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# Truth, Democracy, and the Limits of Law

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# TRUTH, DEMOCRACY, AND THE LIMITS OF LAW

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## I. INTRODUCTION

Bullshit is deadly to democracy. Here and throughout, I use the term "bullshit" in the sense of Professor Harry Frankfurt's short book on the subject.[1] The defining characteristic of bullshit is indifference to the truth.[2] This is distinct from lying. Liars know the truth and deceive others about it. Bullshitters, by contrast, do not care whether what they say is true or false. They are driven by motives other than deception.[3]

Bullshit is deadly to democracy, even deadlier than lies, because democracy depends on a shared commitment to the truth. We sometimes disagree on what is true, just as we disagree on what laws should govern us and how those laws should be interpreted. We may even, at times, try to mislead other people about what is true. But democracy cannot function without a common belief in truth.[4] This is why, for many of us, President Donald J. Trump arouses consternation about the future of democracy in America. His main interest is neither in conveying nor concealing the truth. When President Trump makes false statements—as he so persistently does[5]—it is usually for other reasons.[6] In Professor Frankfurt's words, not written about Trump but fitting him perfectly:

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1. HARRY FRANKFURT, ON BULLSHIT 5 (2005). Thanks to my colleague Dale Oesterle for sharing this book with me.

2. *Id.* at 61.

3. *Id.* at 55.

4. *See* TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY 65-71 (2017).

5. Glenn Kessler et al., *President Trump Has Made 15,413 False or Misleading Claims Over 1,055 days*, WASH. POST (Dec. 16, 2019, 5:52 AM), https://www.washingtonpost.com/politics/2019/12/16/president-trump-has-made-false-or-misleading-claims-over-days/ [https://perma.cc/3HKF-SDYR].

6. Matthew Yglesias, *The Bullshitter-in-Chief*, VOX (May 30, 2017, 8:40 AM), https://www.vox.com/policy-and-politics/2017/5/30/15631710/trump-bullshit [https://perma.cc/4CRG-L5RF].

"What he cares about is what other people think of *him*."[7] Bullshitting is the greater enemy of truth than lying, because it represents an abandonment of the commitment to truth.[8] And without this commitment, democracy cannot function.[9]

Although Professor Hasen's Childress Lecture does not use the term, there is no doubt that he shares my view that bullshit is poisonous to democracy.[10] What he calls the "post-truth" era is defined by its disregard for truth among many people, including not just the President but other politicians, purveyors of information, and the polity. The goal is typically not (or not just) to deceive their intended audience about what the truth is. Rather, they are driven by other objectives—to influence elections, to get more clicks and likes, to make money, or even to destabilize established democracies[11]—and commonly indifferent to what is or isn't true.

That is bullshit. And it is especially toxic bullshit, given the ease with which social media and other contemporary technologies can be used to disseminate misinformation without the filters of bygone days,[12] like local newspapers[13] and Walter Cronkite.[14] As Professor Hasen has elsewhere described, the lower barriers to mass publication enable the propagation of false statements, even as the disappearance of trusted intermediaries makes it more difficult to check

7. FRANKFURT, *supra* note 1, at 18. As my colleague Ruth Colker has recently noted, President Trump frequently accompanies false statements with insults, designed to denigrate his political opponents and thereby promote his own ambitions. Ruth Colker, *The Power of Insults,* 100 B.U. L. REV. 1, 5-8 (2020).

8. *Id.* at 61.

9. *See* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 197 (2018).

10. Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a "Post-Truth" World,* 64 ST. LOUIS U. L.J., 535, 536–37 (2020).

11. *See, e.g.,* Larry Diamond, *Russia and the Threat to Liberal Democracy: How Vladimir Putin is Making the World Safe for Autocracy*, THE ATLANTIC (Dec. 9, 2016), https://www.theatlantic.com/international/archive/2016/12/russia-liberal-democracy/510011/ [https://perma.cc/89VF-B32Y]; Andrew Higgins, *Putin's Russia, Punching Above Its Weight, Keeps Adversaries Off Balance*, N.Y. TIMES (Dec. 23, 2019), https://www.nytimes.com/2019/12/23/world/europe/russia-putin.html [https://perma.cc/6FZZ-H79W]; International Republican Institute, *Chinese Malign Influence and the Corrosion of Democracy*, 6 (2019), https://www.iri.org/sites/default/files/chinese_malign_influence_report.pdf [https://perma.cc/58NK-4TDC]; Josh Rogin, *China's Efforts to Undermine Democracy are Expanding Worldwide*, WASH. POST (June 27, 2019, 5:00 AM), https://www.washingtonpost.com/opinions/2019/06/27/chinas-efforts-undermine-democracy-are-expanding-worldwide/ [https://perma.cc/CAN8-6375].

12. Hasen, *supra* note 10, at 542.

13. Lara Takenaga, *More Than 1 in 5 U.S. Papers Has Closed. This Is the Result*, N.Y. TIMES (Dec. 21, 2019), https://www.nytimes.com/2019/12/21/reader-center/local-news-deserts.html [https://perma.cc/QJP8-UEAW].

14. David Folkenflik, *Walter Cronkite, America's 'Most Trusted Man,' Dead*, NPR (Jul. 18, 2009), https://www.npr.org/templates/story/story.php?storyId=106770499 [https://perma.cc/Q9S7-BN4Q].

misinformation.[15] Sunlight cannot disinfect, if we cannot or will not distinguish truth from falsity.

Professor Hasen thus paints a dark portrait of American democracy. And it is hard to deny that things look bleak at the moment, not just in the U.S. but around the world. These are perilous times. Many countries are experiencing a loss of faith in constitutional democracy and the institutions that sustain it.[16] This has contributed to the rise of extremist political movements, often with a racist, nativist, or authoritarian complexion. These developments threaten not only emerging democracies, but also established ones in Western Europe and North America. When societies become so polarized that there is scant common ground and no evident basis for compromise, when partisan divisions become so bilious that political adversaries are viewed as enemies, when racial, ethnic, and religious cleavages widen to the point that some feel like perpetual outsiders, and when we give up on truth, then democracy is at risk of perishing from the earth.

The central question Professor Hasen asks is what election law can do about this state of affairs. He presents several suggestions, all of which I agree with, so won't spend much time restating or explicating. Instead, I focus on the bigger question of what law can do in a hyperpolarized environment where we disagree not only about what is and what should be, but about the basic proposition that truth matters. As is common in responsive essays like this one, I will focus on the few points on which Professor Hasen and I diverge, at the risk of diverting attention from the many others on which we agree.

Part II addresses Professor Hasen's proposed modifications to election law, most of which are designed to help we the people distinguish truth from falsity. Though I agree with most of his recommendations and add one more, focused on foreign government interference with U.S. elections, I doubt that such rule-tinkering will have a major impact. Instead, I recommend shoring up the institutions with responsibility over elections. That includes courts. Despite the polarization of the judiciary that Professor Hasen rightly notes, a cardinal principal of our legal system is that judicial factfinding is based on evidence. While we cannot expect courts to prevent the onslaught of lies and bullshit, they can—and at this point still do—embody our shared commitment to truth.

Part III turns to free speech law, explaining how existing doctrine falls short of the First Amendment's aspirations of promoting truth and democracy. The Supreme Court has long presumed that lower governmental barriers to speech

15. Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMENDMENT L. REV. 200, 201-02 (2018).

16. *See, e.g.,* Roberto S. Foa & Yascha Mounk, *The Signs of Deconsolidation*, 28 J. DEMOCRACY 5, 5 (2017); Daniel P. Tokaji, *Vote Dissociation,* 127 YALE L.J. FORUM 761, 769-70 (2018); *Public Trust in Government Remains Near Historic Lows as Partisan Attitudes Shift*, PEW RES. CTR. (May 3, 2017), http://www.people-press.org/2017/05/03/public-trust-in-government-remains-near-historic-lows-as-partisan-attitudes-shi [https://perma.cc/6GH4-EYYT].

advance the pursuit of truth and promote self-government. It hasn't quite worked out that way in the digital age. Although we should be cautious about upending established rules that have generally served American democracy well over the last century, the libertarian approach to free speech does not necessarily promote truth or democracy.

