

# THE MARKETPLACE OF FAKE NEWS

*Ari Ezra Waldman\**

## ABSTRACT

*We are often told that fake news is the price we pay for a free society, or that fake news is part of the “marketplace of ideas.” Indeed, most arguments against any kind of regulation of fake news—and even some arguments in favor—rest on the presumption that lies, distortions, and fabrications are part of the marketplace metaphor. This Article challenges that presumption. Since the phrase was coined, the “marketplace of ideas” was always about ideas, not facts, and the law has always treated facts and feelings or opinions about those facts differently. Current interpretations that expand the First Amendment from ideas to facts are not only ahistorical and wrong. They are also complicit in the erosion of the body politic brought on by fake news.*

## TABLE OF CONTENTS

|                                                             |     |
|-------------------------------------------------------------|-----|
| INTRODUCTION.....                                           | 846 |
| I. THE PROBLEM OF FAKE NEWS .....                           | 849 |
| A. <i>Harms to Society</i> .....                            | 850 |
| B. <i>In the Marketplace</i> .....                          | 851 |
| II. EVALUATING SOLUTIONS TO FAKE NEWS .....                 | 857 |
| A. <i>Algorithmic and Financial Responses</i> .....         | 857 |
| B. <i>Speech Norms</i> .....                                | 860 |
| C. <i>Legal Interventions and the First Amendment</i> ..... | 862 |
| III. CHALLENGING THE MARKETPLACE METAPHOR.....              | 866 |
| CONCLUSION.....                                             | 869 |

---

\* Professor of Law and Director, Innovation Center for Law and Technology, New York Law School. Affiliate Scholar, Princeton University, Center for Information Technology Policy. Ph.D., Columbia University; J.D., Harvard Law School. The argument in this Article was delivered as part of an invited presentation at a symposium hosted by the *University of Pennsylvania Journal of Constitutional Law*. A version of this Article was accepted via a Call for Papers for presentation at the American Association of Law Schools annual meeting in January 2018, and was accepted for presentation at the International Conference on Communication and Media Studies in Berkeley, California in October, 2018. Special thanks to the students at the University of Pennsylvania Law School and the editorial board of the *University of Pennsylvania Journal of Constitutional Law*. This Article is the first of three proposed projects on fake news.

## INTRODUCTION

Fake news is a new name for an old problem.<sup>1</sup> Disinformation, misinformation, hoaxes, conspiracy theories, and lies have long tried to influence public opinion. Fake news is enjoying another moment in the national discourse today because its proliferation on online social networks may have influenced a national election.<sup>2</sup> Therefore, scholars, thought leaders, and even online platforms themselves have started to study fake news, its impacts, and its corrosive effect on the body politic.<sup>3</sup>

Fake news is a complex social problem with a variety of solutions. Industry prefers market-based or technological solutions. But relying only on financial incentive structures gets at a small fraction of the fake news out there,<sup>4</sup> as will algorithmic approaches, which also have their own troubling consequences.<sup>5</sup> Some legal scholars have called for further *deregulation* of

---

<sup>1</sup> In the United States, newspapers developed as an adjunct to printing businesses. Until the lead-up to the Revolutionary War, these small printed pamphlets were hyper-local and relatively apolitical. See Charles E. Clark & Charles Wetherell, *The Measure of Maturity: The Pennsylvania Gazette, 1728–1765*, 46 WM. & MARY Q. 279, 292–93 (1989) (stating that out of over 1,900 pieces published by the Gazette between 1728 and 1765, only 1.8% actually touched on politics). See generally MICHAEL SCHUDSON, *THE SOCIOLOGY OF NEWS* 26–83 (2d ed. 2011) (discussing the historical evolution of news in America through the development of the Internet). But in the early Republic, newspapers emerged as intensely partisan mouthpieces of dominant political parties: first, the Federalists and the Democratic-Republicans, and later, the Democrats (of the Jacksonian variety). These papers were biased, and unabashedly so, often making up false, and by some standards, libelous stories about political opponents. *Id.* at 66–69. Norms of neutrality—and honest reporting—are relatively recent phenomena. See Michael Schudson, *The Objectivity Norm in American Journalism*, 2 JOURNALISM 149 (2001) (tracing the development of objectivity in American journalism).

<sup>2</sup> Facebook and Twitter played an outsized role in spreading fake news during the 2016 presidential campaign in the United States. And because of their reach—44% of U.S. adults get their news from Facebook—fake news had a significant impact on campaign discourse. Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, PEW RES. CTR. (May 26, 2016), <http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016/>. Although it is hard to argue with the proposition that fake news had an effect on campaign discourse, whether it impacted the election's outcome is far less clear. Election results are influenced by a multitude of factors; fake news may have been one. That discussion is beyond the scope of this Article.

<sup>3</sup> On February 17–18, 2017, Harvard University's Kennedy School of Government, Northeastern University's NULab for Texts, Maps, and Networks, and Northeastern University's Network Science Institute jointly hosted a conference entitled, "Combating Fake News: An Agenda for Research and Action." The conference brought together a diverse group of lawyers, social scientists, technologists, and industry representatives, all of whom agreed that fake news needs to be discussed and addressed. See David Lazer et al., *Combating Fake News: An Agenda for Research and Action* (May 2, 2017, 11:45 AM), <https://shorensteincenter.org/combating-fake-news-agenda-for-research/> (detailing how fake news spreads and offering solutions to its spread).

<sup>4</sup> See Mark Verstraete, Derek E. Bambauer & Jane R. Bambauer, *Identifying and Countering Fake News* 18 (Ariz. Legal Studies, Discussion Paper No. 17-15, 2017), <http://ssrn.com/abstract=3007971> (noting that a "market-based solution is likely to be under-inclusive because it does not reach the incentives that power trolling and propaganda," which are both "strongly motivated by nonfinancial incentives").

<sup>5</sup> See, e.g., Brett Frischmann & Evan Selinger, *Utopia?: A Technologically Determined World of Frictionless Transactions, Optimized Production, and Maximal Happiness*, 64 UCLA L. REV. DISCOURSE 372 (2016)

online platforms as a means of incentivizing those platforms to address the problem on their own.<sup>6</sup> That counterintuitive proposal forces us to trust that Facebook will regulate itself, even though we know it won't,<sup>7</sup> and flies in the face of what we know motivates online social networks to moderate content in the first place.<sup>8</sup> Others have proposed social solutions, like increased media literacy or bolstering better news sources.<sup>9</sup> But those take time, cannot reach everyone, and may not have any effect on the proliferation of lies, rumor, and conspiracies.<sup>10</sup> Given the inadequacies of these proposals, some experts have proposed legal interventions to address the dangers of fake news.<sup>11</sup> But these legal weapons, we are told, run up against constitutional barriers—namely, the First Amendment.<sup>12</sup>

Civil libertarians argue that fake news is part of the price we pay for a free society. It is part of the marketplace of ideas, a phrase that, although coined almost in passing in Justice Oliver Wendell Holmes's dissent in *Abrams v. United States*,<sup>13</sup> has arguably become one of the most powerful governing

---

(arguing that the increasing use of artificial intelligence to outsource human work raises concerns about free will).

- 6 See Verstraete, Bambauer & Bambauer, *supra* note 4, at 22–24 (“Overall, there is a consensus in the United States that the information ecosystem is best served by limiting liability, not increasing it.”).
- 7 See Sandy Parakilas, Opinion, *We Can't Trust Facebook to Regulate Itself*, N.Y. TIMES (Nov. 19, 2017), <https://www.nytimes.com/2017/11/19/opinion/facebook-regulation-incentive.html> (opining that profit maximization incentivizes companies to collect data rather than police it).
- 8 See Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1625–29 (2018) (discussing the influence of free speech norms, corporate governance, and user norms on social media platforms' moderation of content). Klonick suggests that platforms already have some market incentives to moderate content, but she also proposes law reform to that end that tighten regulation in the gaps. De-regulation won't help.
- 9 See Nicholas Lemann, *Solving the Problem of Fake News*, NEW YORKER (Nov. 30, 2016), <https://www.newyorker.com/news/news-desk/solving-the-problem-of-fake-news> (suggesting that more rigorous fact-checking could help alleviate the spread of fake news).
- 10 See, e.g., Sonia Livingstone, *Media Literacy and the Challenge of New Information and Communication Technologies*, 7 COMM. REV. 3 (2004) (discussing, among other things, the challenges of teaching media literacy in the Internet Age).
- 11 See, e.g., Callum Borchers, *How the Federal Trade Commission Could (Maybe) Crack Down on Fake News*, WASH. POST: FIX (Jan. 30, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/01/30/how-the-federal-trade-commission-could-maybe-crack-down-on-faknews/?utm\\_term=.af5edf10ef24](https://www.washingtonpost.com/news/the-fix/wp/2017/01/30/how-the-federal-trade-commission-could-maybe-crack-down-on-faknews/?utm_term=.af5edf10ef24) (explaining how Federal Trade Commission regulation of fake news as commercial speech could conform with United States Supreme Court precedent).
- 12 In addition to potential First Amendment concerns, there are also statutory barriers. For example, holding platforms liable for third-party content would likely require changes to Section 230 of the Communications Decency Act, which immunizes websites from almost all lawsuits associated with hosted content. See Communications Decency Act of 1996, 47 U.S.C. § 230 (2012). And given congressional gridlock, the likelihood of Congress proposing and voting on any changes to Section 230 is slim. See THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 3–30 (2012) (describing Congress's paralysis during the fight over the 2011 budget); see also SARAH A. BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK 23–25 (2003) (discussing the relationship between hyperpartisanship and congressional gridlock).
- 13 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

analogies in First Amendment law. It holds, in short, that the only way for democratic society to determine the best idea among many is to let ideas fight it out in the field: “[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market,” Holmes wrote.<sup>14</sup> Good ideas, like the best products, will win out and bad ideas, like inferior, faulty, or poorly made products, will be tossed aside. Getting the state involved in any capacity in the fight against fake news, the argument goes, runs afoul of this most basic free speech principle of nonintervention and tolerance. Requiring changes in platform design, applying a consumer protection agenda, or using the law to intervene in any other way to address online social networks’ complicity in the spread of fake news runs up against this barrier.

