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Free Speech and Democracy: A Primer for Twenty-First Century Reformers

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Left unfettered, the twenty-first-century speech environment threatens to undermine critical pieces of the democratic project. Speech operates today in ways unimaginable not only to the First Amendment's eighteenth-century writers but also to its twentieth-century champions. Key among these changes is that speech is cheaper and more abundant than ever before, and can be exploited — by both government and powerful private actors alike — as a tool for controlling others' speech and frustrating meaningful public discourse and democratic outcomes.

The Court's longstanding First Amendment doctrine rests on a model of how speech works that is no longer accurate. This invites us to reconsider our answers to key questions and to adjust doctrine and theory to account for these changes. Yet there is a more or less to these re-imagining efforts: they may seek to topple, or instead to tweak, current theory and doctrine. Either route requires that reformers revisit the foundational questions underlying the Free Speech Clause: what, whom, and how does it protect — and from whom, from what, and why?

Part I of this Article discusses the threats to public discourse and democracy posed in the twenty-first-century speech environment, as well as the failure of traditional First Amendment theory and doctrine to adequately address these threats. Part II compares the advantages and

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shortcomings of topples and tweaks as strategies for reform — and by reform, we mean changes to theory and doctrine that may enable the First Amendment to better protect free speech values and democracy from the threats posed by cheap, abundant, and weaponized speech. Here we focus on tweaks and explain why. Part III identifies key features of contemporary theory and doctrine that hobble efforts to empower the First Amendment to respond to the threats to well-functioning democracy posed in the twenty-first-century speech environment. In so doing, it introduces a process for considering and addressing foundational obstacles for constructive First Amendment reform and flags some proposals (our own, as well as others') for productive tweaks to those core features.

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INTRODUCTION

There is good news and more complicated news on the free speech front. First the good news: the First Amendment case law that protects free speech on matters of public concern is robust and, for now, reasonably secure.[1] For this, we can thank the federal judiciary of the twentieth-century civil rights era, and the combination of legal and social forces that drove its Free Speech Clause decisions.[2] In some ways and in certain settings,[3] today's Court never has been more convinced of the theoretical benefits of free speech nor more willing to protect it despite its potential harms.[4]

[1] *E.g.*, BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 11 (2015) (calling the Roberts Court the "strongest First Amendment Supreme Court in our history"); *see also* Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 372-93 (2014) [hereinafter *Tread on Me!*] (outlining this steady progress while highlighting some significant exceptions to courts' general speech-protective trend).

[2] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that the First Amendment protects the advocacy of illegal action except for that "directed to inciting or producing imminent lawless action" and likely to incite such action); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (holding that the First Amendment protects public primary and secondary school students' political dissent absent a showing of material interference with school activities); New York Times Co. v. Sullivan, 376 U.S. 254, 297 (1964) (Goldberg, J., concurring) (holding that the First Amendment does not permit a public official to recover damages for "a defamatory falsehood relating to his official conduct" absent a showing that the statement was made with actual malice).

[3] For a sampling of work noting the limitations of the contemporary Court's commitment to free speech, see RONALD J. KROTOSZYNSKI, JR., THE DISAPPEARING FIRST AMENDMENT, at xiv (2019) (observing that "the Roberts and Rehnquist Courts consistently have favored certainty, predictability, and consistency over speech when deciding First Amendment questions"); GREGORY P. MAGARIAN, MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT, at xv (2017) ("The Roberts Court, with a consistency and potency unique in the Supreme Court's history, has authorized established, powerful institutions strongly invested in the status quo to exercise managerial control over public discussion, with the apparent goal and typical result of pushing public discussion away from destabilizing, noisy margins and toward a stable, settled center."); Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 724 (2011) (disputing characterizations of the contemporary Court as speech-protective); Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 2 (2009) (documenting the Court's failure to protect government workers' speech about the government's performance despite that expression's great value to the public).

[4] *See* Iancu v. Brunetti, 139 S. Ct. 2294, 2302-03 (2019) (Alito, J., concurring) ("At a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination.").

The more complicated news is that the First Amendment faces a paradoxical threat: left unfettered, speech in the twenty-first century may undermine critical pieces of the democratic project itself.

Freedom of speech is a precondition of a healthy constitutional democracy and its protection of free and fair elections, the right to vote and participate in the political process, due process and equal protection of the law, an independent judiciary, and legal institutions that operate with integrity and in the public interest.[5] Yet in the twenty-first-century environment, speech operates in ways unimaginable not only to the First Amendment's eighteenth-century writers but also to its twentieth-century champions.[6] As technology law scholar Tim Wu has explained, the new speech environment has undermined the First Amendment's foundational assumptions that information is scarce and listeners' attention abundant:

> The most important change in the expressive environment can be boiled down to one idea: it is no longer speech itself that is scarce, but the attention of listeners. Emerging threats to public discourse take advantage of this change . . . . More precisely, the emergent techniques of speech control depend on new punishments, like the unleashing of "troll armies" to abuse critics, the fabrication of news, and "flooding" tactics that distort or drown out other speech through the payment of fake commentators or the deployment of propaganda robots. Powerful actors, both public and private, have adopted speech itself as a weapon for controlling speech, yielding challenges for which the First Amendment is unprepared. . . . And the use of

[5] *See* TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 9-10 (2018) (describing predicates for a healthy constitutional democracy). For a sampling of recent work expressing anxiety about the current state of constitutional democracy, see *id.*; *see, e.g.*, CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018) (exploring the causes of the global decline of constitutional democracies); SANFORD LEVINSON & JACK M. BALKIN, DEMOCRACY AND DYSFUNCTION (2019) (describing differing frameworks for analyzing the decline of constitutional democracy); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018) (identifying the symptoms of democratic decline).

[6] Robert Post described the related "paradox of public discourse" decades ago: "To the extent that a constitutional commitment to critical interaction prevents the law from articulating and sustaining a common respect for the civility rules that make possible the ideal of rational deliberation, public discourse corrodes the basis of its own existence." ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 147 (1995); *see also* Toni M. Massaro & Robin Stryker, *Freedom of Speech, Liberal Democracy, and Emerging Evidence on Civility and Effective Democratic Engagement*, 54 ARIZ. L. REV. 375, 375 (2012) (discussing how civility norms might be squared with democracy and free speech values).

> speech as a tool to suppress speech is, by its nature, challenging for the First Amendment to deal with — especially if it is taken as being in the business of protecting speech, no matter what the form.[7]

At first blush, expression's speed, low cost, and abundance offer clear First Amendment benefits. More speech means more information available to listeners; cheaper speech means more speakers engaged in public discourse and contributing to the marketplace of ideas.

But a closer look reveals that this is not always the case. Enabled by twenty-first-century technology, both government and powerful private actors may deploy speedy, cheap, and abundant speech to control others' speech, to mislead and manipulate listeners, and to undermine meaningful public discourse.[8] As Wu observes, "[t]he fundamental challenge comes not from cheap speech itself, but that its cheapness makes it easier to weaponize as a tool of speech control. The unfortunate truth is that speech may be used to attack, harass, and silence as much as it is used to enlighten."[9]

Many of the fundamental assumptions on which free speech theory and doctrine have long rested are thus now unstable. That longstanding First Amendment doctrine rests on an inaccurate model of how speech actually works invites us to reconsider aspects of free speech doctrine that fail to adjust and account for these realities.

To this end, Part I discusses threats to free speech and democracy posed in the twenty-first-century speech environment as well as how traditional First Amendment theory and doctrine make it difficult to

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[7] Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 548-49 (2018).

[8] In other words, sometimes more is less. *See* Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369, 384 (2016) [hereinafter *Regulatory State*] (describing "infoglut" as a way in which sophisticated speakers can create confusion and undermine certainty by overloading the public with speech); *see also* David E. Pozen, *Seeing Transparency More Clearly*, 80 PUB. ADMIN. REV. 326, 326 (2019) ("[T]here is nothing incoherent about transparency policies yielding positive outcomes in certain settings and negative or even opposite outcomes in other settings."). Sophisticated actors can and do present, even dump, information that skews or eliminates its value to its recipients. *See, e.g.*, OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS (2012) (exploring why financial service providers create, and consumers sign, one-sided contracts); OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014) (describing how more disclosures sometimes make consumers less informed).

[9] Wu, *supra* note 7, at 549. Eugene Volokh was among the first to anticipate the paradigm-altering emergence of cheap speech in the Internet era, although he was largely optimistic in predicting its consequences. Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1806-07 (1995).

address these threats. For example, because First Amendment theory assumes more speech is ever better than less, it deals poorly with the problem of speech floods and distortions that undermine the very democratic, enlightenment, and autonomy ends that free speech is meant to advance.

Reformers therefore must revisit the foundational questions: what, whom, and how does the Free Speech Clause protect — and from whom and from what? The remainder of this Article re-examines those basic questions, with an eye towards empowering the First Amendment to address the harms to democracy generated by the new free speech environment.

Part II compares the advantages and shortcomings of topples versus tweaks as strategies for reform. By reform, we mean changes to theory and doctrine that empower the First Amendment to better protect free speech and democracy from the threats posed not only by the weaponization of speech itself, but also by the weaponization of the Free Speech Clause as a powerful deregulatory tool. As we will see, there is a more or less to doctrinal and theoretical remodeling. Reformers may seek to topple or instead to tweak. That is, they may seek to reconstruct the free speech edifice from the bottom up, or work within the edifice insofar as possible while urging context-specific amendments as dictated by speech harms.

Although we see value in both approaches, here we emphasize tweaks over topples and explain why. Among other things, the nature of judicial decision-making is inherently incremental. Respect for precedent and its traditional, rhetorical framing of speech rights is hard-baked into the judicial process. Moreover, the Supreme Court's composition and character make it ill-equipped to respond well to rapid, technologically driven changes that threaten the traditional First Amendment model. And, perhaps most important, the basic First Amendment structures still have enduring value and serve the democratic ends we favor.[10] Toppling those structures may unwisely disrupt many worthy objectives. These complexities lead us to reject a binary approach to theory and doctrine that either celebrates "what is" under American law uncritically, or condemns theory and doctrine unthinkingly and tosses them aside.

[10] We start from the premise that the United States should remain a democracy. Note, however, that this premise is increasingly contested among Americans. *See* GINSBURG & HUQ, *supra* note 5, at 30-31 (summarizing survey evidence documenting the growing proportion of Americans who believe that it would be "good" for the military to rule or to have "a strong leader who does not bother with elections").

Part III revisits the key questions underlying the Free Speech Clause (what, whom, and how does it protect — and from whom, from what, and why?), identifies the primary obstacles to reform embedded in the First Amendment architecture, notes the fissures in the theory and doctrine that invite democracy-enhancing tweaks, and offers specific examples of these tweaks.

For example, we note two possibilities for confronting the ever-expanding answer to the question of *why* the First Amendment protects speech — possibilities that promote meaningful public discourse and democracy. The first is normative and suggests a hierarchy of free speech theories that privileges democratic self-governance theory as a tiebreaker when competing free speech theories point in different directions. The second relies on history and experience in setting limits on negative theory to identify where we have greater reason to worry that the government's choices will be clumsy, partisan, or self-interested — and also where we have less reason to fear that the government's distinctions are infected by its incompetence or malignance.

We also emphasize doctrinal currents that privilege comparatively vulnerable listeners' First Amendment interests in certain circumstances when they collide with speakers' interests — as is often the case when speakers seek to conceal their identities from listeners who rely on the source of speech to gauge its credibility and quality. Greater attention to listeners' interests helps explain not only when and why the First Amendment protects speech, but also when and why the First Amendment permits expression's regulation in certain circumstances to preserve meaningful public discourse.