My main disagreement with Professor Hasen appears in Part IV. I urge that we avoid talking about a "'post-truth' world." It's not a thing. The world is no more "post-truth" after the 2016 election than it was "post racial" after the 2008 election. Drawing on two short books by distinguished scholars outside of law—philosopher Frankfurt's *On Bullshit* and historian Timothy Snyder's *On Tyranny*—I argue that this myth unintentionally emboldens those who would exploit skepticism about truth to weaken constitutional democracy. As lawyers and scholars, our greatest potential contribution is to practice and demand the fidelity to truth upon which democracy depends.

## II. ELECTION LAW CAN ONLY DO SO MUCH, BUT IT CAN DO SOMETHING

While dissenting from Professor Hasen's "post-truth" terminology, I mostly accept his diagnosis of the problem and prescriptions for election law. If anything, I think the indifference to truth in current political discourse is worse than he portrays it. While election law cannot alone solve these problems, it can make things better, primarily through the improvement of electoral institutions.

### *A. Election Law Reform*

Professor Hasen correctly notes that there is "fundamental disagreement among members of the public regarding basic facts about the state of the world."[17] This disagreement is driven in part by the rise of social media and concomitant decline in "trusted intermediaries, especially the news media, who had helped people to separate the truth from fiction."[18] The difficulty in distinguishing truth from fiction has led some people to discount—or even despair of discovering—the truth.[19] He cites the danger that "people will discount the veracity of *all* information based on the potential for it to be false."[20] This is an especially deadly prospect. It is one thing to be mistaken about what is true; it is far worse if the citizenry no longer believes it possible to discover the truth.[21] When bullshit has become so pervasive that we give up hope for truth, the foundations of democracy are imperiled.

17. Hasen, *supra* note 10, at 537.

18. *Id.* at 539.

19. *See* LEVITSKY & ZIBLATT, *supra* note 9, at 198-99 (discussing loss of faith in truth and consequent deleterious effects on democracy).

20. Hasen, *supra* note 10, at 543.

21. SNYDER, *supra* note 4, at 65 ("If nothing is true, then no one can criticize power, because there is no basis on which to do so.").

Professor Hasen recommends several changes to existing election laws to make it harder to deceive would-be voters and easier for them to discover whether the information they're consuming is true or false. Below are his four main recommendations, with my comments:

1. *Prohibit false election speech.* The First Amendment has long been understood to limit public entities' authority to restrict speech because of its truth or falsity, part of the larger prohibition on content-based discrimination that is a staple of free speech law.[22] An example is *United States v. Alvarez*, in which the Supreme Court struck down a federal law that penalized people for lying about military honors.[23] The Court took a hard line on government attempts to criminalize false speech, declining to create a new categorical exception to the prohibition on content discrimination.

That said, there is still room to regulate false speech. As Professor Hasen notes, false speech within polling places can be prohibited, because they are a "nonpublic forum" under the First Amendment.[24] Viewpoint discrimination is prohibited within such a forum, but other forms of content discrimination—like a prohibition on false speech or campaign materials[25]—would not be, if drawn with sufficient clarity.[26] Moreover, under *New York Times v. Sullivan* and its progeny, the government can prohibit defamation of public officials and public figures, if it satisfies the actual malice standard.[27] That requires speech to be made "with knowledge that it was false or with reckless disregard of whether it was false or not."[28]

Speech made with knowledge of its falsity is a lie; speech made with "reckless disregard" of its falsity is bullshit, under Professor Frankfurt's definition. Thus, a civil or criminal defamation law could be applied to knowingly or recklessly false campaign speech that injures the reputation of its

22. Part III delves into the general prohibition on content discrimination.

23. United States v. Alvarez, 567 U.S. 709, 713, 730 (2012); discussed in Hasen, *supra* note 10, at 547.

24. Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876, 1885–86 (2018); Hasen, *supra* note 10, at 548. While striking down the law before it on vagueness grounds, the Court stated in a footnote "We do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures." Id. at 1889 n.4. For discussion of this statement, see William Marshall, *The Constitutionality of Campaign Deceptive Practices Act* (Abstract Jan. 10, 2020).

25. Burson v. Freeman, 504 U.S. 191, 198, 208, 211 (1992) (upholding prohibition on campaign-related speech).

26. *See Mansky*, 138 S. Ct. at 1888-91 (striking down ban on "political" speech as too vague and open ended).

27. New York Times v. Sullivan, 376 U.S. 254, 283-84 (1964). *See also* Garrison v. Louisiana, 379 U.S. 64, 67 (1964) (extending this standard to criminal libel cases); Curtis v. Butts, 388 U.S. 130, 155 (1967) (extending standard to public figures).

28. *Sullivan*, 376 U.S. at 279-80.

target.[29] It's also possible that a defamation law specifically targeting campaign ads would be upheld, although this would potentially run up against the First Amendment's limits on content discrimination *within* a category of generally proscribable speech.[30] Outside the realms of defamation and the polling place, bans on false campaign speech would have to meet strict scrutiny. But strict in theory is not fatal in fact.[31] The evidence cited by Professor Hasen suggests that the systemic negative effects of pervasively false speech on democracy are a compelling interest that could justify a narrowly tailored law prohibiting false electoral speech.

2. *Truthful government speech*. Justice Brandeis's concurring opinion in *Whitney v. California* famously declared that the remedy for false speech is "more speech, not enforced silence."[32] To be sure, this proposition has its limits, especially in an age where false speech is so easy to disseminate and so difficult to rebut effectively. But as Professor Hasen notes,[33] public entities themselves have some power to respond to lies and bullshit, by engaging in government speech. In recent years, the Supreme Court has expanded the government speech doctrine, understanding it to reach religious monuments in public parks[34] and specialty license plates.[35] Governments could therefore establish agencies whose mission is to call out false campaign speech and publicize the truth. Whether such agencies would have much impact is another matter, but they would be squarely within the scope of what the First Amendment permits.

3. *Truth in labelling*. Another recommendation of Professor Hasen is to compel disclosure of false speech. This might include a law requiring social media platforms to label "deep fakes" and other false or deceptive speech as "altered."[36] As he notes, the Supreme Court has generally been sympathetic to compelled disclosure that it perceives to be neutral, even as it has limited other government efforts to restrict speech.[37] It has, for example, upheld governmentally compelled disclosure of information on such diverse topics as

29. *See* William Marshall, *False Campaign Speech and the First Amendment*, 153 U. PENN. L. REV. 285, 291-92 (2004).

30. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 383-86 (1992).

31. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995). The phrase "'strict' in theory and fatal in fact" comes from Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). But empirical analysis shows it isn't always so. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006).

32. Whitney v. Cal., 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

33. Hasen, *supra* note 10, at 549.

34. Pleasant Grove City v. Summum, 555 U.S. 460, 464 (2009).

35. Walker v. Tex. Div., Sons of Confederate Veterans, 135 S. Ct. 2239, 2246 (2015).

36. Hasen, *supra* note 10, at 549.

37. *Id.* at 550–51.

abortions,[38] campaign expenditures,[39] and referendum petitions.[40] On the other hand, the Court's recent opinion in *National Institute for Family and Life Advocates v. Becerra* (*NIFLA*)[41] struck down disclosure requirements for so-called "crisis pregnancy centers" that oppose abortion. In a split decision, the five more conservative justices found this to be a content-based restriction on speech that was inadequately tailored to the state's claimed informational interest.[42]

Professor Hasen is right to worry that *NIFLA* may signal a less tolerant approach to governmentally compelled disclosure on the part of the Court. But there is no bar to social media companies choosing to label speech on their own platforms as altered, manipulated, or even false. As he notes, these companies are private actors, not state actors, and therefore are not bound by the First Amendment.[43] Whether social media companies are doing a good job of policing false and misleading speech on their platforms—and whether they are even capable of doing so effectively—is more questionable.[44] Bullshit detection is a difficult challenge in any context, but especially so in the contemporary social media environment.