In response, some scholars argue that First Amendment doctrine permits state regulation of fake news even within the marketplace of ideas metaphor. After all, sometimes markets fail. And when they do, the state steps in to fix it, whether through forced disclosures, consumer protections, or even more draconian measures. Fake news is a market failure, an example of falsehoods rising to the top due to information asymmetries and the inability of consumers to discern good ideas from bad.<sup>15</sup> Government intervention, therefore, makes sense.

This response, though persuasive, misses the point. It commits an epistemic error. To suggest that the proliferation of fake news represents a breakdown in a market where consumers trade ideas is to presume that fake news concerns ideas about which the public can debate. It doesn’t. Fake news does not concern ideas. It concerns facts. And the law treats ideas about facts and facts themselves differently. So, too, does the marketplace of ideas analogy, which does not and was never meant to apply to basic facts. Therefore, I argue that the marketplace of ideas metaphor does not apply to fake news. If civil libertarians would like to use the First Amendment to stand in the way of using the law to stop fake news, they need to deploy a different doctrine.<sup>16</sup>

This Article proceeds as follows. Part I defines fake news, provides historical context to the problem, and identifies its effects on public discourse as

---

<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., Noah Feldman, Opinion, *Closing the Safe Harbor for Libelous Fake News*, BLOOMBERG: VIEW (Dec. 16, 2016, 12:24 PM), <https://www.bloomberg.com/view/articles/2016-12-16/free-speech-libel-and-the-truth-after-pizzagate> (discussing the so-called “Pizzagate” scandal while comparing European models of regulating fake news to potential legal remedies for libel in the United States); Noah Feldman, Opinion, *Fake News May Not Be Protected Speech*, BLOOMBERG: VIEW (Nov. 23, 2016 1:22 PM), <https://www.bloomberg.com/view/articles/2016-11-23/fake-news-may-not-be-protected-speech>.

<sup>16</sup> Exactly how we should use law to address the fake news problem will be the subject of my forthcoming scholarship, *Network (Fake) News*. I will show that the spread of fake news is a designed-in aspect of online social network platforms. Therefore, I argue that the common law of products liability for design defects offers lawyers and legal scholars several principles for structuring a legal response to fake news.

the central problem to address. This Part also describes the marketplace of ideas metaphor and lays out the conventional belief that fake news is a part of that marketplace. Part II reviews some of the proposals to address the problem of fake news and argues that the marketplace of ideas analogy is a powerful barrier to implementation. Part III challenges the application of the marketplace of ideas principles to fake news, arguing that the marketplace of ideas was never meant to include facts. Nor should it. I conclude with a summary and avenues for future research.

## I. THE PROBLEM OF FAKE NEWS

Fake news, which I define as misinformation designed to mislead readers by looking like and coming across as traditional media,<sup>17</sup> is similar to much older forms of misinformation. Biased newspapers affiliated with political parties in the early Republic frequently printed misleading articles.<sup>18</sup> In 1925, *Harper's Magazine* published a piece titled "Fake News and the Public."<sup>19</sup> And a significant portion of the U.S. population believed stories suggesting that President Franklin Roosevelt was either in on or at least knew about the Japanese plan to bomb Pearl Harbor.<sup>20</sup> We have tolerated it for so long, the argument goes, because it is the price we pay for a free society. Letting people lie to and mislead us, coupled with our ability to discern a statesman from a charlatan (if that is indeed what we want), is what democracy is all about. In this Part, I discuss the problems associated with the spread of fake news. I then describe how fake news fits into the marketplace of ideas analogy.

---

<sup>17</sup> This definition brings together the views of several scholars, all of whom are still struggling to define fake news. Some definitions are expansive. For example, the economists Hunt Allcott and Matthew Gentzkow define it as "news articles that are intentionally and verifiably false, and could mislead readers." Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 213 (2017). They purposely include satire "that could be misunderstood as factual . . ." *Id.* Mark Verstraete, Derek Bambauer, and Jane Bambauer argue that separating out different kinds of fake news, based on origin, intent to deceive, and motive to create, is essential in order to identify solutions to a multifaceted problem. *See* Verstraete, Bambauer & Bambauer, *supra* note 4, at 5–10. They would exclude satire from an umbrella definition. *Id.* at 5.

<sup>18</sup> SCHUDSON, *supra* note 1, at 66–72.

<sup>19</sup> Edward McKernon, *Fake News and the Public*, 151 HARPER'S MAG., Oct. 1925, at 528.

<sup>20</sup> *See* KARLYN BOWMAN & ANDREW RUGG, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, AEI PUBLIC OPINION STUDIES: PUBLIC OPINION ON CONSPIRACY THEORIES 10 (2013), [http://www.aei.org/wp-content/uploads/2013/11/-public-opinion-on-conspiracy-theories\\_181649218739.pdf](http://www.aei.org/wp-content/uploads/2013/11/-public-opinion-on-conspiracy-theories_181649218739.pdf) (demonstrating that 31% of those surveyed in a 1991 Gallup poll responded that they "agree" that President Roosevelt knew in advance about the bombing of Pearl Harbor, and 18% of those surveyed in a 1971 Harris poll responded that "a conspiracy involving President Roosevelt, who wanted an excuse to go to war with Germany and provoked Japan into attacking the U.S.," was a cause of World War II).

### A. Harms to Society

Although some misinformation can be relatively innocuous—Are there really only six simple steps to a slim waistline and six-pack abs?<sup>21</sup>—fake news has significant social costs. First, falsehoods dressed up as truth directly reduce voter knowledge of basic facts, which is already on the decline.<sup>22</sup> Second, fake news corrodes public discourse by creating the circumstances necessary for narratives of false equivalencies. If every statement is given equal weight, no matter how demonstrably false, then it becomes possible, in the name of journalistic neutrality, to have news segments devoted to one candidates' bankruptcies (true)<sup>23</sup> and another candidates' leadership of a pedophilia ring (not true).<sup>24</sup> And because of the way we process information, once a story is heard, even retractions are ill equipped to change our minds.<sup>25</sup> Third, and

21 See, e.g., David Barr, *Get 6-Pack Abs in 6 Simple Moves*, MUSCLE & FITNESS, <https://www.muscledandfitness.com/workouts/abs-and-core-exercises/get-six-pack-abs-6-moves> (last visited Feb. 11, 2018).

22 See THE ECONOMIST & YOUNG, THE ECONOMIST/YOUNG POLL: DECEMBER 17–20, 2016–1376 US ADULTS 58 (2016) [https://d25d2506sfb94s.cloudfront.net/cumulus\\_uploads/document/ljv2ohxmzj/econTabReport.pdf](https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/ljv2ohxmzj/econTabReport.pdf) (showing that in 2016, 42% of self-identified Republicans still believed former President Barack Obama was born in Kenya); see also Kathy Frankovic, *Belief in Conspiracies Largely Depends on Political Identity*, YOUNG (Dec. 27, 2016, 2:34 AM), <https://today.yougov.com/news/2016/12/27/belief-conspiracies-largely-depends-political-iden/> (showing that in December 2016, 46% of Trump voters thought it was either “definitely true” or “probably true” that leaked emails from Hillary Clinton’s campaign “talked about pedophilia and human trafficking—Pizzagate”). See generally Press Release, Annenberg Pub. Pol’y Ctr., Americans Know Surprisingly Little About Their Government, Survey Finds (Sept. 17, 2014), <http://www.annenbergpublicpolicycenter.org/americans-know-surprisingly-little-about-their-government-survey-finds/> (showing that Americans are largely ignorant of basic facts about government).

23 See Michelle Lee, *Fact Check: Has Trump Declared Bankruptcy Four or Six Times?*, WASH. POST (Sept. 26, 2016, 9:58 PM), [https://www.washingtonpost.com/politics/2016/live-updates/general-election/real-time-fact-checking-and-analysis-of-the-first-presidential-debate/fact-check-has-trump-declared-bankruptcy-four-or-six-times/?utm\\_term=.a506243aca8f](https://www.washingtonpost.com/politics/2016/live-updates/general-election/real-time-fact-checking-and-analysis-of-the-first-presidential-debate/fact-check-has-trump-declared-bankruptcy-four-or-six-times/?utm_term=.a506243aca8f) (reporting that Donald Trump’s companies have filed for bankruptcy six times).