Next, we explain how the foundational claim that the Court treats all governmental regulation of speech based on content or speaker identity with suspicion is undercut by occasional exceptions to the purported rule, exceptions that appropriately attend to context. In other words, the doctrine is not as formalistic or absolutist as it appears, which offers opportunities for nuanced democracy-promoting interventions. Here, available tweaks include exposing that the Court's actual practice is often more context-sensitive than it claims, and offering solid evidence that documents the specific harms posed by certain expression to free speech and democracy — harms that can justify regulation in appropriate contexts.

Mindful of the ways in which the government's own speech can threaten free speech and democracy, we then confront and reject the simplistic claim that "government speech" lies wholly beyond constitutional constraint. This assertion is belied by a growing and commonsense appreciation of how the government's abuse of its own

bully pulpit can frustrate free speech and other constitutional rights. Here too we identify possibilities for doctrinal tweaks, building on pockets of precedent that recognize how the government's threats sometimes silence its targets' speech as effectively as its hard law action, and how its expressive attacks sometimes incite or encourage third parties to punish its targets for their speech.

Finally, in light of the ways in which private (and not just governmental) power increasingly threatens free speech and democracy, we urge greater attention to when and how government enables the weaponization of speech by private actors, as well as to non-constitutional approaches to encourage powerful private actors to incorporate democracy-promoting approaches to their own expressive efforts.

In Part III we thus offer a framework for assessing when and why the First Amendment permits carefully designed regulations of speech to further free speech and democracy values. For instance, when courts, policymakers, and lawyers consider the constitutionality of a proposed intervention, we urge them to privilege the choice that maximizes democratic self-governance as a tiebreaker if and when competing free justifications point towards different choices; to privilege listeners' interests over speakers' when speakers seek to undermine democratic legitimacy at listeners' expense; to consider whether and when evidence and precedent justify content- or speaker-based regulation calibrated to address threats to democracy posed by specific content or by specific speakers; and to consider whether and when deployment of the government's own expressive powers interferes with free speech and democracy.

Taken together, what would these tweaks mean on a more granular basis — in other words, when applied to specific proposals for interventions? Again, we seek to provide a framework for thinking about these problems more generally, but we also offer a few illustrations. For instance, these tweaks support an understanding of the First Amendment that permits the government to regulate lies about the mechanics of voting — like lies about who is eligible to vote, where, and when. We also note the government's ability to regulate foreign speakers' influence over the outcome of U.S. elections by prohibiting foreign entities' campaign contributions and expenditures, and state efforts to combat extreme partisan gerrymandering through voter-approved initiatives to prevent party insiders from serving on state redistricting commissions.

This Article thus contributes to the ongoing discussion about the threats to free speech and democracy posed by the twenty-first-century

speech environment in at least two ways. First, it identifies the foundational features of contemporary First Amendment theory and doctrine that pose the greatest barriers to reform. Second, it emphasizes the gaps and ambiguities in that theory and doctrine — the edifice *is* porous in places — to show how reformers might use these gaps and ambiguities to push for tweaks that advance public discourse and democracy.

I. HOW THE CHANGES IN TODAY'S SPEECH ENVIRONMENT THREATEN FREE SPEECH AND DEMOCRACY

In this Part, we examine how and why the twenty-first-century speech environment is not the free speech and democracy paradise that some early-stage theorists hoped it would be. As we will see, speedy, cheap, and abundant speech does not always translate into more ideas, nor does it always maximize listeners' choices. Instead it often enables non-transparent, powerful, and sophisticated speakers to skew discourse in ways that undermine free speech and democratic values.[11]

A. Speech Itself Is Increasingly Weaponized

Here we sketch some of the harms to public discourse and democracy threatened and exacerbated by the contemporary speech environment[12] — harms that have been catalogued at length elsewhere.[13]

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[11] Although our focus in this Article is on harms to a healthy democracy, we recognize the potential of harm to many other values, like privacy, dignity, reputation, emotional well-being, physical security, and more.

[12] *See* NATHANIEL PERSILY, KOFI ANNAN FOUND., THE INTERNET'S CHALLENGE TO DEMOCRACY: FRAMING THE PROBLEM AND ASSESSING REFORMS 5-7 (2019), https://pacscenter.stanford.edu/wp-content/uploads/2019/03/a6112278-190206_kaf_democracy_internet_persily_single_pages_v3.pdf [https://perma.cc/BA28-APJG] (describing the unique dangers of the twenty-first century speech environment as its capacity for velocity, virality, anonymity, homophily, and monopoly).

[13] For earlier work on emerging risks of distortion in the Internet era, see, for example, JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD (2006) (tracing the transformation of the Internet from "a technology that resists territorial law to one that facilitates its enforcement"); Elizabeth Garrett, *Political Intermediaries and the Internet "Revolution*," 34 LOY. L.A. L. REV. 1055 (2001) (describing two opposing schools of thought on the Internet's impact on democratic functions); Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653 (1998) (describing how the Internet permits users to "customize the universe of information they receive"); Jonathan Zittrain, *Internet Points of Control*, 44 B.C. L. REV. 653 (2003) (describing how the Internet makes content less "regulable").

First, the cheapness of speech "dramatically lower[s] costs for those who want to draw on people's fears and rile them up for violent purposes," which may include exacerbating political divisions, stoking distrust of the press and other watchdog institutions, demonizing opponents and critics, and fueling cynicism about democratic politics.[14] Authoritarians have long employed these expressive strategies to acquire and maintain power.[15]

Second, the volume of speech made possible by contemporary technology now leaves listeners' attention — always inherently limited[16] — increasingly scarce. Producing and ferreting out good and reliable speech "peaches" amidst the sea of information "lemons" — half-truths, distortions, lies — often takes more time and money than does generating and swallowing lemons.[17] That the twenty-first-century

Recall the caution offered by Fred Schauer, whose thoughtful approach to these questions is worth quoting at length:

> It would be the height of hubris to suggest that understanding and sorting out the various types of speech-associated harm will send the development of First Amendment doctrine in a new and better direction. Indeed, it would be hubris even to suggest that the failure to consider seriously the nature and varieties of speech-related harms is a major cause of an area seeming less systematic than even the balance of constitutional law. Still, the question of harm is one of huge First Amendment significance, and it has been one that has largely been avoided, perhaps in part because of the looming presence of a still pervasive but nonetheless implausible harmlessness model of speech and its protection.

Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 111.

[14] Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 216 (2017) [hereinafter *Cheap Speech*].

[15] *See* GINSBURG & HUQ, *supra* note 5, at 80-81; *see also* LEVITSKY & ZIBLATT, *supra* note 5, at 106 (identifying authoritarians' justification of "their consolidation of power by labeling their opponents as an existential threat" as a consistent contributor to democratic breakdown); RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. ST. L.J. 1301, 1301 (2017) [hereinafter *Enemy Construction*] (documenting the Trump Administration's attacks on the press).

[16] As Tim Wu notes, Nobel Laureate Herbert Simon issued an even earlier warning about the threats to listener attention in "an information-rich world." Wu, *supra* note 7, at 554 (quoting Herbert A. Simon, *Designing Organizations for an Information-Rich World*, *in* COMPUTERS, COMMUNICATIONS, AND THE PUBLIC INTEREST 37, 40-41 (Martin Greenberger ed., 1971)).

[17] For a recent article offering an economic analysis of free speech costs and the analogy to lemons and peaches, see Daniel Hemel, *Economic Perspectives on Free Speech*, *in* OXFORD HANDBOOK OF FREEDOM OF SPEECH (Frederick Schauer & Adrienne Stone eds.) (forthcoming 2021) ("As the share of speech that is false rises, listeners will be willing to pay less for it . . . . Truthtellers, then, will be less willing to bear the high cost of producing truth given the low price. Bad speech will tend to drive out the good.").

speech environment also contributes to the disappearance of reliable intermediaries only exacerbates listeners' challenges in separating peaches from lemons.[18]

Relatedly, today's digital technologies are easily weaponized to manipulate listeners, where manipulation means "imposing a hidden or covert influence on another person's decision-making" and "influencing someone's beliefs, desires, emotions, habits, or behaviors without their conscious awareness."[19] Such manipulation undermines democracy as well as individual autonomy: "When citizens are targets of online manipulation and voter decisions rather than purchase decisions are swayed by hidden influence, democracy itself is called into question."[20] Additionally, attention-strapped listeners are easily steered to expression that confirms their pre-existing beliefs and partisan affiliations, which further divides and polarizes the public in ways that undermine democratic ends.[21]

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[18] As Richard Hasen notes, the rise in cheap speech also undermines local newspapers, which have long provided a major (and sometimes the only) check on state and local government corruption. Hasen, *Cheap Speech*, *supra* note 14, at 209-10.

[19] Daniel Susser, Beate Roessler & Helen Nissenbaum, *Online Manipulation: Hidden Influences in a Digital World*, 4 GEO. L. TECH. REV. 1, 26 (2019); *see also* Jamie Luguri & Lior Jacob Strahilevitz, *Shining a Light on Dark Patterns* 1 (Univ. of Chi. Pub. Law, Working Paper No. 719, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3431205 [https://perma.cc/HP2F-MKYE] (describing "dark patterns" as "user interfaces whose designers knowingly confuse users, make it difficult for users to express their actual preferences, or manipulate users into taking certain actions"). Contrast deception and other forms of manipulation to persuasion and even coercion, where the speaker's efforts to influence the listener's choices are transparent to the listener.

[20] Susser et al., *supra* note 19, at 43; *see also id.* at 35 ("Since autonomy lies at the normative core of liberal democracies, the harm to autonomy rendered by manipulative practices extends beyond personal lives and relationships, reaching public institutions at a fundamental level.").

[21] *See* CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 59-68 (2018) [hereinafter #REPUBLIC] (describing how media's filter bubbles prevent listeners' serendipitous encounters with other ideas in ways that may compromise democracy and the pre-conditions of a system of free expression). For a nuanced understanding of this dynamic, see PERSILY, *supra* note 12, at 20 ("The social science as to online echo chambers has moved away from the 'strong version' that suggests most people live political homophilous online lives to a set of more complicated questions as to 'who' experiences echo chambers and 'why.'"); Julie E. Cohen, *Tailoring Election Regulation: The Platform is the Frame*, 4 GEO. L. TECH. REV. 641, 646-47 (2020) [hereinafter *Tailoring Election Regulation*] (describing "filter bubbles" as a "misleading" term, in that "[p]latform users do not experience or self-select into impermeable bubbles but rather sort themselves into opposing tribes" and "search for content using syntax that prompts algorithms to serve up tribally validating results"); *id.* at 652 ("The individual subject of the digital unconscious is not the rational listener but rather the listener who is not really listening at all."). Cognitive science confirms that humans selectively search for, believe, and confirm that which we think we already know, in

These tactics are hardly new, but the digital age empowers and insulates them.[22] Computers can tally Facebook "likes" to better predict some of our future choices than can our friends, parents, or spouses — sometimes even ourselves.[23] Algorithms can steer audiences to messages written by ideological extremists.[24] Even unintentional biases may distort discourse as flawed algorithms can perpetuate our cognitive errors in exponential ways.[25] (That said, the algorithms that increasingly govern in our data world are not inevitably biased or malevolent. As Cass Sunstein recently observed, well-designed algorithms can correct for human cognitive biases in ways that may improve decisions in many realms.)[26]

Deception is an especially pernicious subset of manipulation, and today's speech environment enables the strategic deployment of falsehoods to manipulate democratic outcomes in new ways.[27] As legal scholar Sarah Haan observes: "A defining feature of post-truthism is its rejection of fact-based reasoning as a means to advance the interests of powerful actors [who can] exploit their existing informational

politics and many other areas. *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 80-81 (2011); NATALIE JOMINI STROUD, NICHE NEWS: THE POLITICS OF NEWS CHOICE 19 (2011); Tamara Witschge, *Online Deliberation: Possibilities of the Internet for Deliberative Democracy*, *in* DEMOCRACY ONLINE: THE PROSPECTS FOR POLITICAL RENEWAL THROUGH THE INTERNET 109, 111, 119 (Peter M. Shane ed., 2004).