4. *Campaign finance disclosure*. Professor Hasen proposes that campaign finance disclosure requirements be tightened, so as to better inform the public of the identity of those funding communications. He is certainly right that current laws aren't up to the task of revealing "the true sources of new social media campaigns aimed at trying to influence opinions in elections."[45] His recommended fixes to campaign finance disclosure include (a) extending existing rules to online ads (including those on social media), (b) requiring disclosure of the "ultimate" source of funding for social media campaigns, (c) requiring speakers to certify under penalty of perjury that the required disclosures have been made, and (d) extending disclosure beyond express advocacy and electioneering communications, to reach other communications that may influence elections.[46]

38. Planned Parenthood v. Casey, 505 U.S. 833, 881-82 (1992).

39. Citizens United v. FEC, 558 U.S. 310, 319 (2010).

40. Doe v. Reed, 561 U.S. 186, 191 (2010).

41. Nat'l Inst. for Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 2370, 2378 (2018).

42. *Id.* at 2374–78 (2018). *See* Daniel P. Tokaji, *Denying Systemic Equality: The Last Words of the Kennedy Court*, 13 HARV. L. & POL'Y REV. 539, 561–65 (2019).

43. Hasen, *supra* note 10, at 553.

44. For an exploration of this thorny problem, see Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech,* 131 HARV. L. REV. 1598, 1602 (2018).

45. Hasen, *supra* note 10, at 556.

46. *Id.* at 557–62. There have been proposals in Congress for legislation that would strengthen disclosure for online political advertisements, such as the so-called "Honest Ads Act," S. 1356 (May 7, 2019), https://www.congress.gov/bill/116th-congress/senate-bill/1356/text [https://perma.cc/S2RK-DQNM].

The last of these recommendations presents the most novel—and constitutionally uncertain—recommendation, since it would reach beyond communications that are covered by current federal law and would inevitably reach some expression that is not intended to influence elections. The difficulty is navigating between the twin shoals of overbreadth and vagueness. Under current law, Congress can require disclosure of spending that is *not* intended to influence elections, but to achieve other ends such as influencing policymaking.[47] But Professor Hasen has good reason for worrying that the Roberts Court will take a more skeptical view of disclosure requirements that reach beyond campaign spending and contributions.[48] And even if the Court were to uphold an enhanced disclosure requirement, there is reason to doubt how much it would really accomplish. No matter how inclusive the disclosure and certification requirements are, they are subject to evasion.[49] Moreover, disclosure alone cannot achieve the democracy-enhancing goals of campaign finance reform; without more, it is an excuse for abandoning those goals.[50]

To Professor Hasen's list of proposed law reform, I would add one more:

5. *Restrict election interference by foreign governments*. The risk and reality of foreign governments and their agents spreading misinformation justifies stricter limits on their federal campaign contributions and expenditures than current federal law provides. Longstanding federal law prohibits any "foreign national" from making contributions and expenditures to influence federal elections.[51] This statute dates back to the Foreign Agents Registration Act of 1938 (FARA), and amendments adopted in 1966 to prevent foreign interests from influencing American elections.[52] It defines "foreign national" broadly, to include not just agents of a foreign government but any individual who is not a U.S. citizen, national, or permanent resident.[53] The law imposes the same rule

47. Hasen, *supra* note 10, at 561. The leading Supreme Court case, as he notes, is United States v. Harriss, 347 U.S. 612 (1954) (upholding lobbying disclosure requirements of Federal Regulation of Lobbying Act). *See also* Nat'l Assoc. of Mfrs. v. Taylor, 582 F.3d 1, 20 (D.C. Cir. 2009) (upholding disclosure requirements of Lobbying Disclosure Act).

48. Hasen, *supra* note 10, at 562.

49. Professor Hasen acknowledges this point. *Id.* at 563.

50. Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 290 (2009); *see also id.* at 276 ("disclosure is not likely to accomplish much in directly making the financing of elections more democratic").

51. 52 U.S.C. § 30121 (2012).

52. Bruce D. Brown, *Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System,* 15 YALE L. & POL'Y REV. 503, 508–09 (1997). *See also* Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT'L L. 1, 22 (1989).

53. 52 U.S.C. § 30121(b) (defining foreign national to include "foreign principal," as well as individuals who are not U.S. citizens, nationals, or permanent residents); 22 U.S.C. § 611(b) (defining "foreign principal" to include foreign governments and corporations).

on foreign governments and foreign individuals,[54] prohibiting them from making contributions and expenditures in federal elections.[55]

In *Bluman v. Federal Election Commission*,[56] a three-judge district court panel gave this provision a narrow construction in order to save it from a First Amendment challenge. The opinion by then-Judge Brett Kavanaugh (affirmed without opinion by the Supreme Court) held that the statute "does not restrain foreign nationals from speaking out about issues or spending money to advocate their views about issues."[57] It interpreted the statute to reach only "a certain form of expressive activity closely tied to the voting process—providing money for a candidate or political party or spending money in order to expressly advocate for or against the election of a candidate."[58]

By its terms, *Bluman*'s interpretation narrows the foreign interference statute in two significant respects, both of them flatly inconsistent with the statutory text. First, *Bluman* limits the contribution ban to *monetary* contributions, thus seeming to exclude in-kind (i.e., nonmonetary) contributions. Thus, according to *Bluman*, the statute would not prohibit a foreign government from providing valuable information—such as polling data or dirt on an opponent—to a federal candidate or political party, even if that information has a determinate monetary value.[59] This interpretation flatly contradicts the statutory text,[60] creating a potential loophole in the statute.[61] Second, *Bluman* limits the expenditure ban to *express advocacy*,[62] even though the statute's plain

54. For purposes of this discussion, I use the term "foreign individuals" to mean individuals who are not U.S. citizens, nationals, or permanent residents.

55. 52 U.S.C. § 30121 (2012).

56. Bluman v. Federal Election Comm'n, 800 F. Supp. 2d 281, 286 (D.D.C. 2011).

57. *Id.* at 290.

58. *Id.*

59. *See* Daniel P. Tokaji, *What Trump Jr. Did Was Bad, But It Probably Didn't Violate Federal Campaign Finance Law*, JUST SECURITY BLOG (June 14, 2017), https://www.justsecurity.org/43116/trump-jr-bad-didnt-violate-federal-campaign-finance-law/ [https://perma.cc/U944-D2ZX].

60. 52 U.S.C. § 30101(8)(A) (2012).

61. *Id.* The report of Special Counsel Robert Mueller on Russian interference in the 2016 election considered a potential violation of the foreign contribution ban through in-kind contributions, in connection with a meeting at Trump Tower between Donald Trump, Jr. and Russian representatives. Robert S. Mueller, III, *Report on the Investigation into Russian Interference in The 2016 Presidential Election*, Vol. I, at 184–88 (2019), https://www.justice.gov/storage/report.pdf [https://perma.cc/58LZ-RBLW]. The report concluded (contrary to what *Bluman* implies) that the statute should be read to cover in-kind contributions like opposition research, though noted that there was some legal uncertainty over the question. *Id.* at 187.

62. *See also Bluman,* 800 F. Supp. 2d at 284 ("This statute, as we interpret it, does not bar foreign nationals from issue advocacy—that is, speech that does not expressly advocate the election or defeat of a specific candidate."); *id.* at 288 ("the question here is whether . . . express-advocacy expenditures . . . constitute part of the process of democratic self-government").

language includes disbursements for electioneering communications as well.[63] Federal law defines electioneering communications to include broadcast, cable, or satellite communications mentioning a specific federal candidate, within thirty days of a primary or sixty days of a general election, targeted to the relevant electorate.[64] That means that a foreign government could spend money on a TV ad attacking a federal candidate within these time frames, so long as it avoids "magic words" such as "vote for" or "vote against."

