

However, in keeping with the government’s necessarily limited role in dictating truth—as required by both the self-governance and marketplace theories—the focus of these interventions should be on the infrastructure and processes that underlie democratic discourse.³⁰¹ The government should not be permitted to prescribe which topics are appropriate for public discourse or to dictate the outcomes of public debate.

C. Government Speech that Undermines Self-Governance

Reforming the economic markets where speech takes place is an important starting point, but the government has an even larger role to play in ensuring that citizens have the capacity to exercise their right of self-governance. We must remember that the government itself is an active participant in public discourse. Indeed, in many situations, it is the eight-hundred-pound gorilla in the room. Recognition of this point leads to the conclusion that the First Amendment ought to impose obligations on the government to do what it can as a speaker and contributor to public discourse to ensure that the public has the information it needs to understand and evaluate issues of public policy.

²⁹⁸ See, e.g., *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2348 (2020) (noting that “Congress’s continuing interest in protecting consumer privacy” can justify restrictions on speech); *F.T.C. v. Superior Ct. Trial Laws. Ass’n*, 493 U.S. 411, 428 (1990) (affirming that the First Amendment does not preclude regulation of economic activities that have an indirect effect on speech).

²⁹⁹ See, e.g., *U.S. v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 211–12 (2003) (upholding federal subsidies to libraries for internet access); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587–88 (1998) (allowing government to award financial grants to support the arts); *Rust v. Sullivan*, 500 U.S. 173, 193–94 (1991) (“The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.”). Of course, the government is not free to impose any conditions it wishes on these subsidies. See generally Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543 (1996).

³⁰⁰ 326 U.S. at 20–21.

³⁰¹ The focus on process echoes the approach of Schauer and Marshall, who argue that the value of preserving a marketplace of ideas is not in defining “truth” itself, but in producing a method of truth-seeking that is comparatively better than any other method. See Schauer, *The Problem of Collective Knowledge*, *supra* note 7, at 237 (concluding that the marketplace of ideas does not define truth, but instead provides “a method for doing so that it is superior to any or most other available alternative methods.”); Marshall, *supra* note 34, at 4 (“The value that is to be realized is not in the possible attainment of truth, but rather, in the existential value of the search itself.”).

At a minimum, this means that the government should be prohibited from knowingly disseminating false information that undermines self-governance. It should come as no surprise that governments lie. As Helen Norton notes, “[t]hey do so for many different reasons to a wide range of audiences on a variety of topics.”³⁰² She offers a number of examples, including lies about the government’s justifications for military action, whether government officials acted in compliance with the law, and the existence or scope of government programs.³⁰³ More recently, we can add to this list government lies about the prevalence of election fraud³⁰⁴ and the spread of deadly diseases.³⁰⁵ Some of these lies are harmless, some advance national interests, and some corrode the very fabric of our democracy and undermine the public’s capacity for self-governance.

Although scholars have long debated the extent to which the First Amendment permits the government to regulate falsehoods propagated by private speakers,³⁰⁶ relatively little attention has been paid by either jurists or scholars to the constitutional implications of the government’s efforts to mislead.³⁰⁷ Regulating government speech raises challenging First Amendment issues because the government’s actions in spreading misinformation do not involve the traditional exercise of the state’s censorial power.³⁰⁸ In fact, the government’s own speech currently gets a pass from First Amendment scrutiny due to what is known as the “government speech doctrine.”³⁰⁹ Under

³⁰² Helen Norton, *The Government’s Lies and the Constitution*, 91 IND. L.J. 73, 73 (2015).

³⁰³ *Id.* at 73–74.

³⁰⁴ See, e.g., Yochai Benkler, Casey Tilton, Bruce Etling, Hal Roberts, Justin Clark, Rob Faris, Jonas Kaiser & Carolyn Schmitt, Mail-In Voter Fraud: Anatomy of a Disinformation Campaign, BERKMAN KLEIN CTR. FOR INTERNET & SOC’Y AT HARV. UNIV. (Oct. 1., 2020), <https://cyber.harvard.edu/publication/2020/Mail-in-Voter-Fraud-Disinformation-2020> [<https://perma.cc/UM5E-TNZF>]; Libby Cathey, *Legacy of Lies – How Trump Weaponized Mistruths During his Presidency*, ABC NEWS (Jan. 20, 2021), <https://abcnews.go.com/Politics/legacy-lies-trump-weaponized-mistruths-presidency/story?id=75335019> [<https://perma.cc/DGX2-6WYR>]; Mark Z. Barabak, *Debunking Trump’s ‘Big Lie,’ Scholars and Statistics Show the Facts Don’t Add Up*, L.A. TIMES (Aug. 17, 2021), <https://www.latimes.com/politics/story/2021-08-17/trump-big-lie-experts-debunk-voting-fraud-claims> [<https://perma.cc/2DEH-YJM5>].

³⁰⁵ See, e.g., Sheryl Gay Stolberg & Noah Weiland, *Study Finds ‘Single Largest Driver’ of Coronavirus Misinformation: Trump*, N.Y. TIMES (Sept. 30, 2020), <https://www.nytimes.com/2020/09/30/us/politics/trump-coronavirus-misinformation.html> [<https://perma.cc/HE8H-PEJ4>]; Christian Paz, *All the President’s Lies About the Coronavirus*, ATLANTIC (Nov. 2, 2020), <https://www.theatlantic.com/politics/archive/2020/11/trumps-lies-about-coronavirus/608647/> [<https://perma.cc/X3Y5-SZZ9>]; Daniel Funke & Katie Sanders, *Lie of the Year: Coronavirus downplay and denial*, POLITIFACT (Dec. 16, 2020), <https://www.politifact.com/article/2020/dec/16/lie-year-coronavirus-downplay-and-denial/> [<https://perma.cc/6AQV-7UCZ>].