[22] *See, e.g.*, THOMAS RID, ACTIVE MEASURES: THE SECRET HISTORY OF DISINFORMATION AND POLITICAL WARFARE (2020) (discussing earlier uses of the same tactics).

[23] *See* YUVAL NOAH HARARI, HOMO DEUS: A BRIEF HISTORY OF TOMORROW 344-45 (2017).

[24] *See* Kevin Roose, *The Making of a YouTube Radical*, N.Y. TIMES (June 9, 2019), https://www.nytimes.com/interactive/2019/06/08/technology/youtube-radical.html [https://perma.cc/NB94-45WK] (discussing how YouTube may have "inadvertently created a dangerous on-ramp to extremism by combining two things: a business model that rewards provocative videos with exposure and advertising dollars, and an algorithm that guides users down personalized paths meant to keep them glued to their screens"). YouTube's efforts to block extremist videos trigger controversies of their own. *See* Neima Jahromi, *The Fight for the Future of YouTube*, NEW YORKER (July 8, 2019), https://www.newyorker.com/tech/annals-of-technology/the-fight-for-the-future-of-youtube [https://perma.cc/F8FE-EV48] (discussing the complexities of YouTube's efforts to moderate content).

[25] *See* Cade Metz, *We Teach A.I. Systems Everything, Including Our Biases*, N.Y. TIMES (Nov. 11, 2019), https://www.nytimes.com/2019/11/11/technology/artificial-intelligence-bias.html [https://perma.cc/QXP6-9X3G].

[26] Cass R. Sunstein, *Algorithms, Correcting Biases*, 86 SOC. RES. 499, 499-500 (2019).

[27] *See* Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a "Post-Truth" World*, 64 ST. LOUIS U. L.J. 535, 536-37 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3418427 [https://perma.cc/8DE6-ESCX] [hereinafter *Deep Fakes*]; Helen Norton, *(At Least) Thirteen Ways of Looking at Election Lies*, 71 OKLA. L. REV. 117, 122, 137 (2018) [hereinafter *Thirteen Ways*].

advantages for political or economic gain."[28] Once false stories begin, they are now extraordinarily difficult to contain.[29]

In recent U.S. elections, for example, a wide range of speakers not only spewed speech false in content, but also lied about the source of that speech through manufactured websites and social media posts and profiles falsely attributed to nonexistent individuals.[30] Russian speakers, for instance, targeted the American electorate as part of a campaign to influence and manipulate the 2016 elections.[31] Facebook ads purportedly the work of Republican teetotalers in support of 2018 Republican senatorial candidate Roy Moore were instead secretly engineered by Democrats who hoped that "associating Mr. Moore with calls for a statewide alcohol ban would hurt him with moderate, business-oriented Republicans and assist the Democrat, Doug Jones, who won the special election by a hair-thin margin."[32] As yet another illustration, during the 2014 election cycle the National Republican Congressional Committee ("NRCC") "created nearly 20 websites appearing to support Democratic candidates in all but the small print" that "include[d] donation forms that accept credit cards and encourage viewers to contribute up to $500, but instead of money going to the Democratic candidates, it goes to the NRCC."[33]

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[28] Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L.J. 1351, 1356 (2019).

[29] *See* PERSILY, *supra* note 12, at 10-11 (explaining how the Internet's "velocity" and "virality" confound efforts to timely correct or combat lies).

[30] Scott Shane, *Purged Facebook Page Tied to the Kremlin Spread Anti-Immigrant Bile*, N.Y. TIMES (Sept. 12, 2017), https://www.nytimes.com/2017/09/12/us/politics/russia-facebook-election.html [https://perma.cc/8ZXT-ZJZL]; Scott Shane, *The Fake Americans Russia Created to Influence the Election*, N.Y. TIMES (Sept. 7, 2017), https://www.nytimes.com/2017/09/07/us/politics/russia-facebook-twitter-election.html [https://perma.cc/GRB3-UG68]. For an in-depth analysis of how highly partisan media sources influenced the 2016 election, see ROBERT M. FARIS, HAL ROBERTS, BRUCE ETLING, NIKKI BOURASSA, ETHAN ZUCKERMAN & YOCHAI BENKLER, BERKMAN KLEIN CTR. FOR INTERNET & SOC'Y, PARTISANSHIP, PROPAGANDA, AND DISINFORMATION: ONLINE MEDIA AND THE 2016 U.S. PRESIDENTIAL ELECTION 130-31 (2017), https://dash.harvard.edu/bitstream/handle/1/33759251/2017-08_electionReport_0.pdf [https://perma.cc/A4YB-QM6C].

[31] Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. DEMOCRACY. 63, 70-71 (2017) (describing Russian interference in the 2016 U.S. election); Joseph Thai, *The Right to Receive Foreign Speech*, 71 OKLA. L. REV. 269, 270-74 (2018) (same).

[32] Scott Shane & Alan Blinder, *Democrats Faked Online Push to Outlaw Alcohol in Alabama Race*, N.Y. TIMES (Jan. 7, 2019), https://www.nytimes.com/2019/01/07/us/politics/alabama-senate-facebook-roy-moore.html [https://perma.cc/YY3M-ZPNV].

[33] Daniel Rothberg, *Republican Party Wing Creates 18 Fake Websites for Democrats*, L.A. TIMES (Feb. 7, 2014, 4:12 PM PT), https://www.latimes.com/nation/politics/politicsnow/la-pn-republican-fake-websites-democrats-20140207-story.html [https://perma.cc/D735-CS6F].

Falsehoods that allege widespread voter fraud pose especially corrosive harms to self-governance by fueling voter cynicism and disengagement and inspiring disingenuous calls for legal changes that effectively disenfranchise certain voters.[34]

Election law scholar Richard Hasen rightly asks: "Will voters on the losing end of a close election trust vote totals and election results announced by election officials when voters are bombarded with conspiracy theories about the reliability of voting technology and when foreign adversaries target voting systems to undermine confidence?"[35]

Blame abounds for this weaponization of political speech. All sides of the political aisle too often declare that the ends of winning justify the expressive means, however despicable those means.[36] Because both principled "red" conservatives and "blue" progressives (as well as those who defy partisan labels) legitimately deplore this state of affairs,

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[34] *See* CHRISTOPHER FAMIGHETTI, DOUGLAS KEITH & MYRNA PÉREZ, BRENNAN CTR. FOR JUST., NONCITIZEN VOTING: THE MISSING MILLIONS 1 (2017), https://www.brennancenter.org/sites/default/files/2019-08/Report_2017_NoncitizenVoting_Final.pdf [https://perma.cc/R827-NQ34] (finding that election officials referred only about thirty incidents of suspected noncitizen voting for further investigation or prosecution out of 23.5 million votes cast in the 2016 election, and that forty out of forty-two jurisdictions studied reported no known incidents of noncitizen voting); Norton, *Thirteen Ways*, *supra* note 27, at 136 ("Most recently, President Trump claimed — without evidence — that '[i]n addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally' and '[s]erious voter fraud in Virginia, New Hampshire and California – so why isn't the media reporting on this? Serious bias – big problem!'" (citations omitted)).

[35] Hasen, *Deep Fakes*, *supra* note 27, at 536; *see* Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2177 (2018) ("The political production of a common good becomes impossible if citizens pervasively mistrust the results of the political process — for instance, if they doubt the objectivity of voting, they regard the system as irremediably rigged by such means as gerrymandering and influence peddling, or they come to regard their political opponents as so essentially hostile to their values and interests as to be disqualified from sharing in any common good. For a *democratic* republic to produce such an account of the common good, there must be no pervasive exclusion from political participation, and the distribution of political influence must not be so marked by inequality that the majority of people who must live under the law cannot regard themselves in any serious sense as having authorized it.").

[36] *See* Shane & Blinder, *supra* note 32 ("Matt Osborne, a veteran progressive activist who worked on the project, said he hoped that such deceptive tactics would someday be banned from American politics. But in the meantime, he said, he believes that Republicans are using such trickery and that Democrats cannot unilaterally give it up. 'If you don't do it, you're fighting with one hand tied behind your back,' said Mr. Osborne, a writer and consultant who lives outside Florence, Ala. 'You have a moral imperative to do this — to do whatever it takes.'").

understanding how speech itself may devour free speech and democracy could be among the "magenta" constitutional concerns.

But what to do about it? As the next subpart examines, not only is speedy, cheap, and abundant speech increasingly weaponized to frustrate meaningful public discourse and democratic outcomes, so too is the First Amendment itself increasingly weaponized to frustrate regulatory interventions that seek to enhance democracy or to achieve equality, public welfare, and other democratic goals.[37]

B. The First Amendment Itself Is Increasingly Weaponized

The traditional remedies for "the thought that we hate"[38] are to speak against it or ignore it.[39] But those remedies were never entirely convincing even in the very different speech environment of the early twentieth century.[40] In today's world, rebuttal or avoidance strategies seem even less effective, especially when one recalls Justice Brandeis's oft-forgotten caveat in proposing counterspeech as the remedy for the speech that we hate: "*If there be time* to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education,

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[37] *See* Amy Kapczynski, *Free Speech, Incorporated*, BOS. REV. (Dec. 5, 2019), http://bostonreview.net/law-justice/amy-kapczynski-free-speech-incorporated [https://perma.cc/2QXK-JR5Y] ("Today, most Americans are clamoring for more robust regulation of markets. But what companies cannot win through democratic politics, they are hoping to win from increasingly conservative courts, with First Amendment speech protections as an increasingly powerful weapon in their arsenal.").

[38] United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).

[39] *See* Cohen v. California, 403 U.S. 15, 21 (1971) ("Those in the Los Angeles courthouse [offended by a jacket bearing the words "Fuck the Draft"] could effectively avoid further bombardment of their sensibilities simply by averting their eyes."); Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

[40] *See* Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 73 (1981) ("Brandeis's dictum that 'the fitting remedy for evil counsels is good ones' rings hollow to an age that has seen demagogues destined to perpetrate unspeakable horrors use the facilities of mass communication to acquire and retain political power." (quoting *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring))); Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1163 (2015) ("[A] considerable amount of existing empirical research . . . tends . . . to justify skepticism about the causal efficacy of establishing an open marketplace of ideas in identifying true propositions and rejecting false ones."); Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 910-11 (2010) ("[T]he persistence of the belief that a good remedy for false speech is more speech, or that truth will prevail in the long run, may itself be an example of the resistance of false factual propositions to argument and counterexample.").

the remedy to be applied is more speech, not enforced silence."[41] Time for counterspeech is now vanishingly small, as information technology permits speakers to reach global audiences instantly. And efforts to refute lies can instead affirmatively reinforce them in listeners' memories.[42] Indeed, as Daniel Kahneman documents, "[a] reliable way to make people believe in falsehoods is frequent repetition, because familiarity is not easily distinguished from truth."[43] Finally, when many speak at once, few may be heard. Meaningful counterspeech thus may not be a realistic option for those without the resources or expertise to confront well-aimed lies with rebuttals of equal volume, speed, and listener-targeted precision.

Yet even as rebuttal and avoidance are increasingly ineffective shields from weaponized speech, governmental remedies remain profoundly worrisome. This is especially true in this hyper-partisan moment when concern has spiked about the government's viewpoint-specific censorship of political opponents and platforms, and about its abuse of its own powerful voice.

These dueling risks create a familiar tension that is exacerbated by new developments, both technological and sociopolitical.[44] On the one

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

[42] *See* Ian Skurnik, Carolyn Yoon, Denise C. Park & Norbert Schwarz, *How Warnings About False Claims Become Recommendations*, 31 J. CONSUMER RES. 713, 713-14 (2005).