*Bluman*'s narrowing interpretation of the existing statute seems to have been driven by concern that a broader interpretation would have a potentially unconstitutional effect on the speech of foreign individuals.[65] But these concerns carry less force for attempted interference in U.S. elections by foreign *governments* or their agents.[66] Although existing federal law treats foreign governments and foreign individuals identically, there is strong justification for a more stringent ban on the former than the latter.

We now have substantial evidence of extensive foreign governmental interference with our elections.[67] The most significant example, of course, is the Russian government's vicious campaign of disinformation during the 2016 election campaign, which reached hundreds of millions[68] and is extensively documented in a recent report of the U.S. Senate Intelligence Committee that received rare bipartisan support.[69] This report documents how the "Russian information warfare campaign" used falsified social media accounts to animate people on opposing sides of "socially divisive issues—such as race, immigration, and Second Amendment rights—in an attempt to pit Americans against one another and against their government."[70] The report found that no group was more heavily targeted than African Americans, with phony social media accounts like "Blacktivist" used to generate millions of contacts.[71] This

63. 52 U.S.C. § 30121(a)(1)(C) (2012).

64. 11 C.F.R. § 100.29(a) (2012).

65. *See Bluman*, 800 F. Supp. 2d at 286–87 (listing the constitutional rights that foreign citizens enjoy).

66. *See* Tokaji, *supra* note 59.

67. *See* Helen Norton, *Thirteen Ways of Looking at Election Lies*, 71 OKLA. L. REV. 117, 120 (2018); Joseph Thai, *The Right to Receive Foreign Speech*, 71 OKLA. L. REV. 269, 272–74 (2018).

68. Mike Isaac & Daisuke Wakabayashi, *Russian Influence Reached 126 Million Through Facebook Alone*, N.Y. TIMES (Oct. 30, 2017), https://www.nytimes.com/2017/10/30/technology/facebook-google-russia.html [https://perma.cc/UB8D-SZKX].

69. U.S. SENATE INTELLIGENCE COMMITTEE, *Russian Active Measure Campaign and Interference in the 2016 U.S. Election, Vol. 2: Russia's Use of Social Media with Additional Views*, 3 https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume2.pdf [https://perma.cc/E7T6-H5MT].

70. *Id.* at 6.

71. *Id. See also* Spencer Overton, *State Power to Regulate Social Media Companies for Voter Suppression* 53 U.C. DAVIS L. REV. 1793, 1795–98 (2020) (summarizing evidence on Russia's microtargeting of black voters).

is just one example of how foreign governments employ false and misleading information to exacerbate existing racial and political divisions. Not all of it was lies, or even untruthful. Some of the information that Russia helped spread was true, even though the sources were indifferent to the truth and misrepresented their motives. In other words, some of it was bullshit rather than lies. Although Russia is the worst documented governmental offender to date, it is not the only one about which we need worry.[72]

There is good reason for expanding existing law to cover online communications by foreign governments and their agents.[73] Whatever the scope of First Amendment protections enjoyed by individuals who are not U.S. citizens, nationals, or permanent residents, those of foreign governments and their agents are considerably less.[74] Congress could certainly act to prohibit foreign governments from making any *contributions* to candidates, parties, or political committees, including in-kind contributions that lack a determinate monetary value. Congress could also reduce the dollar threshold for criminal prosecution ($2000) or felony punishment ($25,000).[75]

Foreign government expenditures for online electioneering present a more difficult regulatory challenge. Because the existing electioneering ban only reaches broadcast, cable, and satellite communications, it does not prohibit foreign governments from spending money for *online* communications, so long as they avoid express advocacy. Congress could limit expenditures for online electioneering communications by foreign governments and their agents. Such a limit could borrow the thirty/sixty day timeframes from the existing definition of "electioneering communications," while expanding the ban to reach all such communications—including those distributed through social media and other online sources—funded by foreign governments, over a prescribed monetary threshold.

To be sure, there are legitimate concerns about expanding the restriction on foreign government expenditures to reach online electioneering. Unlike broadcast, cable, and satellite communications, social media and other online communications are not limited (and not necessarily targeted) to any particular

72. *See* Tim Mak, *Experts Warn U.S. Should Prepare For Election Interference From China*, NPR (Sept. 9, 2019), https://www.npr.org/2019/09/05/757803903/experts-warn-u-s-should-prepare-for-election-interference-from-china [https://perma.cc/24Z7-CJF2].

73. Federal law also contains a definition for "agents of a foreign principal," including foreign government. 22 U.S.C. § 611(c) (2012).

74. *See* Meese v. Keene, 481 U.S. 465, 485 (1987) (upholding FARA's registration requirement for those distributing films and periodicals funded by foreign governments); Ronald J. Krotoszynski, Jr., *Transborder Speech*, 94 NOTRE DAME L. REV. 473, 488 (2018) ("It is quite clear that foreign governments seeking to disseminate propaganda have no protected constitutional interest in using the U.S. mail service to accomplish this objective.").

75. 52 U.S.C. § 30109(d)(1) (2012). The inability to prove that this threshold was exceeded is one reason that Special Prosecutor Mueller declined to prosecute anyone for the June 9, 2016 Trump Tower meeting. *See* Mueller, *supra* note 61, at 188.

market. Thus, a restriction on online electioneering by foreign governments cannot practically be limited geographically, in the way the existing electioneering ban is. Moreover, foreign governments can scarcely be expected to avoid mentioning candidates for federal office, some of whom will be current officeholders, within thirty or sixty days of an election. So any restriction on online speech would have to be limited to paid ads, or set a maximum dollar threshold on foreign government expenditures for other speech. This would make enforcement especially challenging, given the difficulty of ascertaining exactly how much foreign governments are spending to influence domestic elections. Still, a limitation on foreign government electioneering could help stem the tide of false and misleading speech from foreign governments aimed at destabilizing American democracy, which is otherwise likely to crash upon our shores with increasing force and regularity in years to come.

### *B. Electoral Institutions*

As is true of the electoral reforms that Professor Hasen advocates, restricting foreign government misinformation can only do so much. The greatest threats to our political discourse come not from the outside, but from within. On this front, election law scholars would do best to shift their attention from electoral rules to the institutions responsible for election administration and adjudication.

Aziz Huq and Tom Ginsburg have offered an immensely valuable framework for understanding the risk of democratic backsliding, concluding that the United States is at greater risk than has commonly been supposed.[76] They begin by identifying three intertwined characteristics that are essential to constitutional democracy: (1) competitive elections, (2) free speech and association, and (3) administrative and adjudicative rule of law.[77] They proceed to contrast two different pathways through which constitutional democracy can fail. One is through the rapid collapse, which they call "authoritarian reversion."[78] The other is through a slow-motion deterioration in the three institutional prerequisites for a well-functioning constitutional democracy, which they call "constitutional regression."[79] Their central argument is that the United States is at much greater risk of a gradual deterioration of constitutional democracy than an immediate collapse into authoritarianism. They also note that one of the risk factors is the widening economic inequality that the U.S. has experienced.[80] For more than four decades, income and wealth disparities have

76. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 80 (2018).

77. *Id.* at 83, 86–92.

78. *Id.* at 92–94.

79. *Id.* at 94–99.

80. *Id.* at 81.

increased alongside political polarization.[81] There is good reason to believe that the centrifugal forces of economic inequality and political polarization are mutually reinforcing, for reasons that are not completely understood.[82] For present purposes, the key point is that the widening gulf between rich and poor—which partly reflects inequalities of political influence—exacerbates the risk of democratic deterioration.