24 See Cecilia Kang, *Fake News Onslaught Targets Pizzeria as Nest of Child-Trafficking*, N.Y. TIMES (Nov. 21, 2016), [https://www.nytimes.com/2016/11/21/technology/fact-check-this-pizzeria-is-not-a-child-trafficking-site.html?\\_r=1](https://www.nytimes.com/2016/11/21/technology/fact-check-this-pizzeria-is-not-a-child-trafficking-site.html?_r=1) (explaining the false story that Hillary Clinton was running a pedophile sex ring out of the back room of a pizza shop in Washington, D.C.). Indeed, four of the five most widely-shared fake news stories in the three months leading up to the November election all targeted Secretary Clinton, including stories that she sold weapons to ISIS, that she is disqualified from holding office, and that she was helped by an FBI agent’s murder-suicide. See generally Craig Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook*, BUZZFEED NEWS (Nov. 16, 2016, 5:15 PM), [https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm\\_term=.yok7YmL00#.ikMD1Nd22](https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm_term=.yok7YmL00#.ikMD1Nd22) (explaining that fake news dominated social media closer to the election).

25 See, e.g., Lynn Hasher, David Goldstein & Thomas Toppino, *Frequency and the Conference of Referential Validity*, 16 J. VERBAL LEARNING & VERBAL BEHAV. 107, 111–12 (1977) (explaining that people are heavily influenced by the first version of a story they hear); see also Norbert Schwarz et al., *Metacognitive Experiences and the Intricacies of Setting People Straight: Implications for Debiasing and Public Information Campaigns*, 39 ADVANCES EXPERIMENTAL SOC. PSYCH. 127, 152 (2007) (reaffirming through research that memory does not serve to distinguish between true and false details).

relatedly, in a world where news consumers cannot tell the difference between true and false, fake news reduces trust in traditional media, making it difficult for true stories to have impact. Again, there is already evidence that this is happening.<sup>26</sup> And, finally, fake news contributes to political polarization, which breeds divisiveness and erodes social solidarity. We are psychologically primed to accept without question new information that confirms our prejudices and previous knowledge or assumptions.<sup>27</sup> Highly politicized fake news, which tends to sensationalize political narratives, hardens those silos by playing into our confirmation biases.

These effects are interrelated, creating a feedback loop that could damage democracy. Low-information voters, kept uninformed by falsehoods and narratives of false equivalencies, harden their political biases by selecting media that confirm their previous beliefs, regardless of whether those media report true or fake stories. This increases polarization, which both erodes trust in traditional reporting and further encourages selection of confirming media. Fake news is a self-reinforcing problem.

### B. *In the Marketplace*

Despite these dangers, we tolerate fake news as part of the marketplace of ideas. At least, that is what we are told. The metaphor's underlying notion is that, like a free market in goods, where consumer demand helps the best products rise to the top, a democratic public sphere with the free exchange of ideas will let the best ideas prevail. This principle predates Holmes's metaphor and represents a foundational element of the liberal state.<sup>28</sup>

When Holmes stated 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”<sup>29</sup>—he was echoing centuries-old philosophy. In the *Areopagitica*, John Milton wrote, “Let [Truth]

<sup>26</sup> See Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP (Sept. 14, 2016), <http://www.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx> (showing that trust in the accuracy and fairness of media reports was down 8% from the previous year).

<sup>27</sup> See, e.g., Alessandro Bessi et al., *Science vs Conspiracy: Collective Narratives in the Age of Misinformation*, 10 PLOS ONE 1, 9 (2015), <http://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0118093&type=printable> (concluding that polarized communities rise up around conspiracy theory posts on Facebook); Delia Mocanu et al., *Collective Attention in the Age of (Mis)Information*, 51 COMPUTERS HUM. BEHAV. 1198, 1199 (2015) (finding that while “normative social influence” and “the coherence with the [consumer's] individual system of beliefs” affected “[t]he process of acceptance of a claim,” a claim's origin or whether it was substantiated did not).

<sup>28</sup> See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 71 (1971) (suggesting that where there are differing ideas in the market, the most worthy ideas will become more highly valued); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 25 (2d ed. 1998) (arguing that abundance of ideas leads to more rational and equal choices).

<sup>29</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter.”<sup>30</sup> Similarly, John Stuart Mill, also part of the same intellectual tradition, argued that censorship “robb[ed] the human race.”<sup>31</sup> Instead of silencing bad speech, Mill wrote, put it out in the open so it can be denounced and proved wrong. “If the opinion is right,” censorship deprives us “of the opportunity of exchanging error for truth: if wrong, [the opinion will] lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.”<sup>32</sup>

The marketplace rhetoric gives the metaphor an economic flavor, in particular, the neoclassical economic assumptions of frictionless exchange. Debates over ideas, like competition between different toothpastes or sweaters, will eventually identify the best quality ideas (or toothpastes or sweaters) on the assumptions that everyone has access to all necessary information about those products, that there are no transaction costs to selection, and that individuals actually have the capacity to identify and choose.<sup>33</sup> Richard Posner praised this approach, calling the “Darwinian test” for ideas far superior to a “centrally managed” economy in thought.<sup>34</sup> And Aaron Director, a founding law and economics theorist, noted that, like the rationale for free markets in goods, “[t]he traditional defense of the free market in ideas has in the main also been utilitarian.”<sup>35</sup> To Holmes and his intellectual descendants, then, free speech deserves constitutional protection because the free flow of ideas creates competition that allows the best ideas to succeed and the worst ideas to fail.<sup>36</sup> Government intervention identifying favored ideas would short-circuit this debate and, much like state interference in the free trade of commodities, cause inefficiencies, erode choice, and limit freedom.

As a number of First Amendment scholars have noted, the marketplace of ideas metaphor has dominated the Supreme Court’s free speech jurisprudence.<sup>37</sup> After Holmes introduced the metaphor in 1919, Justice Brandeis, who joined in Holmes’s *Abrams* dissent, reiterated the marketplace of ideas principle in his concurrence in the 1927 case, *Whitney v. California*.<sup>38</sup> Brandeis wrote that when bad or dangerous ideas find their way into the

<sup>30</sup> JOHN MILTON, *AREOPAGITICA* 167 (1644).

<sup>31</sup> JOHN STUART MILL, *ON LIBERTY* 35 (2d ed. 1863).

<sup>32</sup> *Id.* at 35–36.

<sup>33</sup> See *infra* notes 55–58 and accompanying text.

<sup>34</sup> RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 115 (1990).

<sup>35</sup> Aaron Director, *The Parity of the Economic Market Place*, 7 *J.L. & ECON.* 1, 8 (1964).

<sup>36</sup> See R. H. Coase, *Advertising and Free Speech*, 6 *J. LEGAL STUD.* 1, 27 (1977) (“The rationale of the First Amendment is that only if any idea is subject to competition in the marketplace can it be discovered . . . whether it is false or not.”).

<sup>37</sup> See, e.g., Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 *DUKE L.J.* 821, 830–32 (2008) (examining the Supreme Court’s remedial decision to accord more speech when falsehoods or bad ideas persist).

<sup>38</sup> 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).



public sphere, as with speech intended to incite or encourage the violent overthrow of the government, “the remedy to be applied is more speech, not enforced silence.”<sup>39</sup> Landmark free speech Supreme Court opinions since, including, but not limited to, *Board of Education v. Pico*,<sup>40</sup> *Consolidated Edison Co. of New York v. Public Service Commission*,<sup>41</sup> *Bigelow v. Virginia*,<sup>42</sup> *Miami Herald Publishing Co. v. Tomillo*,<sup>43</sup> *Red Lion Broadcasting Co. v. FCC*,<sup>44</sup> *National Endowment for the Arts v. Finley*,<sup>45</sup> *Reno v. ACLU*,<sup>46</sup> and *Virginia v. Hicks*,<sup>47</sup> all leverage the marketplace rhetoric when discussing the scope and reach of First Amendment protections.<sup>48</sup>

---

<sup>39</sup> *Id.*

<sup>40</sup> 457 U.S. 853, 866–67 (1982) (plurality opinion) (“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.’ And we have recognized that ‘the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.’ In keeping with this principle, we have held that in a variety of contexts ‘the Constitution protects the right to receive information and ideas.’ . . . ‘The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.’” (first quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978); then quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); then quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); and then quoting *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring))).

<sup>41</sup> 447 U.S. 530, 537–38 (1980) (“If the marketplace of ideas is to remain free and open, governments must not be allowed to choose ‘which issues are worth discussing or debating . . . .’” (quoting *Police Dept. v. Mosley*, 408 U.S. 92, 96 (1972))).

<sup>42</sup> 421 U.S. 809, 826 (1975) (“The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.”).

<sup>43</sup> 418 U.S. 241, 248 (1974) (“A true marketplace of ideas existed in which there was relatively easy access to the channels of communication.”).

<sup>44</sup> 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, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.” (citing *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945))).

<sup>45</sup> 524 U.S. 569, 587 (1998) (“[A] more pressing constitutional question would arise if Government funding resulted in the imposition of a disproportionate burden calculated to drive ‘certain ideas or viewpoints from the marketplace.’” (quoting *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991))).

<sup>46</sup> 521 U.S. 844, 885 (1997) (referring to the growth of the Internet as a “dramatic expansion of this new marketplace of ideas”).

<sup>47</sup> 539 U.S. 113, 119 (2003) (“Many persons . . . will choose simply to abstain from protected speech . . . harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.” (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486–87 (1965))).

