

What If More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble

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I. INTRODUCTION

The results and aftermath of the 2016 U.S. presidential election have brought increased attention to the dynamics of the contemporary news and information ecosystem and how these dynamics affect citizen knowledge and political decision-making. Specific points of focus have included the extent to which algorithmically-driven search and social media platforms are facilitating the construction of “filter bubbles” or “echo chambers”,¹ the presence of political bias in content curation platforms,² the extent to which such platforms facilitate the widespread dissemination of false news stories,³ and inflammatory political advertisements placed by foreign governments.⁴ These phenomena interact in ways that have raised significant concerns about the nature of the relationship between contemporary news and information channels, as well as the effective functioning of the democratic process.⁵

1. See generally, Mostafa M. El-Bermawy, *Your Filter Bubble Is Destroying Democracy*, WIRED (Nov. 18, 2016, 5:45 AM), [<https://perma.cc/K87X-NJ59>]; see also Matthew Ingram, *Facebook and the News: Trends, Filter Bubbles and Algorithmic Bias*, FORTUNE (May 12, 2016), <http://fortune.com/2016/05/12/facebook-and-the-news/> [<https://perma.cc/2KLF-EP6P>].

2. See, e.g., Olivia Solon & Sam Levin, *How Google's search algorithm spreads false information with a rightwing bias*, THE GUARDIAN (Dec. 16, 2016, 06:00 EST), <https://www.theguardian.com/technology/2016/dec/16/google-autocomplete-rightwing-bias-algorithm-political-propaganda> [<https://perma.cc/C9BT-2WP8>]; see also Daniel Trielli et al., *Googling Politics: How the Google Issue Guide on Candidates is Biased*, SLATE (June 7, 2016), http://www.slate.com/articles/technology/future_tense/2016/06/how_the_google_issue_guide_on_candidates_is_biased.html [<https://perma.cc/N8DU-Y4HR>]; Nelson Granados, *How Facebook Biases Your News Feed*, FORBES (June 30, 2016, 7:26 PM), <https://www.forbes.com/sites/nelsongranados/2016/06/30/how-facebook-biases-your-news-feed/#799f10621d51> [<https://perma.cc/73LB-CYT4>]; Issie Lapowsky, *Of Course Facebook Is Biased. That's How Tech Works Today*, WIRED (May 11, 2016, 7:00 AM) <https://www.wired.com/2016/05/course-facebook-biased-thats-tech-works-today/> [<https://perma.cc/5AKR-63KV>].

3. See generally, Jen Weedon et. al, FACEBOOK, INFORMATION OPERATIONS AND FACEBOOK 8 (Version 1.0, Apr. 27, 2017), <https://fbnewsroomus.files.wordpress.com/2017/04/facebook-and-information-operations-v1.pdf> [<https://perma.cc/63QM-SH65>]; ALICE MARWICK & REBECCA LEWIS, DATA & SOC'Y, MEDIA MANIPULATION AND DISINFORMATION ONLINE 44, <https://datasociety.net/pubs/oh/DataAndSocietyMediaManipulationAndDisinformationOnline.pdf> [<https://perma.cc/6M9Y-FLCN>].

4. See, e.g., Mark Isaac & Scott Shane, *Facebook's Russia-Linked Ads Came in Many Disguises*, N.Y. TIMES (Oct. 2, 2017), <https://www.nytimes.com/2017/10/02/technology/facebook-russia-ads-.html> [<https://perma.cc/ZH2B-BY6E>].

5. See, e.g., Clive Thompson, *Social Networks Must Face Up to Their Political Impact*, WIRED (Jan. 5, 2017, 6:01 PM), <https://www.wired.com/2017/01/social-networks-must-face-political-impact/> [<https://perma.cc/2WZ7-4GEJ>]; Alex Kantrowitz, *How The 2016 Election Blew Up in Facebook's Face*, BUZZFEED (Nov. 21, 2016, 11:15 AM), <https://www.buzzfeed.com/alexkantrowitz/2016-election-blew-up-in-facebooks-face> [<https://perma.cc/9JKJ-5DCA>]; El-Bermawy, *supra* note 1; Nathaniel Persily, *Can Democracy Survive the Internet*, 28 J. DEMOCRACY 63.

In 2013, the World Economic Forum presciently highlighted “massive digital misinformation” as a leading global risk in its annual global risk assessment.⁶ In 2016, renowned fact-checking organization PolitiFact declared “fake news” its Lie of the Year.⁷ Nonetheless, at least in the U.S., issues of misinformation in the digital sphere have only very recently found their way onto the communications policy agenda.⁸

This somewhat sluggish response can be explained, at least in part, by a First Amendment tradition that has valorized the notion of “counterspeech.” A central tenet of the First Amendment is that more speech is an effective remedy against the dissemination and consumption of false speech.⁹ The counterspeech doctrine is a perspective that was first explicitly articulated by Justice Louis Brandeis in *Whitney v. California*.¹⁰ Since then, the effectiveness of counterspeech has become an integral component of most conceptualizations of an effectively functioning “marketplace of ideas,” in which direct government regulation of speech is minimized in favor of an open and competitive speech environment.¹¹

This Article seeks to unpack the set of assumptions about the dynamics of the production, dissemination, and consumption of news that are embedded in the counterspeech doctrine. This Article then questions whether these

6. See WORLD ECONOMIC FORUM, GLOBAL RISKS 2013: EIGHTH EDITION 23 (2013), http://www3.weforum.org/docs/WEF_GlobalRisks_Report_2013.pdf [<https://perma.cc/9GKG-UCW3>].

7. See generally Angie Drobnic Holan, *2016 Lie of the Year: Fake News*, POLITIFACT (Dec. 13, 2016), <http://www.politifact.com/truth-o-meter/article/2016/dec/13/2016-lie-year-fake-news/> [<https://perma.cc/8X2N-SHJ9>].

8. See, e.g., *Extremist Content and Russian Disinformation Online: Working with Tech to Find Solutions*, Hearing Before the S. Comm. on the Judiciary, Subcomm. on Crime and Terrorism, 115th Cong. (Oct. 31, 2017), <https://www.judiciary.senate.gov/meetings/extremist-content-and-russian-disinformation-online-working-with-tech-to-find-solutions> [<https://perma.cc/42VE-5HSD>]; *Social Media Influence in the 2016 United States Elections*, Hearing Before the S. Select Comm. on Intelligence (Nov. 1, 2017), <https://www.intelligence.senate.gov/hearings/open-hearing-social-media-influence-2016-us-elections> [<https://perma.cc/K65Y-XAQ4>]; *Russia Investigative Task Force Open Hearing with Social Media Companies*, Hearing before the H. Permanent Select Comm. on Intelligence (Nov. 1, 2017), <https://intelligence.house.gov/calendar/eventsingle.aspx?EventID=814> [<https://perma.cc/8DYT-QRJU>].

9. See Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech*, 2000 B.Y.U. L. REV. 553, 553-554 (2000) (“Rather than censor allegedly harmful speech and thereby risk violating the First Amendment’s protection of expression, or file a lawsuit that threatens to punish speech perceived as harmful, the preferred remedy is to add more speech to the metaphorical marketplace of ideas”).

10. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

11. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). (“[T]he ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution.”); see also Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1, 3 (1996); Ronald Coase, *The Market for Goods and the Market for Ideas*, 63 AM. ECON. REV. 384, 384 (1974) (“[I]n the market for goods, government regulation is desirable whereas, in the market for ideas, government regulation is undesirable and should be strictly limited.”).

assumptions remain viable in the face of the evolving structure and operation of the contemporary media ecosystem: and if not, what this means for contemporary media law and policy. Specifically, this Article argues that conditions, such as the structural and economic changes that have affected the news media, increased fragmentation and personalization, and increasingly algorithmically-dictated content dissemination and consumption, affect the production and flow of news in ways that may make it more difficult than it has been in the past to assume that legitimate news will systematically win out over false news. Thus, just as it has been asked whether the assumptions underlying the Second Amendment right to bear arms (written in the era of muskets and flintlocks) are transferrable to today's technological environment of high-powered, automatic assault weapons,¹² it may be time to ask whether this fundamental aspect of First Amendment theory, crafted in an era when news circulated primarily via interpersonal contact and print media, and in which electronic media were just beginning to develop, is effectively transferrable to today's radically different media environment.

In addressing this issue, Part I will review the counterspeech doctrine, its underlying assumptions, the ways that it has been put into practice in legal and policy decision-making, and the critiques that have been leveled against it. As Part I will illustrate, the focal points of these critiques have been the psychological and behavioral barriers to counterspeech, as well as the resistance of certain types of speech to the effectiveness of counterspeech. Missing from the counterspeech dialogue, however, has been a substantive consideration of whether the evolution of the media ecosystem has progressed in ways that might affect the validity of the doctrine.

Part II then will provide an overview of the profound technological changes that have affected the media ecosystem and media users over the past two decades. While most of these changes are widely recognized, this section will argue that each of these developments bears directly on the integrity of the counterspeech doctrine. Specifically, this part will illustrate that technological changes have: 1) affected the relative prominence of the production of true versus false news; 2) diminished the gatekeeping barriers that have traditionally curtailed the production and dissemination of false news; 3) increased the ability of those producing false news to target those most likely to be receptive to/affected by the false news; 4) diminished news consumers' likelihood of being exposed to accurate news that counteracts false news; 5) diminished news consumers' ability to distinguish between true and false news; and 6) enhanced the speed at which false news can travel.

12. See, e.g., Christopher Ingraham, *What 'Arms' Looked Like When the 2nd Amendment Was Written*, WASH. POST (June 13, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/06/13/the-men-who-wrote-the-2nd-amendment-would-never-recognize-an-ar-15/?utm_term=.86da76908f41 [<https://perma.cc/KA8E-WV53>] (“Of course, semiautomatic firearms technology didn't exist in any meaningful sense in the era of the founding fathers. They had something much different in mind when they drafted the Second Amendment. The typical firearms of the day were muskets and flintlock pistols. They could hold a single round at a time, and a skilled shooter could hope to get off three or possibly four rounds in a minute of firing. By all accounts they were not particularly accurate either.”).

Each of these six conditions contributes to undermining the extent to which counterspeech can effectively operate as a fundamental assumption of First Amendment theory.

Finally, Part III will consider the broader political, legal, and policy implications of this argument. In particular, this part will consider what the diminished efficacy of counterspeech might mean for the understanding of the marketplace of ideas metaphor and the potential for failure in the marketplace of ideas. The results of the 2016 presidential election will be used to examine possible causes and indicators of such market failure. This part will conclude with a consideration of the legal and policy implications of a media ecosystem in which the counterspeech doctrine has been undermined due to technological change.

II. COUNTERSPEECH AND THE FIRST AMENDMENT: ASSUMPTIONS, APPLICATIONS, AND CRITIQUES

The counterspeech doctrine was first formally articulated by Justice Louis Brandeis in *Whitney v. California*.¹³ According to Brandeis, “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”¹⁴ This perspective is in many ways a natural outgrowth of the well-known “marketplace of ideas metaphor”,¹⁵ which has served as a fundamental principle in communications law and policy,¹⁶ but has been subject to substantial critique in its own right.¹⁷ As Justice Holmes’ famous articulation of the marketplace of ideas metaphor asserts, “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.”¹⁸ Under this formulation, the ideas marketplace is inherently capable of distinguishing between truth and falsity and can be counted on to accept and act upon true information and reject false information. This process is, in turn, fundamental to the well-functioning democracy that, according to many interpretations, the First Amendment is intended to protect.¹⁹ Today, Holmes’

13. See 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

14. *Id.*

15. See Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1167 (2015) (observing that Brandeis’ opinion in *Whitney v. California* represents a “‘canonical formulation’ of the marketplace of ideas metaphor”).

16. See generally PHILIP M. NAPOLI, FOUNDATIONS OF COMMUNICATIONS POLICY (2001).

17. See, e.g., Darren Bush, “*The Marketplace of Ideas: Is Judge Posner Chasing Don Quixote’s Windmills?*”, 32 ARIZ. ST. L.J. 1107, 1146 (2000) (arguing that, in realms such as speech, “the market metaphor becomes increasingly less applicable or useful”); Ho & Schauer, *supra* note 15; Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984).

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

19. See generally ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960); See also CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1995).

statement is echoed within more contemporary notions of the “wisdom of crowds”²⁰ or “the wealth of networks.”²¹

Counterspeech is an outgrowth of this marketplace of ideas framework. Given the metaphor’s assumption that the marketplace is capable of effectively distinguishing between truth and falsity,²² then a speech environment that facilitates as much speech as possible is a potentially effective way of assuring that truth prevails over falsity, and that the good ideas prevail over the bad ones. “More speech” (i.e., counterspeech) thus becomes an effective and First Amendment-compliant approach to assuring that individuals have the information they need to be informed and effective participants in the democratic process.

There are a number of fundamental assumptions that underlie this perspective. First, there is the assumption that individuals are capable of discerning between true and false information.²³ The logic here is that, just as participants in the traditional product market are capable of distinguishing between high and low value products, participants in the idea market are similarly capable of distinguishing between true and false news and information. A second, related, assumption is that participants in the idea marketplace place greater value on true news and information than they do on false information.²⁴ This assumption strikes at the core of what it is the marketplace actually values. A third assumption is that, as late U.S. Supreme Court Justice Antonin Scalia has stated, “[g]iven the premises of democracy, there is no such thing as too much speech.”²⁵ A fourth assumption that underlies the counterspeech doctrine is that a sufficient number of those exposed to false information also will be exposed to the countervailing true information.²⁶ Of course, if the previous assumptions hold true, then this exposure to true and accurate information will have its desired effect in terms

20. See generally JAMES SUROWIECKI, *THE WISDOM OF CROWDS* XII (2004) (arguing that “under the right circumstances, groups are remarkably intelligent, and are often smarter than the smartest people in them”).

21. YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 4 (2006) (illustrating “the rise of effective, large-scale cooperative efforts – peer production of information, knowledge, and culture”).

22. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market”).

23. See, e.g., Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 801 (discussing the “rational audience” assumption in First Amendment jurisprudence: “The first of these assumptions is that audiences are capable of rationally assessing the truth, quality, and credibility of core speech”).

24. See *Goldman & Cox*, *supra* note 11, at 18 (“Thus, if consumers have no very strong preference for truth as compared with other goods or dimensions of goods, then there is no reason to expect that the bundle of intellectual goods provided and “traded” in a competitive market will have maximum truth content. If people valued falsehood, then perfect competition would provide falsehood in a Pareto-optimal way.”).

25. See *McCormell v. FEC*, 540 U.S. 93, 258-59 (2003) (Scalia, J., concurring in part and dissenting in part).

26. See, e.g., Vincent Blasi, *Reading Holmes through the Lens of Schauer: The Abrams Dissent*, 72 NOTRE DAME L. REV. 1343, 1357 (1997); see also Richards and Calvert, *supra* note 9, at 554-55.

of contributing to an informed citizenry. Each of these are contentious assumptions in their own right.²⁷ However, as will be discussed below, economic and technological changes in the media ecosystem have led to conditions that further challenge many of these assumptions.

A. *The Counterspeech Doctrine in Practice*

Applications of the counterspeech doctrine have been wide ranging in media law and policy, as well as in industry practice.²⁸ Below, are a few applications that have particular relevance to the focus on the structure and operation of the contemporary media ecosystem and its relationship to a well-functioning democracy.

The well-known (some might say notorious) Fairness Doctrine is a useful case study of a rare instance in which the counterspeech doctrine has been utilized to justify government regulation.²⁹ The Fairness Doctrine required broadcast licensees to devote news coverage to controversial issues of public importance.³⁰ In providing such coverage, broadcasters were further required to devote time to competing perspectives on an issue.³¹ So, for instance, if a news broadcast ran a story on new research asserting a link between cigarette smoking and cancer, the tobacco industry was entitled to demand that time be devoted to the perspective that the causal link between cigarette smoking and cancer had yet to be determined. And, importantly, this competing perspective needed to be broadcast during a day/time when a comparable number of viewers who viewed the initial broadcast could be reached.

To the extent that the Fairness Doctrine essentially compelled additional, most likely contradictory, speech, it embodies the counterspeech doctrine and its commitment to “more speech.” The irony is that the Fairness Doctrine was eliminated in the late 1980s under the logic that the requirement to provide counterspeech “chilled” broadcaster coverage of controversial issues overall,³² essentially resulting in less speech rather than more speech.

27. See generally DARREN BUSH, *supra* note 17; HO & SCHAUER, *supra* note 15; STANLEY INGBER, *supra* note 17.

28. See RICHARDS AND CALVERT, *supra* note 9, at 553-585.

29. For a more detailed discussion of the Fairness Doctrine and its relationship to counterspeech, see Adam Welle, *Campaign Counterspeech: A New Strategy to Control Sham Issue Advocacy in the Wake of FEC v. Wisconsin Right to Life*, 2008 WIS. L. REV. 795, 823-825. (2008).

30. KATHLEEN ANNE RUANE, FAIRNESS DOCTRINE: HISTORY AND CONSTITUTIONAL ISSUES 2 (2011) (noting that the Fairness Doctrine “affirmatively established the duty of broadcast licensees to cover controversial issues of public importance in a fair and balanced manner”); See generally Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

31. RUANE, *supra* note 30, at 2 (“Broadcasters . . . had the affirmative duty to determine what the appropriate opposing viewpoints were on these controversial issues, and who was best suited to present them.”).