[43] KAHNEMAN, *supra* note 21, at 62.

[44] Many others have wrestled more generally with a multitude of free speech issues triggered by technological advances. *See, e.g.*, LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999) (envisioning "the expanding architecture of regulation that the Internet will become"); JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT (2008) (arguing that burgeoning fear of information theft will necessitate more rigid regulation of digital participation); Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435 (2011) (advocating for "internet intermediaries" to combat online hate speech); James Grimmelmann, *The Virtues of Moderation*, 17 YALE J.L. & TECH. 42 (2015) (presenting content moderators as a bridge between too much freedom and too much control for online users); Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11 (2006) (outlining the dangers of using private companies as "proxy censors" in lieu of government regulation of the Internet); Michael I. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media*, 71 NOTRE DAME L. REV. 79, 118 (1995) (advocating for different rules of speech liability for Internet service providers and users); Dawn Carla Nunziato, *The Marketplace of Ideas Online*, 94 NOTRE DAME L. REV. 1519 (2019) (examining self-regulation of social media platforms in absence of government regulation); Robert C. Post, *Data Privacy and Dignitary Privacy:* Google Spain*, the Right to Be Forgotten, and the Construction of the Public Sphere*, 67 DUKE L.J. 981 (2018) (describing *Google Spain* as a case study of dignitary privacy in light of European regulations).

hand, speech obviously can, and does, promote democratic values, autonomy, human creativity, enlightenment, and character development. The judiciary thus *must* protect expression from government censorship. On the other hand, speech can, and does, distort and corrupt elections; mislead and defraud voters, consumers, and clients; inspire people to harm others; advance criminal ends; and more. The judiciary thus *must* preserve room for government regulation of speech as necessary to prevent grave harms, especially harms to democracy, while mindful of that power's potential misuse.[45]

But this tension too often leads the contemporary Court to throw up its hands and choose the purported clarity of articulating bright-line rules over the complexities of identifying context-sensitive standards.[46] This, in turn, increasingly inspires those who seek to protect their economic interests, as well as those ideologically committed to economic libertarianism, to challenge regulation on First Amendment grounds and seek full-dress strict scrutiny to protect these interests.[47] Indeed the mission creep of the First Amendment — its ever-expanding coverage — is a critical component of weaponization. When all a deregulation advocate has is a free speech "hammer," everything may look like a free speech "nail." And in the modern information-driven economy, arguments that what is being regulated is "expression" rather

[45] Speech can also collide with other constitutional rights in ways that are difficult to juggle. For a thoughtful examination of this problem, see TIMOTHY ZICK, THE DYNAMIC FREE SPEECH CLAUSE: FREE SPEECH AND ITS RELATION TO OTHER CONSTITUTIONAL RIGHTS, at xi (2018).

[46] *See* KROTOSZYNSKI, *supra* note 3, at xiii ("[M]any of the categorical rules that the Rehnquist and Roberts Courts have adopted in cases where a would-be speaker needs the government's assistance in order to speak actually protect less speech than the open-ended balancing tests that they replaced.").

[47] *See* Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1976 (2018) (describing this emerging and well-funded coalition as a kind of "First Amendment-industrial complex" (emphasis omitted)). Note that we do not suggest that deregulatory moves reliant on fortified constitutional tools are unique to the First Amendment zone. Carol Rose, for example, has noted parallel developments in property law, where the Takings Clause became a formidable deregulatory weapon. *See* Carol M. Rose, *The Story of* Lucas*: Environmental Land Use Regulation Between Developers and the Deep Blue Sea*, *in* ENVIRONMENTAL LAW STORIES 237, 239-41 (Richard J. Lazarus & Oliver A. Houck eds., 2005) (discussing the history of regulatory takings as applied to environmental regulation and land use law). Indeed, land use law offers a rich example of a field in which various deregulatory moves based on constitutional law principles (like freedom of speech, freedom of religion, and freedom from uncompensated takings) have combined to transform these local decisions — once the province of state and local actors and relatively insulated from constitutional review — into a constitutional law hot zone.

than "conduct" are often quite persuasive.[48] Speech is *everywhere*, once one looks for it.

As Julie Cohen has explained, our economy's emphasis has shifted to the "development of intellectual and informational goods and services, production and distribution of consumer information technologies, and ownership of service-delivery enterprises."[49] In this new information economy, economic regulation increasingly invites characterization (and attack) not as the regulation of commercial conduct, but instead as the regulation of information and thus speech.[50] Under today's free speech doctrine, the government's content- or speaker-based regulation presumptively triggers strict scrutiny, at least in public discourse and sometimes elsewhere.[51] Yet one can hardly imagine the government's regulation of specific industries or professions that would *not* be content- or speaker-specific. Looks here thus "can kill" the

[48] *See* Kessler & Pozen, *supra* note 47, at 1973-75 (observing that neoliberalism calls for the regulation of information more than conduct, which "makes economic regulation more susceptible to First Amendment scrutiny"); Helen Norton, *Discrimination, the Speech That Enables It, and the First Amendment*, 2020 U. CHI. LEGAL F. 209, 223-24 [hereinafter *Discrimination*] (detailing commercial actors' increasing claims that certain antidiscrimination laws that regulate commercial transactions regulate speech rather than conduct). For a recent illustration of this trend to expand speech coverage outward, see Justin S. Wales & Richard J. Ovelmen, *Bitcoin Is Speech: Notes Toward Developing the Conceptual Contours of Its Protection Under the First Amendment*, 74 U. MIAMI L. REV. 204, 253-54 (2019).

[49] *See* Cohen, *Regulatory State*, *supra* note 8, at 371.

[50] *See* sources cited *supra* note 48.

[51] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws — those that target speech based on its communicative content — are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."); *see also* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799 (2011) (striking down a California law that regulated the sale of violent interactive videos to minors without parental consent); Sorrell v. IMS Health, Inc., 564 U.S. 552, 564-65 (2011) (striking down a Vermont statute that regulated the sale of information regarding doctors' prescribing practices for use in pharmaceutical marketing on grounds that statute burdened "disfavored speech by disfavored speakers"); United States v. Stevens, 559 U.S. 460, 468-70 (2010) (striking down on overbreadth grounds a federal law that criminalized the commercial creation, sale, or possession of depictions of animal cruelty — and rejecting as "startling and dangerous" what it characterized as the Government's proposed "free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits"); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010) ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content."). For a critique of unnuanced invocations of *Reed*'s application to compelled speech, see Note, *Two Models of the Right to Not Speak*, 133 HARV. L. REV. 2359, 2367-68 (2020); *see also* Massaro, *Tread on Me!*, *supra* note 1, at 407-11 (offering taxonomy of compelled speech cases and distinguishing among them in ways that hinge on speaker roles, listener interests, and government purposes in compelling speech).

government's efforts to address the harms of certain expression, to use Kenji Yoshino's quip about the consequences of vigorous strict scrutiny.[52] In fact, they usually do.[53]

Progressive Justices have noted and condemned the majority's "weaponization" of the First Amendment for antiregulatory ends.[54] Many academic commentators share this worry.[55] Jeremy Kessler and David Pozen, for instance, have synthesized, in a fresh and fair way, a wide swath of scholarship that addresses the equality costs of free speech and suggests practical strategies for protecting economic and social welfare legislation designed to achieve egalitarian goals.[56] Framing the issue as whether "progressive civil libertarianism can be reimagined for the digital age in ways that make good on its egalitarian promise while limiting possibilities for government censorship and abuse," they identify familiar options for this re-imagination: voice

[52] Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756 (2011).

[53] Fewer than a handful of speech restrictions have survived the Court's strict scrutiny in recent years. *See, e.g.*, Williams-Yulee v. Fla. Bar, 575 U.S. 433 (2015) (upholding some limits on judicial candidates' campaign speech); Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (upholding a statutory ban on speech coordinated with foreign organizations identified as terrorist by United States government); Burson v. Freeman, 504 U.S. 191 (1992) (plurality opinion) (upholding limits on the distribution of campaign literature within 100 feet of polling places); *see also* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 844-55 (2006) (presenting an empirical study of lower courts' application of strict scrutiny and concluding that the government was least likely to survive — at a rate of twenty-two percent — strict scrutiny in the Free Speech Clause context).

[54] Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (describing the majority as "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy"); *see Sorrell*, 564 U.S. at 591-92, 602-03 (Breyer, J., dissenting) (describing the Court's use of free speech to strike down legislation as reminiscent of its *Lochner*-era deployment of the Due Process Clause to strike down economic legislation).

[55] *E.g.*, TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA 28-30 (2012); Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 323-26 (2016); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1207, 1209 (2015); Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2120 (2018) [hereinafter *Imagining*]; Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31, 34-35 (2016) [hereinafter *Truth and Lies in the Workplace*]; Amanda Shanor, *The New* Lochner, 2016 WISC. L. REV. 133, 134.

[56] Kessler & Pozen, *supra* note 47, at 1999-2000.

versus exit, reform versus revolution.[57] Put another way, change-minded thinkers can try to topple or tweak.

We agree. Inequality is a serious threat both to individual human flourishing and to democracy, and a First Amendment doctrine unmindful of inegalitarian conditions may exacerbate them.[58] Indeed, the weaponization of free speech doctrine may obscure or distort choices about *all* normative ends, including but not limited to equality. The question of how to protect important governmental efforts to address economic and other material inequalities from First Amendment attack is thus related to, but not quite the same as, the question that we address here: how to stop speech from undermining the functioning of a healthy democracy.[59]

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[57] *Id.* at 2009-10; *see also id.* at 1953-54 (describing a "grammar of free speech egalitarianism" for addressing these challenges and concluding that "[i]f First Amendment Lochnerism is to be countered in any concerted fashion, the roadmap for reform will be found within this grammar; where it gives out, a new language may become necessary").

[58] *See* Massaro, *Tread on Me!*, *supra* note 1, at 371; Helen Norton, *Powerful Speakers and Their Listeners*, 90 U. COLO. L. REV. 441, 450-68 (2019) [hereinafter *Powerful Speakers*] (discussing how free speech doctrine should, and sometimes does, attend to inequalities of information and power). No liberal democracy worthy of our faith can ignore how hard-wired inequality is in the United States, nor how much remains undone to make neutrality principles truly liberal or democratic. Baselines matter.

[59] For thoughtful attention to both sets of questions, see Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. 959, 961-62 (2020) (proposing "a democratic interpretation of the First Amendment that harmonizes rights protection with concern for political, social, and economic belonging" by recognizing that "people who are suffering from certain forms of deprivation and disadvantage will find it impossible to exercise their basic rights to participate in the project of cooperative government"). We note — though do not plumb — the many intellectual predecessors who long ago recognized and anticipated related challenges. *See, e.g.*, WALTER F. BERNS, FREEDOM, VIRTUE AND THE FIRST AMENDMENT (1957) (questioning the common premise that a legal conception of freedom is the only basis for First Amendment critique); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 146, 163, 215 (1987) (critiquing the First Amendment as an absolutist barrier to the regulation of subordinating speech); MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLÈ WILLIAMS CRENSHAW, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993) (advocating for public regulation of assaultive speech at the intersection of constitutional law and critical race theory); STEVEN H. SHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT? (2016) (arguing that "free speech idolatry" has overtaken attention to speech's impact on a host of pressing social concerns); JEREMY WALDRON, THE HARM IN HATE SPEECH (2012) (arguing that hate speech undermines the public good); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1407-08 (1986) (arguing that capitalism is foundational to understanding the "tradition" of the First Amendment).