All this means that election law cannot solve all the challenges that American democracy faces. But it can do something more than Professor Hasen suggests. He concludes his article by suggesting that election scholars focus on how election laws and procedures should be updated "to assure continued peaceful transitions of power."[83] While this line of research is important,[84] intervention only at this late stage in the process is like trying to close the barn door after the horses have bolted. An immediate reversion to autocracy is not the main threat confronting democracy in America. As Huq and Ginsburg explain, the gradual retrogression arising is a far more realistic and insidious threat. And protecting our institutions—especially those with electoral responsibilities—is an essential means by which to stem that retrogression.[85]

In the sphere of election law, the most promising remedy is to improve the functioning of the bodies that are responsible for administering our elections. The U.S. remains an outlier among democratic countries, in the degree to which elections are run by partisan actors.[86] In most states, the chief election official (usually the Secretary of State) is elected to office as the nominee of one of the political parties. And we have seen repeated instances in which state and local election officials execute their responsibilities in a manner that favors their own party. The actions of Georgia's Brian Kemp—who in his capacity as Secretary of State made numerous controversial decisions that aided his own successful campaign for Governor[87]—is just the latest and perhaps most egregious example.

81. Tokaji, *supra* note 16, at 771.

82. *Id.* at 771–73.

83. Hasen, *supra* note 10, at 567. Professor Hasen's most recent book develops the idea that a disputed presidential election would be catastrophic, due to the increase in election chicanery and attendant voter mistrust. RICHARD L. HASEN, ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY (2020). I agree, though I see greater risks in the more gradual deterioration arising from rising political polarization and economic inequality. Dan Tokaji, *The Centrifugal Forces of Democracy*, BALKINIZATION (Feb. 28, 2020).

84. For a worthy example, see EDWARD B. FOLEY, BALLOT BATTLES 8–9 (2016).

85. *See* SNYDER, *supra* note 4, at 22 (explaining why it is essential to protect institutions).

86. *See* Daniel P. Tokaji, *Comparative Election Administration: A Legal Perspective on Electoral Institutions*, COMPARATIVE ELECTION LAW (forthcoming 2020).

87. Maggie Astor, *Georgia Governor Brian Kemp Faces Investigation by House Panel*, N.Y. TIMES (Mar. 6, 2019), http://www.nytimes.com/2019/03/06/us/politics/governor-brian-kemp-voter-suppression.html [https://perma.cc/F8K9-V2YC].

On this front, the U.S. could learn much from the experience of other countries. There is now a rich body of literature on the functioning of election management bodies around the globe.[88] While most of that literature emphasizes the *independence* of election management bodies, the empirical research suggests that functional *impartiality* is much more important.[89] That impartiality is often advanced by allowing for representation and interaction among disparate political factions within the election management body, rather than by attempting to completely insulate that body from partisan politics.[90] Heather Gerken has referred to this idea as the *inoculation* of electoral bodies with politics, so that disputes can be channeled through them. At the state level, the U.S. lacks independent election authorities, with its lone exemplar—Wisconsin's Government Accountability Board[91]—been abolished by the state legislature in 2015.[92] Given the difficulty of establishing independent election management bodies in the U.S., election law scholars should consider how institutions might be restructured so as to allow representation by both major parties. One possibility is a bipartisan model of state election administration, which would allow partisan conflict to be more effectively channeled than in the current system, where one major party or the other effectively controls the administration of elections in most states.

Finally, in an era of proliferating falsehoods, it is incumbent on the judiciary to defend the truth. Over the past two decades, the courts—federal courts in particular—have played an increasingly important role in overseeing elections, and especially in enforcing federal voting rights. Some of those cases have involved constitutional claims, others claims under statutes like the Voting Rights Act. Plaintiffs have not always succeeded in stopping practices alleged to impose illegal burdens on voting, like voter ID laws, registration purges, and restrictions on early voting. But some of these cases have succeeded, thereby stopping some of the most egregious restrictions on democratic participation.[93] The facts matter in these kinds of cases, particularly under the balancing standard that the Court has suggested.[94] In general, federal courts have done a

88. Tokaji, *supra* note 86.

89. *Id.*

90. *Id.* (citing Luis Alejandro Trelles Yarza, "Building Democracy: *De Jure* and *De Facto* Autonomy in Election Management Bodies in Latin America and Africa," Ph.D. diss., University of Pittsburgh (2018)).

91. Daniel P. Tokaji, *America's Top Model: The Wisconsin Government Accountability Board*, 3 U.C. IRVINE L. REV. 575, 576 (2013).

92. The Republican legislature enacted a law in 2015 eliminating this board, effective 2016. *See* Wisconsin Elections Commission, "About the Wisconsin Elections Commission," https://elections.wi.gov/about [https://perma.cc/XD8B-4N29].

93. *See* Daniel P. Tokaji & Owen Wolfe, Baker*,* Bush*, and Ballot Boards: The Federalization of Election Administration*, 62 CASE W. RES. L. REV. 969, 984–86 (2012).

94. *See* Daniel P. Tokaji, *Voting Is Association*, 43 FLA. ST. L. REV. 763, 789–90 (2016).

good job of scrutinizing the evidentiary record to discern both the effects on voters and the rationale underlying the state's action.[95]

On the whole, then, the federal courts have played a constructive role in overseeing election administration since 2000. Will that constructive engagement continue? Professor Hasen worries about "siloed justices," the risk that members of the Supreme Court will increasingly have divergent views of the facts corresponding to the partisan orientation of the news sources they consume[96]—with the more liberal justices getting their truth from the *New York Times* and NPR, the more conservative justices from the *Wall Street Journal* and Fox news. My colleague Katrina Lee has raised a similar concern about the impact of social media, worrying that their interaction with bots and bubbles will compromise judicial impartiality.[97] These concerns are real. At the same time, the judiciary has an advantage over the so-called political branches of government: they must justify their decisions based on evidence and reason. At the heart of the legal method is the idea that courts should make findings of facts based on the evidence presented, and then apply the law to those facts. Of course, there are often legitimate disagreements about what the facts are, just as there are over how the law should be interpreted and applied. But the mode of analysis in which courts engage does provide them with a functional advantage over political actors—up to and including the President—who may play fast and loose with the facts. The legal method may not guarantee truth, but it does provide a hedge against the most egregious falsehoods.[98]

## III. SPEECH LAW IS INCREASINGLY AT ODDS WITH THE TRUTH AND DEMOCRACY VALUES TO WHICH IT ASPIRES

Having explored what election law might do to stem the rising tide of bullshit and lies, I now turn to the law governing freedom of speech. Professor Hasen's essay mostly takes existing First Amendment doctrine as a given, noting at several points the severe constraints that it imposes upon public entities' authority to combat false expression.[99] Most significant among these limitations, the First Amendment has long been understood to limit government's power to discriminate against speech based upon its content.[100] The Roberts Court has doubled down on this principle in recent years, applying strict scrutiny to

95. *Id.* at 779–84.

96. Hasen, *supra* note 10, at 563.

97. Katrina Lee, *Your Honor, On Social Media: The Judicial Ethics of Bots and Bubbles*, 19 NEV. L.J. 789, 790 (2019).

98. *See* John Roberts, Jr., *2019 Year-End Report on the Federal Judiciary*, at 2, available at https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf [https://perma.cc/QT5Y-9936] (stressing role of courts in countering false information).

99. *See* Hasen, *supra* note 10, at 547–48, 551, 553, 561–62. In previous work, Professor Hasen has questioned some of the background assumptions of free speech doctrine.

100. *See* Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

content-discriminatory laws, outside a handful of established areas where speech is less protected (like obscenity, defamation, fighting words, threats, and bribery).[101] As the definition of speech has broadened and the rule against content discrimination hardened, a disconnect between free speech theory and doctrine has emerged. The result is that free speech doctrine is not delivering on its promise to promote truth and democratic self-government. That doesn't mean existing doctrine should be abandoned, but we should think more carefully about further expansion and consider other ways in which these intertwined values might be vindicated.