32. See RUANE, *supra* note 31 at 6 (“The Commission examined the effect of its enforcement of the Fairness Doctrine upon broadcasters and came to the conclusion that the doctrine chilled speech substantially”).

In the case of the Fairness Doctrine, counterspeech was used to justify speech regulation. More often, it has been used to reject speech regulation. For instance, in the realm of political campaign advertising there has been a history of efforts to impose restrictions on the dissemination of false information.³³ A useful example involves efforts in the state of Washington to impose a regulation that allowed a state agency to determine the veracity of campaign statements, and to fine campaigns found to disseminate false statements.³⁴ These regulations were overturned by the Washington State Supreme Court for a host of reasons,³⁵ including a rejection of the State's contention that protecting the integrity of elections represented a sufficiently compelling government interest.³⁶ According to the court, prohibiting "arguably false, but nondefamatory, statements about political candidates to save our elections conflicts with fundamental principles of the First Amendment."³⁷ Moreover, the court explicitly argued that counterspeech represented the more appropriate mechanism for coping with falsity in political campaign communications.³⁸ According to the court, "[o]ur constitutional election system already contains the solution to the problem that RCW 42.17.530(1)(a) is meant to address."³⁹ Quoting *Brown v. Hartlage*, the court noted that "[i]n a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent.⁴⁰ The preferred First Amendment remedy of 'more speech, not enforced silence,' thus has special force."⁴¹ Thus, the court concluded, "[i]n other words, the best remedy for false or unpleasant speech is more speech, not less speech."⁴²

What is particularly important about both of these examples is the extent to which they reflect how the First Amendment will facilitate the dissemination of false news and information. However, the importance of the circulation of diverse ideas and viewpoints is so important that such falsity must be tolerated. This tolerance is accompanied by the confidence that a robust speech environment will allow truthful and accurate news and information to triumph over falsity. This position is well-reflected in the Supreme Court's statement in *Gertz v. Robert Welch, Inc.*, that the First

33. See *Rickert v. State Pub. Disclosure Comm'n*, 168 P.3d 826, 827 n. 2-3 (Wash. 2007).

34. *Id.*

35. Reasons included the court's rejection of the notion that "the State possesses an independent right to determine truth and falsity in political debate," *id.* at 827, as well as the fact that the statute did not require proof of the defamatory nature of the speech, *id.* at 828-829.

36. *Id.* at 830-831.

37. *Id.* at 831.

38. *Id.* at 832.

39. *Id.*

40. *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

41. See *Rickert* 168 P.3d at 855.

42. *Id.* at 855-56.

Amendment requires protecting “some falsehood in order to protect speech that matters.”⁴³

Compared to less-protected categories of speech, such as commercial speech, the First Amendment protections for political false speech – and thus the reliance upon counterspeech – are at their most pronounced.⁴⁴ News organizations represent the most explicitly protected category of speakers (as reflected in the “of the press” clause).⁴⁵ For news organizations, since *New York Times Co. v. Sullivan*,⁴⁶ legal liability for falsity has been largely limited to intentional and malicious falsities directed at individuals or organizations that are damaging to the individual’s or organization’s reputation.⁴⁷ This focus is a reflection of the Supreme Court’s position that “false statements of fact [can] cause damage to an individual’s reputation that cannot easily be repaired by counterspeech, however persuasive or effective.”⁴⁸ No such liabilities exist for the production and dissemination of journalistic falsities for the remaining political issues and concerns around which falsities could be generated, whether it be older examples, such as AIDS conspiracy theories or Holocaust denial,⁴⁹ or more recent examples, such as the nature of the scientific evidence surrounding climate change, given the broad protections given to the press and its role in maintaining “uninhibited, robust, and wide open”⁵⁰ political discussion.

Similarly, the journalistic presentation of falsities about individuals or organizations that are beneficial rather than harmful are fully protected. So while a news outlet accusing a political figure of running a child sex ring out of a Washington, DC, pizza parlor could be vulnerable to a libel lawsuit, a news outlet that knowingly reports inflated figures for a candidate’s net worth or charitable donations (thereby enhancing the candidate’s status with voters) is in the clear, even if it is subsequently proven that this information was published with knowledge of its falsity, since in no way was the candidate’s stature or reputation damaged by the false information.

The bottom line is that “any test of truth” when applying the First Amendment to the work of journalists has been rejected.⁵¹ According to the Supreme Court in *New York Times Co. v. Sullivan*, “[i]njury to official reputation error affords no more warrant for repressing speech that would

43. See 418 U.S. 323, 340-41 (1973).

44. See Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 912-914 (2009-2010).

45. See Potter Stewart, “*Or of the Press*”, 26 HASTINGS L.J. 631 (1974-1975).

46. See 376 U.S. 254 (1964).

47. See generally ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991).

48. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988).

49. See Schauer, *supra* note 46 at 897. For a discussion of the First Amendment protections for Holocaust deniers, see generally Jonathan D. Varatt, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, n. 27-29 and accompanying text.

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

51. *Id.* at 271.

otherwise be free than does factual error.”⁵² From this standpoint, we can assume that the prevailing First Amendment position on fake news is the production, dissemination, and consumption of more news.

Finally, it is important to note that counterspeech has become tightly integrated into the operation of the social media platforms and content aggregators that have become the eye of the storm for escalating concerns about the impact of false news on democratic decision-making. Facebook, for example, has commissioned a series of studies that highlights the prominence of counterspeech within the context of a variety of controversial issues across different countries.⁵³ In addition, in 2016, the company launched the Online Civil Courage Initiative, which states its mission as to “[t]o promote the civil courage displayed by organizations and grassroots activists carrying out valuable counterspeech work online.”⁵⁴ Facebook’s commitment to counterspeech is reflected in its description of the Online Civil Courage Initiative: “We believe that engagement is more powerful than censorship in reforming prejudiced and bigoted opinions and voices, and are committed to amplifying campaigns which encourage positive dialogue and debate.”⁵⁵ In this statement, Facebook seems to suggest that the platform will work to enhance (i.e. “amplifying”) counterspeech to address prejudiced and bigoted opinions and voices.

Along similar lines, Twitter has organized online convenings to facilitate discussions about strategies for producing and disseminating counterspeech through social media.⁵⁶ Google, in its 2017 testimony before the Senate Subcommittee on Crime and Terrorism about its initiatives to combat extremist content and disinformation on its platforms, highlighted that

52. *Id.* at 272.

53. See JAMIE BARTLETT & ALEX KRASODOMSKI-JONES, DEMOS, COUNTER-SPEECH ON FACEBOOK (2016), <https://www.demos.co.uk/wp-content/uploads/2016/09/Counter-speech-on-facebook-report.pdf> [<https://perma.cc/YPW5-WPHN>]; JAMIE BARTLETT & ALEX KRASODOMSKI-JONES, DEMOS, COUNTER-SPEECH EXAMINING CONTENT THAT CHALLENGES EXTREMISM ONLINE (2015), <https://www.demos.co.uk/wp-content/uploads/2015/10/Counter-speech.pdf> [<https://perma.cc/BYM6-MVW7>]. It is worth noting that while these studies seek to document the prevalence of counterspeech on Facebook, they do not seek to determine its effectiveness.

54. See ONLINE CIVIL COURAGE INITIATIVE, FACEBOOK, <https://www.facebook.com/pg/OnlineCivilCourage/about/> [<https://perma.cc/SW32-SF6X>] (last visited June 9, 2017).

55. *Id.*

56. See, e.g., @TweeSurfing, *Counter Speech On Social Media: The New Age Activism*, TWITTER, (Dec. 2, 2016), <https://perma.cc/JYE7-XK9L>. See also Colin Crowell, *Our Approach to Bots and Misinformation*, TWITTER BLOG (June 14, 2017), <https://perma.cc/68UA-DSES> (“Twitter’s open and real-time nature is a powerful antidote to the spreading of all types of false information. This is important because we cannot distinguish whether every single Tweet from every person is truthful or not. We, as a company, should not be the arbiter of truth. Journalists, experts and engaged citizens Tweet side-by-side correcting and challenging public discourse in seconds. *These vital interactions happen on Twitter every day.* . . .” [emphasis in original]).

it is “creating new programs to promote counterspeech on [its] platforms.”⁵⁷ These programs include efforts to redirect consumers of extremist propaganda toward content that counters those narratives, as well as efforts to encourage YouTube content creators to speak out against hate speech, xenophobia, and extremism.⁵⁸

B. Critiques of Counterspeech

To some extent, critiques that have been directed at counterspeech overlap with those directed at the overarching marketplace of ideas metaphor within which the counterspeech doctrine is embedded. This is particularly the case for those critiques that emphasize fundamental human characteristics and tendencies that could lead to the embracing of false news and information over true news and information. In light of the concerns that have arisen in the wake of the 2016 U.S. presidential election about the potential influence of fake news,⁵⁹ there appears to be a renewed interest in the vast literatures across fields, such as communication, cognitive psychology, and behavioral economics, that highlight fundamental human tendencies that can lead to the acceptance of false information over accurate information.⁶⁰ This literature illustrates how established behavioral patterns, such as selective exposure, confirmation bias, heuristics for coping with information overload, and directionally motivated reasoning explain how false news can be favored over legitimate news.⁶¹

57. See *Extremist Content and Russian Disinformation Online: Working with Tech to Find Solutions: Hearing Before the Subcomm. on Crime and Terrorism of the S. Comm. the Judiciary*, 115th Cong. (2017) (Statement of Richard Salgado, Director, Law Enforcement and Information Security, Google).

58. *Id.*

59. See Weedon et al., *supra* note 3.

60. See, e.g., CASS SUNSTEIN, #REPUBLIC 71-97 (2017); Elizabeth Kolbert, *Why Facts Don't Change Our Minds*, THE NEW YORKER (FEB. 27, 2017), <https://perma.cc/M354-3UYN>; Parmy Olson, *Why Your Brain May Be Wired to Believe Fake News*, FORBES (FEB. 1, 2017, 5:35PM), <https://perma.cc/UN3J-DFAC>. It is beyond the scope of this paper to review these bodies of literature. For helpful reviews, see Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COL. L. REV. 649 (2006); Goldman & Cox, *supra* note 11; Ho & Schauer, *supra* note 15.

61. See, e.g., R. Kelly Garrett & Natalie Jomini Stroud, *Partisan Paths to Exposure Diversity: Differences in Pro- and Counterattitudinal News Consumption*, 64 J. COMM. 680, 693-94 (2014); Michael A. Beam, *Automating the News: How Personalized News Recommender System Design Choices Impact News Reception*, 41 COMM. RES. 1019, 1020-36 (2014); D.J. Flynn, Brendan Nyhan & Jason Reifler, *The Nature and Origins of Misperceptions: Understanding False and Unsupported Beliefs About Politics*, 38 ADVANCES POL. PSYCHOL. 127,128-32 (2017). For a more detailed discussion of the range of cognitive biases that can come into play see Bambauer, *supra* note 60 at 673-96. See also Alessandro Bessi et. al., *Homophily and Polarization in the Age of Misinformation*, 225 EUR. PHYS. J. SPECIAL TOPICS 2047 (2016) (discussing research showing a correlation between polarized social networks and participation in the consumption and spread of false news and information).

These are long-standing behavioral and psychological patterns.⁶² As Frederick Schauer has noted, “[t]hat people believe things that are false comes as no surprise. That a large number of people believe things that are false despite being told the truth is also hardly a revelation.”⁶³ The bottom line is that the notion of the “rational audience,” capable of processing speech from diverse sources, and capable of effectively and rationally assessing the truth, quality, and credibility, is much more an ideal-type in First Amendment theory than an empirical reality.⁶⁴ What may be different today, however is the extent to which the U.S. media system is capable of counteracting these fundamental human tendencies. Instead, it may be exacerbating them.⁶⁵

Other critiques have explored specific speech contexts, where it has been argued that the counterspeech doctrine is particularly ineffective. It has frequently been noted that the efficacy of counterspeech can depend upon a wide range of circumstances related to the character of the speech at issue.⁶⁶ Hate speech, for instance, has been singled out as being particularly resistant to the effects of counterspeech.⁶⁷ Hate speech may have a silencing effect on would-be speakers, inhibiting their ability to engage in counterspeech or it may impose unfair or dangerous burdens on those who engage in counterspeech.⁶⁸ Further, marginalized groups that often are the targets of hate speech may lack the access and resources to effectively reach all of those exposed to the initial speech.⁶⁹

The counterspeech doctrine is a pillar of First Amendment theory that rests on an intellectual foundation that is somewhat shaky, at best. The critiques of counterspeech have focused on either the aspects of human psychology that work against counterspeech being consumed and/or having its intended effects, or on those types of speech that the mechanisms of counterspeech are less likely to affect.⁷⁰

Largely absent from these critiques of the counterspeech doctrine are detailed considerations of how technological and structural changes in the media and information environment may impact the extent to which we can

62. See, e.g., Schauer, *supra* note 44, at 899.

63. See Schauer, *supra* note 44, at 898.

64. See generally Lidsky, *supra* note 23.

65. See *infra* notes 76-180 and accompanying text.

66. See, e.g., Blasi, *supra* note 26, at 1357; see also Richards and Calvert, *supra* note 9, at 554-55.

67. See Richard Delgado & David Yun, “The Speech We Hate”: First Amendment Totalism, the ACLU, and the Principle of Dialogic Politics, 27 ARIZ. ST. L.J. 1281, 1292 (1995).

68. See, e.g., OWEN M. FISS, THE IRONY OF FREE SPEECH 25-6 (1996).

69. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, in MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 17, 48 (1993) (arguing that minority groups have “diminished access to private remedies such as effective counterspeech”).

70. See Schauer, *supra* note 46, at 912-914; see generally Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 17, 48 (1993).

expect factual speech to overcome false speech.⁷¹ How might these technological changes affect the integrity of the counterspeech doctrine? This question is the focus of the next section, which argues that the media ecosystem has evolved in ways that undermine the likelihood (however slim it already may have been)⁷² that true and high-quality news and information will overcome false and low-quality news information. In this regard, the arguments presented here can be layered upon the established critiques discussed above, thereby further calling into question the validity of the notion of more speech serving as an effective antidote to false speech.

III. HOW TECHNOLOGICAL CHANGES UNDERMINE THE COUNTERSPEECH DOCTRINE

The goal of this section is to consider the range of changes affecting the contemporary media ecosystem through the lens of counterspeech, with a particular focus on contemporary concerns about the prominence of fake news and the operation of filter bubbles. That is, how do these changes potentially affect the production, distribution, and consumption of legitimate versus false news and information?

A. *The Relative Prominence of True Versus False News*⁷³

In considering the changes that have affected the media ecosystem over the past two decades, it makes sense to begin with the changing dynamics of news production. The technological and economic changes that have transformed the media ecosystems have had a number of intersecting effects that have, on the one hand, undermined the production of legitimate news, while at the same time enhanced the production of false news.

71. For instance, see Schauer's *supra* note 46 at 899, wherein Schauer recognizes the apparent "increasing and unfortunate acceptance of factual falsity in public communication", but doesn't explore how the evolution of the media sector might be contributing to this increase.

72. See *supra*, notes 62-72 and accompanying text.

73. It should be noted that this analysis starts from the premise that it is possible to make valid distinctions between "legitimate" and "fake" news. Certainly, as with all dimensions of speech classification (*e.g.*, commercial vs. non-commercial speech, libelous vs. non-libelous speech), there will be areas of ambiguity and disagreement, but such ambiguity and disagreement does not invalidate the viability, legitimacy or importance of maintaining the distinction. See James Weinstein, *Speech Characterization and the Limits of First Amendment Formalism: Lessons from Nike v. Kasky*, 54 CASE WESTERN RESERVE L. REV. 1091, 1093 (2004) ("In a typical free speech case, . . . use of verbal formulae or case matching to determine the category in which to place the speech in question works well enough. There is often precedent so factually similar that it really is controlling; or even in the absence of such truly controlling precedent, categorizing the speech in question one way rather than the other so clearly promotes the values underlying free speech doctrine that a judge can intuitively make the right choice"). Not surprisingly, efforts to clarify the concept of fake news or to develop more precise terminology, are ongoing; see, *e.g.*, Claire Wardle & Hossein Derakhshan, INFORMATION DISORDER 4 (2017) (developing the concept of "information pollution" as an alternative to "fake news").

In terms of the production of legitimate news, the ongoing economic crisis in journalism has been well documented.⁷⁴ Key consequences of this crisis include: declines in the number of newspapers across the country, in the size of television newsrooms, and in the number of professional journalism positions.⁷⁵ The rise of various online news outlets, and the new opportunities technological change fostered for “citizen journalism,” have been interpreted by some as adequate countervailing forces in the wake of declines in traditional journalism; however, the reality is that these developments have not been able to fully replace the declines in news workers or news reporting that have resulted from the declines affecting traditional media.⁷⁶ The troubling paradox here is that increases in the number of media outlets and channels have led to decreases in the production of genuine journalism.