Although none of this is new, the challenges to constitutional democracy now seem especially grave, as speech is more evidently and disturbingly both the solution and the problem. What can, or should, First Amendment law do about these challenges? We turn again to Tim Wu, who identifies two possibilities:

> The first is to admit defeat and suggest that the role of the political First Amendment will be confined to harms that fall within the original 1920s paradigm. There remains important work to be done here, as protecting the press and other speakers from explicit government censorship will continue to be essential. And perhaps this is all that might be expected from the Constitution (and the judiciary). The second — and more ambitious — answer is to imagine how First Amendment doctrine might adapt to the kinds of speech manipulation described above.[60]

In the remainder of this Article, we take up the task implied in the second of these possibilities, and "imagine how First Amendment doctrine might adapt" to the democratic challenges posed by the twenty-first-century speech environment.

II. STRATEGIES FOR REFORM: TOPPLES AND TWEAKS

By topples, we mean abandoning or replacing certain Free Speech Clause theories and doctrines altogether.[61] Tweaks, in contrast, do not require overruling past precedent but instead emphasize one theoretical or doctrinal strand among available (if sometimes inconsistent) strands — the sort of choice about what to analogize and what to distinguish that is endemic to much legal reasoning. Tweaks thus differ from topples in their scope and speed of change. Note too that the decision to describe a proposal as a tweak or a topple is itself a contestable framing choice.[62] Depending on your baseline, urging a return to a longstanding but more recently abandoned doctrine may be

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[60] Tim Wu, *Is the First Amendment Obsolete?*, *in* EMERGING THREATS 2, 17 (2017).

[61] Topples include, for example, altogether abandoning certain theories (like autonomy theory) or certain doctrines (like the state action doctrine).

[62] *See* Lakier, *Imagining*, *supra* note 55, at 2158 ("The transformation of the First Amendment that this Essay calls for may simply not be politically feasible right now. And yet there is value in remembering both what the First Amendment has been and what it may be again. Doing so reminds us that the free speech guarantee is susceptible to multiple interpretations and that the disequalizing tendencies of contemporary free speech law are neither necessary nor inevitable.").

characterized as a tweak, or instead as a topple.[63] That said, the distinction between these types of reforms is meaningful even if blurred at the edges.

Much of today's First Amendment challenge is structural. Basic assumptions — many of which are now undermined by the twenty-first-century speech environment — create the theoretical and doctrinal obstacles to addressing contemporary threats to free speech and democracy.[64] Rethinking fundamental assumptions inevitably invites fundamental rethinking of theory and doctrine — which, in turn, suggests the need for topples rather than tweaks.[65]

Yet here we focus on tweaks, largely because the Court's traditional approaches to free speech problems are so resilient. Several factors contribute to this resilience.

First, the judicial process is inherently incremental and retrospective. Courts rarely topple basic principles and tend to take existing doctrine seriously, given *stare decisis* and its role in assuring judicial integrity and doctrinal stability.

Second, judges, lawyers, and scholars alike are understandably wary of encouraging the Court to act boldly when revisiting First Amendment precedent, lest it swing too widely and jettison worthy law in favor of less constitutionally and normatively desirable options.

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[63] *See id.* at 2159 ("This Essay argues that scholars need not reinvent the wheel to construct a First Amendment doctrine that does a better job of ensuring that free speech rights are — in practice and not just in theory — 'available to all, not merely to those who can pay their own way.' Instead, they can — and perhaps should — look to the First Amendment's past as a guidepost for its future."). For the strategic reasons discussed in this Part, there is value in emphasizing a proposal's tweak-ish components.

[64] *See* Kessler & Pozen, *supra* note 47, at 1999 (2018) ("[T]he failure of such arguments reflects both the substantively libertarian orientation of First Amendment doctrine and the arguments' awkward fit with the structure of public law litigation — a structure that disinclines judges to acknowledge and balance the competing constitutional interests of private parties."); Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2226 (2018) ("The theory, structure, and tradition of American free speech law make it a particularly unpromising entry point for a progressive transformation.").

[65] *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 77 (3d ed. 1996) ("The decision to reject one paradigm is always simultaneously the decision to accept another, and the judgment leading to that decision involves the comparison of both paradigms with nature and with each other." (emphasis omitted)); *id.* at 91 ("The proliferation of competing articulations, the willingness to try anything, the expression of explicit discontent, the resource to philosophy and to debate over fundamentals, all these are symptoms of a transition from normal to extraordinary research. It is upon their existence more than upon that of revolutions that the notion of normal science depends.").

Third, proposals to cabin expression's harms trigger painful recollections of the government's many efforts to suppress political speech, especially dissent and criticism aimed at the government itself.[66] Only freedom's enemies, these iconic stories warn, oppose expansive speech coverage. Men *always* have feared "witches," and government *always* has "burnt women."[67] Regulators who try to check speech in the interest of other, worthy government goals thus may be labeled as speech traitors — intellectually dishonest censors and book burners, unpatriotic and illiberal purveyors of political correctness, or worse.

The resilience of the Court's traditional approaches has still other and overlapping roots. These approaches often appeal to our positive sense of self and agency: they presume us to be rational and self-governing such that government interventions smack of demeaning paternalism. "Don't tread on me!" rings not only traditional, but also modern, liberty bells. Arguments that foreground human vulnerabilities (we are not always rational and self-regarding) are jarring to those who prize autonomy and fear government paternalism.

The dominant speech narratives also thwart reform efforts because they are well worn and familiar. Think of the pithy and powerful aphorisms of earlier eras like "Men feared witches and burnt women" — a line that still resonates a century after Brandeis first penned it.[68] To overcome the allure of such memorable passages requires new, equally beguiling stories and rhetoric to counter the old tales and metaphors, if only to force greater attention to the democratic harms threatened in today's speech environment. And courts (like the rest of us) often prefer simple stories to the complex. Thus, they prefer uniform free speech rules that can apply to all expression regardless of context. Recall, most

[66] *E.g.*, New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (rejecting the government's request for an injunction to stop *The New York Times* and other newspapers from publishing the Pentagon Papers); Debs v. United States, 249 U.S. 211, 212 (1919) (upholding the government's criminal prosecution and conviction of labor leader and presidential candidate Eugene Debs for criticizing the war effort).

[67] *See* MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION 105-57 (2019) (critiquing unexamined deference to speech rights without attention to its harms to vulnerable persons and groups); Mary Anne Franks & Ari Ezra Waldman, *Sex, Lies, and Videotape: Deep Fakes and Free Speech Delusions*, 78 MD. L. REV. 892, 897 (2019) ("Arguing that we should not enact reasonable limitations on harmful speech because historical speech restrictions often targeted minority voices is like saying we should not criminalize rape because the criminal law has long been used to subjugate women.").

[68] Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

prominently, the presumption that all speaker- or content-specific regulations trigger strict scrutiny.[69]

On top of the foregoing obstacles to substantial theoretical or doctrinal change is the matter of judicial expertise. The current Court is simply ill-equipped to manage the rapidly evolving technological aspects of the new speech environment or to impose sensible limits narrowly tailored to its dangers. Some Justices resist, even ridicule, what they call social science "gobbledygook,"[70] and often view "novelty" in constitutional law as presumptively dangerous.[71] The Court's aversion to innovation, together with its penchant for the past, are grim news for many areas of law. But it is especially bad news for the First Amendment as new information technologies usher in exponential changes.

For all of these reasons, arguments that challenge the traditional assumptions underlying First Amendment law are like salmon, swimming upstream against a rapid current of judicial, rhetorical, doctrinal, and institutional resistance.[72] Because we cannot wish away the strength of this judicial resistance, topples aimed at Supreme Court doctrine remain unlikely in the short term, even as we recognize topples' powerful pull at a time when the threats to our democracy feel increasingly existential.

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[69] *E.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (stating that content-based laws are presumptively unconstitutional).

[70] Transcript of Oral Argument at 40, Gill v. Whitford, 137 S. Ct. 2268 (2017) (No. 16-1161), https://www.supremecourt.gov/oral_arguments/argument_transcripts/16-1161_kjfm.pdf [https://perma.cc/SV89-4HEB] (statement of Roberts, C.J.) ("[T]he whole point is you're taking these issues away from democracy and you're throwing them into the courts pursuant to, and it may be simply my educational background, but I can only describe as sociological gobbledygook.").

[71] Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1407 (2017) (describing and critiquing the tendency of the current Justices to treat a statute's novelty as evidence of its unconstitutionality).

[72] To be sure, some Justices and many scholars agree that in order to affect the right balance between these risks, courts and policymakers must frankly acknowledge the threats as well as the benefits of cheap, abundant, and manipulable speech to free speech and democracy. *See, e.g.*, Iancu v. Brunetti, 139 S. Ct. 2294, 2304 (2019) (Breyer, J., concurring in part and dissenting in part) ("I believe we would do better to treat this Court's speech-related categories not as outcome-determinative rules, but instead as rules of thumb."); Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953, 960 (2016) (arguing against a "constitutional default rule that categorically disables government from legislating for the common good" and urging the Court to engage in more nuanced decision-making); Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1, 1 (2016) (proposing "a theory for balancing free speech against other express and implied constitutional, statutory, and doctrinal values"). These thinkers recognize the difficulty in capturing the "just so" balance between protecting speech and mitigating its harms but do not regard the task as hopeless.

We therefore emphasize tweaks. As we explain in Part III, nothing about current theory or doctrine points inexorably in one direction.[73] Courts can (and sometimes do) sidestep, even pivot, for better and for worse.[74] Indeed, doctrinal exceptions abound already, from which new possibilities may emerge. As doctrinal exceptions accumulate, courts may develop new context-sensitive rules to accommodate particularly powerful evidence that the old rules fit poorly in some places. Moreover, the brisk pace and power of technological change may hasten the day of structural doctrinal and theoretical reckoning.[75] Modern reformers should emphasize these intra-doctrinal tensions, reminding the Court that the effort to strike the appropriate balance between protecting speech and mitigating its harms is an ongoing struggle, waged internal to doctrine, and one that has always vexed policymakers, scholars.

In short, First Amendment traditionalism, however stubborn, need not ever and always be the enemy of a more practical First Amendment good.[76] But the successful interventions, for now, are likely to be those that observe common law customs by drawing from prior cases, proceeding incrementally, justifying departures, and redefining law and theory as new patterns emerge.

III. TARGETS AND OPPORTUNITIES FOR CONSTRUCTIVE TWEAKS

Here we name several struts of contemporary theory and doctrine that hobble efforts to empower the First Amendment to respond to the

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[73] *See* Maxwell L. Stearns, *Constitutional Law's Conflicting Premises*, 96 NOTRE DAME L. REV. 447, 451 (2020) (describing these sorts of "doctrinal inconsistenc[ies] as Constitutional Law's special feature and bug. Virtually every salient domain presents major precedents operating in tension. Bodies of precedent are rarely abandoned simply because a newer strand makes an older one appear out of place. And when the earlier strand is redeployed, the once-newer strand likewise persists").

[74] *E.g.*, Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2463-65 (2018) (overruling forty years of precedent to hold that requiring nonmembers of public sector unions to pay agency fees violates the First Amendment).

[75] For an explanation of how tweaks become topples in the scientific world, see KUHN, *supra* note 65, at 6 ("[When] the profession can no longer evade anomalies that subvert the existing tradition of scientific practice — then begin the extraordinary investigations that lead the profession at last to a new set of commitments . . . ."); *id.* at 52-53 ("Discovery commences with the awareness of anomaly, i.e., with the recognition that nature has somehow violated the paradigm-induced expectations that govern normal science. It then continues with a more or less extended exploration of the area of anomaly. And it closes only when the paradigm theory has been adjusted so that the anomalous has become the expected.").