Let me start by stating my belief in the vision of free speech underlying modern First Amendment law. That vision is best captured by Justice William Brennan's opinion in *New York Times v. Sullivan*: "[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[102] At the core of this vision is idea that "uninhibited" speech is a good thing.[103]

But toward what end? At this point, conventional understandings of the First Amendment diverge. The three leading theories of free speech emphasize different fundamental values:

1. *Autonomy*. The first theory sees individual fulfillment as the primary goal of the First Amendment. As Justice Thurgood Marshall put it, free speech "serves the needs of . . . the human spirit—a spirit that demands self-expression."[104] This perspective on freedom of speech tends toward a negative libertarian perspective, the idea that the government best promotes individual liberty by avoiding any constraints on speech, whatever its content.[105]

2. *Democracy.* The second theory emphasizes democratic self-government as the main purpose of free speech. Associated with the work of Alexander Meiklejohn, this theory emphasizes the centrality of a rich political discourse to a well-functioning democracy.[106] If we are not free to debate issues

101. *See* Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 IOWA L. REV. 1427, 1430–46 (2017).

102. 376 U.S. 254, 270 (1964).

103. *See* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1407 (1986).

104. Procunier v Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring). For scholarly expositions of this idea, see Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233–34 (1992). *See also* Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

105. *See* Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 880–83 (1994).

106. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 15–16 (1948). *See also* Fiss, *supra* note 103, at 1410 (emphasizing "rich political discourse" as First Amendment's goal); Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 301 (1992) ("[T]he First Amendment is principally about political deliberation").

of public importance, the theory goes, then democracy will ultimately give way to tyranny.[107] The above quotation of Justice Brennan tends toward the democracy theory. It suggests that the advantage of an "uninhibited, robust, and wide-open" public debate is to allow criticism of those in power, thus clearing the channel for political change.[108]

3. *Truth.* The third theory holds that freedom of speech promotes the search for truth. This theory is associated with the "marketplace of ideas" metaphor, articulated over a century ago in Justice Oliver Wendell Holmes's dissenting opinion in *Abrams v. United States*:

> when men have realized that time has upset many fighting faiths, they may come to believe … 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.[109]

The roots of this theory can be traced even deeper, to Thomas Jefferson[110] and even John Milton.[111] The idea is that truth will ultimately rise to the top, if the free exchange of competing ideas prevails.

Today, the democracy theory of free speech holds sway among judges and commentators across the ideological spectrum, as autonomy and truth have faded into the background.[112] The Court's decision in *Citizens United v. FEC*, for example, rests on the premise that freedom of speech is essential to democracy.[113] No conception of individual freedom justifies the notion that corporate speech is protected by the First Amendment, as has been the law for more than four decades.[114] And there are deeper problems with autonomy theory. It has no persuasive answer to Robert Bork's devastating critique, which questioned why expression should be preferred to other human activities through which people might find fulfillment, like stock trading, bartending, or sexual intercourse.[115]

107. *See* Whitney v. Cal., 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Recognizing the occasional tyrannies of governing majorities, [those who won independence] amended the Constitution so that free speech and assembly should be guaranteed.").

108. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 105 (1980).

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

110. Letter of Thomas Jefferson to William Roscoe, (Dec. 27, 1820), https://founders.archives.gov/documents/Jefferson/98-01-02-1712 [https://perma.cc/2KNH-5H86] ("we [the University of Virginia founders] are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it"). I am indebted to an attendee of the symposium at which this paper was presented for calling attention to this quotation.

111. JOHN MILTON, AREOPAGITICA 35 (1644). *See* Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 898 & n.11 (2010).

112. Bhagwat, *supra* note 101, at 1451.

113. Citizens United v. FEC, 558 U.S. 310, 339 (2010).

114. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 767 (1978).

115. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25 (1978).

As for truth theory, the "marketplace" metaphor has long fallen into disrepute among scholars, for its seeming presumption that truth will necessarily emerge from an unregulated market.[116] And there are good reasons for doubting that less regulation will actually promote truth, especially in the short term.[117] I count myself among those who doubt that truth will inexorably emerge from an unregulated marketplace of ideas. That should not cause us to abandon the idea that promoting truth is at the core of the First Amendment's purpose.[118] It should, however, cause us to question whether a laissez-faire approach will advance truth.

What we have lost over the decades is a recognition of the deep connection between truth and democracy. It wasn't always so. Justice Holmes's dissenting opinion in *Abrams* is typically understood as embodying the truth theory, but it is also grounded in a recognition that democratic self-government depends on making room for political opposition: "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."[119]

The idea that truth and democracy are inextricably linked is even more explicit in the Justice Brandeis's concurring opinion in *Whitney v. California*.[120] Some eight years after joining Justice Holmes's *Abrams* dissent, Justice Brandeis famously wrote:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew

116. *See, e.g.,* Thomas W. Joo, *The Worst Test of Truth: The "Marketplace of Ideas" as Faulty Metaphor*, 89 TUL. L. REV. 383, 383 (2014); Tamara R. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem That Won't Go Away*, 41 LOY. L.A. L. REV. 181, 181–82 (2007); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 1 (1984); Jerome Barron, *Access to the Press – A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641 (1967).

117. *See* Harry Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1130–32 (1979).

118. *See* William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 1 (1995).

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

120. *Whitney,* 274 U.S. at 372–73, 75 (Brandeis, J., concurring).

> that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence—coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[121]

For both Justices Holmes and Brandeis, then, truth and democracy were joined at the hip. Freedom of speech was meant to promote "political truth," and thereby ward off the threat of tyranny.

It's unfortunate that the truth and democracy theories of free speech were decoupled over time. As consensus has developed around democratic self-government as the main justification for protecting speech, we have lost sight of the fact that democracy and truth are intertwined.[122] There are very good reasons for the centrality of democracy in contemporary free speech doctrine, including its better fit with freedoms of the press and association.[123] But there are costs to this approach, most notably the failure to recognize—as Justices Holmes and Brandeis did—that democracy depends upon a commitment to truth.[124] One can believe that the search for truth and the protection of democracy are linked, as they did, while rejecting the empirically doubtful proposition that an unregulated marketplace of ideas will necessarily advance either value.[125]

This highlights a perverse feature of contemporary speech doctrine. Despite its nominal commitment to democratic self-government as the central rationale for constitutionally privileging speech, the doctrine still embraces a negative libertarian approach to speech. That orientation has been especially notable under the Roberts Court, which has defined speech broadly—to cover, for example, violent video games[126] and depictions of animal cruelty[127]—while adopting a strong presumption that any restraints on covered speech are forbidden.[128] In previous generations, by contrast, the Supreme Court was more willing to find certain categories of non-political speech (like obscenity and

121. *Id.* at 375–76 (Brandeis, J., concurring).

122. Bhagwat, *supra* note 101, at 1451.

123. *See* Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 991–94 (2011).

124. *See* Frederick Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699, 724 (1991) (arguing that truth has instrumental value for self-government).

125. *See* Marshall, *supra* note 118, at 34–38.

126. Brown v. Entm't Merch. Ass'n, 564 U.S. 786, 786 (2011).

127. United v. Stevens, 559 U.S. 460, 460 (2010).

128. *See* Ashutosh Bhagwat, *When Speech Is Not "Speech"*, 78 OHIO ST. L.J. 840, 845–46 (2017); Gregory P. Magarian, *The Marrow of Tradition: The Roberts Court and Categorical First Amendment Speech Exclusions*, 56 WM. & MARY L. REV. 1339, 1345–54 (2015).

commercial speech) to be of "low value," and therefore entitled to lesser First Amendment protection.[129]

Ashutosh Bhagwat persuasively explained how contemporary First Amendment doctrine is at odds with the democracy theory of speech. That is especially true of the principle of content neutrality, which the Roberts Court has broadened and hardened.[130] A striking example is *Reed v. Town of Gilbert*, an otherwise forgettable case invalidating a municipal sign ordinance.[131] The ordinance imposed different rules on signage depending on their content. For example, temporary directional signs were subject to more stringent restrictions than others, including those containing ideological messages which were treated most favorably.[132] The Court was unanimous in finding the ordinance content-discriminatory and in the bottom-line conclusion that the ordinance should be struck down.[133] But there was sharp disagreement on the strength of the presumption against content discrimination. Justice Thomas's opinion stated, in more absolute terms than the Court ever has, that content-discriminatory laws are presumptively unconstitutional: "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."[134] The concurring justices (Breyer, Ginsburg, and Kagan) would have adopted a less absolute presumption against constitutionality.[135]

The majority's fixation on content-discrimination is hard to reconcile with the democracy theory of speech—especially when considering a law that treats political speech *more favorably* than other speech.[136] As Justice Kagan notes in her concurring opinion, this hard presumption is also irreconcilable with truth theory.[137] It's hard to see how the discovery of truth is impeded by treating directional signs less favorably than political signs.