While it is difficult to reconcile this position with the apparent abundance of online news, it is more understandable if we consider a seldom discussed, and insufficiently researched, phenomenon in the realm of digital journalism: what is perhaps best described as parasitic journalism.⁷⁷ Parasitic journalism refers to news stories that have as their origins and foundation reporting produced by another media outlet.⁷⁸ If one examines news stories produced by digital media outlets through this analytic lens, the proportion of the online news reporting that merits classification as original journalism declines dramatically. Indeed, this kind of parasitic journalism (or “vampire web pages,” as they are sometimes called) has emerged as a thriving business model, due in large part to the extent to which social media platforms facilitate

74. See, e.g., Leonard Downie, Jr., & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. J. REV. 1 (Nov./Dec. 2009), http://archives.cjr.org/reconstruction/the_reconstruction_of_american.php [<https://perma.cc/8MQJ-GQB8>] (“As almost everyone knows, the economic foundation of the nation’s newspapers, long supported by advertising, is collapsing, and newspapers themselves, which have been the country’s chief source of independent reporting, are shrinking—literally. Fewer journalists are reporting less news in fewer pages, and the hegemony that near-monopoly metropolitan newspapers enjoyed during the last third of the twentieth century, even as their primary audience eroded, is ending. Commercial television news, which was long the chief rival of printed newspapers, has also been losing its audience, its advertising revenue, and its reporting resources”); C.W. Anderson et al., *Post-Industrial Journalism: Adapting to the Present 2* (Colum. J. School / Tow Ctr. for Digital Journalism Rep.) http://towcenter.org/wp-content/uploads/2012/11/TOWCenter-Post_Industrial_Journalism.pdf [<https://perma.cc/UV9D-HPS8>]. (“The effect of the current changes in the news ecosystem has already been a reduction in the quality of news in the United States”).

75. See BUR. LAB. STAT., NEWSPAPER PUBLISHERS LOSE OVER HALF THEIR EMPLOYMENT FROM JANUARY 2001 TO SEPTEMBER 2016 (Apr. 3, 2017), <https://www.bls.gov/opub/ted/2017/mobile/newspaper-publishers-lose-over-half-their-employment-from-january-2001-to-september-2016.htm>; <https://perma.cc/A4VT-22NH>.

76. See PEW RES. CTR., STATE OF THE NEWS MEDIA 2016 (June, 2016), <http://www.journalism.org/2016/06/15/state-of-the-news-media-2016/>, [<https://perma.cc/2LAM-E72U>].

77. See generally *The Future of Newspapers*, THE INDEP. (Nov. 13, 2006), <http://www.independent.co.uk/news/media/the-future-of-newspapers-5331270.html> [<https://perma.cc/8CWU-LKWM>].

78. *Id.* (“Although there’s an enormous amount of online news-related material, if you analyse it, very, very little is actually new fact, new information - it’s almost all parasitic journalism carried out either by broadcasters or newspapers.”).

the ability to identify popular news stories, and then recycle and recirculate nearly identical versions of those stories that demonstrably drain the audience (and thus, revenue) away from the outlets that produced the original story.⁷⁹

Ultimately, the apparent multitude of online news outlets masks a journalistic ecosystem in which original reporting is recycled and circulated by scores of under-resourced news outlets incapable in engaging in original reporting.⁸⁰ In many ways, this may be the true online echo chamber – the process by which the same reporting reverberates through outlet after outlet, often reconfigured and re-summarized in ways that sometimes seek to disguise the story’s true origins and that provide opportunities for original commentary – but not original reporting. The end result is that the bulk of the news produced continues to originate from a relatively small number of media outlets, each of whose economic capacity to produce news is in a continued state of decline.⁸¹

The bottom line is that original reporting is costly to produce and, given the degrading economics of journalism, this production is in decline. Fake news, on the other hand, is far less costly to produce.⁸² Fabricated news stories do not require the same rigorous research, verification processes, or trained professionals to produce. This is why fake news has a fairly extensive history – one that certainly predates the Internet and social media⁸³ – with changes in communications technologies consistently affecting the dynamics of how fake news is produced, disseminated, and consumed.⁸⁴ Today, fake news can be easily and effectively produced (and monetized) by a “Macedonian” teenager in his bedroom.⁸⁵ From this standpoint, the evolution of the media ecosystem has done nothing to make the production of false news and

79. See Steven Rosenfeld & Ivy Olesen, *Vampire Webpages Suck Content from Legitimate Progressive News Sites*, ALTERNET (Mar. 6, 2017), <http://www.alternet.org/media/vampire-webpages-suck-content-legitimate-progressive-news-sites> [<https://perma.cc/Y6BX-WF3N>].

80. Even producers of fake news engage in rampant cannibalization of other fake news producers. See Craig Silverman & Lawrence Alexander, *How Teens in The Balkans Are Duping Trump Supporters with Fake News*, BUZZFEED.COM (Nov. 3, 2016), https://www.buzzfeed.com/craigsilverman/how-macedonia-became-a-global-hub-for-pro-trump-misinfo?utm_term=.jgOP8e208#.mc5dvo9bv [<https://perma.cc/YCH9-8NN4>] (“Most of the posts on these sites are aggregated, or completely plagiarized, from fringe and right-wing sites in the US”).

81. See *supra* notes 76-82 and accompanying text.

82. See generally, Jamie Condliffe, *Fake News is Unbelievably Cheap to Produce*, MIT TECH. R. (June 14, 2017), <https://www.technologyreview.com/s/608105/fake-news-is-unbelievably-cheap/>.

83. See, e.g., David Uberti, *The Real History of Fake News*, COLUM. J. REV. (Dec., 15, 2016), http://www.cjr.org/special_report/fake_news_history.php [<https://perma.cc/K5FH-Z9C8>].

84. See Jacob Soll, *The Long and Brutal History of Fake News*, POLITICO (Dec. 18, 2016), <http://www.politico.com/magazine/story/2016/12/fake-news-history-long-violent-214535> [<https://perma.cc/ZRR6-ZY35>] (discussing impact of the printing press on production, dissemination, and consumption of fake news).

85. See Samantha Subramanian, *Inside the Macedonian Fake-News Complex*, WIRED (Feb. 15, 2017), <https://www.wired.com/2017/02/veles-macedonia-fake-news/> [<https://perma.cc/AG3C-7D6Z>]; Silverman & Alexander, *supra* note 80.

information more economically challenging in the way that it has for legitimate news. On the contrary, the economics of false news have been enhanced as a result of the changes in systems of news distribution.⁸⁶ Thus, from the standpoint of the counterspeech doctrine, the relative production of legitimate news and information compared to false news and information is in the midst of perhaps an unprecedented decline.

B. Diminished Gatekeeping and Distribution Barriers

The shift in the relative prominence of legitimate versus false news is a function of the fact that the gatekeeping barriers that have traditionally curtailed the dissemination of false news relative to legitimate news have been dramatically reduced. The notion of gatekeeping barriers refers to the decision-making mechanisms controlling the type of news to which consumers have access.⁸⁷ The mass media era was defined by gatekeeping bottlenecks, in which freedom of the press was “guaranteed only to those that own one.”⁸⁸ Effective distribution was confined to outlets, such as broadcast stations, cable networks/systems, newspapers, and magazines, all of which were relatively scarce for technological and economic reasons, and thus operated as news and information bottlenecks that wielded substantial gatekeeping power.⁸⁹

The Internet has provided the opportunity to circumvent these bottlenecks. As a consequence, the economic incentives for producing legitimate journalism have been undermined, even as, the opportunities to distribute news have increased, and the costs of distribution have decreased.⁹⁰ Conversely, given the low costs associated with producing fake news, the diminished gatekeeping barriers and minimal distribution costs have enhanced the economic incentives for producing fake news.⁹¹ The size of the potential market is, simply, larger.⁹²

Even the gatekeeping to advertising dollars has been transformed in ways that enhance the opportunities for fake news outlets. Today, the allocation of online advertising dollars is increasingly handled by algorithmically-driven ad placement networks, given the overwhelming

86. See *infra* notes 92-102 and accompanying text.

87. See generally Pamela Shoemaker and Timothy Vos, *GATEKEEPING THEORY* (2009).

88. See A.J. Liebling, *The Wayward Press: Do You Belong in Journalism?* NEW YORKER, (May 14, 1960), at 109.

89. See Jonathan Taplin, *The IP TV Revolution*, in *THE NETWORK SOCIETY* 241 (2005) (describing the “critical transition from a media world of analog scarcity to . . . digital abundance where any maker of content (films, music, video games) could have access to the world’s audience through a server based on demand media environment”).

90. See *supra* notes 78-83 and accompanying text.

91. See Abby Ohlheiser, *This is How Internet’s Fake News Writers Make Money*, WASH. POST (Nov. 18, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/11/18/this-is-how-the-internets-fake-news-writers-make-money/?utm_term=.7c4ee4d7e8d6 [<https://perma.cc/V5S9-LBJS>].

92. *Id.*

number of ad placement options.⁹³ Often, online advertisers do not even know exactly where their advertisements are being placed.⁹⁴ This is in stark contrast to the mass media era, when information about when and where advertisements were being placed was common knowledge.⁹⁵ The end result is that, on the basis of the criteria embedded in the ad-placement algorithms, fake news sites have been on more or less equal footing with other online content providers. Even recent, initial efforts to ban known fake news outlets from major ad networks (a response to the post-2106 fake news revelations) appear to have – at least initially – proven not entirely effective.⁹⁶

Previously, the distribution and monetization of fake news would be prevented to some extent via the limited number of gatekeepers.⁹⁷ Given their limited number, these gatekeepers had both the incentive and the opportunity to curb the dissemination of fake news. The incentive came from the fact that, in a far less fragmented media environment, neutral and objective (and thus less likely to be false) reporting represented an effective approach to attracting and retaining the largest possible audience.⁹⁸ The opportunity came in the form of the substantial economic resources these outlets had to research and verify stories – resources that were a function of the economic health of these

93. See Robert Thomson, *News Corp. CEO on Fake News, 'Digital Duopoly' and What Role Advertising Plays in All of It*, MEDIASHIFT (Apr. 3, 2017), <http://mediashift.org/2017/04/news-corp-ceo-fake-news-digital-duopoly-role-advertising-plays/> [<https://perma.cc/P382-B8VV>].

94. David Iaconangelo, *Why Didn't These Companies Know They Were Advertising on Breitbart?* CHRISTIAN SCIENCE MONITOR (2016, Nov. 30), <https://www.csmonitor.com/Business/2016/1130/Why-didn-t-these-companies-know-they-were-advertising-on-Breitbart/> (“The fact that many of the companies apparently didn’t know that their ads were appearing [on Breitbart] seems to highlight how new ad technologies have loosened companies’ grip over their brand’s associations”).

95. *Id.* (noting that it has become “a lot easier for buyers to lose a degree of control over where their ads run”).

96. See Craig Silverman et al., *In Spite of the Crackdown, Fake News Publishers Are Still Earning Money from Major Ad Networks*, BUZZFEED (Apr. 4, 2017), <https://www.buzzfeed.com/craigsilverman/fake-news-real-ads> [<https://perma.cc/62GN-L72N>].

97. See A.J. Lieblich, *The Wayward Press: Do You Belong in Journalism?* NEW YORKER, May 14, 1960, at 105.

98. See, e.g., JAMES T. HAMILTON, ALL THE NEWS THAT’S FIT TO SELL: HOW THE MARKET TRANSFORMS INFORMATION INTO NEWS 38 (2004) (“The evidence in this chapter demonstrates that independent news coverage grew as scale economies became more important”); see also GERALD J. BALDASTY, THE COMMERCIALIZATION OF NEWS IN THE NINETEENTH CENTURY 28 (1992). It should be noted that some researchers have questioned whether the development of the norm of objectivity is tied to the commercialization of the press. See, e.g., Michael Schudson, *The Objectivity Norm in American Journalism*, 2 JOURNALISM 149, 160 (2001) (“The notion that the move from partisanship to objectivity was economically motivated is widely believed but nowhere justified.”).

outlets prior to the damaging effects of an increasingly fragmented media environment.⁹⁹

This scenario of diminished bottlenecks and gatekeepers represents a tremendous opportunity for the production and dissemination of fake news. As has been well-illustrated in the months since the 2016 U.S. presidential election, many of those engaged in the production and distribution of fake news did so purely because of the tremendous economic opportunity it presented, not out of any ideological motivations.¹⁰⁰ Economic incentives to provide false news have always existed, given the appealing economics of false news production discussed above.¹⁰¹ The key point here is that the diminished barriers to entry (and thus diminished institutional gatekeeping) afforded by the Internet enhanced these incentives.

These economic incentives have been further enhanced over the past few years by social media distribution.¹⁰² Social media provides a means to more effectively capitalize on the diminished gatekeeping barriers facilitated by the Internet by providing previously unprecedented paths to low-cost distribution and large aggregations of audiences. Research indicates that social media referrals are a more crucial component of story distribution for hyper-partisan and fake news sites than they are for legitimate news sites.¹⁰³ Another recent study found that, in the days before the 2016 election, many Twitter users received a higher volume of misinformation and conspiratorial content than professionally produced news.¹⁰⁴

99. See, e.g., Leonard Downie, Jr., & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. J. REV. 1 (Nov./Dec. 2009), http://archives.cjr.org/reconstruction/the_reconstruction_of_american.php [<https://perma.cc/XD6D-DBLM>] (“Commercial television news, which was long the chief rival of printed newspapers, has also been losing its audience, its advertising revenue, and its reporting resources.”).

100. See, e.g., Subramanian, *supra* note 85 (“These Macedonians on Facebook didn’t care if Trump won or lost the White House. They only wanted pocket money to pay for things—a car, watches, better cell phones, more drinks at the bar.”). As Adam Mosseri, Facebook’s Vice President of News, has stated, “We’ve found that a lot of fake news is financially motivated.” Adam Mosseri, *News Feed FYI: Addressing Hoaxes and Fake News*, FACEBOOK (Dec. 15, 2016), <https://newsroom.fb.com/news/2016/12/news-feed-fyi-addressing-hoaxes-and-fake-news/> [<https://perma.cc/GT4S-X4QH>]; Silverman & Alexander, *supra* note 82 (“Their reasons for launching these sites are purely financial, according to the Macedonians with whom BuzzFeed News spoke”).

101. See *supra* notes 84-88 and accompanying text.

102. See generally Timothy B. Lee, *Facebook’s Fake News Problem, Explained*, VOX (Nov. 16, 2016), <http://www.vox.com/new-money/2016/11/16/13637310/facebook-fake-news-explained> [<https://perma.cc/JV55-2MZP>]

103. See Alexios Mantzarlis, *Facebook Referrals are Crucial for Traffic to Hyperpartisan and Fake News Sites*, POYNTER (Nov. 28, 2016), <https://www.poynter.org/2016/facebook-referrals-are-crucial-for-traffic-to-hyperpartisan-and-fake-news-sites/440132/> [<https://perma.cc/KT3K-YBAP>].

104. See Philip N. Howard et al., *Social Media, News and Political Information During the U.S. Election: Was Polarizing Content Concentrated in Swing States?* COMPROM DATA MEMO (Sept. 27, 2017); <http://comprop.oii.ox.ac.uk/wp-content/uploads/sites/89/2017/09/Polarizing-Content-and-Swing-States.pdf> [<https://perma.cc/53VP-PBY2>], at 1 (finding that “nationally, Twitter users got more misinformation, polarizing and conspiratorial content than professionally produced news”).

It is important to emphasize that these social media platforms, like their mass media predecessors, also represent bottlenecks with substantial gatekeeping capacity.¹⁰⁵ The reality however, has been that, likely due to a combination of factors (scale, technological limitations, economic incentives, organizational philosophy, ignorance), this gatekeeping authority has not been rigorously deployed to combat the dissemination of fake news.

It is important to recognize that underlying this argument is the assumption that, regardless of the motivation, sources of news and information with more partisan orientations produce more false news than journalistic sources that adhere to more traditional notions of neutrality and objectivity. While perhaps controversial, this assumption is grounded in compelling empirical evidence.¹⁰⁶

In sum, within the counterspeech doctrine's valorization of "more speech," the point here is that, in today's news ecosystem, more of this "more speech" is likely to be false speech.

C. Increased Ability to Target the Most Impressionable

Within the context of the distribution of news, it is also important to take into consideration the ways in which the distribution of false news can now be more effectively targeted at those individuals most likely to be affected by the misinformation.

Nicholas Negroponte's famous speculation about the inevitability (and desirability) of *The Daily Me* provides a useful starting point for the rise of personalization in digital media.¹⁰⁷ Personalization is a data driven phenomenon, facilitated by the information backchannels that are inherent in interactive media.¹⁰⁸ As Negroponte predicted, interactive media have allowed people to craft their own individual news diets. Negroponte's somewhat utopian perspective has since been tempered by concerns about the

105. See Emily Bell, *Facebook is Eating the World*, COL. J. REV. (Mar. 7, 2016) ("The largest of the platform and social media companies, Google, Apple, Facebook, Amazon, and even second order companies such as Twitter, Snapchat and emerging messaging app companies, have become extremely powerful in terms of controlling who publishes what to whom. . . . There is a far greater concentration of power in this respect than there ever has been in the past").

106. See, e.g., Kate Starbird, *Examining the Alternative Media Ecosystem Through the Production of Alternative Narratives of Mass Shooting Events on Twitter* (2017) (unpublished manuscript), http://faculty.washington.edu/kstarbi/Alt_Narratives_ICWSM17-CameraReady.pdf [<https://perma.cc/HS9M-8VF7>]. The author notes that, "[n]ot surprisingly, we found the conversation around alternative narratives of mass shooting events to be largely fueled by content on alternative (as opposed to mainstream) media." *Id.* at 9.