<sup>48</sup> See generally Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 6–7 (1984) (discussing in more depth the reach of the marketplace of ideas metaphor). Indeed, the metaphor is so pervasive that a Westlaw search for the phrase “marketplace of ideas” conducted on February 11, 2018, revealed 427 Supreme Court and federal courts of appeals cases. That number more than doubled (877) when federal district courts were included.

It is hard to overstate the impact of the marketplace of ideas metaphor. It is not only a conceptual framework. The marketplace of ideas is the principle behind the law of content neutrality. Generally, the First Amendment does not permit the state to restrict categories of speech specifically because of the effects such censorship can have on the marketplace of ideas. The Court comes back to this idea regularly. In *R.A.V. v. City of St. Paul*,<sup>49</sup> for example, a case that involved state restrictions on hate speech, the Court said that the “rationale of the general prohibition [of content discrimination] . . . is that content discrimination ‘raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.’”<sup>50</sup> In *Board of Education v. Pico*,<sup>51</sup> the Court responded to an attempt by a school board to censor public school libraries by noting that the “Constitution does not permit the official suppression of ideas. . . . To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned . . . .”<sup>52</sup> And in *Police Department v. Mosley*,<sup>53</sup> the Court made the connection between content neutrality and the marketplace of ideas explicit:

[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>54</sup>

This makes clear that the 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.

The marketplace metaphor, however, has faced substantial criticism, much of which is directed at the neoclassical economic mirage underpinning it. From the left, Stanley Ingber called the metaphor “as flawed as the

---

49 505 U.S. 377 (1992) (holding that the state statute at issue failed due to existence of alternatives neutral to content).

50 *Id.* at 387–88 (quoting *Simon & Schuster, Inc.*, 502 U.S. at 116).

51 457 U.S. 853 (1982).

52 *Id.* at 870–71 (emphasis omitted).

53 408 U.S. 92 (1972) (plurality opinion) (finding a law that failed to distinguish between labor picketing and other forms of picketing to be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment).

54 *Id.* at 95–96 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

economic market.”<sup>55</sup> It ignores what makes us human: our altruism, bigotry, panic, luck, culture, privilege, and so forth.<sup>56</sup> It tends to ignore marginalized populations and entrench powerful interests.<sup>57</sup> It misses the fact that participants in marketplaces have imperfect abilities, including the abilities to discern truth from falsehood and to understand how to figure out the difference in the first place.<sup>58</sup> Behavioral economists have demonstrated many of those flaws empirically.<sup>59</sup>

Like economists, adherents to the marketplace of ideas metaphor responded to these criticisms by noting that even under neoclassical theory, sometimes markets fail. First Amendment law is replete with market failures, if not in so many words. For example, we do not give First Amendment protection to, among other things, true threats,<sup>60</sup> incitements to violence,<sup>61</sup> or yelling fire in a crowded theatre,<sup>62</sup> the last of which is an early example of fake news. The Supreme Court has stated that state intervention to counter these forms of expression passes constitutional muster in part because the evils they target do not add any good ideas to the marketplace. For example, in *Miller v. California*,<sup>63</sup> the Court denied First Amendment protection to obscene speech, stating that, like fighting words, obscenities are “no essential part of any exposition of ideas, and are of such slight social value as a step to truth than any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>64</sup> The same is true for speech

---

<sup>55</sup> Ingber, *supra* note 48, at 16–17.

<sup>56</sup> Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951, 962–63 (1997).

<sup>57</sup> See Blocher, *supra* note 37, at 832–33.

<sup>58</sup> *See id.*

<sup>59</sup> Behavioral economics argues that rational choice theory does not accurately describe how consumers behave in markets. Economic actors are not automatons, always acting rationally and engaging in markets without transaction costs. They are, instead, humans, with cognitive limitations and biases who enter markets with opportunity and transaction costs as well as very little of the information they would normally need to make perfectly rational decisions. The seminal law review article on behavioral economics is Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998). *See also, e.g.*, Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749 (2008); Cass R. Sunstein, *Boundedly Rational Borrowing*, 73 U. CHI. L. REV. 249 (2006).

<sup>60</sup> *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam) (deciding that the threat at issue, made in opposition to the military draft, was merely “political hyperbole” and did not constitute an actionable true threat).

<sup>61</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (upholding a New Hampshire statute prohibiting the use of offensive language against another in public, finding it to be sufficiently narrow in its scope).

<sup>62</sup> *Schenck v. United States*, 249 U.S. 47, 52 (1919) (finding that defendants’ political leaflets, produced and distributed during wartime, could be punishable due to the “clear and present danger” they posed under the circumstances).

<sup>63</sup> 413 U.S. 15 (1973) (reaffirming that obscenity is not constitutionally protected speech, and stipulating that obscenity should be defined based on “contemporary community standards” rather than a national standard).

<sup>64</sup> *Id.* at 20–21 (quoting *Chaplinsky*, 315 U.S. at 572).

that incites a mob to violence<sup>65</sup> and, as I have argued elsewhere, for hate and harassing speech, which disempowers and silences its targets.<sup>66</sup>

Fake news has been reflexively put within the marketplace metaphor. Some have called fake news the price we pay for freedom;<sup>67</sup> others have fit it within the market failure corollary.<sup>68</sup> In either case, the metaphor holds. And, it would seem, false statements of fact are now protected under the First Amendment. In *United States v. Alvarez*,<sup>69</sup> the Supreme Court declared the Stolen Valor Act unconstitutional and overturned a conviction of a man who was prosecuted for lying about his service and medal awards in the Marines. The plurality opinion by Justice Kennedy held that the Act, which prohibited lying about military service, was a content-based restriction on speech, which must either pass strict scrutiny or fail Constitutional muster.<sup>70</sup> Kennedy was generally skeptical of the state's ability to punish the category of false speech, but even if it could, Kennedy wrote, stopping the lies we tell each other does not rise to the level of a compelling state interest.<sup>71</sup> Kennedy clearly stated 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."<sup>72</sup> Although I will argue later this decision misses the mark, for now suffice it to say that the marketplace of ideas metaphor rests behind both arguments against regulating fake news and those that see fake news as a market failure in need of state intervention.

---

65 See *Brandenburg v. Ohio*, 395 U.S. 447, 447–48 (1969) (per curiam) (finding that incitements are unprotected while advocacy of violence is protected).

66 See Ari Ezra Waldman, *Triggering Tinker: Student Speech in the Age of Cyberharassment*, 71 U. MIAMI L. REV. 428 (2017). But see *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (noting that the city could not prohibit expression that "arouses anger, alarm or resentment in others . . . on the basis of race, color, creed, religion, or gender" because such a prohibition constituted viewpoint discrimination).

67 See Jay Stanley, *Fixing Fake News*, ACLU (Dec. 12, 2016, 3:30 PM), <https://www.aclu.org/blog/free-speech/internet-speech/fixing-fake-news> (suggesting that there is nothing either Facebook or the state can, or should, do to combat fake news).

68 See Feldman, *Fake News May Not Be Protected Speech*, *supra* note 15 (arguing that truth may not always be able to defeat falsehoods in the marketplace of ideas).

69 567 U.S. 709, 723 (2012) (plurality opinion) ("Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.")

70 *Id.* at 722–23.

71 *Id.* at 717–23.

72 *Id.* at 718.

## II. EVALUATING SOLUTIONS TO FAKE NEWS

The power of the marketplace of ideas metaphor is evident in the proposed technical, market-based, social, and legal responses to the problem of fake news.<sup>73</sup> Rather than being an exhaustive list, these proposals—and their inadequacies—highlight how the First Amendment, in general, and the marketplace of ideas analogy, in particular, lurks in the background of the debate over fake news.

### A. Algorithmic and Financial Responses

On the technical side, some platforms propose taking humans out of the equation and outsourcing the task of identifying fake news to artificial intelligence. Computer science scholars are working on this, as well,<sup>74</sup> and legal scholars have proposed further expanding platform immunity in order to incent this kind of self-regulation.<sup>75</sup> Some platforms also want to take away the financial incentives for fake news. Macedonian teenagers, for example, were paid to create fake news during the 2016 U.S. presidential campaign.<sup>76</sup> As a result, Google announced that it would prohibit fake news websites from using AdSense to make money off targeted advertisements.<sup>77</sup> Since announcing that policy, Google has moved against hundreds of websites.<sup>78</sup> Facebook has plans to do something similar.<sup>79</sup>

---

<sup>73</sup> Focusing on these four areas—technical, market-based, social, and legal solutions—consciously relies on Larry Lessig’s classic formulation that law, markets, architecture, and norms constrain behavior online. See LAWRENCE LESSIG, *CODE: VERSION 2.0*, 123 (2d ed. 2006). Verstraete, Bambauer, and Bambauer used this same organization in their report on fake news. See Verstraete, Bambauer & Bambauer, *supra* note 4, at 13–29. It is a convenient organizational structure for considering a variety of tools to combat fake news, but using it does not imply that a potentially effective solution could not exist outside these four discrete categories.

<sup>74</sup> See JACOB RATKIEWICZ ET AL., *DETECTING AND TRACKING POLITICAL ABUSE IN SOCIAL MEDIA* 297–304 (2011).

<sup>75</sup> Verstraete, Bambauer & Bambauer, *supra* note 4, at 22–24.