³⁰⁶ See *supra* Part I.A.

³⁰⁷ See Norton, *supra* note 302, at 74 (noting the dearth of scholarship on this issue). Norton is one of the few exceptions.

³⁰⁸ See *id.* at 74.

³⁰⁹ See *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005) (explaining that the government’s own speech is exempt from Free Speech Clause scrutiny); *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (“If [government entities] were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.”).

this “recently minted” doctrine,³¹⁰ the courts have granted government officials “nearly carte blanche ability” to engage in otherwise prohibited speech activities when the government is speaking for itself.³¹¹ This must change if we are to ensure that the government’s own speech does not undermine the public’s capacity for self-governance; mis- and disinformation that originates from the government is especially harmful precisely because of its governmental source, which often makes it more likely to be believed and less amenable to rebuttal by counterspeech.³¹²

Norton is among a small number of scholars who have taken up the charge to develop constitutional doctrines that address the problem of government lies.³¹³ She argues that certain types of government lies violate the Due Process, Free Speech, and Press Clauses.³¹⁴ With regard to the Free Speech Clause, Norton suggests that the government’s deliberate falsehoods should be prohibited by the First Amendment when they rise to the level of

³¹⁰ *Sumnum*, 555 U.S. at 481 (Stevens, J., concurring) (“To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit.”).

³¹¹ David S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites*, 2010 B.Y.U. L. REV. 1981, 1983–84 (2010) (“The government speech doctrine . . . grants the government nearly carte blanche ability to exclude speakers and speech on the basis of viewpoint so long as the government can show that it ‘effectively controlled’ the message being conveyed.”) (quoting *Johanns*, 544 U.S. at 560–61).

³¹² See Norton, *supra* note 302, at 101 (“[G]overnment lies pose especially grave instrumental threats to democratic self-governance in contexts where such deliberate falsehoods are unlikely to be addressed by counterspeech, as can be the case with government lies about information to which it has near-monopoly access, such as national security and intelligence matters.”); Leslie Gielow Jacobs, *Bush, Obama and Beyond: Observations on the Prospect of Fact Checking Executive Department Threat Claims before the Use of Force*, 26 CONST. COMMENT. 433, 442 (2010) (“A barrier to achieving this kind of contemporaneous accountability for threat claims asserted by the executive department to build support for the use of force is its superior access to and control over the intelligence information that forms the basis of the claims.”); Ho & Schauer, *supra* note 11, at 1169 (observing that the “acceptability of an idea varies with what social psychologists call ‘peripheral cues,’ which include, among others, the identity, authority, and charisma of the agent expressing the proposition”).

³¹³ See, e.g., Norton, *supra* note 302; Helen Norton, *Government Lies and the Press Clause*, 89 U. COLO. L. REV. 453 (2018); Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1631 (2021). Other scholars who have taken up this issue include Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 OHIO ST. L.J. 815 (2020); Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107 (2006); and David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991).

³¹⁴ See Norton, *supra* note 302, at 89 (“I propose that government lies violate the Due Process Clause when they directly deprive individuals of life, liberty, or property or when they are sufficiently coercive of their targets to constitute the functional equivalent of such deprivations I further propose that even noncoercive government lies may violate the Due Process Clause in those extreme circumstances when they lack any reasonable justification”); *id.* at 103 (proposing “that we understand the Free Speech Clause to constrain the government’s lies that are sufficiently coercive of expressive activity to be the functional equivalent of regulating that expression directly”); Helen Norton, *Government Lies and the Press Clause*, 89 U. COLO. L. REV. 453, 469–70 (2018) (asserting that the Press Clause should “protect certain negative rights by prohibiting press-related lies by the government that undermine the press’s watchdog and educator functions”).

“coerc[ing] targets’ beliefs or expression.”³¹⁵ In other words, government lies violate the First Amendment when they “are sufficiently coercive of expressive activity to be the functional equivalent of regulating that expression directly.”³¹⁶ Norton goes on to explain—convincingly in this author’s view—how the courts already consider the coercive potential of speech when determining whether the government has violated the Establishment Clause, labor laws, employee speech rights, and other constitutional interests.³¹⁷ Caroline Mala Corbin, another proponent of using the First Amendment to restrain government falsehoods, would go farther by making the government’s knowing or reckless propagation of false or misleading statements of fact on matters of public concern unconstitutional even if they are not the functional equivalent of government censorship of private speech.³¹⁸

Although the implementation of a right not be lied to by the government requires deeper study, under a self-governance centered theory of the First Amendment the public must be protected from deliberate government falsehoods that undermine self-governance.³¹⁹ Like Norton, I would start by delineating a limited subset of government speech for restriction: “false assertion[s] of fact known by the speaker to be untrue and made with the intention that the listener understand it to be true”³²⁰ and intended to influence a matter of public concern. While there are many other ways the government can intentionally or unintentionally mislead the public, this definition captures the most egregious and harmful conduct.³²¹ It would, for example, reach situations where a government official knowingly publishes incorrect information regarding when the polls will be open in hopes of suppressing turnout, deliberately misstates government data (e.g., unemployment rates, infection rates) to improve the incumbent’s reelection prospects, or falsely accuses a company that provides electronic voting machines of having altered the votes in order to sow distrust in election procedures.³²² The

³¹⁵ Norton, *supra* note 302, at 103.

³¹⁶ *Id.* at 103.

³¹⁷ *See id.* at 103–107.

³¹⁸ Corbin, *supra* note 313, at 818, 820 n.23.