107. See NICHOLAS NEGROPONTE, *BEING DIGITAL* 153 (1996).

108. See generally, Mary Collins, *Personalized Media: It's All About the Data*, TVNEWSCHECK (2017, Sept. 8), <http://www.tvnewscheck.com/article/107097/personalized-media-its-all-about-the-data>.

political and cultural detriments of residing in such filter bubbles.¹⁰⁹ Nonetheless, personalization continues to work its way through the news ecosystem, with even the *New York Times* recently launching an initiative to bring more data-driven personalization to the process of presenting stories to online news consumers.¹¹⁰ The key point here is that interactivity provides a stream of audience data that facilitates audience targeting and personalization to an unprecedented extent.

Within the context of counterspeech, this means that those with an economic and/or political interest in the dissemination of false news are now far better equipped than in the past to deliver their content to those they most desire to reach. Targeting exclusively right- or left-leaning news consumers (or other, more specific political traits) with false news or information has never been easier, as observable social media activity provides a host of reliable indicators of an individual's political orientation.¹¹¹ In these ways, the magnitude of the "evil" (to use Brandeis' term)¹¹² that false speech can achieve is amplified.

In the wake of the 2016 election, it was reported that Donald Trump's campaign employed a consulting firm, Cambridge Analytica, which drew upon massive amounts of social media data to construct detailed psychological, demographic, and geographic profiles of individual voters. These data were then utilized by the Trump campaign to deliver micro-targeted political messages through social media platforms such as

109. See, e.g., Eli Pariser, THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU (2011); SUNSTEIN, *supra* note 62 at 2 ("In the 1990s, the idea of a Daily Me seemed more than a little absurd. But it's looking astoundingly good. If anything, Negroponte understated what was coming, what has now arrived, and what is on the horizon. Is that a promise or a threat? I think it's both – and that the threatening part is what needs to be emphasized, not least because so many people see it as pure promise"); Jon Keegan, *Blue Feed, Red Feed: See Liberal Facebook and Conservative Facebook, Side by Side*, WALL ST. J. (May 18, 2016), <http://graphics.wsj.com/blue-feed-red-feed/> [<https://perma.cc/8SPX-SBGA>]. For empirical evidence of filter bubbles, see Tien T. Nguyen et. al., *Exploring the Filter Bubble: The Effect of Using Recommender Systems on Content Diversity*, in WWW '14 IN PROCEEDINGS OF THE 23RD INTERNATIONAL CONFERENCE ON WORLD WIDE WEB 677 (Apr. 2014); <http://dl.acm.org/citation.cfm?doid=2566486.2568012> [<https://perma.cc/TH9X-KW9F>]; Alessandro Bessi et al., *Users Polarization on Facebook and YouTube*, PLOS ONE (Aug. 23, 2016), <https://doi.org/10.1371/journal.pone.0159641> [<https://perma.cc/NA5D-SG4P>]; Walter Quattrociocchi et al., *Echo Chambers on Facebook* (2016, June 13) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795110 [<https://perma.cc/PA95-WDGD>].

110. See Ricardo Bilton, *All the News That's Fit for You: The New York Times is Experimenting with Personalization to Find New Ways to Expose Readers to Stories*, NIEMAN LAB (Sept. 28, 2017), <http://www.niemanlab.org/2017/09/all-the-news-thats-fit-for-you-the-new-york-times-is-experimenting-with-personalization-to-find-new-ways-to-expose-readers-to-stories/> [<https://perma.cc/QJ8T-XZ8P>].

111. See Elanor Colleoni et al., *Echo Chamber or Public Sphere? Predicting Political Orientation and Measuring Political Homophily in Twitter Using Big Data*, 64 J. OF COMMUNICATION 317, 321 (2014) ("By classifying all the content posted according to its political orientation we are able to identify the general political orientation of the users and measure levels of political homophily in their network").

112. See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

Facebook.¹¹³ Hundreds of Russian-operated Facebook accounts also have been found to have been engaging in such election-related micro-targeted advertising.¹¹⁴ Congressional investigators are currently evaluating the content of these ads, so there is no clear sense yet of the extent to which false news or claims were delivered in these messages.¹¹⁵ However, the point here is that the technological capacity to target citizens with tailored messages or false news stories based on their characteristics appears to have taken yet another substantial leap forward, beyond what was possible through previous communications channels.¹¹⁶

From a false news perspective, according to a U.S. Senate investigation, the Russians working to spread fake news stories specifically targeted voters in swing states such as Wisconsin, Michigan, and Pennsylvania,¹¹⁷ with this geographic targeting facilitated by social media data. Further, according to the testimony of cybersecurity expert Clint Watts, some of these fake news outlets explicitly targeted Donald Trump, tweeting fake news stories directly to his Twitter account during time periods when he was known to be online, under the presumption that he has shown himself to be particularly susceptible

113. See Issie Lapowsky, *What Did Cambridge Analytica Really do for the Trump Campaign?* WIRED (Oct. 26, 2017), <https://www.wired.com/story/what-did-cambridge-analytica-really-do-for-trumps-campaign/> [<https://perma.cc/72E7-8WLL>]. For methodological details, see generally Joshua Green & Sasha Issenberg, *Inside the Trump Bunker, with Days to Go*, BLOOMBERG BUSINESSWEEK, <https://www.bloomberg.com/news/articles/2016-10-27/inside-the-trump-bunker-with-12-days-to-go> [<https://perma.cc/79L3-MVJV>].

114. See Alex Stamos, *An Update on Information Operations on Facebook*, FACEBOOK (Sept/ 6, 2017), <https://newsroom.fb.com/news/2017/09/information-operations-update/> [<https://perma.cc/A5RY-Z7F5>].

115. See Craig Timberg et al., *Facebook to Turn Over Thousands of Russian Ads to Congress, Reversing Decision*, WASH. POST (Sept. 21, 2017), https://www.washingtonpost.com/business/technology/facebook-to-turn-over-thousands-of-russian-ads-to-congress-reversing-decision/2017/09/21/9790b242-9f00-11e7-9083-fbffd6804c2_story.html?utm_term=.0d6c72e30048 [<https://perma.cc/RJ5A-TM6H>].

116. See Zeynep Tufekci, *Engineering the Public: Big Data, Surveillance, and Computational Politics*, 19 FIRST MONDAY, <http://firstmonday.org/article/view/4901/4097> [<https://perma.cc/3LWW-AWMC>] (“While computational politics in its current form includes novel applications, the historical trends discussed in this paper predate the spread of the Internet. In fact, there was already a significant effort underway to use big data for purposes of marketing, and the progression of using marketing techniques for politics — and “selling of the President” — clearly reflects longer-term trends. However, computational politics introduces significant qualitative differences to that long march of historical trends. Unlike previous data collection efforts (for example, collating magazine subscriptions or car type purchases) which required complicated, roundabout inferences about their meaning (does a magazine subscription truly signal a voter preference?) and allowed only broad profiling in the aggregate, this data provides significantly more individualized profiling and modeling, much greater data depth, and can be collected in an invisible, latent manner and delivered individually[.]”).

117. See Rachel Roberts, *Russia Hired 1,000 People to Create Anti-Clinton Fake News in Key U.S. States During Election, Trump-Russia Hearings Leader Reveals*, THE INDEP. (Mar. 30, 2017) (According to Senator Mark Warner, “[i]t’s been reported to me, and we’ve got to find this out, whether they were able to affect specific areas in Wisconsin, Michigan, Pennsylvania [.]”). For further evidence of the targeting of fake news to swing state social media users, see Howard et al., *supra* note 104.

to fake news.¹¹⁸ This is an extreme example of today's highly personalized media environment enhancing the opportunities for purveyors of fake news to reach those both most likely and most important to be affected by the misinformation.

One could certainly argue that these dynamics provide comparable opportunities for true and accurate news to target those news consumers most in need of being reached, or most vulnerable to fake news. The problem with this logic becomes clearer when factoring in the ways in which this process of personalization undermines the likelihood of exposure to counterspeech that directly addresses the false speech that has been consumed.¹¹⁹

D. *The Diminished Likelihood of Being Exposed to Factual Counterspeech*

As Vincent Blasi has emphasized, one of the key conditions impacting the effectiveness of counterspeech is the extent to which “the counter-message comes to the attention of all the persons who were swayed by the original idea.”¹²⁰ The dynamics of the contemporary media environment to some extent serve to explicitly prevent this type of exposure to counterspeech from taking place. This is the essence of the filter bubble phenomenon, in which the intertwining of individual and algorithmic content personalization¹²¹ on social media and other news aggregation platforms works to deflect news sources and content that do not correspond to the user's established content preferences and political orientation.¹²² Certainly, this

118. See MEDIA MATTERS FOR AMERICA, *CNN: Fake News Trolls Pushing Conspiracy Theories “Tweet Right at President Trump” Hoping that “He Cites it Publicly* (Mar. 30, 2017) <https://www.mediamatters.org/video/2017/03/30/cnn-fake-news-trolls-pushing-conspiracy-theories-tweet-right-president-trump-hoping-he-cites-it/215878> [https://perma.cc/35GH-43VN] (“WOLF BLITZER (HOST): Do these fake news trolls sometimes actually target President Trump himself? BRIAN TODD: According to the cybersecurity expert Clint Watts who you had on earlier, Wolf, they do, in fact, do that. Watts testified today that some outlets pushing fake or misleading stories will tweet right at President Trump during high volume periods when they know he's online. They're pushing conspiracy theories hoping that he clicks on one and cites one publicly.”).

119. See *infra* notes 122-136 and accompanying text.

120. See Blasi, *supra* note 26, at 1357.

121. See Eytan Bakshy et al., *Exposure to Ideologically Diverse News and Opinion on Facebook*, 348 SCIENCE 1130, 1130 (June 5, 2015) (“The media that individuals consume on Facebook depends not only on what their friends share but also on how the News Feed ranking algorithm sorts these articles and what individuals choose to read.”); Philip M. Napoli, *Social Media and the Public Interest: Governance of News Platforms in the Realm of Individual and Algorithmic Gatekeepers*, 39 TELECOM. POL'Y 751 (Oct. 2015).

122. See Sunstein, *supra* note 60; Seth R. Flaxman et al., *Ideological Segregation and the Effects of Social Media on News Consumption*, at 1 (May 2014) (unpublished manuscript), https://bfi.uchicago.edu/sites/default/files/research/flaxman_goel_rao_onlinenews.pdf (finding that “recent technological changes do increase ideological segregation”). For critiques of the filter bubble logic and some contrary empirical findings, see Mark S. Nadel, *Customized News Service and Extremist Enclaves in Republic.com*, 54 STANFORD L. REV. 831 (2002); Jacob L. Nelson, *Is Fake News a Fake Problem?* COLUMBIA J. REV. (January 31, 2017), <https://www.cjr.org/analysis/fake-news-facebook-audience-drudge-breitbart-study.php>.

process of deflection works both ways. That is, one's filter bubble might deflect fake news that contradicts previously-consumed legitimate news. Or, it might deflect legitimate news that contradicts previously-consumed false news.

But here again is where the extent to which the filter bubbles have a partisan orientation comes into play. Given the empirical connection between partisanship and falsity,¹²³ to the extent one's filter bubble has a partisan orientation, the likelihood of fake news making it through the filter bubble increases.¹²⁴ At the same time, the likelihood of legitimate news that counteracts that fake news decreases.¹²⁵ The current state of play is perhaps best termed the "Spiral of Partisanship."¹²⁶ In this scenario, the increased media fragmentation and personalization that began in the 1980s with the development of cable television; then accelerated through the 90s and 2000s with the rise of the Internet and social media, simultaneously facilitates the mutually dependent phenomena of the rise of more partisan news outlets and the selective exposure to more partisan news. These are mutually dependent phenomena in that partisan news outlets require an audience to justify their existence and more partisan news consumption requires the availability of more partisan news outlets.

And so, as the media environment grows more fragmented, its ability to both sow and satisfy increasing partisanship is amplified.¹²⁷ It is likely no coincidence that the upswing in self-reported partisanship begins in the 1980s, at the same time that media fragmentation begins in earnest, primarily through

123. See Starbird, *supra* note 106.

124. See, e.g., Delia Mocanu et al., *Collective Attention in the Age of (Mis)information*, 51 *COMP. IN HUM. BEHAV.* 1198, 1202 (2015) (finding that "users with strong preferences for alternative information sources . . . are more susceptible to false information"); Alessandro Bessi et al., *Science vs Conspiracy: Collective Narratives in the Age of Misinformation*, *PLoS ONE* at 1 (finding that "polarized communities emerge around distinct types of contents and usual consumers of conspiracy news result to be more focused and self-contained on their specific contents").

125. See Quattrocio et al., *supra* note 109.

126. This term is used in reference to the well-known Spiral of Silence, which has posited that individuals who perceive their opinion to be in the minority will choose not to express that opinion, thus feeding into a downward spiral that systematically silences more and more of those holding that minority opinion, thereby creating a false impression of a widely-shared majority opinion. See ELIZABETH NOELLE NEUMAN, *THE SPIRAL OF SILENCE: PUBLIC OPINION – OUR SOCIAL SKIN* (1994).

127. See JONATHAN M. LADD, *WHY AMERICANS HATE THE MEDIA AND HOW IT MATTERS* (2011) (illustrating how increased media fragmentation has interacted with demand for more partisan news to amplify partisanship and distrust of institutional news media).

the rise of cable television.¹²⁸ And, as data tell us, consumers of partisan news are both more likely to consume false news¹²⁹ and possibly are inherently more resistant to counterspeech that corrects that false news.¹³⁰ Therefore, the net effect is one in which the dynamics of the contemporary media ecosystem tilt the balance toward the consumption/impact of fake news to an extent that was not the case in the pre-filter bubble era.

This dynamic is particularly damaging to traditional articulations and applications of the counterspeech doctrine. Traditional approaches to counterspeech have essentially operated under a broadcast-era model of media distribution. Consider the Fairness Doctrine, which operated under the assumption that counterspeech presented on the same platform and at the same time of day as the original speech would be effective.¹³¹ Such an assumption seems at best quaint, and at worst utterly anachronistic, when applied to today's media environment of intertwined individual and algorithmic content filtering,¹³² in which filter bubbles have been constructed in ways that often are fundamentally oriented toward deflecting counterspeech. From this standpoint, it seems reasonable to suggest that the ability of counterspeech to reach exactly those it needs to reach has been diminished as a result of the technological changes that have affected the media ecosystem.

E. The Diminished Ability to Distinguish Between Legitimate and False News

Technological changes are undermining news consumers' abilities to distinguish between legitimate and false news. In illustrating this point, it is important to begin with the unique challenges associated with evaluating news. To do so, it is useful to begin with how consumers evaluate the quality of the products that they consume. Economists generally recognize three

128. See Amanda Taub, *The Real Story About Fake News is Partisanship*, N.Y. TIMES (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/upshot/the-real-story-about-fake-news-is-partisanship.html> [<https://perma.cc/DQ34-XERP>] (“[S]tarting in the 1980s, Americans began to report increasingly negative opinions of their opposing party.”). For a more detailed discussion of the relationship between fragmentation and political polarization, see RICARDO GANDOUR, *A NEW INFORMATION ENVIRONMENT: HOW DIGITAL FRAGMENTATION IS CHANGING THE WAY WE PRODUCE AND CONSUME NEWS* (2016), <https://knightcenter.utexas.edu/books/NewInfoEnvironmentEnglishLink.pdf> [<https://perma.cc/8KZA-WG7A>].

129. See Delia Mocanu et al., *supra* note 124.

130. See R. Kelly Garrett et al. *Driving a Wedge Between Evidence and Beliefs: How Online Ideological News Exposure Promotes Political Misperceptions*, 21 J. OF COMPUTER-MEDIATED COM. 331, 344 (2016) (“In the month leading up to the election, a quarter of Americans said they used biased news sites several times or more. Reliance on these websites appears to produce a distorted understanding of evidence, potentially promoting inaccurate beliefs even when evidence is understood correctly. It is sobering to recognize that online news may contribute to misperceptions even when consumers encounter a range of outlets and have been exposed to more accurate political information”).

131. See Ruane, *supra* note 30.

132. See Napoli, *supra* note 121.

categories of goods: 1) search/inspection goods, for which quality can be readily determined through examination; 2) experience goods, for which quality can be determined only after usage for a period of time; and 3) credence goods, which must be consumed on faith, as quality is difficult to ascertain.¹³³

News can sometimes fall into the second category (say, for example, when the local newscast reports rain for tomorrow, but it ends up snowing instead).¹³⁴ But more often, news is likely to fall into the third category, with news being consumed, and potentially being put to use in decision-making, in ways that do not always result in the kind of observable feedback that allows for a subsequent evaluation of the veracity or quality of that reporting.¹³⁵

When it comes to the evaluation of any kind of product, the notion of “bounded rationality” comes into play.¹³⁶ And news consumers typically are extremely rational, lacking the necessary information to make fully informed determinations as to the quality of the product they are consuming. This is a reflection of the fact that “by definition, news is what the public does not know.”¹³⁷ For these reasons, the consumption of false news is to some extent a function of receiving inadequate information (interacting with the various cognitive biases discussed above),¹³⁸ and the resulting inability of consumers to distinguish between true and false information, and thus consuming fake news under the misperception that it is truthful. The challenge of accurately distinguishing between true and false news is further exacerbated by the dramatic increase in available news and information sources online, which places a greater cognitive burden on news consumers in terms of distinguishing between legitimate and false news sources and stories.¹³⁹

133. See John H. McManus, *What Kind of Commodity is News?* 19 COMM’N RESEARCH 787, 794 (1992).

134. In this situation, news is not unlike a “lemon” purchased from an automobile seller. The poor quality of the information (or car) is not revealed until well after the purchase is finalized. See George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. OF ECON. 488, 490-91 (1970) (discussing “asymmetrical information”).