<sup>76</sup> See Samanth Subramanian, *Inside the Macedonian Fake-News Complex*, WIRED (Feb. 15, 2017), <https://www.wired.com/2017/02/veles-macedonia-fake-news/> (telling the story of a Macedonian teen who pulled himself out of poverty by building websites and using Facebook to spread fake news).

<sup>77</sup> See Scott Spencer, *How We Fought Bad Ads, Sites and Scammers in 2016*, GOOGLE: THE KEYWORD (Jan. 25, 2017), <https://www.blog.google/topics/ads/how-we-fought-bad-ads-sites-and-scammers-2016/> (explaining the steps Google has taken to fight back against misleading and predatory advertisements).

<sup>78</sup> Tess Townsend, *Google Has Banned 200 Publishers Since It Passed a New Policy Against Fake News*, RECODE (Jan. 25, 2017 9:01 AM), <https://www.recode.net/2017/1/25/14375750/google-ad-sense-advertisers-publishers-fake-news>.

<sup>79</sup> See JEN WEEDON, WILLIAM NULAND & ALEX STAMOS, *FACEBOOK, INFORMATION OPERATIONS AND FACEBOOK 5* (2017) (laying out plans to solve the problem of fake news in part by disrupting the economic incentives to those who profit from it, thereby undermining the operations that are financially motivated).

These market-based solutions are steps in the right direction, but they are not panaceas for a variety of reasons. First, they fail to capture ideologically created fake news, where the incentive is power, not money. Second, eliminating some of the financial incentives for creating some fake news leaves intact the financial incentives social media platforms have to keep information spreading. One of the reasons why platforms are willing to employ teams of humans to run content moderation is because they have a financial incentive to do so.<sup>80</sup> But unlike harassing or violent content, which has the effect of depressing engagement,<sup>81</sup> fake news generates the clicks, shares, and social engagements Facebook, Twitter, and others need in order to make behavioral targeting work. After all, sharing fake news is a strong indicator of political affiliation, an aspect of our virtual selves Facebook can use to earn advertising dollars from political campaigns, retailers, and even luxury goods. Political leanings are good proxies for our other interests.<sup>82</sup>

Third, technical design strategies have already proved unsuccessful. When a Gizmodo report suggested that Facebook's human editors privileged politically liberal news in its Trending Topics section,<sup>83</sup> Facebook responded with more automation,<sup>84</sup> arguing that the algorithm, the argument went, would not have any of the biases of humans. That, as we know, is not true. Not only is

---

<sup>80</sup> See Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435, 1454 (2011) (stating that “[s]ome intermediaries see digital hate as a potential threat to profits”); see also Klonick, *supra* note 3, at 34 (claiming that the main reason for removing obscene and violent material is the threat that such speech has on profits).

<sup>81</sup> See, e.g., Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 391 (2009) (“Online abuse solidifies male dominance of online spaces by eliminating and muting women’s voices from the internet.”).

<sup>82</sup> See, e.g., Amy Friedman, *Red and Blue Brands: How Democrats and Republicans Shop*, TIME (June 19, 2012), <http://newsfeed.time.com/2012/06/19/red-and-blue-brands-how-democrats-and-republicans-shop/> (exploring the differences in consumer behavior between Republicans and Democrats).

<sup>83</sup> See Michael Nunez, *Former Facebook Workers: We Routinely Suppressed Conservative News*, GIZMODO (May 9, 2016, 9:10 AM), <http://gizmodo.com/former-facebook-workers-we-routinely-suppressed-conser-1775461006> (displaying journalistic research showing that Facebook workers prevented dissemination of stories of interest to conservative readers).

<sup>84</sup> See *Search FYI: An Update to Trending*, FACEBOOK: NEWSROOM (Aug. 26, 2016), <https://newsroom.fb.com/news/2016/08/search-fyi-an-update-to-trending/> (announcing a policy change to automation of the Trending feature on Facebook and an end to reliance on topic summarization by humans).

artificial intelligence just as biased as the humans who program it,<sup>85</sup> Facebook's automation of Trending Topics only made the problem worse.<sup>86</sup>

Moreover, outsourcing human reasoning to a computer is not something we should do on a whim, especially given the attendant moral, ethical, and political questions. We now have the technology to let computers make a litany of decisions for us, from whom to hire<sup>87</sup> to how to move our muscles.<sup>88</sup> And although such technology offers us an extraordinary set of opportunities, designers rarely consider its dark side. As Brett Frischmann and Evan Selinger have argued, Silicon Valley's almost reflexive use of technology and artificial intelligence to solve social problems asks us "to dissociate from our physicality and objectify our incarnate bodies as mere commodities."<sup>89</sup> This

---

85 There is a growing literature on the biases inherent in artificial intelligence, machine learning, and algorithmic processing. See, e.g., Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671 (2016) (examining how, through the lens of Title VII's prohibition of discrimination in employment, the algorithmic techniques used to eliminate human biases fail to do so); Aylin Caliskan, Joanna J. Bryson & Arvind Narayanan, *Semantics Derived Automatically from Language Corpora Contain Human-Like Biases*, 356 SCIENCE 183, 183 (2017) (showing "that standard machine learning can acquire stereotyped biases from textual data that reflect everyday human culture"); Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1 (2014) (arguing for the due process tradition to protect individuals against artificially intelligent scoring systems that risk biased and arbitrary results); Amanda Levendowski, *How Copyright Law Can Fix Artificial Intelligence's Implicit Bias Problem*, 93 WASH. L. REV. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3024938](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3024938) (examining examples of artificial intelligence systems that reflect or exacerbate societal bias through the lens of copyright doctrine); Latanya Sweeney, *Discrimination in Online Ad Delivery*, ACM QUEUE, March 2013, at 2 (finding that structural racism can exist in the technology computer scientists design); Kate Crawford, *Think Again: Big Data*, FOREIGN POL'Y (May 10, 2013, 12:40 PM), <http://foreignpolicy.com/2013/05/10/think-again-big-data> (explaining that big data sets are not immunized from faulty assumptions because they are still designed by humans).

86 Trending Topics became infested with fake news, including a story that Megyn Kelly was fired from Fox News because she supported Hillary Clinton. Verstraete, Bambauer & Bambauer, *supra* note 4, at 19.

87 See, e.g., Zeynep Tufekci, *Algorithmic Harms Beyond Facebook and Google: Emergent Challenges of Computational Agency*, 13 COLO. TECH. L.J. 203, 217 (2015) ("For example, rather than race, a hiring algorithm could discriminate based on correlates of race, which would result in a workforce that excluded certain racial backgrounds. This could be done by hiring people based on 'commuting distance to work,' a factor that companies working on algorithmically calculating the potential success of newly hired employees have already found to be correlated to a low-degree of employee turnover. Such a criterion would not directly target race, but given the residential segregation patterns in many cities around the United States, could easily effectively do so."); see also Kevin McGowan, *Big Bad Data May Be Triggering Discrimination*, BIG L. BUS. (Aug. 15, 2016), <https://biglawbusiness.com/big-bad-data-may-be-triggering-discrimination/> (exploring the fear that algorithms can perpetuate discrimination based on race, sex, or other protected characteristics); Dustin Volz, *Silicon Valley Thinks It Has the Answer to Its Diversity Problem*, ATLANTIC (Sept. 26, 2014), <http://www.theatlantic.com/politics/archive/2014/09/silicon-valley-thinks-it-has-the-answer-to-its-diversity-problem/431334/> (explaining how data mining can perpetuate undetected bias because it is based on specific examples rooted in past patterns).

88 See Frischmann & Selinger, *supra* note 5, at 384 (discussing Max Pfeiffer's research, in which he manipulated how students navigated through a space by using electrical current to trigger their muscles).

89 *Id.* at 386.

is as true for technologies that make our minds redundant. Distinguishing between real and fake news is the kind of discerning engagement with social life that humans are good at, but still a muscle we need to exercise. But as more human agency is erased, the loss of this deep engagement can have deleterious effects on politics, policy, and democracy.<sup>90</sup>

The marketplace of ideas sits in the background of these market-based approaches in two ways. First, as voluntary industry responses to fake news, changes to technology design and financial structures reflect the idea that the best response to a problem is often not a governmental one. Rather, Facebook and other social platforms may simply be responding to consumer preferences: Consumers may stop using their products if they become infested with fake news. Therefore, attempting to stanch the spread of fake news through voluntary adoption of technical design changes may be exactly what the marketplace of ideas analogy envisioned.

Second, online content moderation itself reflects the principles of marketplace of ideas. In her research on how online platforms developed policies regarding third party content, Kate Klonick found that even as platforms like Facebook, YouTube, Twitter, and others developed different policies, those policies were all written by “American lawyers trained and acculturated in American free speech norms and First Amendment law.”<sup>91</sup> Those lawyers all described how they were conscious of traditional American democratic norms, particularly free speech, when writing new policies.<sup>92</sup> The integration of those principles into systematic policies that determined what their users can say online, or which videos remained on YouTube or Twitter and which violated their terms of use, reflected an appreciation for the role the free exchange of ideas plays in the cultural experience of their user bases.<sup>93</sup>

### B. *Speech Norms*

Free speech norms online would seem to make countering fake news difficult, as well. Our feelings about speech on the Internet are still to some extent governed by the cyberlibertarians who dominated early Internet scholarship<sup>94</sup> and by the first few online speech cases in the federal courts.