³¹⁹ Support for prohibiting knowing government falsehoods could also be based on the marketplace of ideas theory. *See* Varat, *supra* note 313, at 1132 (“By its nature, government deception impairs the enlightenment function of the First Amendment, limiting the citizenry’s capacity to check government abuse and participate in self-governance to the maximum extent.”); Norton, *supra* note 302, at 102 (“[G]overnment lies can frustrate the search for truth and the dissemination of knowledge.”).

³²⁰ Norton, *supra* note 302, at 77.

³²¹ *Id.* at 77 (“I chose this narrower scope in large part because the moral and instrumental harms caused by the government’s intentional lies are arguably greater than those caused by its nondisclosures and inaccuracies more generally, and thus make more immediate demands for our attention.”). Although the requirements I propose raise difficult issues of proof regarding a speaker’s state of knowledge and intent, such inquiries are common in defamation law, which provides a well-established doctrinal roadmap for dealing with them.

³²² Some of these examples are not so hypothetical. *See, e.g.,* Gina Heeb, *Fact Check: 3 false claims Trump made about the economy at his State of the Union address*, MARKETS INSIDER (Feb. 5, 2020), <https://markets.businessinsider.com/news/stocks/trump-sotu-false-claims-us-economy-state-union-fact-check-2020-2> [<https://perma.cc/BS49-H4TK>]; Aaron Blake, *The Stampede Away from Trump’s Voting-Machine Complaints Continues Apace, As Legal Liability Looms*

First Amendment would clearly be implicated if the government were to punish a speaker who exposed one of these government lies, but the government need not be so direct in its efforts to undermine democratic self-governance. As David Strauss points out, “it is not implausible to say that the government ‘abridg[es] the freedom of speech’ when it deliberately lies about a matter of great public concern for the purpose of preventing a full public debate.”³²³

It is easy to see how deliberate government falsehoods can undermine self-governance. Without accurate information from the government, the public cannot hold government officials accountable for their actions (or inaction).³²⁴ Government lies frustrate citizens’ ability to make informed policy choices and “undermine[] the bond of trust between the government and the people that is essential to the functioning of a democracy.”³²⁵ While we might think that political checks will keep the government from lying—and they undoubtedly do constrain some government actors—there is reason to be concerned that a government intent on misleading the public can effectively undercut both public and interbranch accountability by continuing to obfuscate and lie.³²⁶ As Eric Alterman writes, “[w]ithout public honesty, the

for *Allies*, WASH. POST (July 12, 2021), <https://www.washingtonpost.com/politics/2021/05/03/slow-painful-death-trump-allies-voting-machine-conspiracy-theories/> [<https://perma.cc/ZVP6-M3SE>].

³²³ Strauss, *supra* note 313, at 358 n.67 (alteration in original); Nat Stern, *Judicial Candidates’ Right to Lie*, 77 MD. L. REV. 774, 781 (2018) (“[D]issemination of misinformation to the voting public threatens to defeat the very promise of democratic self-government. The success of this system depends on the ability of citizens to make reasoned choices about the alternative visions they are offered.”) Norton, *supra* note 302, at 101 (“Just as a government’s criminal sanction or economic reprisal intended to punish or silence those who seek to expose its wrongdoing clearly undermine democratic self-governance, so too can be the case of government lies designed to prevent or deter such exposure.”).

³²⁴ See, e.g., JOHN J. MEARSHEIMER, WHY LEADERS LIE 94 (2011); GEOFFREY R. STONE, PERILOUS TIMES 517 (2004); Norton, *supra* note 259, at 82, 101.

³²⁵ ERIC ALTERMAN, WHEN PRESIDENTS LIE 14 (2004); see also Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091, 1112 (2010) (“If citizens expect public officials to mislead them, they will become wary of arguments offered in public discourse.”); Strauss, *supra* note 313, at 358 (“[F]alse statements by the government . . . can seriously hamper the discussion necessary for democratic self-government that, according to the Meiklejohn theory, the first amendment was designed to protect.”).

³²⁶ See Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 466 (2014) (“The executive, however, strongly resists Congress’s attempts to force the disclosure of information, and there is very limited opportunity for judicial review of these interbranch disputes.”); *id.* at 473 (“[T]he ability of IGs to check executive power suffers from significant limitations; importantly, IGs are appointed and removable by the President, and they cannot report even serious wrongdoing to Congress without first giving the relevant agency head the opportunity to delete sensitive information.”); Corbin, *supra* note 313, at 881 (“[T]he political process cannot be relied upon to remedy government propaganda because, as detailed earlier, a consequence—if not the point—of government propaganda is to shut down normal political processes.”); David Frum, *Disclosure Doesn’t Work on a Shameless President*, ATLANTIC (Sept. 25, 2020) (“The Trump presidency has exposed the degree to which presidential compliance with law is voluntary.”), <https://www.theatlantic.com/ideas/archive/2020/09/disclosure-doesnt-work-on-a-shameless-president/616504/> [<https://perma.cc/6ZAE-P2K9>]; Steve Coll, *Donald Trump’s “Fake News” Tactics*, NEW YORKER (Dec. 3, 2017) (“Trump has brought to the White House bully pulpit a

process of voting becomes an exercise in manipulation rather than the expression of the consent of the governed.”³²⁷

Regardless of whether the government’s lies succeed in misleading a majority of voters, intentional government falsehoods are a threat to the stability of American democracy.³²⁸ David Karpf has written that “disinformation and propaganda do not have to be particularly effective at duping voters or directly altering electoral outcomes in order to be fundamentally toxic to a well-functioning democracy.”³²⁹ He notes that disinformation “undermines some of the essential governance norms that constrain the behavior of our political elites” and warns that “[i]t is entirely possible that the current disinformation disorder will render the country ungovernable despite barely convincing any mass of voters to cast ballots that they would not otherwise have cast.”³³⁰