135. See *Id.*

136. For an overview and advocacy of the concept of bounded rationality, see generally John Conlisk, *Why Bounded Rationality?*, 34 J. OF ECON. LIT. 669 (1996). For a discussion of the concept’s relationship to the marketplace of ideas metaphor, see generally Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821 (2008).

137. See McManus, *supra* note 133, at 793.

138. See Garrett & Stroud, *supra* note 61.

139. See, e.g., Olivia Solon, *Only 20% of U.S. Adults Have Information Overload, but Those Who do Feel the Burden*, THE GUARDIAN (Dec. 7, 2016), <https://www.theguardian.com/technology/2016/dec/07/information-overload-pew-study-digital-divide>. [https://perma.cc/647C-C5QP]; Xiaoyan Qiu et al., *Lack of Quality Discrimination in Online Information Markets* (January 2017) (unpublished manuscript) (on file with ResearchGate), https://www.researchgate.net/publication/312194354_Lack_of_quality_discrimination_in_online_information_markets [https://perma.cc/E3R6-UFWV].

Of particular importance is the extent to which the traditional mechanisms for combating this sort of uninformed consumption have been undermined by technological change. For instance, the reputations of news outlets long have served as a way for consumers to distinguish between truth and falsity.¹⁴⁰ Reputations have often been identified as an important factor to facilitate efficient markets for experience and credence goods.¹⁴¹ The reputation of the *New York Times* for being truthful and accurate has generally been better than that of the *National Enquirer*.

This important heuristic, however, is being undermined as news consumption migrates to news aggregators and social media platforms. This is most compellingly demonstrated by research showing how seldom news consumers know the actual source of the news they are consuming. For example, recent research by the Pew Research Center indicates that individuals who consume news via social media are capable of identifying the originating source of the story consumed only about half the time.¹⁴²

Further, this traditional outlet reputation-based mechanism for evaluating the likely truthfulness of a news story is being replaced by a new heuristic – the trustworthiness of the individual who shared the story on social media.¹⁴³ Thus, an article shared by a trusted member of an individual’s social network, but written by a source unknown to that individual, will be evaluated as more trustworthy – and thus be more likely to be consumed and shared – than an article produced by a reputable news source but shared by someone viewed as less trustworthy.¹⁴⁴ This halo effect extends to news brands as a whole, with individuals more likely to follow and recommend news outlets that were referred to them by trusted members of their social network.¹⁴⁵ Given that the filter bubble dynamic discussed above is a function of the ideological homogeneity that characterizes many individuals’ social

140. See Miriam J. Metzger et al., *Social and Heuristic Approaches to Credibility Evaluation Online*, 60 J. COMM. 413, 426 (2010) (“One of the most prevalent heuristics used for evaluating credibility that was mentioned by focus group participants was relying on site or source reputation.”).

141. See Steffen Huck et al., *Pricing and Trust 1* (Feb. 2008) (unpublished manuscript) (on file with Paris School of Economics) (noting that “[w]henver contracts for the exchange of a good are incomplete and sellers have leeway to shade its quality about which the consumer finds out only if it is too late . . . A key role in markets for such goods is assumed by trust”), <https://www.parisschoolofeconomics.eu/IMG/pdf/Huck2.pdf> [https://perma.cc/RS7B-EWVX].

142. See Amy Mitchell et al., *How Americans Encounter, Recall and Act Upon Digital News*, PEW RES. CTR. (Feb. 9, 2017), <http://www.journalism.org/2017/02/09/how-americans-encounter-recall-and-act-upon-digital-news/>. [https://perma.cc/L6JG-VQQA].

143. See generally, THE MEDIA INSIGHT PROJECT, “WHO SHARED IT?”: HOW AMERICANS DECIDE WHAT NEWS TO TRUST ON SOCIAL MEDIA (2017), http://mediainsight.org/PDFs/Trust%20Social%20Media%20Experiments%202017/MediaInsight_Social%20Media%20Final.pdf [https://perma.cc/ED2R-YHEK].

144. *Id.* at 4-9.

145. *Id.* at 10 (“Those who trusted the sharer but saw the unknown outlet were more likely than those who did not trust the sharer and saw the reputable outlet to share the article, follow the sharer, sign up for news alerts from the source, and recommend the source to friends.”).

networks,¹⁴⁶ the situation once again presents itself in which the likelihood of exposure to counterspeech is being undermined by the social media context in which news consumption is increasingly taking place.

These dynamics help to explain recent findings indicating that trust in mainstream news outlets is much lower than the levels of trust that news consumers place in the news outlets catering to their ideological orientation.¹⁴⁷ The distribution of trust in news organizations is essentially being reallocated in ways that favor the consumption and acceptance of fake news over legitimate news, which works against the effectiveness of counterspeech. Ultimately, if news consumers are increasingly unable to accurately gauge whether a news source's reporting is likely to be true or false, then more speech (i.e., counterspeech) does nothing to assure that truth prevails and that democratic decision-making is well-informed.¹⁴⁸

Moreover, news consumers need to consider the issue of intentional misrepresentation of news sources. Political propaganda has always been a part of political campaigns.¹⁴⁹ Under the logic of counterspeech, false propaganda should be effectively counteracted by true and accurate news and information. However, a key means of enhancing the effectiveness of false propaganda involves disguising the source.¹⁵⁰ Propaganda disguised as

146. See Itai Himelboim et al., *Birds of a Feather Tweet Together: Integrating Network and Content Analyses to Examine Cross-Ideology Exposure on Twitter*, 18 J. COMPUTER-MEDIATED COMM. 40, 40 (Jan. 2013) (finding that “Twitter users are unlikely to be exposed to cross-ideological content from the cluster of users they followed as these were usually politically homogeneous”); Andrei Boutyline & Robb Willer, *The Social Structure of Political Echo Chambers: Variation in Ideological Homophily in Online Networks*, 38 POL. PSYCHOL. 551, 566-567 (2017) (finding that more ideologically extreme individuals have more homophilous social networks, which should “result in networks that embed their members in denser webs of like-minded associations, which could then insulate individuals from the demotivating effects of dissenting views, and may enable political behaviors to spread faster than they would through sparser networks”).

147. See Amy Mitchel et. al., *Political Polarization & Media Habits*, PEW RES. CTR. (Oct. 21, 2014) (showing “little overlap in the news sources [liberals and conservatives] turn to and trust”), <http://www.journalism.org/2014/10/21/political-polarization-media-habits/>. [<https://perma.cc/MR4D-DUHL>]; “My” Media Versus “The” Media: Trust In News Media Depends on Which News Media You Mean 1, MEDIA INSIGHT PROJECT (May 2017), http://www.mediainsight.org/PDFs/Meaning%20of%20Media/APNORC_Trust_The_Media_Topline_final.pdf. <https://perma.cc/N6FQ-5M5E>. (finding that “on many fronts, Americans are skeptical of ‘the news media’ in the abstract but generally trust the news they themselves rely on”).

148. See Goldman & Cox, *supra* note 11, at 23.

149. For a comprehensive overview of the history of propaganda and its use in political campaigns, see generally Garth S. Jowett & Victoria J. O’Donnell, *Propaganda & Persuasion* (6th ed.) (2014).

150. See Jessie Daniels, *Cloaked Websites: Propaganda, Cyber-Racism and Epistemology in the Digital Era*. 11 NEW MEDIA & SOCIETY 658, 660 (2009) (“The emergence of websites such as Weltner’s Katrina Families and American Civil Rights Review illustrates a central feature of propaganda and cyber-racism in the digital era: the use of difficult-to-detect authorship and hidden agendas intended to accomplish political goals.”).

legitimate news has proven to be particularly effective.¹⁵¹ What is different now is the extent to which propaganda can be effectively disguised as legitimate news.¹⁵² This is a function of the diminished barriers to entry and institutional gatekeeping, which operate in concert with the enhanced distribution capacity of social media.

The degree to which propaganda operations can masquerade as news outlets is much greater in an environment in which legitimate and illegitimate news outlets can all exist side-by-side on social media platforms.¹⁵³ This is well-illustrated by the report that as many as 1,000 Russians were actively engaged in the production and distribution of fake news through social media during the 2016 election.¹⁵⁴ An analysis of Russia's online propaganda efforts emphasized Russia's utilization of a multiplicity of online sources that are often disguised as news outlets.¹⁵⁵

In a 2012 television interview on the influence of money on political campaigning, the late, conservative Supreme Court Justice (and established counterspeech enthusiast) Antonin Scalia was asked how Thomas Jefferson would likely have viewed the contemporary political communication environment.¹⁵⁶ Scalia's reply was, "I think Thomas Jefferson would have said 'the more speech the better.' That's what the First Amendment is all about."¹⁵⁷ He followed that statement, however, with this important caveat: "*so long as the people know where the speech is coming from.*"¹⁵⁸ Thus, even from a traditionalist First Amendment perspective, the counterspeech doctrine is not absolute, and is especially vulnerable when the true source of news or information is disguised.

151. *Id.* at 662 ("Organizations and individuals who deploy the strategies of 'black' and 'grey' propaganda online via cloaked websites can be more effective precisely because they conceal their intention and authorship.").

152. Research indicates that social media users find it particularly difficult to accurately distinguish news posts from other types of social media posts. See Emily K. Vraga et al., *Blurred Lines: Defining Social, News, and Political Posts on Facebook*, 13 J.INFO. & TECH.POL. 272, 272 (2016) ("[U]sers and researchers often agree on defining social and political content, but are more likely to disagree on categorizing news content.").

153. Technological changes are likely to further enhance the ability to disguise fake news as legitimate news. See Nick Bilton, *Fake News is About to Get Even Scarier than You Ever Dreamed*, VANITY FAIR (Jan. 26, 2017), <http://www.vanityfair.com/news/2017/01/fake-news-technology>. [<https://perma.cc/93U3-4MY9>] ("At corporations and universities across the country, incipient technologies appear likely to soon obliterate the line between real and fake. Or, in the simplest of terms, advancements in audio and video technology are becoming so sophisticated that they will be able to replicate real news—real TV broadcasts, for instance, or radio interviews—in unprecedented, and truly indecipherable, ways").

154. See Roberts, *supra* note 117.

155. See Christopher Paul & Miriam Matthews, *The Russian "Firehouse of Falsehood" Propaganda Model*. RAND CORP.: PERSP. (2016), http://www.rand.org/content/dam/rand/pubs/perspectives/PE100/PE198/RAND_PE198.pdf, <https://perma.cc/U3N8-5LXV> ("[T]here are dozens of proxy news sites presenting Russian propaganda, but with their affiliation with Russia disguised or downplayed.").

156. See Piers Morgan Tonight (air date: Jul. 18, 2012 at 21:00 ET), CNN, <http://www.cnn.com/TRANSCRIPTS/1602/13/cnr.12.html>, [<https://perma.cc/5C42-7MUX>].

157. *Id.*

158. *Id.* (emphasis added).

It is important to note that even mainstream news outlets have, on many occasions, shown themselves to be unable to distinguish between legitimate news and fake news, and thus have contributed to the dissemination of fake news.¹⁵⁹ Parasitic journalism is an increasingly prominent dimension of the news ecosystem, with news outlets facing diminished resources to produce their own reporting or to rigorously verify the reporting of other news outlets.¹⁶⁰ These patterns increase the likelihood that legitimate news outlets will facilitate the dissemination of fake news and thereby legitimize it for some news consumers.

Thus, it is not surprising that recent research has illustrated that the false news stories emanating from “hyper-partisan” right-wing news sites were able to influence the agenda of the mainstream news media.¹⁶¹ From a counterspeech perspective, this means that even the key providers of the legitimate news that is intended (according to the counterspeech doctrine) to overcome false news are not only operating at a diminished capacity to counteract false news, but are sometimes even complicit in its perpetuation.

And then, of course, there is the question of how well new distributors of news (i.e., social media platforms) are capable of distinguishing between true and false news, and whether they take action on the basis of such distinctions. Certainly, in the wake of the election these platforms have ratcheted up their efforts to identify and curtail the spread of fake news

159. For a discussion of the challenges to the journalistic process of verifying news and information disseminated online, see Alfred Hermida, *Tweets and Truth: Journalism as a Discipline of Collaborative Verification*, 6 JOURNALISM PRAC. 659 (2012).

160. See *The Future of Newspapers*, *supra* note 79.

161. See Yochai Benkler et al., *Study: Breitbart-Led Right-Wing Media Ecosystem Altered Broader Media Agenda*, COLUM. JOURNALISM. REV. (Mar. 3, 2017), <http://www.cjr.org/analysis/breitbart-media-trump-harvard-study.php>, <https://perma.cc/B4K8-ULQA> (“Our own study of over 1.25 million stories published online between April 1, 2015 and Election Day shows that a right-wing media network anchored around Breitbart developed as a distinct and insulated media system, using social media as a backbone to transmit a hyper-partisan perspective to the world. This pro-Trump media sphere appears to have not only successfully set the agenda for the conservative media sphere, but also strongly influenced the broader media agenda, in particular coverage of Hillary Clinton.”).

stories.¹⁶² Whether these efforts have thus far been successful has been called into question.¹⁶³ The bottom line, however, is that when previous iterations of content distributors (cable systems, broadcast networks, book distributors, etc.) are compared to today's social media platforms, social media platforms know far less about the sources and content they are distributing (given the massive scale at which they operate) than any previous generation of content distributor.¹⁶⁴ In this regard, their relatively limited ability to distinguish between fake and legitimate news stories/sources – their bounded rationality – has been transferred to the news consumer.

F. *The Enhanced Speed at Which False News Can Travel*

Finally, it is important to consider how changes in media technology have altered the speed at which fake news can travel. The issue of speed is particularly important given that Brandeis' original articulation of the counterspeech doctrine notes that counterspeech represents the appropriate remedy to false speech only "If there be time . . ."¹⁶⁵ This is a very important qualification to take into consideration within the context of today's media ecosystem, in which news can "go viral."¹⁶⁶

It has been well documented how advances in media technologies have compressed the "news cycle" and facilitated ever greater immediacy in the

162. See Josh Constone, *Facebook Shows Related Articles and Fact-Checkers Before You Open Links*, TECHCRUNCH (Apr. 25, 2017), <https://techcrunch.com/2017/04/25/facebook-shows-related-articles-and-fact-checkers-before-you-open-links/>. <https://perma.cc/P243-XPQE>; Fergus Bell, *Here's a List of Initiatives that Hope to Fix Trust in Journalism and Tackle Fake News*, MEDIUM (Apr. 25, 2017), <https://medium.com/@ferg/heres-a-list-of-initiatives-that-hope-to-fix-trust-in-journalism-and-tackle-fake-news-30689feb402>. <https://perma.cc/W72T-KQ6E>; See also Testimony of Sean J. Edgett, Acting General Counsel, Twitter, Inc., S. Comm. on the Judiciary, Subcomm. on Crime and Terrorism (October 31, 2017), <https://www.judiciary.senate.gov/imo/media/doc/10-31-17%20Edgett%20Testimony.pdf>. [<https://perma.cc/YN59-VF5Z>]; Testimony of Richard Salgado, Senior Counsel, Law Enforcement and Information Security, Google, S. Comm. on the Judiciary, Subcomm. on Crime and Terrorism (October 31, 2017), <https://www.judiciary.senate.gov/imo/media/doc/10-31-17%20Salgado%20Testimony.pdf>. [<https://perma.cc/S6AS-T6FJ>]; Testimony of Colin Stretch, General Counsel, Facebook, S. Comm. on the Judiciary, Subcomm. on Crime and Terrorism (October 31, 2017), <https://www.judiciary.senate.gov/imo/media/doc/10-31-17%20Stretch%20Testimony.pdf>. [<https://perma.cc/4Z2D-H32W>].

163. See, e.g., Sam Levin, *Facebook Promised to Tackle Fake News. But the Evidence Shows it's not Working*, THE GUARDIAN (May 16, 2017, 5:00 EDT), <https://www.theguardian.com/technology/2017/may/16/facebook-fake-news-tools-not-working> [<https://perma.cc/TQP6-R7KD>].

164. Indeed, one could convincingly argue that the goal of these platforms is to host as many speakers, and as much speech, as possible, with relatively little consideration given to the nature of the speakers/speech – particularly in comparison to previous generations of content distributors.

165. 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

166. For a useful case study of viral news, see Sapna Maheshwari, *How Fake News Goes Viral: A Case Study*, N. Y. TIMES (Nov. 20, 2016), https://www.nytimes.com/2016/11/20/business/media/how-fake-news-spreads.html?_r=1. [<https://perma.cc/G53Y-DZ9X>].

delivery of news.¹⁶⁷ The latest development in this process is the role that social media can play in accelerating the distribution of a news story.¹⁶⁸ An emerging literature on “digital wildfires” documents the speed at which false news can travel and seeks to explain the factors that can affect its diffusion.¹⁶⁹ The speed of diffusion can be enhanced by technological advances such as bots (certainly something Brandeis didn’t have to consider) that can operate on a scale and pace that human false news disseminators cannot¹⁷⁰ distribute fake news in their efforts to influence the 2016 election.¹⁷¹

Presumably, legitimate news has the same capacity to travel at equal speeds to false news today, just as it did in Brandeis’ time. However, while the underlying technological capacity is the same, the troubling reality is that the rapid dissemination capacity of social media appears more likely to be brought to bear for false news stories than for true news stories. Recent data indicate that false news stories are more likely to be shared – and are thus

167. See generally HOWARD ROSENBERG & CHARLES S. FELDMAN, *NO TIME TO THINK: THE MENACE OF MEDIA SPEED AND THE 24-HOUR NEWS CYCLE* (2008).