[76] *See* KROTOSZYNSKI, *supra* note 3, at xvii ("[T]he Warren Court was more willing to innovate, to create, to bend First Amendment rules and theory to support the process of democratic self-government, than its successors have proven to be.").

threats posed to free speech and democracy in the twenty-first-century speech environment, and flag some proposals (our own, as well as others') for productive revisions of those struts. Rather than catalogue all the possible specific interventions, we introduce a process for considering and addressing obstacles for constructive change, a process that requires us to revisit foundational First Amendment questions and their answers.[77]

A. Confronting the Ever-Expanding Justifications for Free Speech Protection

Why does the First Amendment protect speech from the government's unjustified interference? There is no single, unifying answer — and understandably so.[78] Because multiple theories dominate the case law and commentary, the resulting doctrine remains theoretically pluralistic, incredibly ornate, and at times internally incoherent.[79] And because these traditional theories focus on the good in speech rather

[77] Rather than offer a compendium, we seek to organize ongoing engagement with these issues in digestible form to mobilize further conversation. That is, we take seriously Tim Wu's cautionary note about limited listener attention in an information-rich world. Like all areas of public discourse, legal scholarship has expanded via the new media. Making sense of the flood of ideas — springing from traditional and non-traditional journals, books (print and audio), webcasts, podcasts, blogs, op-eds, tweets — is time-consuming and hard work. The role of the engaged listener within the academic marketplace of ideas — no less than the role of the engaged listener more generally — has never been more challenging, nor more necessary. The job of academic speakers also has become harder. Translating the burgeoning sea of relevant information into digestible, manageable forms becomes more essential. Getting audience attention — even academic audience attention — without resorting to intentionally provocative and hyperbolic theses, sound bite rhetoric, or complexity-crushing compression is increasingly difficult. Detail and nuance sometimes fall by the wayside in light of the growing need for synthesis that helps audiences navigate sophisticated ideas and a rapidly changing information environment. And yes, we see the irony.

[78] *See* HARRY KALVEN, JR., *Preface* to A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (Jamie Kalven ed., 1988) ("The Court has not fashioned a single, general theory which would explain all of its decisions; rather, it has floated different principles for different problems."); L.A. Powe, Jr., *Scholarship and Markets*, 56 GEO. WASH. L. REV. 172, 179 (1987) ("[W]hen combined, the various theories of freedom of expression are far stronger than the sum of the parts."); Steven H. Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1216, 1282-83 (1983) (arguing against a single general theory of the First Amendment).

[79] *See* Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 278 (1991) (describing the doctrine as "a vast Sargasso Sea of drifting and entangled values, theories, rules, exceptions, [and] predilections . . . requir[ing] determined interpretive effort to derive a useful set of constitutional principles").

than its harmful consequences, they offer little in the way of answers to thorny application questions.[80]

The most influential free speech theories fall into two clusters: positive arguments that identify expression's affirmative value (like democratic self-governance,[81] enlightenment through a robust marketplace of ideas,[82] and individual autonomy[83]) and negative arguments that focus instead on the dangers of the government's regulation of expression.[84] Together, these sets of theories are so capacious as to permit the coverage, and perhaps the protection, of virtually all speech (and increasingly much conduct as well[85]), with little room for limiting principles that explain *when* the First Amendment permits the government to regulate speech that inflicts democratic and other harms.

For example, democracy-based theories emphasize the value of speech to democratic self-governance (rather than to individual speakers). Alexander Meiklejohn, often cited for developing this approach, famously noted that what matters for freedom of speech is

[80] *See* Massaro, *Tread on Me!*, *supra* note 1, at 389 (noting that the prevailing "theories are great at explaining why speech is valuable in a liberal democracy that prizes individual autonomy, even if the content seems worthless to others; but even the best of them offer too little by themselves to inform or justify much past, present, or future judicial line-drawing that excludes some speech from the constitutional fold" (emphasis omitted)).

[81] *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1st ed. 1948) (proposing that the freedom of speech guarantees positive rights to U.S. citizens that inform their opinions on matters essential to self-governance).

[82] *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, and that truth is the only ground upon which their wishes safely can be carried out.").

[83] *E.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 5 (1989) (emphasizing individualistic concerns and speaker liberty); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 201-05 (1977) (focusing on speaker dignity and respect); Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 283 (2011) (proposing a theory of the First Amendment that emphasizes thinkers' autonomy).

[84] *See* Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 17 (2008) (discussing the negative view of the First Amendment that "does not rest on the affirmative claim that free speech will lead to any particular social or political benefits" and instead emphasizes the dangers created "when collective entities are involved in the determination of truth").

[85] *See* Norton, *Discrimination*, *supra* note 48, at 223-34 (describing some commercial actors' reliance on First Amendment claims to challenge the regulation of commercial conduct).

not that all speak, but that "everything worth saying shall be said."[86] Under this theory, the First Amendment may be interpreted to cover an expansive range of speech: what *isn't* "worth saying," even if only for the sake of informed voting and democratic participation?

Relying largely on expression's instrumental value to listeners, the marketplace of ideas (or enlightenment) theory also resists limiting principles.[87] Emphasizing the production of ideas and information regardless of their source, and assuming that more speech is always better in facilitating listeners' acquisition of knowledge and discovery of truth, this theory finds constitutional value in all information, apart from any connection to democratic participation or culture.[88]

And, of course, the same is true of autonomy-based theories: all speech furthers the speaker's autonomy to say what she will.[89]

So, under positive rights theories, virtually all expression arguably promotes the democracy-based, enlightenment, or autonomy benefits of free speech.[90] Indeed, the elasticity of these speech justifications makes it difficult to place *any* speakers or *any* topic wholly outside their embrace. The more zones of government involvement, the more topics become relevant to self-governance. The more ideas thrust into the public sphere, the larger the marketplace of ideas. The more ecumenical

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[86] ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1st ed. 1948).

[87] *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15-34 (1982); Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 41-42.

[88] *See* Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 423 (1980) (describing the values most often located at the heart of the First Amendment as including the search for truth and the discovery and dissemination of knowledge).

[89] *See* Toni M. Massaro & Helen Norton, *Siri-ously? Free Speech Rights and Artificial Intelligence*, 110 NW. U. L. REV. 1169, 1175-78 (2016) (discussing the broad reach of First Amendment autonomy theory). As discussed in more detail *infra* Part III.B, however, sometimes speakers' and listeners' autonomy interests collide.

[90] Related positive free speech theories emphasize expression's ability to develop our capacities for tolerance and other positive character traits. *See* LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 157-58 (1986) ("For speech that attacks and challenges community values, the act of toleration serves to both define and reaffirm those values; the act of tolerance implies a contrary belief and demonstrates a confidence and security in the correctness of the community norm."); Vincent Blasi, *Free Speech and Good Character*, 46 UCLA L. REV. 1567, 1569 (1998) ("[A] culture that prizes and protects expressive liberty nurtures in its members certain character traits such as inquisitiveness, independence of judgment, distrust of authority, willingness to take initiative, perseverance, and the courage to confront evil. Such character traits are valuable, so the argument goes, not for their intrinsic virtue but for their instrumental contribution to collective well-being, social as well as political.").

one's notion of individual autonomy, the more generous one becomes about allowing the individual to express herself — even in vulgar, hateful, threatening, disruptive, or horrific ways. In short, all of the positive theories are elastic and in one direction only, pushing ever outward with little in the way of clear borders.[91]

At the same time, negative First Amendment theory urges that we protect speech from the government's regulation not because speech is so valuable in itself, but instead because the government is so dangerous. To illustrate the contemporary Court's embrace of the negative view of the First Amendment as a restraint on governmental power rather than a celebration of speakers or speech, consider the Court's decision in *United States v. Alvarez*.[92] In earlier cases like *New York Times v. Sullivan*[93] and *Gertz v. Welch*,[94] the Court relied on positive theory to conclude that the First Amendment sometimes protects defamatory falsehoods about public officials and figures from the government's regulation to prevent the chilling of valuable criticism and dissent. But in *Alvarez*, the Court struck down the government's regulation of a speaker's self-aggrandizing lie that he had received the Congressional Medal of Honor (a restriction that even the liar's lawyer conceded neither punished nor chilled any valuable speech), relying solely on negative theory, that is, a focus on constraining the government rather than safeguarding valuable speech.[95]

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[91] *But see* KROTOSZYNSKI, *supra* note 3, at 11 ("Instances of the federal courts contracting First Amendment rights constitute an important countertrend to the more generally observed, and often celebrated, ever-expanding First Amendment universe meme.").

[92] United States v. Alvarez, 567 U.S. 709 (2012).

[93] 376 U.S. 254, 270-80 (1964) (explaining how criticism of public officials deserves constitutional protection because of its affirmative value in furthering democratic self-governance).

[94] 418 U.S. 323, 339-44 (1974) (explaining the affirmative value of a free and "uninhibited press").

[95] *See Alvarez*, 567 U.S. at 723 (plurality opinion) ("Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth."). Note that some lies may have affirmative First Amendment value. *See* Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1437, 1437-38 (2015) (identifying certain lies by undercover journalists and investigators as valuably furthering democratic self-governance); Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 165 ("[L]ies that trigger confrontation and rebuttal may lead to increased public awareness and understanding of the truth, lies by undercover law enforcement or journalists can

Concerned with the potential for government's institutional incompetence and malignant self-interest, negative theory rests on a distrust of the government's efforts to assess expression's costs and benefits.[96] So here too, speech coverage and protection arch ever-outward.[97]

We note at least two tweaks for confronting the ever-expanding answer to the question of *why* the First Amendment protects speech — possibilities that explain not only when and why the First Amendment protects speech, but also when and why the First Amendment permits expression's regulation to advance free speech and democratic values.

The first is normative and suggests a hierarchy of free speech theories that privileges democratic self-governance as a tiebreaker when competing theories point in different directions.[98] This hierarchical

help expose the truth, and Socratic questioning in which a teacher knowingly asserts a falsehood can help a student to recognize and counter falsity.").

[96] *See* Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1439, 1441 (1987) ("The framers were not intent on promoting some well-defined conception of the good, whether individual or societal. They were responding to problems that already had arisen [i.e., "specific perceived abuses of government power" like prior restraint] and that they feared might recur."); Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 WASH. L. REV. 445, 451 (2012) (describing a negative justification for the First Amendment as rooted "primarily on the grounds of distrust of government").

[97] Consider how these traditional justifications for free speech protection might apply to the growing expressive power of artificial intelligence ("AI"). AI is not human yet may profoundly affect human speakers and listeners, and does so in ways directly relevant — and often valuable — to marketplaces of ideas and information. As we note in earlier work, current theory and doctrine offer few obstacles to the First Amendment coverage of AI-enhanced speakers or the emerging technologies that shape and carry them. *See* Massaro & Norton, *supra* note 89, at 1175; Toni M. Massaro, Helen Norton & Margot E. Kaminski, *SIRI-OUSLY 2.0: What Artificial Intelligence Reveals About the First Amendment*, 101 MINN. L. REV. 2481, 2482 (2017).

[98] *See, e.g.*, CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH, at xviii, xx (1993) ("[T]here is a large difference between a 'marketplace of ideas' — a deregulated economic market — and a system of democratic deliberation. . . . I argue that many of our free speech disputes should be resolved with reference to the Madisonian claim that the First Amendment is associated above all with democratic self-government."); SUNSTEIN, #REPUBLIC, *supra* note 21, at 202-06 (relying on democratic self-governance theory to critique aspects of social media that interfere with voters' exposure to a range of ideas); *id.* at 258 ("Free speech is never an absolute. . . . The question is how we can regulate some kinds of speech while promoting the values associated with a system of free expression, emphatically including democratic self-government."); Martin H. Redish & Julio Pereyra, *Resolving the First Amendment's Civil War: Political Fraud and the Democratic Goals of Free Expression*, 62 ARIZ. L. REV. 451, 454 (2020) (recognizing that "false political speech may just as easily undermine the democratic process as facilitate it" and proposing an understanding of the First

theorizing means, more specifically, permitting the government to regulate speech that frustrates democratic self-governance at the occasional expense of the autonomy of speakers determined to interfere with democratic self-governance.