---

<sup>90</sup> See *Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976) (“Democracy depends on a well-informed electorate . . .”).

<sup>91</sup> Klonick, *supra* note 8, at 28.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 26–28.

<sup>94</sup> See Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 234–37 (2011) (describing how cyberspace idealists consider the Internet as “a paradise that needed no externally imposed laws”); see also JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD 17 (2006) (describing John Perry Barlow, a cyberlibertarian who reasoned that cyberspace came with its own rules).



Early on, the Internet was seen as a true marketplace of ideas, unencumbered by legal restrictions, antiquated social norms, or even our bodies.<sup>95</sup> John Perry Barlow called the Internet “a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity.”<sup>96</sup> Eugene Volokh wrote that the Internet would empower end users to bypass intermediaries and filters, like Rupert Murdoch and the publisher of *The New York Times*.<sup>97</sup> Kathleen Sullivan agreed: Since the Internet was available at home to anyone who could afford a computer and a connection, or to anyone who could rent a few minutes of connectivity at a cybercafé or drive to the public library to use it for free, there would be more speakers and more listeners, and more things said and heard.<sup>98</sup>

Congress and the courts cemented these strong free speech norms with passage and subsequent interpretations of Section 230 of the Communications Decency Act. The provision, which immunizes Internet platforms from lawsuits associated with third-party content on their sites, was first offered as an amendment by then-Representatives Christopher Cox of California and now-Senator Ron Wyden of Oregon<sup>99</sup> to keep the marketplace of ideas online at its acme. Congress explicitly stated that it passed the law to preserve the Internet as “a forum for a true diversity” of views “with a minimum of government regulation,” and to maintain “the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation.”<sup>100</sup> The metaphor just went digital.

Congress’s other reason for enacting Section 230 was to encourage Internet intermediaries, users, and parents to self-police the Internet for obscene conduct.<sup>101</sup> But in interpreting the clause, federal courts cemented broad

---

<sup>95</sup> *The New Yorker* expressed this point in one of its famous cartoons. A dog, sitting at a computer desk, looks down at his doggy friend on the floor and says, “On the Internet, nobody knows you’re a dog.” Peter Steiner, Cartoon, *On the Internet, Nobody Knows You’re a Dog*, NEW YORKER, July 5, 1993, at 61.

<sup>96</sup> John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), <https://www.eff.org/cyberspace-independence>. Barlow was one of the founders of the Electronic Frontier Foundation, a libertarian privacy advocacy group. *A History of Protecting Freedom Where Law and Technology Collide*, ELEC. FRONTIER FOUND., <https://www.eff.org/about/history> (last visited May 9, 2018).

<sup>97</sup> See Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1834 (1995) (explaining how “[a] speaker need no longer satisfy the intermediaries before being allowed to speak”).

<sup>98</sup> See Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1670 (1998) (finding that an abundance of speech can be explained, in part, by the comparatively low cost of a personal computer and Internet connection).

<sup>99</sup> See 141 CONG. REC. H8460–71 (daily ed. Aug. 4, 1995) (describing the amendment and why it would maintain the marketplace of ideas on the Internet).

<sup>100</sup> Communications Decency Act of 1996, 47 U.S.C. §§ 230(a)(3)–(4), (b)(2) (2012).

<sup>101</sup> See *id.* at § 230(b)(4) (describing the desire to “empower parents to restrict their children’s access to objectionable or inappropriate online material”); *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998) (demonstrating how Congress enacted 47 U.S.C. § 230 to remove disincentives to self-regulation); 141 CONG. REC. H8469–71 (daily ed. Aug. 4, 1995) (statements of Reps. Cox,

free speech norms. In *Zeran v. America Online, Inc.*, for example, the Fourth Circuit noted that lawsuits against providers for third-party content would risk “freedom of speech in the new and burgeoning Internet medium.”<sup>102</sup> In a broad holding,<sup>103</sup> the court stated that “Section 230 was enacted, in part, to maintain the robust nature of Internet communication, and accordingly, to keep government interference in the medium to a minimum.”<sup>104</sup> Therefore, although federal courts recognized Section 230’s “Good Samaritan” provision,<sup>105</sup> their broad immunity decisions expanded the marketplace of ideas metaphor to the World Wide Web.

### C. Legal Interventions and the First Amendment

Law can also affect norms. Indeed, law has expressive value that helps move public opinion.<sup>106</sup> Law can also create incentives for companies to act,

---

Wyden, and Barton) (advocating legislation to protect children from offensive materials found on the Internet). This is sometimes called the “Good Samaritan” clause. As Kate Klonick argues, social media platforms have taken this to heart when it comes to harassing, hateful, and harmful speech. See Klonick, *supra* note 8.

<sup>102</sup> 129 F.3d 327, 330 (4th Cir. 1997). Congress made clear that Section 230 was meant to overrule *Stratton Oakmont v. Prodigy Servs.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). In that case, a user of Prodigy’s “Money Talk” bulletin board posted that Stratton Oakmont, an investment bank, committed fraud and other criminal acts before its initial public offering. *Id.* at \*1. Stratton sued Prodigy, arguing that by running the bulletin board and holding itself out as a service that monitored and removed such content, Prodigy should be liable for the defamation. *Id.* at \*1–2. The court agreed. Because Prodigy took an active role in monitoring its bulletin boards, it was a publisher for the purposes of state libel laws and could be held liable for defamatory posts. *Id.* at \*4. When it took up Section 230, Congress made clear that it intended to use the section to overrule *Stratton Oakmont*. See 141 CONG. REC. H8461–70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (referring to disincentives created by the *Stratton Oakmont* decision); S. REP. NO. 104-230, at 194 (1996) (“One of the specific purposes of [Section 230] is to overrule *Stratton Oakmont v. Prodigy* and any other similar decisions . . . .”); H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.) (“The conferees believe that [decisions such as *Stratton Oakmont*] create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.”); see also *Zeran*, 129 F.3d at 331 (emphasizing that Section 230 was adopted to overrule *Stratton Oakmont*); HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATION LAW 494 (1999) (observing that it is “crystal clear that [Section 230 was] designed to change the result in future cases like *Stratton Oakmont*”).

<sup>103</sup> *Zeran*, 129 F.3d at 328.

<sup>104</sup> *Id.* at 330; see also Ben Ezra, *Weinstein & Co. v. Am. Online, Inc.*, 206 F.3d 980, 985 n.3 (10th Cir. 2000) (elaborating that “[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation” (quoting 47 U.S.C. § 230(b)(2))).

<sup>105</sup> *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003) (finding that Section 230 was meant “(1) to promote the continued development of the Internet and other interactive computer services and other interactive media; (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation” (citing 47 U.S.C. § 230(b))).

<sup>106</sup> See, e.g., Citron, *supra* note 81, at 407 (“Law has an important expressive character beyond its coercive one. Law creates a public set of meanings and shared understandings between the state and

whether on their own or in reaction to lawsuits. Therefore, some experts have argued that a consumer protection agenda would be effective against fake news.<sup>107</sup> We are told, however, that such state action would run afoul of the First Amendment's protections for falsehoods because falsehoods are tolerated in the marketplace of ideas.<sup>108</sup>

One way around the marketplace barrier is to suggest that fake news overcrowds the marketplace of ideas with lies intended to confuse us, sow mistrust, or generally influence our choices. Left on its own, that marketplace will collapse under the weight of falsehoods. And we have reason to believe such a marketplace would collapse. In a recent study published in *Science*, researchers at the MIT Media Lab looked at Twitter and studied the diffusion of 126,000 true and false stories tweeted by approximately 3 million people more than 4.5 million times.<sup>109</sup> They classified stories as either true or false using six independent fact-checking organizations. They found that false stories diffused "farther, faster, deeper, and more broadly than the truth in all categories of information."<sup>110</sup> The truth, in other words, could not rise to the top because the marketplace was packed with lies.

This is the market failure corollary to the marketplace of ideas metaphor. In other contexts where information asymmetries in the marketplace prevent us from distinguishing quality goods from lemons, consumer protection law steps in. The Federal Trade Commission ("FTC"), the federal regulatory agency dedicated to protecting consumers from unfair and deceptive business practices, has broad regulatory authority to police "unfair or deceptive [trade practices]."<sup>111</sup> That charge includes holding companies' feet to the

---

the public. It clarifies, and draws attention to, the behavior it prohibits. Law's expressed meaning serves mutually reinforcing purposes. Law educates the public about what is socially harmful. This legitimates harms, allowing the harmed party to see herself *as harmed*. It signals appropriate behavior. In drawing attention to socially appropriate behavior, law permits individuals to take these social meanings into account when deciding on their actions. Because law creates and shapes social mores, it has an important cultural impact that differs from its more direct coercive effects." (emphasis added) (footnotes omitted); Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 68 (2002) (noting that motorcycle helmet laws impact our belief that helmets make us safe); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 349 (1997) (noting that laws can both intentionally and unintentionally affect social norms); Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77, 86–88 (1999) (noting that behavior and laws are related); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2043 (1996) (noting that civil rights laws have had an effect on the meaning of nondiscrimination).

<sup>107</sup> See, e.g., Borchers, *supra* note 11 (exploring First Amendment protection of political views in the media).

<sup>108</sup> See, e.g., *United States v. Alvarez*, 567 U.S. 709, 714–15 (2012) (overturning a conviction under the Stolen Valor Act for lying about military service).