168. This process dates back to the development of radio, and progresses through the rise of 24-hour news networks and the dissemination of news online. *Id.*

169. For a review, see Helena Webb et al., *Digital Wildfires: Propagation, Verification, Regulation, and Responsible Innovation*. 34 ACM TRANSACTIONS ON INFO. SYS. 1 (Apr. 2016).

170. See Alessandro Bessi & Emilio Ferrara, *Social Bots Distort the 2016 U.S. Presidential Election Online Discussion*, FIRST MONDAY (Nov. 7, 2016), <http://journals.uic.edu/ojs/index.php/fm/article/view/7090>, [https://perma.cc/258N-D44N] (“Our findings suggest that the presence of social media bots can indeed negatively affect democratic political discussion rather than improving it, which in turn can potentially alter public opinion and endanger the integrity of the Presidential election.”); Samuel C. Woolley & Douglas R. Guilbeault, *Computational Propaganda in the United States of America: Manufacturing Consensus Online*, Computational Propaganda Research Working Paper No. 2017.5, Oxford Internet Institute 3 (2017), <http://comprop.oii.ox.ac.uk/wp-content/uploads/sites/89/2017/06/Comprop-USA.pdf>, [https://perma.cc/K2WM-RXYC] (finding that bots are used to create “the illusion of significant online popularity in order to build real political support,” and “democratiz[e] propaganda through enabling nearly anyone to amplify online interactions for partisan ends”).

171. See Gabe O’Connor & Avie Schneider, *How Russian Twitter Bots Pumped Out Fake News During The 2016 Election*, NPR (Apr. 3, 2017), <http://www.npr.org/sections/alltechconsidered/2017/04/03/522503844/how-russian-twitter-bots-pumped-out-fake-news-during-the-2016-election> [https://perma.cc/BR5U-KA4G] (“When he testified before the Senate Intelligence Committee last week, former FBI agent Clint Watts described how Russians used armies of Twitter bots to spread fake news using accounts that seem to be Midwestern swing-voter Republicans”).

likely to spread faster (and farther) – than legitimate news stories.¹⁷² The explanation for this disparity once again takes us back to the role of partisanship – in this case the role that partisanship plays in increasing the likelihood of sharing a partisan news story,¹⁷³ in combination with the increased likelihood that a partisan news story is a false news story.¹⁷⁴ The key implication here, once again, is that social media disproportionately favor fake news over legitimate news.

In the end, given that news has never been able to travel faster and farther than it can today, it seems reasonable to conclude that the likelihood of there “be[ing] time” to rely upon counterspeech to counteract false news is less today than in Brandeis’ era, and perhaps less today than has ever been the case before, particularly given the other technologically-imposed challenges that truthful counterspeech faces in counteracting false speech. The end result, then, is a compounding set of conditions that contributes to a digital media ecosystem that encourages and facilitates the production, dissemination, and consumption of false news in ways that the traditional media ecosystem did not.

IV. IMPLICATIONS

This section considers the broader legal, policy, and political implications of the arguments developed above, all of which point to a media environment in which the efficacy of counterspeech is being systematically undermined.

A. *The First Amendment and Falsity*

As a starting point, it is worth considering how the arguments developed here connect with other analyses of if and how First Amendment jurisprudence has addressed the issue of false news and information. As Schauer points out, the troubling irony is that First Amendment theory has

172. Craig Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News On Facebook*, BUZZFEED (Nov. 16, 2016), https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm_term=.cq7vVRj0K#.tgekXRJ0E (“During these critical months of the campaign, 20 top-performing false election stories from hoax sites and hyperpartisan blogs generated 8,711,000 shares, reactions, and comments on Facebook. Within the same time period, the 20 best-performing election stories from 19 major news websites generated a total of 7,367,000 shares, reactions, and comments on Facebook”); Craig Silverman, *Lies, Damn Lies, and Viral Content* 45 (Tow Ctr. for Digital Journalism Tow/Knight Rep.) http://towcenter.org/wp-content/uploads/2015/02/LiesDamnLies_Silverman_TowCenter.pdf (observing that “Misinformation is often more viral and spreads with greater frequency than corrective information”).

173. Jisun An, Daniele Quercia, & Jon Crowcroft, *Partisan Sharing: Facebook Evidence and Societal Consequences*, PROCEEDINGS OF THE SECOND ACM CONFERENCE ON ONLINE SOCIAL NETWORKS 13, 17 (Oct. 2014) (showing that “partisan skew” in the sharing of news stories on social media “holds not only for high-activity users but also for low-activity ones”).

174. See Starbird, *supra* note 108.

seldom grappled with the issue of truth versus falsity; or, in today's vernacular, facts versus "alternative facts."¹⁷⁵ Schauer proceeds to convincingly demonstrate that, "nearly all of the components that have made up our free speech tradition . . . in the cases and in the literature, and in the political events that inspired free speech controversies, have had very little to say about the relationship between freedom of speech and questions of demonstrable fact. Implicit in much of that tradition may have been the belief that the power of the marketplace of ideas to select truth was as applicable to factual as to religious, ideological, political, and social truth, but rarely is the topic mentioned."¹⁷⁶ Continuing in this vein, Schauer distressingly notes, "although factual truth is important, surprisingly little of the free speech tradition is addressed directly to the question of the relationship between a regime of freedom of speech and the goal of increasing public knowledge of facts or decreasing public belief in false factual propositions."¹⁷⁷

As a result, the First Amendment has essentially facilitated the type of speech that, ironically, undermines the very democratic process that the First Amendment is intended to serve and strengthen. Historically, different categories of speech have received different levels of First Amendment protection based upon its relevance and value to the democratic process.¹⁷⁸ For instance, commercial speech receives less First Amendment protection (and more rigorous restrictions against falsity) than political speech, which represents the pinnacle of speech protection given its centrality to the democratic process.¹⁷⁹ The irony here is that fake news is a type of speech that is most directly and irrefutably damaging to the integrity of the democratic process, yet because it resides within the large and undifferentiated protective bubble of political speech (where journalism generally resides), it receives (as long as it is not libelous) the highest level of First Amendment protection.

B. Market Failure in the Marketplace of Ideas

It is also worth considering the troubling state of counterspeech in relation to the marketplace of ideas metaphor from which it arose, and whether the increasing inefficacy of counterspeech may cause failure in the marketplace of ideas. From a strictly economic perspective on the marketplace of ideas, false speech can be thought of as a negative externality

175. For a transcript of the *Meet the Press* broadcast in which the term was famously introduced, see Rebecca Sinderbrand, *How Kellyanne Conway Ushered in the Era of "Alternative Facts,"* WASHINGTON POST (Jan. 22, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/22/how-kellyanne-conway-ushered-in-the-era-of-alternative-facts/?utm_term=.b633a394a39f. [<https://perma.cc/MMC2-23J6>].

176. See Schauer, *supra* note 46 at 907.

177. *Id.* at 902.

178. See generally T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519 (1979).

179. See, e.g., Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (May 1990).

of free speech,¹⁸⁰ but a negative externality of increasing magnitude, given counterspeech's increasing inadequacy as an antidote. In economics, negative externalities are accepted indicators of market failure.¹⁸¹

When considering the implications of the diminished potency of counterspeech for the effective functioning of the marketplace of ideas, the presence of such negative externalities raises the question: should the public be concerned about the possibility of market failure in the marketplace of ideas? And if so, how does market failure in the marketplace of ideas look? The prospect and nature of market failure in the marketplace of ideas has received relatively little discussion, particularly within the context of news and journalism.¹⁸² Economist Ronald Coase, in his landmark comparative analysis of regulatory perspectives toward the market for goods and the market for ideas, noted the "results actually achieved by this particular political system suggest that there is a good deal of 'market failure'" in the marketplace of ideas, though he deemed the topic "a large subject on which I will avoid comment."¹⁸³

In addressing these questions, an important starting point is to consider some key causes and indicators of market failure. At the general level, a market failure occurs when the allocation of goods and services are inefficient.¹⁸⁴ Markets for public goods, such as journalism, have proven to be uniquely prone to market failure.¹⁸⁵ Public goods have a tendency to be under-produced relative to their full value, given the ease with which they can be shared or consumed without payment.¹⁸⁶ Journalism also produces value

180. See Richard A. Tybout, *Pricing Pollution and Other Negative Externalities*, 3 BELL J. ECON. & MGMT. SCI. 252 (Spring 1972). Therefore, as Schauer notes in a statement from 2009 that sounds particularly contemporary, "[W]e are left with the conclusion that the seemingly increased pervasiveness of falsity in public discussion is a phenomenon that may possibly be a consequence of a strong free speech culture, but is certainly not a phenomenon that a free speech regime is likely to be able to remedy." Schauer, *supra* note 46 at 911-912.

181. See, e.g., Francis M. Bator, *The Anatomy of Market Failure*, 72 QUARTERLY J. ECON. 351, 3633-371 (1958).

182. For exceptions, see Tamara Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem that Won't Go Away*, 41 LOYOLA L.A. L. REV. 181 (2007) (focusing on market failures in the marketplace of ideas within the specific context of commercial speech); Gregory Brazeal, *How Much Does a Belief Cost? Revisiting the Marketplace of Ideas*, 21 S. CAL. INTERDISC. L.J. 46 (2011). For a more general overview of forms of market failure that may affect the marketplace of ideas, see Bush, *supra* note 17, nn. 47-90 and accompanying text; see also C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978) nn 61-83 and accompanying text.

183. See Ronald H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 385 (1974).

184. Kenneth A. Shepsle and Barry R. Weingast, *Political Solutions to Market Problems*, 78 AM. POL. SCI. REV. 417 (1984) ("According to the market failure orthodoxy, inefficiency in the marketplace provides a prima facie case for public intervention").

185. See Victor Pickard, *The Great Evasion: Confronting Market Failure in American Media Policy*, 31 CRITICAL STUDIES STUD. IN MEDIA COMM. 153, 154 (2014) ("Because public goods are non-rivalrous (one person's consumption does not detract from another's) and non-excludable (difficult to monetize and to exclude from free riders), they differ from other commodities, like cars or clothes, within a capitalistic economy").

186. See Hamilton, *supra* note 100 at 8 ("A person can consume a public good without paying for it, since it may be difficult or impossible to exclude any person from consumption").

for society as a whole (positive externalities) that often is not captured in the economic transactions between news organizations and news consumers, and/or between news organizations and advertisers.¹⁸⁷ All of this leads to market inefficiency in the form of the underproduction of journalism,¹⁸⁸ a situation only exacerbated by the more challenging economic environment discussed above.¹⁸⁹

From an economic theory perspective, an informed citizenry and an effectively functioning democratic process are positive externalities. From a democratic theory perspective, however, these characteristics are not peripheral; they are fundamental. Thus, an effectively functioning marketplace of ideas needs to be assessed according to different standards. According to Piety, market failures in the marketplace of ideas can be exemplified by characteristics such as: “(1) the proliferation and acceptance of false ideas, (2) the suppression of truthful information, (3) the failure to produce truthful information, and... (4) limitations on choice, and the channeling of the exercise of preferences within those limitations.”¹⁹⁰ Each of these characteristics connects fairly clearly to the conditions described above.¹⁹¹ For example, items one and two reflect the apparent increasing prominence and influence potential of fake news and the role of filter bubbles in inhibiting exposure to legitimate news.¹⁹² Item three reflects the diminishing journalistic capacity of legitimate news organizations. Item four concerns the operation of algorithmic filter bubbles, and how they tend to constrict news and information consumption within a narrower range of options determined by demonstrated preferences.

Some might argue that the increasing production, dissemination, and consumption of fake news is a reflection of the ways in which technological changes have allowed the market to more efficiently identify and meet consumer demand for falsity (the marketplace of ideas essentially becoming more efficient in serving consumer demand for fake news), rather than a reflection of consumers’ diminished ability to accurately distinguish between legitimate and false news.¹⁹³ In considering this possibility, the notion that

187. *Id.* at 13 (“... since individuals do not calculate the full benefit to society of their learning about politics, they will express less than optimal levels of interest in public affairs coverage and generate less than desirable demands for news about government”).

188. See Pickard, *supra* note 195 at 155 (“The inadequacy of commercial support for democracy-sustaining infrastructures suggests what should be obvious by now: the systematic underproduction of vital communications like journalistic media”).

189. See Downie & Schudson, *supra* note 76.

190. See Piety, *supra* note 191 at 189-190.

191. See *supra* notes 75-180 and accompanying text.

192. See Piety, *supra* note 191 at 189-190.

193. See Goldman & Cox, *supra* note 11 at 18 (“The whole idea of economic efficiency is that the system should be responsive to consumers’ tastes or preferences (subject to the limits of technology), not that it should produce certain goods in comparatively large quantities no matter what people want. Thus, if consumers have no very strong preference for truth as compared with other goods or dimensions of goods, then there is no reason to expect that the bundle of intellectual goods provided and “traded” in a competitive market will have maximum truth content. If people valued falsehood, then perfect competition would provide falsehood in a Pareto-optimal way”).

consumer demand for fake news is now being better met is cynical in that it reflects a grim view of the citizenry, in terms of a conscious desire to be misinformed. Even the bulk of the literature discussed above delineating the various cognitive biases that can lead to the consumption and acceptance of false news and information does not suggest that individuals are consciously and intentionally seeking false information, but rather that their cognitive biases lead them to mistakenly embrace false news and information as true.¹⁹⁴

The notion that individuals desire true and accurate information but are not always capable of making the distinction, reflects a less cynical view of the citizenry and a reasonable sense of how an idea marketplace actually functions, given the recognized prominence of “bounded rationality”¹⁹⁵ in limiting marketplace efficiency. Further, this perspective represents the more optimistic (and perhaps naïve) normative principle that an effectively functioning marketplace of ideas facilitates informed democratic decision-making – something that is presumably incompatible with decisions based upon false information. As Lidsky argues,

“The ideal of democratic self-governance . . . makes no sense unless one assumes that citizens will generally make rational choices to govern the fate of the nation. If the majority of citizens make policy choices based on lies, half-truths, or propaganda, sovereignty lies not with the people but with the purveyors of disinformation. If this is the case, democracy is both impossible and undesirable.”¹⁹⁶

Reflecting this position, this analysis operates (perhaps naively and optimistically – but First Amendment theory is nothing if not somewhat naïve and optimistic) from the perspective that consumers generally prefer legitimate to false news.

From this perspective, the unintentional consumption of fake news is a reflection of the bounded rationality of the news consumer, which can be seen as a function of inadequate information for making determinations as to the accuracy and reliability of available news sources. Inadequate information is a recognized source of market failure.¹⁹⁷ According to Brazeal, “[i]mperfect information is arguably the most significant and pervasive source of market failure in the marketplace of ideas.”¹⁹⁸ A market cannot operate efficiently if

194. See, e.g., Olson, *supra* note 62. (“Humans have an evolutionary tendency towards gullibility and wanting to believe what people are telling them”).

194. See *supra* notes 62-63 and accompanying text.

195. See Conlisk, *supra* note 140.

196. Lidsky, *supra* note 23 at 839.

197. For a review see Deborah Haas-Wilson, *Arrow and the Information Market Failure in Health Care: The Changing Content and Sources of Health Care Information*, 26 J. HEALTH POL. POL’Y & L. 1031, 1034-1037 (2001).

198. See Brazeal, *supra* note 191 at 32.

consumers lack the information necessary to make well-informed decisions about the relative value of the products and services available to them.¹⁹⁹

Another widely acknowledged source of market failure – both in the economic marketplace and in the marketplace of ideas – is imperfect competition.²⁰⁰ From an ideas marketplace standpoint, a lack of competition fails to provide the “diverse and antagonistic” sources upon which the marketplace of ideas premise is founded.²⁰¹ More relevant to this analysis, however, is the fact that any biases inherent in the monopolist producers or distributors of news and information can undermine the extent to which the news consumers that rely upon them are properly informed.²⁰² A suddenly more vocal concern in the wake of the 2016 election has been the extent to which platforms, such as Facebook and Google play such an increasingly powerful bottleneck role in the dissemination and consumption of news and information.²⁰³ Such concerns have tended to focus on these platforms’ dominant position in the online advertising marketplace,²⁰⁴ or their increasingly dominant position in the emerging data marketplace.²⁰⁵ However, these platforms’ growing bottleneck position in the dissemination of news and information has begun to receive more attention – and explicitly in relationship to the fake news problem that is the focus here. As Sally Hubbard convincingly argues, “fake news is [fundamentally] an antitrust problem”, given the powerful intermediary position of Facebook, and the extent to which the algorithms that underlie the platform can point news

199. *Id.* at 31-32.

200. *Id.*

201. See *Associated Press v. United States*, 326 U.S. 1, 20 (1945), (noting that the First Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public”).

202. See Brazeal, *supra* note 191 at 31 (“Imperfect competition in the marketplace of ideas also occurs when the promotion of ideas is subsidized unequally”).