Like other First Amendment rights, the right not to be subjected to intentional falsehoods by the government would not be absolute. As both Norton and Corbin concede, the government should be given the opportunity to demonstrate that its decision to lie meets the requirements of strict scrutiny,³³¹ a test that is highly developed in First Amendment jurisprudence.³³² Norton explains how this might work:

The government’s decision to lie should fail [strict] scrutiny when motivated by nonpublic (and thus noncompelling) reasons-for ex-

disorienting habit of telling lies, big and small, without evident shame.”), <https://www.newyorker.com/magazine/2017/12/11/donald-trumps-fake-news-tactics> [<https://perma.cc/WR2L-VZDW>]

³²⁷ ALTERMAN, *supra* note 325, at 14; *see also* William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 294 (2004) (“Democracy is premised on an informed electorate. Thus, to the extent that false [campaign] ads misinform the voters, they interfere with the process upon which democracy is based.”).

³²⁸ *See* INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, GLOBAL STATE OF DEMOCRACY REPORT 2021 15 (2021) (concluding that Trump’s false statements questioning the legitimacy of the 2020 election results were a “historic turning point” that “undermined fundamental trust in the electoral process” in the U.S. and culminated in the Jan. 6 insurrection at the U.S. Capitol), https://www.idea.int/gsod/sites/default/files/2021-11/the-global-state-of-democracy-2021_1.pdf [<https://perma.cc/RU8V-JQV2>]; Daniel P. Tokaji, *Truth, Democracy, and the Limits of Law*, 64 ST. LOUIS U. L.J. 569, 569–70 (2020) (“Bullshit is deadly to democracy, even deadlier than lies, because democracy depends on a shared commitment to the truth. . . . Bullshitting is the greater enemy of truth than lying, because it represents an abandonment of the commitment to truth. And without this commitment, democracy cannot function.”); Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 156 (2018) (noting “state instrumentalities for antidemocratic epistemic degradation include: the manipulation of government secrecy classifications; erosions in the perceived or actual quality of government data; and outright manipulation,” and warning that “the undermining of government data is a way of ensuring there is no authoritative and accurate source of information for the general public about questions of policy significance”).

³²⁹ David Karpf, *On Digital Disinformation and Democratic Myths*, SSRC MEDIAWELL (Dec. 10, 2019), <https://tinyurl.com/OnDigitalDisinformation> [<https://perma.cc/MFB7-Y2H7>].

³³⁰ *Id.*

³³¹ *See* Norton, *supra* note 302, at 115; Corbin, *supra* note 313, at 875.

³³² *See* Ardia, *supra* note 17, at 909 (noting the “large, and growing, body of First Amendment case law applying strict scrutiny”).

ample, when the government has lied to protect itself from legal or political accountability, for its financial gain, or to silence or punish a critic's protected expression. Governmental decisions to lie should also fail this scrutiny even when motivated by compelling public reasons when they are unnecessary to achieve such ends.³³³

Conversely, the government's decision to lie should survive strict scrutiny when necessary for "national security"³³⁴ or to "calm public panic in a public safety emergency or to prevent a criminal from hurting a victim."³³⁵

Remedies for government lies that undermine self-governance should be tailored to repair the damage to society that the false information has caused. At a minimum, courts must be able to issue declaratory judgments to vindicate the right not to be lied to by the government. But where the harm is sufficient, courts should also have the power to enjoin the government from continuing to make false statements and to provide other forms of equitable relief, including requiring that the government retract the false information or engage in corrective speech.³³⁶ These remedies, however, should apply only to situations where a government official is speaking through government channels or is otherwise acting in his or her official capacity.³³⁷ Unlike private parties, the government does not itself hold First Amendment rights.³³⁸

While there is some risk that efforts to punish government lies may chill beneficial speech,³³⁹ this concern is diminished if we target only knowing government falsehoods.³⁴⁰ As Caroline Mala Corbin points out, govern-

³³³ Norton, *supra* note 302, at 115.

³³⁴ Corbin, *supra* note 313, at 875.

³³⁵ Norton, *supra* note 302, at 115.

³³⁶ See Michael T. Morley, *Public Law at the Cathedral: Enjoining the Government*, 35 CARDOZO L. REV. 2453, 2465–83 (2014) (arguing that a constitutional right receives the greatest available level of protection when it is secured by an injunction); David S. Han, *Rethinking Speech-Tort Remedies*, 2014 WIS. L. REV. 1135, 1162–74 (2014) (discussing the advantages of flexible remedies in speech-tort cases). Without injunctive relief, some government officials will just continue to lie. Cf. Glenn Kessler, *Meet the Bottomless Pinocchio, a New Rating for a False Claim Repeated Over and Over Again*, WASH. POST (Dec. 10, 2018) (referring to Donald Trump as a "Bottomless Pinocchio," a "dubious distinction [] awarded to politicians who repeat a false claim so many times that they are, in effect, engaging in campaigns of disinformation"), <https://www.washingtonpost.com/politics/2018/12/10/meet-bottomless-pinocchio-new-rating-false-claim-repeated-over-over-again/> [<https://perma.cc/7367-HPQP>].

³³⁷ See Norton, *supra* note 302, at 76 (limiting her proposed limitation on government speech to the "collective speech of a government body or the speech of an individual empowered to speak for such a body"). Government officials acting in their personal capacity would not fall within these restrictions on government speech, although other statutory and common law theories of liability may apply to them.

³³⁸ See, e.g., *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the Government." (emphasis in original)).

³³⁹ See Norton, *supra* note 302, at 86 (noting that requiring government to guarantee truth in its expression might inhibit it from performing important information-gathering and public-communication functions).