The second relies on history and experience to set limits on negative theory by identifying where the government's competence is high and its self-interest is low, such that greater deference to government is less threatening to basic free speech values. As Amy Kapczynski explains,

> A more democratic First Amendment, and one still recognizable in current doctrine, would also admit that history and experience can help us distinguish between settings in which governments are likely to abuse their powers and settings in which governments are likely to be necessary to give effect to collective judgments about how we wish to live and order our values.[99]

These tweaks do not require foundational shifts in theory. Rather, they require in situ doctrinal adjustments that emphasize and privilege the First Amendment's democracy-enhancing justifications. They also focus attention on the ways in which speech sometimes undermines core political speech itself.

Indeed, these tweaks leverage precedents in which the Court has upheld (even under heightened scrutiny) carefully crafted laws that regulate speech to protect democratic self-governance in demonstrable ways.[100] Recall, for example, the Court's decision in *Burson v. Freeman*, where it upheld the government's restriction of campaign literature within 100 feet of polling places to protect voters from coercion and

Amendment that permits, in moderating conflicts between competing First Amendment interests, the government's regulation of certain instances of "political fraud").

[99] Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179, 203 (2018). Joseph Blocher has also recently proposed a potentially promising tweak, or perhaps a topple, to our understanding of First Amendment enlightenment (i.e., marketplace of ideas) theory, emphasizing the value of speech as the means to the end of knowledge rather than truth. Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 440, 468, 470 (2019) ("What matters is the maximization of knowledge, which includes not only the volume of truths but also the quantity and quality of justifications — bases for believing those truths. . . . My point here is only the general one that knowledge, rather than truth, might better capture the epistemic values that most people really want from free speech: not only quantity, but also quality, of information.").

[100] *See, e.g.*, Williams-Yulee v. Fla. Bar, 575 U.S. 433, 443-44 (2015) (upholding rules of judicial conduct prohibiting solicitation of campaign funds by judicial candidates).

interference.[101] And its decisions in *Citizens United v. Federal Election Comm'n* and *Doe v. Reed*, where it upheld requirements that campaign speakers and petition signatories disclose their identities after concluding that the value of such disclosures to voters and to electoral integrity justified the interference with those speakers' autonomy interest in remaining anonymous.[102]

Taken together, these democracy-driven tweaks would understand the First Amendment to permit the government's regulation of lies about the mechanics of voting — like lies about who is eligible to vote, where, and when.[103] For the same reasons, these tweaks support an understanding of the First Amendment to permit the government to restrict foreign speakers' ability to influence the outcome of U.S. elections by, for instance, prohibiting foreign entities' campaign contributions and expenditures.[104] They also support an understanding of the First Amendment to permit governmental efforts to combat extreme partisan gerrymandering that grossly distorts democratic processes, such as state voter-approved initiatives to prevent party insiders from serving on state redistricting commissions.[105] Each of

[101] Burson v. Freeman, 504 U.S. 191, 211 (1992). *But cf.* Minn. Voters All. v. Mansky, 138 S. Ct. 1876 (2018) (striking down, on First Amendment grounds, a law prohibiting the wearing of buttons or apparel with political insignia inside polling places).

[102] Doe v. Reed, 561 U.S. 186, 191 (2010) (rejecting a facial challenge to state law that required disclosure of petition signatures to assure integrity of petition process); Citizens United v. FEC, 558 U.S. 310, 371 (2010) (upholding campaign disclosure requirements and noting that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages"); *see also Doe*, 561 U.S. 186 at 198 (explaining that the state's interests in election integrity includes not only the prevention of fraud but "also extends more generally to promoting transparency and accountability in the electoral process"); ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 92 (2014) [hereinafter CITIZENS DIVIDED] ("We impose disclosure requirements that apply to campaign-related expenditures but not to expenditures for public discourse generally.").

[103] *See Minn. Voters All.*, 138 S. Ct. at 1889 n.4 (2018) ("We do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures.").

[104] *See* Bluman v. FEC, 800 F. Supp. 2d 281, 285-86 (D.D.C. 2011), *aff'd mem.*, 132 S. Ct. 1087 (2012) (in which the Court summarily affirmed, without an opinion, a lower court's decision upholding the federal statutory ban on campaign contributions and independent expenditures by foreign nationals); *see also* Toni M. Massaro, *Foreign Nationals, Electoral Spending, and the First Amendment*, 34 HARV. J.L. & PUB. POL'Y 663, 664 (2011) (identifying the tension between the speaker-protective rhetoric and logic of *Citizens United*, and speaker-based restrictions on foreign nationals' electoral spending).

[105] *See, e.g.*, Daunt v. Benson, 956 F.3d 396, 401 (6th Cir. 2020) (rejecting a request for a preliminary injunction to Michigan's voter-approved initiative that created a nonpartisan redistricting commission on which party leaders could not serve).

these laws involves the regulation of expression to enhance democratic self-governance. And each calls upon the government to make objectively verifiable determinations (for example, about the times and locations of polling places, about who is or is not a foreign national, and about who has or has not held a party leadership role) that invite less concern about the government's competence or self-interest.

B. Confronting the Court's Focus on Speakers to the Detriment of Listeners

Whom does the First Amendment protect? Speakers, for sure. But listeners matter too, as speech also serves *their* democratic self-governance, autonomy, and enlightenment interests.[106]

Difficult First Amendment problems include clashes between the First Amendment interests of speakers and listeners. This is the case, for example, when speakers seek to keep secrets when listeners want disclosure; when speakers want to shade the truth when listeners do not want to be duped; and when speakers wish to talk when listeners do not want to be spoken to. How should First Amendment law handle these conflicts?[107]

Contemporary courts increasingly favor speakers over listeners when speakers' preferences collide with listeners' First Amendment interests in settings both inside and outside of public discourse — in other words, both inside and outside the space that Jack Balkin describes as "the space in which people express opinions and exchange views that judge what is going on in society."[108]

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[106] *See* NEUBORNE, *supra* note 1, at 104-05 (discussing the undervalued role of the listener in speech analysis); Derek E. Bambauer, *The MacGuffin and the Net: Taking Internet Listeners Seriously*, 90 U. COLO. L. REV. 475, 475-76 (2019) (describing how the Internet may inspire closer attention to the role of listeners in free speech thinking and doctrine — insofar as it reveals much about who they are and what and whom they are listening to — and may produce disruptive effects in tort law and other areas); James Grimmelmann, *Listeners' Choices*, 90 U. COLO. L. REV. 365, 370 (2019) ("Speech is a matching problem. Speakers speak; listeners listen. In each case, the question is to whom?" (emphasis omitted)); Leslie Kendrick, *Are Speech Rights for Speakers?*, 103 VA. L. REV. 1767, 1774 (2017) (concluding free speech protects both speakers and listeners); Norton, *Powerful Speakers*, *supra* note 58, at 441-42 (explaining that expression's First Amendment protection sometimes turns on whether it furthers or frustrates listeners' First Amendment interests).

[107] *See* OWEN M. FISS, THE IRONY OF FREE SPEECH 3 (1996) (noting that libertarian theories "[are] unable to explain why the interests of speakers should take priority over the interests of those individuals who are discussed in the speech, or who must listen to the speech, when those two sets of interests conflict").

[108] Jack M. Balkin, Keynote Address of the Association for Computing Machinery Symposium on Computer Science and Law: How to Regulate (and Not Regulate) Social

For instance, a divided Court interpreted the First Amendment to forbid Arizona's campaign finance law that released additional public financing to publicly-funded candidates when their privately-financed opponents raised or spent more than the state's initial grant to the publicly-financed candidates.[109] In so holding, the majority framed the contested speech subsidy as an impermissible burden on privately-financed speakers rather than the release of counterspeech for the benefit of voters as listeners.[110] (Dissenting Justice Kagan described as "chutzpah" the assertion that Arizona violated the privately-financed candidates' First Amendment rights by "disbursing funds to *other* speakers even though they could have received (but chose to spurn) the same financial assistance."[111]) For this and related reasons, Greg Magarian describes the contemporary Court's decisions on public campaign financing as focused "far less on the imperatives of democracy than on wealthy speakers' autonomy" by "mandat[ing] a less-informed electorate whenever fuller information, funded by government, would reduce the persuasive force of a privately financed candidate."[112]

For another illustration of the contemporary Court's choice to privilege speakers' rights over listeners', consider *National Institute of Family and Life v. Becerra*.[113] There a 5-4 Court preliminarily enjoined California's law that required unlicensed pregnancy service centers to inform women seeking reproductive health care services that the centers are in fact unlicensed (because they do not employ health-care professionals), and that required licensed facilities to inform women seeking reproductive health care services that the state offers free or low-cost comprehensive pregnancy-related services, including prenatal care, contraception, and abortion.[114] In so holding, the majority

Media (Oct. 28, 2019) (transcript available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3484114 [https://perma.cc/5N9V-FEA6]). First Amendment theory and doctrine generally presume speakers and listeners in public discourse to interact in conditions of equality, even if that presumption is more aspirational than real. *See* ROBERT C. POST, DEMOCRACY, EXPERTISE AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 23 (2012) ("Whereas within public discourse the political imperatives of democracy require that persons be regarded as equal and as autonomous, outside public discourse the law commonly regards persons as dependent, vulnerable, and hence unequal.").

109 Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 727-28 (2011).

110 *See id.* at 742-43.

111 *Id.* at 766 (Kagan, J., dissenting).

112 MAGARIAN, *supra* note 3, at 200 (emphasis omitted).

113 138 S. Ct. 2361 (2018).

114 *Id.* at 2371, 2378.

privileged the speakers' autonomy interests in not disclosing this information against their will over listeners' (that is, pregnant women's) autonomy and enlightenment interests in receiving accurate information material to their reproductive decisions.[115]

But here, too, other doctrinal strands privilege listeners' interests in certain circumstances, thus creating opportunities for productive tweaks. First Amendment law has long favored comparatively vulnerable listeners over comparatively knowledgeable or powerful speakers in certain contexts outside of public discourse, like commercial speech.[116] And the Court has recognized that listeners' democratic self-governance, enlightenment, and autonomy interests sometimes justify interference with speakers' unbridled autonomy even within public discourse when doing so furthers democratic legitimacy: recall the case of campaign disclosures, where the Supreme Court has recognized that listeners' (i.e., voters') interest in knowing the source of campaign contributions and communications sometimes justifies requiring campaign speakers to identify themselves even if they would prefer not to.[117] The Court likewise placed listeners' interests over speakers' to protect democratic self-governance in public discourse when it upheld a ban on distributing campaign literature within 100 feet of polling places to protect voters from coercion.[118] And classic time, place, and manner restrictions on speech are often driven by concerns about speech harms to vulnerable listeners.[119]

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115 For a discussion of what the First Amendment law that applies to speech to pregnant women seeking reproductive health services would look like if courts took women's interests as listeners seriously, see Helen Norton, *Pregnancy and the First Amendment*, 87 FORDHAM L. REV. 2417, 2417-18 (2019) [hereinafter *Pregnancy and the First Amendment*].

116 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562-66 (1980) (protecting, as part of a well-developed line of cases doing so, commercial speech that furthers listeners' First Amendment interests, while permitting the government to regulate false or misleading commercial speech because it frustrates listeners' interests); Norton, *Truth and Lies in the Workplace*, *supra* note 55, at 55-60 (discussing how law sometimes privileges listeners in commercial and professional relationships).

117 Citizens United v. FEC, 558 U.S. 310, 371 (2010); *see also* Red Lion Broad. Corp. v. FCC, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."); POST, CITIZENS DIVIDED, *supra* note 102, at 8, 41 (asserting that the First Amendment seeks "to protect the processes of democratic legitimation" that fuel confidence that the people's representatives are freely chosen by, and speak for, the people).