*Reed* is emblematic of the disjunction between free speech theory and contemporary doctrine. In its mechanical invocation and application of the general principle that content discrimination is subject to strict scrutiny, the Court has lost sight of *why* content discrimination should be viewed as problematic. The best answer is that it is a prophylactic, aimed at preventing

129. Bhagwhat, *supra* note 101, at 1447.

130. *Id.* at 1430–46.

131. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2219 (2015).

132. *Id.* at 2224–25.

133. *Id.* at 2227, 2232; *id.* at 2233 (Alito, J., concurring); *id.* at 2234 (Breyer, J., concurring); *id.* at 2236, 2236 (Kagan, J., concurring).

134. *Id.* at 2228.

135. *Id.* at 2234 (Breyer, J., concurring); *id.* at 2237 (Kagan, J., dissenting).

136. Bhagwat, *supra* note 101, at 1457.

137. *Reed*, 135 S. Ct. at 2237 ("Allowing residents, say, to install a light bulb over 'name and address' signs but no others does not distort the marketplace of ideas.").

viewpoint discrimination, especially in the realm of democratic politics.[138] Despite the ascendancy of democracy theory among commentators and courts, contemporary doctrine has increasingly moved toward a broader definition of speech and a stiffening of the bar against content discrimination that cannot be justified by the interest in promoting democratic self-government. Nor can it be justified by an interest in promoting the search for truth. Rather, the negative libertarian features of current doctrine are better explained by autonomy theory. The Court may preach fidelity to democratic self-government as its guiding principle, but its practice is more in line with the hands-off to speech favored by those advocating speech as a means of self-fulfillment. As I have elsewhere written, recent speech decisions like *NIFLA v. Becerra*[139] and *Janus v. AFSCME*[140] embrace a relentlessly atomistic approach that is at war with the interest in systemic equality essential to democratic self-government.[141] Though ostensibly grounded in concerns about content discrimination, they actually embed systematic viewpoint discrimination—favoring one side of contentious public issues while disfavoring the other—into First Amendment law.[142]

It should therefore come as no surprise that the atomistic approach that dominates First Amendment doctrine—including its broadening definition of speech and stiffening prohibition on content discrimination—is advancing neither the discovery of truth nor the flourishing of democracy. The concerns that animate Professor Hasen's lecture are thus part of a larger problem with contemporary free speech law, exemplifying the failure of the libertarian approach to speech. As he and others have observed, the costs of producing speech are lower than ever.[143] One can easily start a Twitter or Instagram account, and use it to broadcast words and images to the world at little or no cost. Those who are famous, or especially skilled at messaging, can generate thousands of views in a matter of seconds, and millions of followers over time.

Though speech can be more cheaply disseminated than ever, no one can seriously pretend we have a healthy political discourse. Most distressingly, we have seen a dramatic increase in demonstrably false speech—bullshit and lies—

138. Daniel P. Tokaji, *First Amendment Equal Protection*, 101 MICH. L. REV. 2409, 2425–26 (2003). *See also* Simon & Schuster v. Members of N.Y. State Crime Victim Bd., 502 U.S. 105, 116 (1991) (". . . specter that the government may effectively drive certain ideas or viewpoints from the marketplace."); Turner Broad. Sys. v. FCC, 512 U.S. 622, 641 (1994) (". . . risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or to manipulate the public debate through coercion rather than persuasion.").

139. NIFLA v. Becerra, 138 S. Ct. 2361, 2361 (2018).

140. Janus v. AFSCME, 138 S. Ct. 2448, 2448 (2018).

141. Tokaji, *supra* note 42, at 561–70.

142. *Id.* at 570.

143. *See* Hasen, *supra* note 15, at 201; Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. OF DEMOCRACY 63, 71 (2017).

with traumatic effects on democratic discourse.[144] Recall the vision of robust public debate that Justice Brennan articulated in *New York Times v. Sullivan*. A premise of both truth and democracy theory is that we will actually be talking to one another, sharing ideas with people who see the world differently—not just trolling them—and that we will be open to persuasion. But that is not our world. It is not just the justices of the Supreme Court who are siloed. Most of us live our lives in silos, red and blue, interacting mostly with people who share our ideological views, with very few places where we can interact with and have reasonable conversations with those on the other side.[145]

To be clear, I am not suggesting that social media, deep fakes, bots, and other technologies are responsible for proliferation of bullshit and lies, or the attendant deterioration of democratic discourse. Political polarization, among both politicians and the people, has been on the rise for decades, and appears to be linked to the rise in economic inequality.[146] But the cheapening of speech, combined with the negative libertarian presumptions that dominate contemporary speech doctrine, certainly aren't helping. To the contrary, they are contributing to an unhealthy political discourse that advances neither truth nor democracy.

What can be done about all of this? It is surely asking too much of First Amendment doctrine to fix the problem of spiraling falsehoods.[147] But we can at least try to bridge the growing divide between that doctrine and its truth and democracy-promoting aspirations. Arguing that free speech doctrine is "on a collision course with reality," Professor Bhagwat makes two suggestions: first, that decisions about whether expression is covered by the First Amendment be guided by the concern with democratic self-governance;[148] and second, that the blanket prohibition on content discrimination be reconsidered in contexts where it does not advance that interest.[149] Though we should be careful about abandoning doctrines that have generally served our democracy well for many decades, there is also reason for caution on the other side. We should be equally

144. Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. OF ECON. PERSP. 211, 212–13 (2017); Richard L. Hasen, *The 2016 U.S. Voting Wars: From Bad to Worse*, 26 WM. & MARY BILL OF RTS. J. 629, 629 (2018); Gregory P. Magarian, *Forward into the Past: Speech Intermediaries in the Television and Internet Ages,* 71 OKLA. L. REV. 237, 238, 256–57 (2018).

145. *Political Polarization and Personal Life,* PEW RESEARCH CTR. (June 12, 2014), https://www.people-press.org/2014/06/12/section-3-political-polarization-and-personal-life/ [https://perma.cc/MH5C-6S8K]; Joshua A. Tucker, et al., *Social Media, Political Polarization, and Political Disinformation: A Review of the Scientific Literature,* HEWLETT (Mar. 2018), https://hewlett.org/wp-content/uploads/2018/03/Social-Media-Political-Polarization-and-Political-Disinformation-Literature-Review.pdf [https://perma.cc/97NJ-XNZN].

146. Tokaji, *supra* note 16, at 771–74.

147. *See* Schauer, *supra* note 111, at 919.

148. Bhagwat, *supra* note 128, at 842, 884.

149. Bhagwat, *supra* note 101, at 1429–30, 1453.

careful about an ever-expanding definition of speech and increasingly doctrinaire application of the content-neutrality principle, in contexts where they do not advance the interests in promotion truth and democracy. Another path, suggested by Tabatha Abu El-Haj, is to consider how intermediary groups—including civil associations, labor unions, and political parties—might be strengthened so as to promote a more healthy engagement in democracy.[150] This line of inquiry is especially promising and worthy of deeper exploration.