<sup>109</sup> Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, 359 SCIENCE 1146, 1147 (2018).

<sup>110</sup> *Id.*

<sup>111</sup> Federal Trade Commission Act, 15 U.S.C. § 45(a)(2) (2012).

fire for any representation, omission, or practice that is likely to mislead consumers, and identifying unfair practices as they come up.<sup>112</sup> Under these doctrines, the FTC has challenged many deceptive practices, including misleading advertising and deceptive product demonstrations,<sup>113</sup> both of which disrupt our ability to discern good products from bad.

Commerce is the shibboleth of FTC action.<sup>114</sup> And although much of the fake news that proliferated throughout the 2016 U.S. presidential election looks like political speech at first blush, it is arguably a product like any other. Granted, we do not pay for fake news directly, like we do for a car, television, or weight loss pill. However, even propagandists who traffic in fake news are engaged in commerce. They earn advertising revenue off our clicks and shares. They often sell products on their fake news sites. They can pay Facebook to privilege their posts in followers' News Feeds. They are also part of a commercial ecosystem that reaches into the hundreds of billions of dollars per year.<sup>115</sup>

The deception, then, is intimately tied to the indirect commercial aspects of fake news. Websites that masquerade as purveyors of real news leverage the design and structure of online social networks to post articles and bait their highly motivated followers to visit their site. From those visits, they earn valuable data and rack up the high traffic necessary for advertising revenue. Whether they earn money directly or indirectly, fake news sites commodify their visitors into dollars. Financial connections weaker than this have triggered legal interventions in other areas of law,<sup>116</sup> so it is at least arguable that

<sup>112</sup> Woodrow Hartzog, *Unfair and Deceptive Robots*, 74 MD. L. REV. 785, 812–13 (2015).

<sup>113</sup> See CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY 123–25 (2016) (explaining the history and power of the Federal Trade Commission); see also Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 583 (2014) (describing how the Federal Trade Commission enforces companies' private policies).

<sup>114</sup> 15 U.S.C. § 45(a)(2) (empowering the FTC to prevent companies “from using unfair methods of competition *in or affecting commerce* and unfair or deceptive acts or practices *in or affecting commerce*” (emphasis added)).

<sup>115</sup> See *Digital Advertising Spending Worldwide from 2015 to 2020 (in Billions U.S. Dollars)*, STATISTA (2016), <https://www.statista.com/statistics/237974/online-advertising-spending-worldwide/> (finding that advertisement spending “would amount to 229.25 billion U.S. dollars in 2017 and that it would grow to 335.5 billion by 2020.”).

<sup>116</sup> In copyright law, for example, vicarious liability for entities that provide the circumstances necessary for direct infringers to violate third party copyrights requires the right and ability to control the infringers' actions and a financial benefit from the infringement. But, as several courts have held, that financial benefit need not come directly from the sale of infringing goods, but indirectly from the broader ecosystem of infringing commerce. See, e.g., *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263 (9th Cir. 1996) (holding that a swap meet that allowed the sale of directly infringing goods could be held vicariously liable because, among other things, it earned indirect financial benefit from “payment of a daily rental fee by each of the infringing vendors; . . . an admission fee, and incidental payments for parking, food and other services by customers seeking to purchase infringing recordings”). And, in trademark law, which requires marks be used “in commerce” to gain Lanham Act protection, the definition of “in commerce” includes more than merely

the FTC Act’s “in commerce” requirement can be triggered by fake news. Indeed, the FTC has already moved against websites that designed themselves to look like news sites in order to disseminate fake stories about products.<sup>117</sup> Such cases provide a pathway for the FTC to address fake news, as well.

I am sympathetic to this argument. But the marketplace of ideas is still in the way. Free speech law is a libertarian triumph;<sup>118</sup> the marketplace as it stands today has room for almost every kind of statement, including false ones. That is, First Amendment law seems to have decided that fake news is not a market failure. It is true that false statements have been found to have little to no First Amendment value. In *Hustler Magazine v. Falwell*, for example, the Supreme Court stated that “[f]alse statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas.”<sup>119</sup> And in *Brown v. Hartlage*, the Court stated explicitly that falsehoods “are not protected by the First Amendment in the same manner as truthful statements.”<sup>120</sup>

But even as it was recognizing the market failure corollary and perhaps implying that state intervention might be permissible, the Court cabined its rhetoric. In *Hartlage*, the Court recognized that an “erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ they ‘need . . . to survive.’”<sup>121</sup> The Court stated the exact same thing in *Hustler Magazine*.<sup>122</sup> Indeed, as the majority noted in *Alvarez*, the only times the Court has excluded false statements of fact from the marketplace of ideas is when the falsehood was associated with some other legally cognizable harm.<sup>123</sup> *Hustler Magazine* concerned defamation.<sup>124</sup> *Gertz v. Robert Welch, Inc.*,<sup>125</sup> which is quoted in *Hustler Magazine*,

---

earning money directly from the sale of goods. See, e.g., Mark P. McKenna, *Trademark Use and the Problem of Source*, 2009 U. ILL. L. REV. 773, 792–93 (dissecting the meaning of “use in commerce” under the Lanham Act § 45, 15 U.S.C.A. § 1127 (2012)).

<sup>117</sup> See Press Release, Federal Trade Commission, *Marketers of Dietary Supplement Amberen Settle FTC Charges Regarding Misleading Weight-Loss and Menopause Relief Claims* (May 20, 2016), <https://www.ftc.gov/news-events/press-releases/2016/05/marketers-dietary-supplement-amberen-settle-ftc-charges-regarding> (documenting how the Federal Trade Commission filed a complaint against the makers of Amberen, a dietary supplement, for deceptive marketing strategies).

<sup>118</sup> See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 314 (2010) (arguing that the government should stay out of the marketplace of ideas); see also Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 145 (2010) (“The outcome of *Citizens United* is best explained as representing a triumph of the libertarian over the egalitarian vision of free speech.”).

<sup>119</sup> 485 U.S. 46, 52 (1988).

<sup>120</sup> 456 U.S. 45, 60 (1982).

<sup>121</sup> *Id.* at 60–61 (first quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964); then quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

<sup>122</sup> *Hustler Magazine*, 485 U.S. at 52.

<sup>123</sup> *United States v. Alvarez*, 567 U.S. 709, 719–22 (2012).

<sup>124</sup> *Hustler Magazine*, 485 U.S. at 47.

<sup>125</sup> 418 U.S. 323, 325 (1974).

*Hartlage*, and other false statement cases, was about libel.<sup>126</sup> Another false statement case, *Illinois ex rel. Madigan v. Telemarketing Associates*, was about fraud.<sup>127</sup> Therefore, although a consumer protection agenda might intellectually fit within the market failure corollary, the Court's strict adherence to the marketplace metaphor far beyond its economic underpinnings<sup>128</sup> counsels against the constitutionality of FTC intervention.

### III. CHALLENGING THE MARKETPLACE METAPHOR

Another way to respond to the marketplace argument is to challenge it head on. We should not reflexively include fake news in the marketplace of ideas, even as a market failure. Indeed, demonstrable falsehoods were never part of the intellectual tradition of the metaphor. To include them now bastardizes the doctrine and erodes the very freedoms the First Amendment, as the constitutional manifestation of the marketplace of ideas metaphor, is meant to protect.

A fact is “[a] thing that is indisputably the case”<sup>129</sup> or “something that actually exists.”<sup>130</sup> Here are some facts: California is a state in the United States of America. A dachshund is breed of dog. Donald Trump became president in January 2017. Here are some things that are not facts: California is the most desirable state in which to live. Dachshunds are the best dogs to have as pets. Donald Trump has been a great president. I might agree or disagree with each of the last three statements, but they are not, as traditionally understood, facts. I can put forth facts to argue in favor or against them. I can compare California's average temperatures, its economic output, the health of its residents, and its laws to argue it is the best state. But anyone from New York, Florida, Colorado, or almost any other state could muster facts to support an argument that I'm wrong. And they might be correct.

Facts are not values. Values color our impression of facts, create feelings about facts, and even determine which facts we think are important. They do not change the facts themselves. Consider the example of a disagreement about which breeds of dogs are the best as pets. My friends Jim, Patrick, Lisa, and Darbi are discussing their views. Jim, who grew up with golden-doodles, points out that dachshunds have trouble going up and down steps.

---

<sup>126</sup> *Id.* at 327; *see also Hustler Magazine*, 485 U.S. at 51 (citing *Gertz*, 418 U.S. at 339); *Phila. Newspapers v. Hepps*, 475 U.S. 767, 768 (1986) (citing *Gertz*, 418 U.S. at 325, 347); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 472 U.S. 749, 760 (1985) (citing *Gertz*, 418 U.S. at 325, 349); *Hartlage*, 456 U.S. at 60 (citing *Gertz*, 418 U.S. at 340).

<sup>127</sup> 538 U.S. 600, 620 (2003) (“False statement alone does not subject a fundraiser to fraud liability.”).

<sup>128</sup> *See Blocher, supra* note 37, at 836–38 (explaining that the Supreme Court has idealized the “marketplace of ideas” to justify its speech protections).

<sup>129</sup> *See Fact*, GOOGLE DICTIONARY, <http://googledictionary.freecollocation.com/meaning?word=fact> (last visited May 10, 2018).