203. See, e.g., Brad Auerbach, *Are Amazon, Facebook and Google Monopolies? Are They Undermining Democracy? Taplin is Persuasive*, FORBES (May 26, 2017), <https://www.forbes.com/sites/bradauerbach/2017/05/26/taplin/#4f7d67d26daa>, [<https://perma.cc/YHW4-XVYS>]; On the Media, *The Fight for Antitrust* (September 22, 2017), <https://www.wnyc.org/story/fight-antitrust/>, [<https://perma.cc/6THS-KR3E>].

204. See BitClave, *The Facebook-Google Online Ads Duopoly is Bad for Business*, MEDIUM (July 8, 2017), <https://medium.com/@BitClave/the-facebook-google-online-ads-duopoly-is-bad-for-business-fa2b388de8fd> [<https://perma.cc/E2VZ-B3VK>].

205. See Nick Srnicek, *We Need to Nationalise Google, Facebook, and Amazon. Here's Why*, THE GUARDIAN (Aug. 30, 2017), <https://www.theguardian.com/commentisfree/2017/aug/30/nationalise-google-facebook-amazon-data-monopoly-platform-public-interest>, [<https://perma.cc/HG3K-S8KN>]. <https://www.theguardian.com/commentisfree/2017/aug/30/nationalise-google-facebook-amazon-data-monopoly-platform-public-interest>, [<https://perma.cc/HG3K-S8KN>].

consumers toward fake news and away from legitimate news organizations.²⁰⁶ The extent to which so many news consumers are relying upon these same algorithms (and whatever flaws or biases are baked into them) provides the baseline from which the damage to the marketplace of ideas emerges.

C. *The 2016 Presidential Election as Market Failure Case Study*

In light of these market failure concerns, a looming question is whether the results of the 2016 presidential election represent a case study of market failure in the marketplace of ideas. Perhaps this is a way to make sense of an election outcome that baffled and blind-sided many journalists, political analysts, and voters²⁰⁷ – and that took place within a media ecosystem that has changed significantly in the years since the 2012 presidential election. Certainly, there are other equally (and perhaps even more) plausible explanations for this outcome (discussed below). The question being posed here is whether market failure in the marketplace of ideas, as a byproduct of the increased inefficacy of counterspeech, represents another potentially plausible explanation.

In considering the increasing challenges discussed above that not only news consumers, but news producers and (perhaps most importantly) distributors face in discerning between real and fake news, there is an “information asymmetry” – a classic cause of market failure – between the creators and the distributors and consumers of news. This is a problem potentially compounded by the “imperfect competition” scenario described above. And in considering the consumption of fake news as a negative externality, then there is a potential indicator of market failure. However, to truly accept the consumption of fake news as a negative externality, one must consider its negative consequences. Given that the idea marketplace is intended to facilitate well-informed decision-making, if there is evidence of poorly-informed decision-making, then that could potentially be seen as evidence of market failure.

Well-informed voting decisions have been defined by many political analysts in terms of the extent that citizens vote in ways that reflect their best

206. See Sally Hubbard, *Why Fake News is an Antitrust Problem*, FORBES (Jan. 10, 2017), <https://www.forbes.com/sites/washingtonbytes/2017/01/10/why-fake-news-is-an-antitrust-problem/#4c557dc730f1>, [https://perma.cc/P8GP-TFGM] (“When viewed through an antitrust lens, news publishers are Facebook’s competitors. They compete for users’ time spent online, user data and advertising dollars. . . . Indeed, competitive biases baked into Facebook’s design deserve a healthy portion of the responsibility for the rise of fake news. By pulling technological levers that keep users on its platform, thereby lessening clicks to news publishers’ sites, Facebook has sped the decline of legitimate news and provided a breeding ground for the fake variety”).

207. See, e.g., Susan Davis and Scott Detrow, *A Year Later, the Shock of Trump’s Win Hasn’t Totally Worn Off in Either Party*, NPR (2017, Nov. 9), <https://www.npr.org/2017/11/09/562307566/a-year-later-the-shock-of-trumps-win-hasn-t-totally-worn-off-in-either-party>; Shane Goldmacher and Ben Schreckinger, *Trump Pulls Off Biggest Upset in U.S. History*, POLITICO (2016, Nov. 11), <https://www.politico.com/story/2016/11/election-results-2016-clinton-trump-231070>;

interests.²⁰⁸ Economic approaches, in particular, have emphasized the role of self-interest, i.e., that voters will vote for those candidates whose policy positions are likely to benefit them the most.²⁰⁹ And, it should be emphasized that this notion of self-interest has been conceptualized not purely in terms of narrow, short-term economic self-interest, but more broadly as well, to accommodate family and social network affinities.²¹⁰

There are a variety of competing theoretical perspectives that seek to explain the dynamics of voting behavior. Other theoretical perspectives emphasize the “expressive” dimension of voting,²¹¹ or the inherent irrationality of voting that is a function of the negligible likelihood of rational voting behavior having a meaningful impact.²¹² The market failure argument being put forth here in reference to the 2016 election does not reflect these theoretical perspectives, but is rather an extension of the self-interested voter hypothesis described above, which, it should be noted, has received strong empirical support in recent research.²¹³

There have similarly been a variety of competing perspectives offered to explain the results of the 2016 presidential election. Some of these explanations have emphasized the likelihood that voters were motivated

208. For an overview of this perspective, *see generally* Gordon Tullock, *On Voting: A Public Choice Approach* (1998).

209. *See* Bryan Caplan, *The Myth of the Rational Voter* 18 (2007) (“[M]ost economists . . . compare voters to consumers who shrewdly ‘vote their pocketbooks’”).

210. *See* Jason Weeden & Robert Kurzban, *The Hidden Agenda of the Political Mind: How Self-Interest Shapes Our Opinions and Why We Won’t Admit It* 39-40 (2014) (Arguing that “it’s probably best to jettison the term ‘self-interest’ altogether . . . [and] refer to ‘inclusive interests.’ Something is in a person’s ‘inclusive interests’ when it advances their or their family members’ everyday, typical goals,” as well as those of “their friends, allies, and social networks”).

211. *See* Geoffrey Brennan and Loren Lomasky, *Democracy & Decision: The Pure Theory of Electoral Preference* (1993) 15-16 (contending that because “electoral outcome is detached from electoral ‘choice’ for each voter,” voting becomes a form of “expressive behavior [that reflects] various kinds of ethical and ideological principles that are suppressed in the market setting. Politics, therefore, gives much freer range to ethical considerations than do markets”).

212. *See* Caplan, *supra* note 225 at 3 (arguing that “Voter irrationality is precisely what economic theory implies once we adopt introspectively plausible assumptions about human motivation”).

213. *See* Weeden & Kurzban, *supra* note 226 at 203 (“The key debate in these discussions . . . is how much interests matter in driving political opinions. In chapter 2 we responded to claims that self-interest hardly matters: When we run simple tests of these simple claims, quite often the simple claims are simply untrue”).

primarily by informed self-interest.²¹⁴ Others have emphasized factors, such as frustration with the entirety of the political system (i.e., a desire to “blow up the status quo” in protest),²¹⁵ or prejudices, such as racism²¹⁶ and sexism.²¹⁷

An additional possibility is that the 2016 election represented a case of market failure in the marketplace of ideas. Under this scenario, some segment of self-interested voters was sufficiently ill-informed (i.e., “boundedly rational”) due to the changing conditions in the media ecosystem described above that they failed to vote in a way that reflected their best interests, an outcome that is associated with market failure. This market failure outcome is premised upon the substantial body of analysis that has been produced in the wake of the election that has repeatedly demonstrated that many categories of voters who voted for Donald Trump are actually those most

214. See Robert Kurzban & Jason Weeden, *No, Trump Voters Were Not Irrational*, WASHINGTON POST (Nov. 9, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/11/09/no-trump-voters-were-not-irrational/?utm_term=.45ad6fae23c6, [https://perma.cc/QU7H-4A3U] (arguing that white, blue collar voters voted for Trump not “because they’re irrational, but because they are self-interested — something generally true of voters on both sides”); see also David Goodhart, *White Self-Interest is not the Same Thing as Racism*, AMERICAN RENAISSANCE (Mar. 2, 2017), <https://www.amren.com/news/2017/03/white-self-interest-not-thing-racism/>, [https://perma.cc/JB4A-JM33]; Ned Barnett, *Duke Professor Dispels Myth About Trump and Working Class Voters*, THE NEWS-OBSERVER (Jun. 10, 2017), <http://www.newsobserver.com/opinion/opn-columns-blogs/ned-barnett/article155509549.html> [https://perma.cc/U87C-AKMP].

215. See Daniel Henninger, *The Trump Question*, WALL STREET JOURNAL (Jan. 18, 2017), <https://www.wsj.com/articles/the-trump-question-1484784436> (“It is said that the Trump electorate wanted to blow up the status quo”).

216. See generally Sean McElwee & Jason McDaniel, *Economic Anxiety Didn’t Make People Vote Trump, Racism Did*, THE NATION (May 8, 2017), <https://www.thenation.com/article/economic-anxiety-didnt-make-people-vote-trump-racism-did/>, [https://perma.cc/2KAH-97U4] (“Our analysis shows Trump accelerated a realignment in the electorate around racism, across several different measures of racial animus—and that it helped him win. By contrast, we found little evidence to suggest individual economic distress benefited Trump”).

217. See Carl Bialik, *How Unconscious Sexism Could Help Explain Trump’s Win*, FIVETHIRTYEIGHT (January 21, 2017), <https://fivethirtyeight.com/features/how-unconscious-sexism-could-help-explain-trumps-win/>, [https://perma.cc/WM6E-DCLM] (“an important obstacle to the first woman president remains: the hidden, internalized bias many people hold against career advancement by women. And perhaps surprisingly, there is evidence that women hold more of this bias, on average, than men do”).

likely to be harmed by his policies.²¹⁸ These analyses have concluded, for instance, that elderly and rural voters (two demographics who were strong Trump supporters) face the greatest economic harms from Trump policy initiatives such as the repeal of the Affordable Care Act, the abandoning of the Trans-Pacific Partnership, and dramatic cuts to Medicaid and agriculture subsidies.²¹⁹ Such patterns may reflect that the role of partisan affiliation in contemporary voting decisions has become largely disconnected from the associated policy positions of the candidates,²²⁰ which is evidence of the Spiral of Partisanship phenomenon discussed above.²²¹

If we accept the conclusions of these analyses (for arguments sake) that there was an unusual degree of voter failure to engage in self-interested voting behaviors, then this could reflect the possibility that a segment of voters lacked adequate information to accurately determine the voting decision that best reflected their self-interest. From the standpoint of a politically-oriented analysis of the operation of the marketplace of ideas, such indicators of voters failing to vote in their best interests, possibly due to false or inadequate information (through the spread of fake news, which was facilitated by the

218. See, e.g., Martha C. White, *Trump Voters Stand to Suffer Most from Obamacare Repeal and Trade War*, NBC NEWS (Feb. 6, 2017) <http://www.nbcnews.com/business/business-news/trump-voters-stand-suffer-most-obamacare-repeal-trade-war-n717491> [<https://perma.cc/HWU7-PP8N>]; Paul Krugman, *Coal Country Is a State of Mind*, NEW YORK TIMES, (Mar. 31, 2017) <https://www.nytimes.com/2017/03/31/opinion/coal-country-is-a-state-of-mind.html>, [<https://perma.cc/9AGM-ZLBY>]; Andrew Restuccia et al., *Trump Releases Budget Hitting His Own Voters Hardest*, POLITICO (May 22, 2017), <http://www.politico.com/story/2017/05/22/trump-budget-cut-social-programs-238696>, [<https://perma.cc/8JW9-AHRU>]; Amanda Taub, *Why Americans Vote "Against Their Interest": Partisanship*, NEW YORK TIMES (Apr. 12, 2017), https://www.nytimes.com/2017/04/12/upshot/why-americans-vote-against-their-interest-partisanship.html?_r=0, [<https://perma.cc/3VEG-7GRS>]; Catherine Rampell, *Why the White Working Class Votes Against Itself*, WASHINGTON POST (December 22, 2016) https://www.washingtonpost.com/opinions/why-the-white-working-class-votes-against-itself/2016/12/22/3aa65c04-c88b-11e6-8bee-54e800ef2a63_story.html?utm_term=.99d233ea82fb, [<https://perma.cc/EW5N-NX22>]; Neil H. Buchanan, *Why Did So Many Americans Vote to Be Poorer?* NEWSWEEK (January 15, 2017), <http://www.newsweek.com/neil-buchanan-why-did-so-many-americans-vote-be-poorer-542453>, [<https://perma.cc/E9V7-C5LN>]; Neil Macdonald, *Trump's Poor and Rural Supporters Line Up to Take their Economic Beating*, CBC NEWS (April 5, 2017), <http://www.cbc.ca/news/opinion/americans-voting-for-cuts-1.4055389>, [<https://perma.cc/TGP8-A58M>].

219. See White, *supra* note 234 (“Donald Trump’s most ardent supporters are likely to be hit the hardest if he makes good on his promise to dismantle the Affordable Care Act and embark on trade wars with China and Mexico”); Restuccia et al., *supra* note 218 (“Donald Trump, whose populist message and promises to help American workers propelled him to the White House, issued a budget proposal on Tuesday that instead takes aim at the social safety net on which many of his supporters rely”).

220. See Taub, *supra* note 234 (“Why do people vote against their economic interests? The answer, experts say, is partisanship. Party affiliation has become an all-encompassing identity that outweighs the details of specific policies”).

221. See *supra* notes 128-131 and accompanying text.

economic and technological conditions outlined above), could be seen as evidence of market failure.²²²

Whether or not one accepts this explanation as the cause of the 2016 election results, it still seems worth considering the ramifications of the market failure in the marketplace of ideas concerns being raised here. Accepting this possibility highlights the danger inherent in the institutionalized confidence in truth to overcome falsity that is endemic of First Amendment theory. It may very well be that the media ecosystem has evolved in such a manner that the gap between normative theory and empirical reality is no longer just a gap, but something much greater and more dangerous.

D. The Future of Counterspeech and the Marketplace of Ideas

Even if this market failure argument remains unconvincing, it seems necessary that, going forward, First Amendment jurisprudence and the operational decision-making of social media platforms, recognize the more limited efficacy of counterspeech within the context of the operation social media platforms. It seems appropriate that, within the context of news on social media, the counterspeech doctrine should receive the same kind of more circumspect and limited application that has been advocated for in speech contexts, such as hate speech²²³ and adopted by the courts in contexts such as libel.²²⁴ The Supreme Court's recognition that "false statements of fact" are particularly resistant to counterspeech²²⁵ needs to extend beyond the context of individual reputation that provided the basis for that decision. In sum, the analytical frameworks of policymakers and the courts, and the governance approaches taken by social media platforms, need to take into account that the dissemination and consumption of news in the increasingly social-mediated online environment (what we might term the *algorithmic marketplace of ideas*) merits inclusion amongst those speech contexts in which reliance on counterspeech is increasingly ineffectual and potentially damaging to democracy.

In the end, perhaps this discussion illustrates a larger problem, which is the extent to which the application of First Amendment theory has tended to conflate the marketplace of ideas with what should perhaps be termed the marketplace of facts, particularly in relation to the role and function of journalism. The "ideas" terminology contains an inherent embrace of subjectivity, analysis, and opinion that reflects some, but not all, of the functionality of journalism in a democracy. A fundamental dimension of journalism is to provide factual information to facilitate informed decision-

222. In this scenario, the decision by some voters to vote for Donald Trump is essentially the marketplace equivalent of purchasing a lemon; see Akerlof, *supra* note 138.

223. See Delgado and Yun, *supra* note 69.

224. See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

225. *Id.* at 52.

making.²²⁶ To the extent that this functionality is folded into the broader marketplace of ideas metaphor, the result is something of a mischaracterization of this aspect of journalism's function.²²⁷ One could argue that the very notion of facts competing for acceptance in the marketplace in the same way as ideas fundamentally undermines the very meaning of the term "fact" as something "that is indisputably the case."²²⁸ In any case, the end result is that intentional disinformation under the guise of journalism receives a degree of First Amendment protection that is not afforded to other categories of false speech; this despite the Supreme Court's explicit statement that "there is no constitutional value in false statements of fact."²²⁹

From this standpoint, it is encouraging that, in the wake of the 2016 election, there has been a dramatic increase in efforts by the news aggregators and social media platforms that played central roles in the dissemination of fake news to alter their policies and procedures in ways intended to combat the spread of fake news. Thus, platforms, such as Google and Facebook, have dropped fake news sites from their ad networks.²³⁰ Facebook and Google have created initiatives to integrate fact-checking and content labeling from third parties into their presentation of news stories to users.²³¹ There have been more concerted efforts to shut down disguised social media accounts operating as fronts for disinformation efforts.²³²

Initiatives such as these address the growing need for "tools of truth recognition" that operate "independent of the market in order for the market to be optimal."²³³ Such efforts can be seen as working to reduce the "transaction costs"²³⁴ associated with evaluating the reliability of news sources, and thereby addressing the information asymmetry that is the fundamental cause of the postulated market failure in the marketplace of

226. See Irene Costera Meijer, *The Public Quality of Popular Journalism: Developing a Normative Framework*, 2 JOURNALISM STUD. 189, 189 (2001) ("Informing citizens in a way that enables them to act as citizens has traditionally been the responsibility of the press"); Mark Cooper, *The Future of Journalism: Addressing Pervasive Market Failure with Public Policy*, WILL THE LAST REPORTER PLEASE TURN OUT THE LIGHTS, 320, 322 (2011) ("The core concept of the monitorial role involves the journalist serving as a neutral watchdog, rather than a partisan participant, holding social, economic, and political actors to account by presenting facts rather than advocating positions and offering opinions").