³⁴⁰ See *id.* at 87; Corbin, *supra* note 313, at 870. The Supreme Court remarked on this concern in *New York Times Co. v. Sullivan*, where it held that the actual malice standard would mitigate the danger of chilling otherwise valuable speech. 376 U.S. 254, 282 (1964).

ment speakers acting in their official capacity “are usually discussing their own domain [and] are well positioned to verify the accuracy of information within their control.”³⁴¹ Moreover, government, like commercial entities, is less susceptible to chill than private individuals because it has resources and a strong incentive to continue to speak.³⁴²

As I noted above, the implementation of this right will require more study to determine how best to regulate a pernicious form of government speech that is distressingly common. Recognizing a right under the First Amendment not to be lied to by the government will not eradicate misinformation in the public sphere. In fact, it will not even stop the flow of lies from the government. To make meaningful headway against the flood of misinformation, the right I have described above must be part of a larger government effort—spurred by the Constitution’s clear directive to safeguard the public’s capacity for self-governance—to develop complementary policies to reduce the harmful effects of mis- and disinformation. This should include enhanced protections for government whistleblowers, robust congressional and inspector general oversight over the executive branch, vigorous enforcement of the Freedom of Information Act, and the recognition of a right of public access to government information.

D. *Government Information that Supports Self-Governance*

First Amendment doctrine should not be blind to how the government attempts to influence public discourse, especially when it impacts citizens’ capacity for self-governance. As we have seen, the government can undermine self-governance by spreading misinformation, but it can also support self-governance by disclosing truthful information. The previous section outlined a right not be misled by the government. This section describes a corollary right to information in the government’s possession that can assist the public in its efforts to understand and evaluate issues of public policy.

As discussed in Part II, the Constitution creates a system of governance in which the people retain the ultimate authority over the government. In the words of James Madison, “[p]ublic opinion is the real sovereign.”³⁴³

³⁴¹ Corbin, *supra* note 313, at 870.

³⁴² See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 772 (1976). As the Supreme Court observed in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*:

[C]ommercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely. Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.

425 U.S. at 771 n.24 (emphasis in original).

³⁴³ James Madison, *Public Opinion*, NAT’L GAZETTE, Dec. 19, 1791, in 14 JAMES MADISON, THE PAPERS OF JAMES MADISON 170, 170 (Robert A. Rutland, Thomas A. Mason, Robert J. Brugger, Jeanne K. Sisson & Frederika J. Teute. eds., 1977) (“Public opinion . . . is the real sovereign in every free” government.”).

From the perspective of self-governance, there is no more important a category of information than information *about the government*.³⁴⁴ Jeremy Bentham pointed out this self-evident truth in 1837:

To conceal from the public the conduct of its representatives, is to add inconsistency to prevarication: it is to tell the constituents, “You are to elect or reject such or such of your deputies without knowing why—you are forbidden the use of reason—you are to be guided in the exercise of your greatest powers only by hazard or caprice.”³⁴⁵

The link between government information and self-governance is hardly controversial.³⁴⁶ It sits at the core of nearly all self-governance theories of the First Amendment. Alexander Meiklejohn, for example, writes that the “welfare of the community requires that those who decide issues shall understand them.”³⁴⁷ The influential political scientist Hannah Arendt warns that “[f]reedom of opinion is a farce unless factual information is guaranteed.”³⁴⁸ Robert Post puts an even sharper point on this: “A state that controls our knowledge controls our minds.”³⁴⁹ This has led a number of scholars and commentators to argue that the Constitution must be understood to embody a right of access to government information.³⁵⁰

³⁴⁴ See David Cuillier, *The People’s Right to Know: Comparing Harold L. Cross’ Pre-FOIA World to Post-FOIA Today*, 21 COMM. L. & POL’Y 433, 438 (2016) (noting that “[c]itizens’ right to be informed about their government has been valued for millennia, at least as far back as the Athenians in 330 B.C.”).

³⁴⁵ JEREMY BENTHAM, AN ESSAY ON POLITICAL TACTICS (1837), reprinted in 2 THE WORKS OF JEREMY BENTHAM 299, 312 (John Bowring ed., 1962).

³⁴⁶ See, e.g., Barron, *supra* note 52, at 1648 (“That public information is vital to the creation of an informed citizenry is, I suppose, unexceptionable.”); David M. O’Brien, *The First Amendment and the Public’s Right to Know*, 7 HASTINGS CONST. L.Q. 579, 580 (1980) (“An increasing number of constitutional scholars argue that the public’s ‘right to know’ is implicitly guaranteed by the First Amendment and by the general principles of a constitutional democracy.”); Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 895–96 (2006) (noting that sentiments favoring government transparency can be found “in the classic liberalism of Locke, Mill, and Rousseau, in both Benthamite utilitarian philosophy and Kantian moral philosophy.”).

³⁴⁷ MEIKLEJOHN, *supra* note 199, at 26–27. Even Thomas Emerson, who was deeply skeptical of Meiklejohn’s self-governance theory, acknowledges that “if democracy is to work, there can be no holding back of information; otherwise ultimate decisionmaking by the people, to whom that function is committed, becomes impossible.” Thomas I. Emerson, *Legal Foundations of the Right to Know*, WASH. U. L.Q. 1, 14 (1976).

³⁴⁸ HANNAH ARENDT, BETWEEN PAST AND FUTURE 238 (1968).

³⁴⁹ POST, *supra* note 29, at 33.