<sup>130</sup> *See Fact*, DICTIONARY.COM, <http://www.dictionary.com/browse/fact> (last visited Mar. 23, 2018).

Darbi, of New York, has no steps in her apartment, but she notes that dachshunds have a litany of medical issues as they age. Lisa thinks that dachshunds' small size makes them ideal pets for urban living, particularly in cities that have rules about pet size. And Patrick, who grew up in Minnesota with two black labs, thinks dachshunds are too small to run with humans. Jim, Patrick, Lisa, and Darbi leveraged facts to make their argument about dachshunds. But the facts they chose—the ability to run up and down stairs, medical vulnerabilities, size, and speed—varied. Their values, what kinds of things are important for their evaluation of what “best” means, determined the facts they brought to the table.

There is a difference, too, between, on the one hand, facts and disagreements about those facts, and, on the other, our feelings about facts and disagreements about those feelings. I thought BB-8, the droid from *Star Wars: The Force Awakens*, was interposed into the film using CGI technology. My twelve-year-old nephew thought otherwise. We checked. We were both a little right and a little wrong. BB-8 is real, and the real robot device was placed in many of the scenes during shooting. The scenes were also touched up and enhanced using CGI.<sup>131</sup> My nephew and I had a disagreement about a fact, much like when a friend and I wondered if David Letterman's mom is still alive.<sup>132</sup> We either did not remember facts or never knew them in the first place.

Feelings about facts are different. Many people were disheartened, even angry, about the fact that Donald Trump became president in January 2017. But that many people disapproved of his election did not change the fact of his victory. Democrats and Republicans disagreed not about the fact, but about their feelings about the fact: whether Trump's election was a good idea, whether it was motivated by racism and sexism and xenophobia, and whether the country can survive his agenda.<sup>133</sup>

---

<sup>131</sup> See, e.g., Sean Hutchinson, *How Puppeteers Brought BB-8 to Life in 'Star Wars: The Force Awakens,'* INVERSE: ENTERTAINMENT (Apr. 6, 2016), <https://www.inverse.com/article/13909-how-puppeteers-brought-bb-8-to-life-in-star-wars-the-force-awakens> (explaining that BB-8's movement in the film was a product of both computerized special effects and an actual robot controlled by humans in various capacities).

<sup>132</sup> She passed away in 2017. See Chloe Melas, *David Letterman's Mom, a Staple of His Late Night Show, Dies at 95*, CNN (Apr. 12, 2017, 10:52 AM), <http://www.cnn.com/2017/04/12/celebrities/david-letterman-mom-dies/index.html> (“David Letterman's mother, Dorothy Mengerling—who was known for her spots on his late night show—has died.”).

<sup>133</sup> Fake news erodes all of these social processes. Websites that traffic in lies make it impossible to check when two people disagree about basic facts. And fake news radically distorts our feelings about facts and our values. If a widely-shared article states that Hillary Clinton used the back room of a pizza parlor to run a pedophile ring, it is difficult to determine the truth when two people disagree about and want to confirm or challenge that statement's veracity. The presence of that false statement of fact in an article made to look like real news also corrodes popular impressions about Hillary Clinton, in general.

So facts, feelings about facts, and values are distinguishable. Which, if any, are meant to be tolerated in the marketplace of ideas? The intellectual tradition underpinning the marketplace of ideas was never concerned about truth or falsehood of basic facts. Rather, as Frederick Schauer has argued, Milton, Mill, Holmes, Brandeis, and others were primarily concerned about ideas and values. Schauer notes that Milton wrote the *Areopagitica*, in which he stated that “who ever knew Truth put to the wors, in a free and open encounter”<sup>134</sup> as a challenge to censorship, in reaction to the British government’s refusal to let him publish *The Doctrine and Discipline of Divorce*, a pamphlet calling for liberalization of divorce law.<sup>135</sup> When he used the word “truth,” he was not referring to truth about facts—that dachshunds are a breed of dog—but rather about ideas (about divorce), about which he thought his were “truer,” or better than others’. Schauer argues that, even beyond Milton’s self interest in getting his pamphlet published, his writing could not have been about factual truth in law. After all, the law governing falsehoods—fraud and defamation, for example—was “rudimentary” to nonexistent at the time.<sup>136</sup>

Nor were facts and falsehoods part of the free speech tradition that grew in the centuries after Milton. Schauer points out that the seditious libel cases in England and in the American colonies focused almost exclusively on criticism, insult, and satire.<sup>137</sup> Truth was not even a complete defense.<sup>138</sup> Throughout this time, the push for greater speech and press freedom—a larger, freer marketplace—was about the right to criticize the monarch.<sup>139</sup> It was never suggested that such freedom also included a right to lie and have those lies accepted as legitimate contributions to discourse. A close reading of John Stuart Mill’s *On Liberty* also reveals that his defense of the marketplace of ideas extended only to values and feelings about facts, not statements that are demonstrably false. Consider his examples. For Mill, it was wrong to suppress discussion of “open questions of morals,” matters of “ethical conviction,” “doctrine,” “belief in a God,” and “religious opinions,” generally. Indeed, as Schauer notes, Mill stated explicitly that liberty of thought applies

---

<sup>134</sup> MILTON, *supra* note 30, at 167.

<sup>135</sup> See Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 902–03 (2010) (explaining that Milton was motivated to write *Areopagitica* because the government did not grant him a publication license for his pamphlet arguing for “liberalization of the then-prevailing strict Anglican rules about divorce”).

<sup>136</sup> *Id.* at 903.

<sup>137</sup> See Thomas A. Green, *The Jury, Seditious Libel, and the Criminal Law*, in R.H. HELMHOLZ & THOMAS A. GREEN, *JURIES, LIBEL, & JUSTICE: THE ROLE OF ENGLISH JURIES IN SEVENTEENTH- AND EIGHTEENTH-CENTURY TRIALS FOR LIBEL AND SLANDER* 37, 40, 43 (1984) (providing examples of seditious libel charges against individuals who criticized the government in writing), *cited in* Schauer, *supra* note 135, at 904.

<sup>138</sup> See Green, *supra* note 137, at 41 (“The official doctrine . . . did not recognize truth as a defense.”).

<sup>139</sup> See Schauer, *supra* note 135, at 903–04 (“Campaigns for increased freedom of speech and freedom of the press were largely about the claimed right to criticize . . . the monarch . . .”).



to “morals, religion, politics, social relations, and the business of life.”<sup>140</sup> Facts were not included.

Justices Holmes and Brandeis, arguably the most important proponents of the marketplace of ideas in the American legal tradition, evidenced a similar focus on ideas and advocacy, not facts. *Abrams, Whitney*, and *Gilow v. New York*,<sup>141</sup> where Holmes and Brandeis joined on another dissent that invoked the marketplace of ideas,<sup>142</sup> were about advocacy for the overthrow of the government.<sup>143</sup> *Schenck v. United States* concerned debate about the World War I draft.<sup>144</sup> Demonstrably false statements were not part of this jurisprudence, or of its intellectual tradition.

The marketplace of ideas was always meant to be a marketplace of *ideas*, not *facts*. There is no marketplace in facts. Indeed, no area of law permits a market in facts.<sup>145</sup> In fact, the goal of fake news is to create one, to erode the stability of foundational elements of society—namely, truth. And the reflexive application of a First Amendment metaphor that never contemplated a debate over truth and falsehood to demonstrable lies is complicit in the corrosion of the body politic brought on by fake news. In this way, tolerating the proliferation of fake news erodes the free and open debate that the First Amendment was intended to protect: If we cannot agree on the veracity of basic facts, debate stops, partisanship hardens, and social solidarity breaks down.

## CONCLUSION

Fake news is a problem for all of us. Democracy is under threat when the truth is no longer a check on power. As such, we all have a role to play in fighting back against the influence of fake news. But current interpretations of the First Amendment make that difficult. I have shown that the marketplace of ideas metaphor has metastasized far beyond its original incarnation, and far beyond reason. Its power as a governing principle of First Amendment law is equally enormous. That is regrettable. Facts, like gravity, are not up for debate; only our impressions or feelings about them are. To suggest that demonstrably false statements of fact cannot be removed from the body politic, especially given their corrosive effects on the very freedom the First Amendment is meant to protect, bastardizes the First Amendment and its marketplace metaphor. It makes little theoretical or doctrinal sense

---

<sup>140</sup> MILL, *supra* note 32, at 34, 71, *quoted in* Schauer, *supra* note 135, at 905.

<sup>141</sup> 268 U.S. 652 (1925).

<sup>142</sup> *Id.* at 672–73 (Holmes, J., dissenting).

<sup>143</sup> *Whitney v. California*, 274 U.S. 357, 359 (1927); *Gilow*, 268 U.S. at 654 (majority opinion); *Abrams v. United States*, 250 U.S. 616, 617 (1919).

<sup>144</sup> 249 U.S. 47, 48–49 (1919).

<sup>145</sup> Facts are not copyrightable, for example. Some modicum of originality is required to put facts in the marketplace. *See* *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344 (1991) (stating that “facts are not copyrightable”).

for the First Amendment to stand as a barrier to legal interventions against fake news, at least to the extent that such a barrier is justified by the related marketplace and contact-neutrality doctrines. Rather than reflecting a hands-off approach, tolerating fake news is a normative choice, one that benefits powerful, moneyed interests who crave power no matter the cost.