Professor Hasen has done us all a service by shedding light on how technological innovation has contributed to the impoverishment of democratic discourse. Distressing as those developments are, they allow us the opportunity to consider the lost linkage between the truth and democracy theories of free speech. Although these have long been viewed as distinct, the reality is that democracy cannot function without a shared commitment to truth. The prevalence of public falsehood—the ease with which it is disseminated and the difficulty of checking it—should be seen as a First Amendment problem, which existing doctrine does not adequately address. To be sure, we cannot expect constitutional law to save us from the explosion of lies and bullshit that Professor Hasen and others have documented. The most we can reasonably expect from speech doctrine is that it be better aligned with the promotion of truth and advancement of democratic self-government. The remaining question, to which I now turn, is what we as teachers and scholars can do to advance those ends.

## IV. STOP TALKING ABOUT THE "POST-TRUTH" WORLD

This brings me to my most significant disagreement with Professor Hasen: his repeated reference to the "post-truth" world. I respectfully urge that we all avoid this language. That is not because I disagree with either of his diagnosis of the problem or his prescribed solutions. It is rather because to say that we are in a "post-truth" world concedes—or at least appears to concede—that agreement on truth is no longer possible. If we concede that point, then the liars and bullshitters win.

Two short non-law books are helpful in understanding why it is so harmful to speak of the "post-truth" world, as though it were a thing. I have already summarized the distinction that Professor Frankfurt's *On Bullshit* draws between lies and bullshit, the former characterized by knowledge of the truth and intent to deceive on what it is, the latter by a reckless disregard for truth. As Frankfurt explains, "bullshit is a greater enemy of the truth than lies are."[151] While the liar knows the truth and tries to deceive his audience about it, the

150. Tabatha Abu El-Haj, *Making and Unmaking Citizens: Law and the Shaping of Civic Capacity*, 53 MICH. J. L. REF. (forthcoming); Tabatha Abu El-Haj, *Networking the Party: First Amendment Rights and the Pursuit of Responsive Party Government*, 118 COLUM. L. REV. 1225, 1254 (2018).

151. FRANKFURT, *supra* note 1, at 61.

bullshitter simply does not care. In Frankfurt's words, "his intention is neither to report the truth nor to conceal it."[152] The distinction is thus one of motivation. For the bullshitter, it is not to fool people about what the truth is, but something else—winning votes, making money, or changing the listener's perception of him.

That is why commentator Matthew Yglesias's reference to President Trump as the "Bullshitter-in-Chief" is so manifestly appropriate.[153] Although the President often lies, he more often bullshits, oblivious to whether what he says is true or false. Yet there is a method to his mendacity. As my colleague Ruth Colker has observed, President Trump frequently slings false and insulting statements at his political opponents.[154] The aim isn't so much to deceive as to demean others, while aggrandizing himself.

Bullshit, especially when it comes from the mouth of the President, is poisonous to democracy. That is a key lesson from another short book, historian Timothy Snyder's *On Tyranny: Twenty Lessons from the Twentieth Century*. Drawing on his study of failed democracies of the past, Professor Snyder cautions Americans against complacency in the face of public dishonesty. Among the lessons of the last century is that it is essential to insist upon truth, especially on the part of our elected leaders: "To abandon facts is to abandon freedom. If nothing is true, then no one can criticize power, because there is no basis upon which to do so. If nothing is true, then all is spectacle."[155]

Irreverence for truth spreads like dysentery. In the present moment, it is not merely the President and his press secretaries who evince a disregard for facts. It can filter throughout the government and beyond. Take the recent Supreme Court case challenging the addition of a citizenship question to the U.S. Census.[156] Throughout that litigation, the Department of Commerce and its head Wilbur Ross repeatedly misrepresented what they were up to. They falsely claimed that the reason for adding this question to the census was to facilitate enforcement of Section 2 of the Voting Rights Act. I doubt whether anyone seriously believed this explanation. It was a lie, and such an obvious one that Chief Justice Roberts—joined by the more liberal members of the Court—could not overlook it. As the majority politely put it: "We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decision-making process."[157] While the opinion does not disclose the real reason for adding the question, it was common knowledge by the time it was issued. After the case was briefed

152. *Id.* at 55.
153. Yglesias, *supra* note 6.
154. Colker, *supra* note 7, at 5-8.
155. SNYDER, *supra* note 4, at 65.
156. Dept. of Comm. v. State of New York, 139 S. Ct. 2551, 2551 (2019).
157. *Id.* at 2575.

and argued but before the opinion was released, a treasure trove of documents from the hard drive of a deceased Republican operative showed that the main reason for adding the question was to influence the 2020 redistricting process.[158] Adding the citizenship question would depress participation among Latinos and noncitizens, and thus would be "advantageous to Republicans and Non-Hispanic Whites."[159] Fortunately, the Court called Secretary Ross and the government out on their lie, euphemistically referring to their explanation as "contrived" and "a distraction."[160] Even in the age of Trump, courts may still serve as a bulwark of truth.[161]

My namesake Daniel Patrick Moynihan once said: "Everyone is entitled to his own opinion, but not to his own facts."[162] Yet that is the world in which we increasingly live. And that is why we must resist the temptation to speak of the "post-truth" world. To accept that it is no longer possible for us to reach agreement on truth is to concede democracy to its adversaries. In Snyder's words, "Post-truth is pre-fascism."[163]

I know that Professor Hasen agrees with all this. We both believe that it is essential for us to insist upon truth, even—and especially—in a world where we have such fierce disagreements about what is and what should be. In that sense, our disagreement is semantic—it is about the words we use to describe our present political condition. But to call our disagreement semantic is not to say it is unimportant. For the words we use matter. To speak of our world as "post-truth" is to concede that we are beyond the possibility of truth, to give up on our electoral institutions, our courts, and our collective capacity to see beyond the lies and bullshit. If we surrender that fight, then Donald Trump, Vladamir Putin, the bots, and the trolls have won. And then, truly, democracy is lost.

158. Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019), http://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html [https://perma.cc/9EUP-PAQ8].

159. Andrew Chung, *What's the Big Deal About Adding a Citizenship Question to the U.S. Census*, REUTERS (Jul. 9, 2019), reuters.com/article/us-usa-census-citizenship-explainer/whats-the-big-deal-about-adding-a-citizenship-question-to-us-census-idUSKCN1U42DT [https://perma.cc/WK8Y-AT8Q].

160. Dept. of Comm., 139 S. Ct. at 2575, 2576.

161. Chief Justice Roberts has reminded us of this fact, not only through his opinion for the Court in *Department of Commerce v. State of New York*, but also in his 2019 year-end report on the federal judiciary. Roberts, *supra* note 98, at 2 (emphasizing importance of judiciary in promoting truth, "[i]n our age, when social media can instantly spread rumor and false information on a grand scale").

162. Steven Weisman, *An American Original*, VANITY FAIR (Oct. 2010), https://www.vanityfair.com/news/2010/11/moynihan-letters-201011 [https://perma.cc/G9B4-H7AM].

163. SNYDER, *supra* note 4, at 71.

## V. CONCLUSION

In an era when bullshit is pervasive, there is a strong temptation to give up. We may despair of reaching agreement on what is true and believe that law no longer matters. To indulge such fears would be wrong. Election and speech law cannot fix all the problems that ail our democracy, but they can help. Professor Hasen has made some valuable suggestions on how electoral rules might be modified to promote truth and counter lies and bullshit. To those, I would add improvement of our electoral institutions and our courts, which play an essential role in ensuring other governmental actors' fidelity to truth. As Professor Snyder puts it: "It is institutions that help us to preserve our decency. They need our help as well."[164] We should also consider how speech law might be improved, to better meet its aspirations of advancing truth and democratic self-government. Lastly, we must not accept that our world is "post-truth." Instead we must double down on truth, as though democracy depends upon it. Because it does.

164. *Id.* at 22.