³⁵⁰ See, e.g., Harold Cross, *Access to Official Information: A Neglected Constitutional Right*, 27 IND. L. J. 209, 209 (1952) (“Public business is the public’s business. The people have the right to know. Freedom of information is their just heritage.”); Emerson, *supra* note 347, at 14 (“[T]he greatest contribution that could be made in this whole realm of law would be explicit recognition by the courts that the constitutional right to know embraces the right of the public to obtain information from the government.”); Anthony Lewis, *A Public Right to Know About Public Institutions: The First Amendment as Sword*, 1980 SUP. CT. REV. 1, 2–3 (1980) (“If citizens are the ultimate sovereigns, as the Constitution presupposes, they must have access to the information needed for intelligent decision.”); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 489 (1985) (“If the right to speak is

Despite the obvious connection between self-governance and government information, the Supreme Court has so far refused to recognize a right under the Constitution to obtain information from the government, seemingly unable to countenance the idea that the government has an obligation to ensure that the public can hold informed opinions.³⁵¹ Instead, the public's ability to understand the work of government relies on a patchwork of statutory provisions and customs that allow the government to "selectively reveal[] information when it suits its purposes."³⁵² Compelled only by political forces,³⁵³ Congress, state legislatures, and government officials decide for themselves what information the public is entitled to see. Admittedly, political pressure has led to some successes—at least on paper—including the federal Freedom of Information Act (FOIA)³⁵⁴ and Government in the Sunshine Act ("Sunshine Act")³⁵⁵ and their state analogs, which create limited rights to obtain government records and attend certain government proceedings, respectively. But these statutes are narrow in their coverage, contain many exemptions, and have been widely criticized for failing to live up to their transparency and accountability aspirations.³⁵⁶

important in large part because of the benefits audiences derive from the information and ideas disseminated by speakers, then a right of potential speakers 'to know,' that is to have access to noteworthy information and events, would seem a natural complement to the right to speak.").

³⁵¹ See *McBurney v. Young*, 569 U.S. 221, 233 (2013) ("This Court has repeatedly made clear there is no constitutional right to obtain all the information provided by FOIA laws."); *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40 (1999) (same). Some states, however, recognize such a right under their state constitutions. See, e.g., *Oberman v. Byrne*, 445 N.E.2d 374 (Ill. 1st Dist. 1983); *Hatfield v. Bush*, 572 So. 2d 588 (La. Ct. App. 1st Cir. 1990); *Billings Gazette v. City of Billings*, 313 P.3d 129 (Mont. 2013).

³⁵² *Mary-Rose Papandrea, Information is Power: Exploring a Constitutional Right of Access in NATIONAL SECURITY, LEAKS & THE FREEDOM OF THE PRESS: THE PENTAGON PAPERS FIFTY YEARS on 434* (L. Bollinger & G. Stone eds., 2021).

³⁵³ See *Houchins v. KQED*, 438 U.S. 1, 12 (1978) (plurality op.) (stating that access to government information is "a legislative task which the Constitution has left to the political processes"); *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 934 (D.C. Cir. 2003) ("[D]isclosure of government information generally is left to the 'political forces' that govern a democratic republic.").

³⁵⁴ 5 U.S.C. § 552.

³⁵⁵ 5 U.S.C. § 552b. The Declaration of Policy and Statement of Purpose accompanying the Sunshine Act states:

It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government. It is the purpose of this Act to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.

Pub. L. No. 94-409, §2, 90 Stat. 1241 (1976).

³⁵⁶ The criticisms of these statutes are legion. See, e.g., David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1156 (2017) (writing that FOIA "fall[s] short of its transparency and accountability aspirations"); Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1363-64 (2016) (noting that FOIA "has been rightly critiqued for failing to live up to its promise, hindered by administrative inefficiency, over withholding of information, and courts' failure to act as a meaningful check on agency secrecy"); William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN L. REV. 171, 197 (2009) (concluding that the Sunshine Act and the Federal Advisory Committee Act "do not necessarily achieve salutary results" and, to some degree, are counterproductive); *FOIA is Broken: A Report, Committee on Oversight and*

Moreover, because even these limited rights of public access are not *constitutionally* protected, they are ultimately “ephemeral.”³⁵⁷ Without a constitutional right of access, the government could at any time change or repeal FOIA and the Sunshine Act. It could decide that henceforth, there shall be no public access to congressional proceedings, executive branch agencies, law enforcement records, immigration statistics, and environmental impact statements, to name just a few examples of the information the public has come to rely on.³⁵⁸ Alternatively, the government could choose to disclose only information that supports its existing policies or that burnishes the image of government officials.³⁵⁹ Aziz Huq and Tom Ginsburg in their bracing article, *How to Lose a Constitutional Democracy*, provide a chilling illustration of this type of strategic disclosure, based in part on the internment of Japanese-Americans during World War II:

[I]magine a government that purports to foster public security by extensive use of detention powers targeting discrete minority populations. The government fails to disclose that its policy is not based on evidence that the minority in question in fact includes a meaningful number of individuals who pose a security threat. At the same time, it employs a divisive language of identity-based differences to both vindicate its policy and to raise political support among nonminority voters. The absence of accurate information about the government’s policy not only facilitates grave violations of individual rights, but it also allows the government to deploy those grave violations as a means of amplifying public support. Incomplete information thus not only leads voters to erroneous judgments, it also allows government to promote exclusionary ideals and to eliminate dissenting minorities from the electorate.³⁶⁰

The refusal to make public access to government information a constitutional right signals that the government’s choice to conduct some or all of its work in secret will always trump the public’s right to force the govern-

Government, U.S. House of Representatives, 114th Cong. Staff Report, available at <https://www.hsdl.org/?abstract&did=789831> [<https://perma.cc/XG4G-3V5C>].

³⁵⁷ Papandrea, *supra* note 352, at 449 (“Because these [statutory] access rights are not constitutionally protected . . . they are ephemeral.”).

³⁵⁸ See *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 40 (1999) (rejecting a First Amendment right of access to police records and stating the government could decide “not to give out [police department arrestee] information at all”).