227. For a discussion of the Supreme Court's failure to develop adequate mechanisms for distinguishing fact from opinion as it relates to journalistic output, see Robert Neal Webner, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule*, 72 GEO. L. J. 1817 (1984).

228. See Google Dictionary (<https://www.google.com/#q=fact&spf=1497365412638>).

229. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1973).

230. See Silverman, *supra*, note 98.

231. See Bell, *supra* note 167.

232. See Stretch, *supra* note 167 at 4 ("we incorporated what we learned from the 2016 election in our detections systems, and as a result of these improvements, we disabled more than 30,000 accounts in advance of the French election").

233. See Goldman and Cox, *supra* note 11 at 23.

234. For a discussion of transaction costs in the marketplace of ideas, see Blocher, *supra* note 140 at 852-60.

ideas. Going forward, these and other initiatives need to be evaluated in terms of the extent to which they address one or more of the six changes outlined above that have affected the marketplace of ideas in ways that have increased the ability of false news to undermine legitimate news.

Of course, such efforts by news aggregators and social media platforms raise the specter of further empowering already-powerful digital media bottlenecks, such as Facebook, Twitter, Google, and YouTube. The irony in this scenario is the extent to which it reflects a transition back towards the limited number of powerful gatekeepers that characterized the pre-fragmentation mass media era, but in a technological context in which many of the barriers to entry characteristic of the mass media era are no longer present. The mass media era was accompanied by critiques about concentration of ownership and the accompanying systemic homogeneity of viewpoints.²³⁵ These critiques gave rise to concerns about the production and influence of propaganda that are similar to the concerns that underlie the current fake news scenario.²³⁶ Given the extent to which different technological contexts seem to be leading to surprisingly similar institutional structures, it is tempting to conclude that a media ecosystem comprised of a fairly limited number of powerful gatekeepers is an inevitability, borne of larger institutional and economic forces, as well as innate audience behavior tendencies.²³⁷

Fortunately, from a journalistic standpoint, it is also the case that the mass media era of few, powerful gatekeepers cultivated a stronger “public service ethos” than has been present since technological change facilitated increased fragmentation and competition, and an associated need for news organizations to prioritize audience and revenue maximization over public service.²³⁸ Of course, within some media sectors (e.g., broadcasting), this public service ethos could be attributed, at least in part, to a government-imposed public interest regulatory framework.²³⁹ In any case, one of the most distressing aspects of contemporary social media gatekeepers is the extent to

235. See, e.g., Edward S. Herman & Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (1988).

236. *Id.* at 1-36 (developing a “propaganda model” of the mass media).

237. For an historical description of evolutionary patterns in the media and telecommunications sectors that support this argument, see Tim Wu, *The Master Switch: The Rise and Fall of Information Empires* (2010) at 6 (illustrating that each communications technology became “a highly centralized and integrated new industry” and that “Without exception, the brave new technologies of the twentieth century . . . eventually evolved into privately controlled industrial behemoths, the ‘old media’ giants of the twenty-first, through which the flow and nature of content would be strictly controlled . . . History also shows that whatever has been closed too long is ripe for ingenuity’s assault: in time a closed industry can be opened anew, giving way to all sorts of technical possibilities and expressive uses for the medium before the effort to close the system likewise begins again”).

238. For an account of the increased emphasis on audience and revenue maximization that took hold in journalism in the 1980s and 1990s, see John H. McManus, *Market-Driven Journalism: Let the Citizen Beware?* (1994).

239. See Napoli, *supra* note 123 at 753 (“ . . . articulations of public interest principles inherent in the professional practice of journalism parallel, to some extent articulations of the public interest that are found in the realms of media regulation and policy.”).

which they have originated and evolved from a technology sector milieu in which the journalistic norms and/or regulatory framework associated with the public interest and social responsibility have been largely foreign to them.²⁴⁰

Moving forward, then, perhaps the most essential development is that these new gatekeepers evolve in such a way as to absorb and implement a more robust public service ethos that is reflective of the institutional responsibilities associated with serving as an essential gatekeeper to the news and information necessary for an effectively functioning democracy. In the aftermath of the 2016 election, and the associated critiques of social media platforms and their role in disseminating fake news, it is certainly evident that things are moving in this direction.²⁴¹ Efforts by search engines and social media platforms, such as Facebook and Google, to work with established and reputable fact-checking organizations to identify and label fake news stories, and to figure out ways at which such fact-checking and verification can operate the scale necessary for social media seem particularly promising.²⁴² However, it seems important that such collaborations go beyond mere content labeling, and that the editorial discretion ascribed to these platforms under Section 230 of the Telecommunications Act of 1996²⁴³ be put to use to filter out false news in the same way that this discretion has long been used to filter out other types of harmful speech such as hate speech and pornography. Indeed, the demonstrated commitment to counterspeech that has been

240. See, e.g., Philip M. Napoli & Robyn Caplan, *Platform or Publisher?* 44 INTERMEDIA 26, 27 (2017) (“One challenge in this regard, however, is a fundamentally different set of institutional perceptions that are being cultivated around social media platforms.”); Emily Bell, *We Can’t Let Tech Giants, Like Facebook and Twitter, Control Our News Values*, THE GUARDIAN (Aug. 31, 2014), <https://www.theguardian.com/media/mediablog/2014/aug/31/tech-giants-facebook-twitter-algorithm-editorial-values>, [https://perma.cc/T8BQ-SL66] (“Platforms that want public trust should be employing many more journalists than they presently do and using their knowledge to imbue automated process with values. . . . Accountability is not part of Silicon Valley’s culture. But surely as news moves beyond paper and publisher, it must become so.”).

241. See, e.g., Fidji Simo, *Introducing the Facebook Journalism Project* (Jan. 11, 2017), <https://media.fb.com/2017/01/11/facebook-journalism-project/>, [https://perma.cc/V59V-5CLA]; Mark Zuckerberg, *Building Global Community* (Feb. 17, 2017), <https://www.facebook.com/notes/mark-zuckerberg/building-global-community/10154544292806634/>, [https://perma.cc/PMA9-S72D] (Among the questions Zuckerberg raises for Facebook is “How do we help people build an informed community that exposes us to new ideas and builds common understanding in a world where every person has a voice?”).

242. See Samuel Gibbs, *Google to Display Fact-Checking Labels to Show if News is True or False*, THE GUARDIAN: TECH (Apr. 7, 2017, 11:37 AM), <https://www.theguardian.com/technology/2017/apr/07/google-to-display-fact-checking-labels-to-show-if-news-is-true-or-false>, [https://perma.cc/M4RV-DH25]; Elle Hunt, *‘Disputed by multiple fact-checkers’: Facebook Rolls Out New Alert to Combat Fake News*, THE GUARDIAN: TECH (Mar. 21, 2017, 8:37 PM), <https://www.theguardian.com/technology/2017/mar/22/facebook-fact-checking-tool-fake-news>, [https://perma.cc/34GB-5G5H]. ; Samuel Gibbs, *Google to Display Fact-Checking Labels to Show if News is True or False*, THE GUARDIAN (Apr. 7, 2017), <https://www.theguardian.com/technology/2017/apr/07/google-to-display-fact-checking-labels-to-show-if-news-is-true-or-false>.

243. 47 U.S.C. § 230.

articulated by social media platforms such as Facebook, YouTube, and Twitter²⁴⁴ needs to be tempered and surpassed by a greater commitment and editorial responsibility toward truth and accuracy that is reflective of our most reputable journalistic institutions.²⁴⁵

It is unclear at this point, however, whether the efforts put forth by social media platforms reflect a politically savvy (and perhaps temporary) response to the current moment of increased scrutiny, or whether these efforts represent the starting point for much-needed and more substantial institutional change. If it is the former, then with the key question is if or how government intervention might be an appropriate response. Other countries have already begun heading down this path. Germany, for instance, recently adopted a law that requires social media platforms to remove stories identified as fake news (along with other content types, such as hate speech and child pornography), or face government-imposed fines of up to 50 million Euros.²⁴⁶ Such approaches, of course, raise the contentious question of who should be in the position of making judgments as to what constitutes fake news.

In the U.S., given the indiscriminate and politicized ways in which the fake news label is being applied by governmental actors,²⁴⁷ the prospect of establishing an objective, reliable, and widely-trusted arbiter of fake news within a government agency seems more dangerous now than perhaps at any time in recent U.S. history.

It is perhaps worth remembering that, within fairly narrow technological contexts (e.g., broadcasting), a precedent for regulatory intervention in response to false news reporting has been established.

244. See, e.g., Bartlett & Krasodomski-Jones *supra* note 55, at 5; TweeSurfing *supra* note 58; ONLINE CIVIL COURAGE INITIATIVE, *supra* note 56.

245. See, e.g., Robyn Caplan, *Like it or Not, Facebook is Now a Media Company*, NEW YORK TIMES (May 17, 2016), <https://www.nytimes.com/roomfordebate/2016/05/17/is-facebook-saving-journalism-or-ruining-it/like-it-or-not-facebook-is-now-a-media-company>, [<https://perma.cc/ZYY9-VDLK>]; Seth Fiegerman, *Dear Facebook, You're a Media Company Now. Start Acting Like One*, MASHABLE: BUSINESS (May 15, 2016), <http://mashable.com/2016/05/15/facebook-media-company/#zOF0ooxw0aqo> [<https://perma.cc/25PB-Y366>]; Seth Fiegerman, *Dear Facebook, You're a Media Company Now. Start Acting Like One*, MASHABLE: BUSINESS (May 15, 2016), [<https://perma.cc/25PB-Y366>].

246. See Staff, *Germany Approves Plan to Fine Social Media Firms Up to 50 Million Euros*, THE GUARDIAN (June 30, 2017), <https://www.theguardian.com/media/2017/jun/30/germany-approves-plans-to-fine-social-media-firms-up-to-50m>. [<https://perma.cc/L6EW-TKF9>].

247. See Lloyd Grove, *How Will the Media Fight the Right's Weaponization of "Fake News,"* THE DAILY BEAST, (Jan. 11, 2017), <http://www.thedailybeast.com/how-will-the-media-fight-the-rights-weaponization-of-fake-news/> [<https://perma.cc/HBY6-QFR7>] (“... the term ‘fake news’—the enduring catchphrase of the 2016 presidential campaign, initially used to describe made-up tales and internet hoaxes that tended to benefit Trump and damage Hillary Clinton—is fast becoming the nascent Trump administration’s rightwing-populist bludgeon to delegitimize the purveyors of *real news*” [emphasis in original].); see also Wardle & Derakhshan, *supra* note 75 at 5 (“the term has also begun to be appropriated by politicians around the world to describe news organizations whose coverage they find disagreeable. In this way, it’s becoming a mechanism by which the powerful can clamp down upon, restrict, undermine and circumvent the free press”).

Specifically, current FCC regulations prohibit broadcast licensees from knowingly broadcasting false information concerning a crime or catastrophe, if the licensee also knows beforehand that “broadcasting the information will cause substantial ‘public harm.’”²⁴⁸ This public harm must begin immediately and cause direct and actual damage to the property, health, or safety of the general public, or divert law enforcement or public health and safety authorities from their duties.²⁴⁹

In addition, since the late 1960s, the Federal Communications Commission (“FCC”) also has maintained a more general policy that it will “investigate a station for news distortion if it receives documented evidence of such rigging or slanting, such as testimony or other documentation, from individuals with direct personal knowledge that a licensee or its management engaged in the intentional falsification of the news.”²⁵⁰ According to the FCC, “of particular concern would be evidence of the direction to employees from station management to falsify the news. However, absent such a compelling showing, the Commission will not intervene.”²⁵¹ News distortion investigations have been rare (especially since the deregulatory trend that began in the 1980s), and seldom have led to any significant repercussions for broadcast licensees.²⁵²

Of course, the nature of the regulatory rationales that have traditionally applied to broadcasting (spectrum scarcity, pervasiveness) generally do not apply to a technological context such as social media.²⁵³ However, discussions about possible regulatory interventions into the social media

248. See Federal Communications Commission, *Broadcasting False Information* (November 3, 2015), <http://transition.fcc.gov/cgb/consumerfacts/falsebroadcast.pdf>, [<https://perma.cc/4PJU-GVLS>].

249. *Id.*

250. See Federal Communications Commission, *The Public and Broadcasting* (July, 2008), <https://www.fcc.gov/media/radio/public-and-broadcasting#DISTORT>, [<https://perma.cc/FZX9-QFWV>].

251. *Id.*

252. See Chad Raphael, *The FCC’s Broadcast News Distortion Rules: Regulation by Drooping Eyelid*, 6 COMM. L. & POLICY 485 (2001) (Arguing that the FCC’s news distortion regulations are more symbolic than genuine). See also William B. Ray, FCC: The Ups and Down of Radio-TV Regulation at 31 (1990) (“On the whole, the commission has done less to carry out its stated policies regarding news broadcasting than in any other field”).

253. For a detailed discussion of established rationales for U.S. media regulation, the distinction between regulatory rationales and motivations, and the significance of this distinction for possible regulatory responses to issues related to social media, see Philip M. Napoli, *Bridging the Disconnect Between Digital Media and the Public Interest*, Paper Presented at the XVIII Nordic Political Science Congress, Odense, Denmark (August, 2017).

space have gained some momentum of late,²⁵⁴ with congressional hearings on the role of social media in the 2016 elections having recently taken place.²⁵⁵ Given these indicators of potential shifts in the political environment, it is important to recognize that concerns about fake news have an established, if not modest and somewhat forgotten, foothold in the U.S. media regulatory framework.

Ultimately, though, it is important to acknowledge that the current political environment lends strength to the First Amendment tradition that has placed the judgment of truth and falsity in the realm of political speech completely outside the bounds of government authority,²⁵⁶ and points us back to what might – at least for the time being – be considered the lesser of two evils – the need for today’s dominant digital gatekeepers to more aggressively impose editorial authority in ways that reflect well-established norms of journalistic service in the public interest.²⁵⁷

V. CONCLUSION

The goal here has been to consider how the evolution of the news ecosystem has undermined legitimate news’ ability to overcome fake news. This argument builds upon a body of critique of the counterspeech doctrine that is grounded in the persistent psychological and cognitive tendencies in news consumption that also undermine the efficacy of counterspeech.²⁵⁸ From this standpoint, it may be that the news ecosystem, as previously constructed, has helped to protect citizens, to some extent, from some of their innate flaws and biases as news consumers.

254. See, e.g., Lincoln Caplan, *Should Facebook and Twitter be Regulated Under the First Amendment?* WIRED (November 11, 2017), <https://www.wired.com/story/should-facebook-and-twitter-be-regulated-under-the-first-amendment/>, [https://perma.cc/8HM4-P4HB]; John Herrmann, *What If Platforms Like Facebook are Too Big to Regulate?* N.Y. TIMES (October 4, 2017), <https://www.nytimes.com/2017/10/04/magazine/what-if-platforms-like-facebook-are-too-big-to-regulate.html>, [https://perma.cc/RD3R-NNY7]; Sally Hubbard, *Why Fake News is an Antitrust Problem*, VOX (September 23, 2017), <https://www.vox.com/technology/2017/9/22/16330008/facebook-google-amazon-monopoly-antitrust-regulation>, [https://perma.cc/EG5W-2K5G].

255. See *Extremist Content and Russian Disinformation Online: Working with Tech to Find Solutions*, Hearing Before the S. Comm. on the Judiciary, Subcomm. on Crime and Terrorism, 115th Cong. (Oct. 31, 2017), <https://www.judiciary.senate.gov/meetings/extremist-content-and-russian-disinformation-online-working-with-tech-to-find-solutions> [https://perma.cc/42VE-5HSD]; *Social Media Influence in the 2016 United States Elections*, Hearing Before the S. Select Comm. on Intelligence (Nov. 1, 2017), <https://www.intelligence.senate.gov/hearings/open-hearing-social-media-influence-2016-us-elections> [https://perma.cc/K65Y-XAQ4]; *Russia Investigative Task Force Open Hearing with Social Media Companies*, Hearing before the H. Permanent Select Comm. on Intelligence (Nov. 1, 2017), <https://intelligence.house.gov/calendar/eventsingle.aspx?EventID=814> [https://perma.cc/8DYT-QRJU].

256. See *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (“every person must be his own watchman for truth, because our forefathers did not trust any government to separate the true from the false for us”).

257. For a discussion of journalistic norms of public service and their applicability to social media platforms, see Napoli, *supra* note 123.

258. See Bambauer, *supra* note 62.

And it may be that the contemporary news ecosystem has been doing the exact opposite. The end result may be a state of market failure in the marketplace of ideas. Consequently, this Article has suggested social media platforms, content aggregators, policymakers, and the courts temper their commitment to counterspeech. This Article has also suggested that these platforms adopt a greater institutional commitment to a public interest-grounded approach to content filtering, in keeping with the editorial responsibilities that have characterized previous generations of news organizations. In the end, counterspeech can no longer function as a viable assumption when considering the current dynamics of the social media-based flow of news and information.