³⁵⁹ See Huq & Ginsburg, *supra* note 328, at 155 (“[T]he Constitution imposes little constraint on the selective disclosure (or nondisclosure) of information by the state in ways that can shunt public debate away from questions that would embarrass or undermine political leaders.”); David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 515 (2013) (noting that the government’s toleration of leaks “is a rational, power-enhancing strategy”).

³⁶⁰ Huq & Ginsburg, *supra* note 328, at 131–32; see also *id.* at 130–31 (“Where information is systematically withheld or distorted by government so as to engender correlated, population-wide errors, democracy cannot fulfill this epistemic mandate.”).

ment to make a public accounting.³⁶¹ In other words, the government has the final say on matters of public oversight. Of course, under any theory of self-governance, this cannot be so. Such a system undermines the very idea of self-governance; permitting the government to decide whether it will deign to disclose information to the public is simply incompatible with the principle that citizens retain ultimate sovereignty over the government.³⁶²

Fortunately, the seeds for a constitutional right of access to government information already exist in the Supreme Court's First Amendment jurisprudence. In what is now accepted dogma, the Supreme Court held in *Richmond Newspapers, Inc. v. Virginia* that the First Amendment embodies a right of public access to criminal trials.³⁶³ Chief Justice Warren Burger, who wrote the plurality opinion, acknowledged that the First Amendment does not explicitly require public access to the courts, but he concluded nonetheless that the amendment's provisions implied that such a right exists: "In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees."³⁶⁴ The First Amendment, Burger wrote, "goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."³⁶⁵

Two years later in *Globe Newspaper Co. v. Superior Court*,³⁶⁶ a majority of the Court adopted the view that the First Amendment protects not just the right to speak, but also the right to acquire information from the courts when it invalidated a Massachusetts statute that excluded the public from the courtroom during the testimony of minors who were victims of certain

³⁶¹ Cf. Steven Helle, *The News-Gathering/Publication Dichotomy and Government Expression*, 1982 DUKE L.J. 1, 3 (1982) ("By according news-gathering less protection the Court has given implicit sanction to the presumption that it is the right of the government to deny information to its citizens.").

³⁶² See HAROLD CROSS, *THE PEOPLE'S RIGHT TO KNOW* xii (1953) (warning that without access to information about the government, "the citizens of a democracy have but changed their kings"); Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1144 (1983) ("To the extent that government manipulates, by interfering with communication of or access to information or ideas useful in evaluating public policy or performance, it manipulates the vote and the other political choices people make."); Blasi, *supra* note 350, at 492 ("It would be anomalous for a constitutional regime founded on the principle of limited government not to impose some fundamental restrictions on the power of officials to keep citizens ignorant of how the authority of the state is being exercised."); Papan-drea, *supra* note 352, at 438 (noting that the absence of a right to know "is an unnerving state of affairs for a democracy").

³⁶³ 448 U.S. 555, 580 (1980) (plurality opinion). In a series of cases that followed *Richmond Newspapers*, the Court went on to hold that a First Amendment right of access could apply in other criminal contexts, including preliminary hearings and voir dire proceedings. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*) (holding that First Amendment provides a right of access to preliminary hearings); *Press-Enterprise v. Superior Court*, 464 U.S. 505 (1984) (*Press-Enterprise I*) (finding right of access to jury voir dire).

³⁶⁴ *Richmond Newspapers, Inc.*, 448 U.S. at 575.

³⁶⁵ *Id.* at 575-76 (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978)); see also *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (noting in dictum that "without some protection for seeking out the news, freedom of the press could be eviscerated").

³⁶⁶ 457 U.S. 596 (1982).

sexual offenses.³⁶⁷ In striking down the statute, Justice William Brennan's majority opinion affirmed that the First Amendment is "broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights."³⁶⁸ Underlying the First Amendment right of access to criminal trials, Brennan pointed out, "is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs.'"³⁶⁹ Echoing Burger's plurality decision in *Richmond Newspapers*, Brennan wrote that a right of public access helps to ensure that the "constitutionally protected 'discussion of governmental affairs' is an informed one."³⁷⁰

As I pointed out in a prior article, there is no principled way to limit a First Amendment right of access solely to criminal trials.³⁷¹ While improving the functioning of criminal trials is undoubtedly an important public good, it is not a First Amendment value. Public access to the courts takes on First Amendment significance because such access supports self-government: "The courts are a central locus where government policies are contested, where rights are recognized or disavowed, and where social change is often implemented or delayed."³⁷² For the same reason, it makes little sense to limit a First Amendment right of access only to the judicial branch. The Court's recognition of a right of access to criminal proceedings was driven in large part by the structural role the First Amendment plays in the American constitutional system. Brennan explicated this linkage in his *Richmond Newspapers* concurrence:

[T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government. Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust, and wide-open," but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.³⁷³

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 604 (citing *Richmond Newspapers*, 448 U.S. at 579–80).

³⁶⁹ *Id.* (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

³⁷⁰ *Id.* at 605.

³⁷¹ See Ardia, *supra* note 17, at 894–900 (arguing that the First Amendment embodies a right of public access to civil proceedings as well as civil and criminal court records).

³⁷² *Id.* at 900 ("Public access to the courts is essential if the public is to understand the contours and operation of their government.")

³⁷³ *Richmond Newspapers, Inc.*, 448 U.S. at 587–88 (1980) (Brennan, J., concurring) (footnotes and internal citations omitted); see also William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States, Address at the Dedication of the S.I. Newhouse Center

The conclusion that an informed public is a prerequisite for self-governance finds additional support in other parts of the Supreme Court's First Amendment jurisprudence.³⁷⁴ In *Thornhill v. Alabama*, for example, the Court noted the importance of the First Amendment in "securing of an informed and educated public opinion,"³⁷⁵ and that "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."³⁷⁶ More recently in *Walker v. Sons of Confederate Veterans, Inc.*, the Court remarked that the First Amendment "helps produce informed opinions among members of the public who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate."³⁷⁷

As with the right not to be lied to by the government, a right of public access to government information will require further study and development. We can, however, draw guidance from the court access cases for how a constitutional right to government information could be implemented. As a starting point, the public should have a qualified right of access to all government proceedings, records, and other information in the government's possession that relate to the activities and conduct of government or bear on questions of public policy. This right of access would not be absolute. As with other First Amendment rights, public access can and should yield when countervailing interests are sufficiently compelling to support government secrecy.³⁷⁸ In evaluating the government's requests for secrecy, courts can look for guidance in the case law interpreting FOIA and the Sunshine Act,³⁷⁹ which adopt a number of exemptions from public access, including

for Law and Justice in Newark, New Jersey (Oct. 17, 1979) ("[T]he First Amendment protects the structure of communications necessary for the existence of our democracy.").

³⁷⁴ See, e.g., *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772–73 (1989) ("[A] democracy cannot function unless the people are permitted to know what their government is up to."); *National Archives and Records Administration v. Favish*, 541 U.S. 157, 171–72 (2004) (noting that public access to government information "defines a structural necessity in a real democracy"); cf. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) ("[Our precedents have focused] not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.").

³⁷⁵ 310 U.S. 88, 104 (1940).

³⁷⁶ *Id.* at 102.

³⁷⁷ 576 U.S. 200, 207 (2015).

³⁷⁸ See *Ardia*, *supra* note 17, at 912–15 (describing application of the strict scrutiny test in the context of public access to court proceedings and records).

³⁷⁹ See *Emerson*, *supra* note 347, at 17:

Establishment of this much of the constitutional right to know through judicial procedures would, of course, be a long and tedious process. Fortunately, a good start has already been made to achieve the same end through legislation. The Federal Freedom of Information Act adopts much of the basic pattern just outlined. It commences with a blanket requirement that every government agency presented with a request for records "shall make the records promptly available to any person." It then provides for nine exceptions, some of which are excessively broad, but which cover much the same areas set forth above. Equally important, the Act contains detailed provisions for enforcing agency compliance, including judicial review.

material that relates to national security, personnel rules and practices, commercial and financial information, law enforcement records, and other information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.³⁸⁰

There is no question that the implementation of a constitutional right of access to government information will face significant obstacles,³⁸¹ but those obstacles are not insurmountable and the payoff—self-governance—is clearly worth the effort. Over the last fifty years, we have learned a great deal about how open government laws such as FOIA and the Sunshine Act function, including the costs they impose and the benefits they offer. We also have learned a lot about how individuals consume and make sense of information, what prompts them to seek out and share information, and how techno-social institutions and practices influence societal knowledge. This experience will be invaluable as scholars and courts flesh out a right of access to government information.

CONCLUSION

It is time to move beyond the notion that the First Amendment's only function is to preserve a "marketplace of ideas." While the "marketplace of ideas" is a catchy metaphor, it undervalues the First Amendment's vital role supporting self-governance. When viewed in its larger constitutional context, it is clear that the First Amendment is part of a system of interrelated institutions and practices, both legal and political, that are necessary to support a representative democracy. Indeed, the words of the First Amendment are merely a pointer to the indispensable role that speech plays in facilitating democratic self-governance.

The goal of ensuring that ideas can freely compete with each other, however, need not be entirely abandoned. We can take the core principle underlying the marketplace of ideas theory—that the government must be precluded from enforcing its view of what should and should not be subject to public discussion—as a starting point, but ultimately the Constitution requires more than the hands-off approach such a theory envisions.

What the Constitution requires is that government take an active role in ensuring that citizens are informed and capable of exercising their right of self-governance. The government can do this in many ways. First, it can use direct and indirect subsidies, antitrust law, tax law, privacy law, and intellectual property law to support the creation and dissemination of information that advances social knowledge. Even under existing First Amendment doctrine, such approaches are permissible (and already being implemented to varying degrees).

³⁸⁰ The exemptions listed in FOIA are at 5 U.S.C. § 552(b)(1)–(9). It is important to remember, however, that the current statutory approach is unlikely to be coterminous with what a constitutional right of access would require.

³⁸¹ See generally Fenster, *supra* note 346; Pozen, *supra* note 356.

We need to do more than tweak the market, however, if we are to ensure that Americans have the capacity for self-governance. As an influential participant in public discourse, the government should have an obligation to wield its influence in ways that support self-governance, not undermine it by misleading its citizens or starving them of the information they need to understand issues of public policy. At a minimum, the government should be prohibited from knowingly disseminating false and misleading information that undermines the public's capacity for self-governance and it should be obligated to disclose information in its possession that makes it possible for the public to understand the actions of government.

The application of these rights will require more study to determine how best to theorize and implement them, but the past decade has shown that focusing solely on preserving an unfettered marketplace for speech, without also considering what is needed to support an informed and empowered electorate, is shortsighted and naïve. In fact, given the growing problems we are seeing with government misinformation, a toothless Congress that is unable to force disclosure from the Executive branch, and a recent president who declared war on journalists as the “enemy of the American people,”³⁸² the need to acknowledge that the Constitution compels the government to actively support self-governance is more pressing than ever.

³⁸² Brett Samuels, *Trump ramps up rhetoric on media, calls press ‘the enemy of the people,’* HILL (Apr. 5, 2019), <https://thehill.com/homenews/administration/437610-trump-calls-press-the-enemy-of-the-people> [<https://perma.cc/H44M-GGDN>].