118 Burson v. Freeman, 504 U.S. 191, 211 (1992).

119 *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 646 (1994) (describing federal "must-carry" rules imposed on cable operators as seeking "not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve

Greater attention to listeners' interests thus explains not only when and why the First Amendment protects speech but also when and why the First Amendment permits expression's regulation in certain circumstances: specifically, we should privilege listeners' interests over speakers' when doing so furthers democratic self-governance.[120] As one of us has suggested:

> As a doctrinal matter, [a listener-centered] focus might helpfully inform our choice of the appropriate level of scrutiny to be applied to such disclosures – for example, we might be less suspicious of disclosure requirements designed to protect listener autonomy than those motivated by other governmental purposes. Such a focus might also (or instead) help determine whether a contested disclosure requirement survives a specific level of review, depending on the justifications offered by both challenger and government. . . . [D]isclosure and disclaimer requirements should be understood as least troubling for First Amendment purposes when applied to speakers who seek to keep secrets or tell lies to manipulate their listeners' decision-making [and thus threaten their autonomy].[121]

Listener-centered tweaks may empower the government to respond to the growing threats to listeners' democratic self-governance interests posed by new technologies. As Nathaniel Persily explains, "[T]here simply is no support for the strong version of the marketplace of ideas when it comes to anonymous speech in the internet age. . . . The norms

access to free television programming for the 40 percent of Americans without cable"); Kovacs v. Cooper, 336 U.S. 77, 81 (1949) (rejecting a First Amendment challenge to an ordinance banning the use of sound trucks to protect listeners' quiet and privacy).

120 *See* Norton, *Powerful Speakers*, *supra* note 58, at 473; Norton, *Truth and Lies in the Workplace*, *supra* note 55, at 55-60; *see also* Tebbe, *supra* note 59, at 978 ("The implication is not only that regulations protecting fair value ought to be upheld, but also that regulations impairing fair value ought to be suspect."); *id.* at 1009 (relatedly criticizing the Court's decision in *Sorrell* as focusing on whether "Vermont regulated categories of speaker and speech, [rather than on] whether the statute would promote the free flow of information to everyone, given the existing power dynamics among corporations, governments, and citizens").

121 Helen Norton, *Secrets, Lies, and Disclosure*, 27 J.L. & POL. 641, 641-42 (2012); *see also* Richard Briffault, *Two Challenges for Campaign Finance Disclosure After* Citizens United *and* Doe v. Reed, 19 WM. & MARY BILL RTS. J. 983, 1005 (2011) (advocating that campaign disclosure requirements target large, powerful, and well-financed speakers whose size and resources suggest their capacity to manipulate others); Anthony J. Gaughan, *Putin's Revenge: The Foreign Threat to American Campaign Finance Law*, 62 HOW. L.J. 855, 857 (2019) (proposing federal legislation to require candidates and their campaigns to inform the Federal Election Commission of their communications with foreign governments).

of civility, the fears of retaliation and estrangement, as well as basic psychological dynamics of reciprocity that might deter some types of speech when the speaker and audience know each other – all are retarded . . . ."[122] Relatedly, think of "deep fake" technologies that falsely — yet convincingly — represent expression as emanating from a source very different from the actual speaker.[123] In response to these democratic and expressive threats, Richard Hasen urges "new law requiring social media to label as 'altered' synthetic media, including so-called 'deep fakes,'" and "campaign disclosure laws requiring those who use online and social media to influence voters, including those using bots and other new technology, to disclose their true identities and the sources and amounts of their spending."[124] Listener-focused tweaks understand the First Amendment to permit laws like these that recognize the importance of accurately identifying expression's source when that source is valuable to listeners' assessment of the message's credibility and quality both inside and outside of public discourse.

C. Confronting the Rigidity of the Neutrality Narrative

How does the First Amendment protect free speech? Applying its neutrality narrative, the Court answers this question by claiming to

[122] PERSILY, *supra* note 12, at 16; *see also* Helen Norton, *Lies to Manipulate, Misappropriate, and Acquire Government Power*, *in* LAW AND LIES: DECEPTION AND TRUTH-TELLING IN THE AMERICAN LEGAL SYSTEM 143, 165-176 (Austin Sarat ed., 2015) (exploring how the First Amendment permits the regulation of lies about being the government, as well as certain other lies about the source of speech, because accurate information about expression's source is so valuable to listeners).

[123] See Bobby Chesney & Danielle Keats Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1758 (2019) (citing Samantha Cole, *We Are Truly Fucked: Everyone is Making AI-Generated Fake Porn Now*, VICE: MOTHERBOARD (Jan. 24, 2018), https://motherboard.vice.com/en_us/article/bjye8a/reddit-fake-porn-app-daisy-ridley [https://perma.cc/48U9-FQH8]) (describing "deep fake" technologies, in which machine-learning algorithms "enable[] the creation of realistic impersonations out of digital whole cloth").

[124] Hasen, *Deep Fakes*, *supra* note 27, at 537, 553-54 ("[T]he deep fakes problem is surprisingly easier to solve (once the technology is in place) than the problem of low-tech false information. When it comes to whether video or audio has been manipulated, there is an objective truth of the matter: a scientific comparison of original content with content posted online." (emphasis omitted)); *see also* Madeline Lamo & Ryan Calo, *Regulating Bot Speech*, 66 UCLA L. REV. 988, 1009 (2019) (suggesting the value of disclosing the robotic source of speech in "certain circumstances, such as the commercial or electoral context").

view any content- or speaker-based regulation of expression with suspicion.[125]

Herein lies the knottiest puzzle.

Left and right, poor and rich, outré and mainstream, sacred and profane — all theoretically enjoy equal speech rights. Under this view, my enemy's free speech victory therefore is my free speech victory. Under this view, outliers stand to benefit the most from the neutrality narrative, because without it the crushing forces of majoritarianism would silence them first and most severely.[126] Viewed in these lights, the neutrality narrative looks egalitarian at its core. Simple and purportedly win-win, the neutrality narrative is both promising and powerful.[127]

To the extent that the neutrality narrative refuses to countenance unjustified differences in the government's treatment of speech and speakers, it undeniably remains a powerful, even essential tool for protecting speech and equality alike, including those most likely to suffer from the day's political orthodoxies.[128] We share that sense of its importance.

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[125] *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws — those that target speech based on its communicative content — are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

[126] *See* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 376, 428 (suggesting that progressives may abandon liberalism's libertarian thrust at their peril when free speech is at stake); Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 736 (2016) ("The view that some speech should be suppressed so other speech can thrive threatens our free speech regime because it depends on difficult empirical and normative judgments about how suppression of speech impacts other speech and more broadly, how suppression of speech impacts the welfare of members of particularly vulnerable groups of society.").

[127] Note, however, that the Court is not always as neutral as it claims to be. *See, e.g.*, Charlotte Garden, *Citizens, United and* Citizens United*: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 47 (2011) (describing the different First Amendment rules that the Court applies to labor speech as opposed to employer speech); Norton, *Pregnancy and the First Amendment*, *supra* note 115, at 2417-18 (describing the different First Amendment rules that the Court applies to speech to pregnant women that discourages abortion as opposed to speech to pregnant women that identifies abortion as an available option).

[128] Neutrality can take many forms. *See* Purdy, *supra* note 35, at 2176 ("This is not to say that neutrality is impossible or undesirable in doctrine or that decisions must be outcome oriented according to the Justices' feelings about specific cases. If neutrality means avoiding this caricature of unprincipled decisionmaking, then neutrality is both desirable and achievable. But such neutrality has multiple possible forms. It might be consistent with neutrality to permit *no* private expenditure on political campaigns, relying on public financing and the strength of volunteer efforts and other shows of popular support. Alternatively, neutrality might require the doctrines of *Buckley* and

The neutrality narrative also points out an extremely important aspect of equality claims worth underscoring: free speech theory and doctrine have always included equality within the core of why free speech matters. Free speech and equality are inextricably connected, such that equality is endogenous to freedom of speech, not exogenous or antagonistic to it. That this creates occasional tensions and paradoxes within doctrine and theory does not prove otherwise.

Seeing the value of the neutrality narrative for equality ends is relatively easy.[129] Recall, for instance, religious actors' adoption of civil rights rhetoric in recent legal and policy battles.[130] Invoking the vocabulary of free speech and equality has enabled this movement to achieve victories upholding publicly funded vouchers for religious education,[131] state funding to religious institutions of other sorts,[132] religious exemptions from antidiscrimination laws,[133] and access to public and limited forums[134] — all despite the Establishment Clause

Citizens United. It might be, too, that the best version of neutrality would start from a constitutional presumption that campaign-finance regulation is legitimate, subject to some constraint of reasonableness. . . . An egalitarian First Amendment jurisprudence should seek a version of neutrality that aims at supporting political equality against economic inequality.").

[129] *See generally* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 535 (2004) (offering a compelling history of how American government has suppressed expression during wartime, and cautioning that "public officials not only respond to the demands of a fearful public [during wartime] but sometimes deliberately manipulate the public in order to create national hysteria," with grave civil liberties costs (emphasis omitted)).

[130] For an articulation of the history of religious civil liberties that argues for a more expansive right to free exercise, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

[131] Zelman v. Simmons-Harris, 536 U.S. 639, 653-54 (2002) (upholding Ohio school voucher plan against Establishment Clause objections).

[132] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021-25 (2017) (striking down, on Free Exercise Clause grounds, Missouri's refusal to extend governmental funding for playground materials to a church playground); Mitchell v. Helms, 530 U.S. 793, 842-43 (2000) (O'Connor, J., concurring) (plurality opinion) (allowing federal loans to religious schools for education-related equipment and materials); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829-32 (1995) (requiring public university to provide funding for religious student group publications on equal basis as that provided to nonreligious publications).

[133] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691-93 (2014) (holding that a closely held for-profit corporation could invoke statutory free exercise protections to avoid compliance with the Affordable Care Act's contraceptive coverage mandate).

[134] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107-13 (2001) (striking down, on free speech grounds, public school's exclusion of religious group from after-school use of facilities); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 391-92 (1993) (same); Widmar v. Vincent, 454 U.S. 263, 272-75 (1981) (striking

concerns that apply uniquely to the government's interaction with religion. Insofar as these actors rely on expansive Free Speech Clause interpretations to advance their ends, their victories are also available to the LGBTQ community and other long-marginalized groups to advance their own ends. Indeed, no part of the free speech tradition may be more useful to these explicitly normative (and at times colliding) agendas than the neutrality narrative.[135]

Harder to see, for some, is how the Court's broad and unqualified claim to view all content- and speaker-based regulation with suspicion is both descriptively inaccurate and normatively misguided. Here again, we reject unnuanced or uncritical thinking, even as it relates to the neutrality mandate.

The Court's sometimes platitudinous claims to neutrality are descriptively inaccurate because they paper over the many settings in which it has upheld (and justifiably so) government's speaker- and content-based distinctions.[136] In other words, what the Court says it does is not always what it does: even as the Court asserts the compellingly simple narrative of bright-line formalism, its practice is not as simplistic or inflexible as it claims.[137]

down, on free speech grounds, public university's exclusion of religious student groups from limited public forums).

[135] This dynamic played out, for example, in the context of after-school Christian groups that pursued their right to convene on public school property on an equal basis with other groups. Taking neutrality seriously means that what is good for the Christian goose must also be good for the gay gander — especially since secular speakers' claims raise no Establishment Clause worries. But this too can have boomerang effects. *See* Toni M. Massaro, *Religious Freedom and "Accommodationist Neutrality": A Non-Neutral Critique*, 84 OR. L. REV. 935, 989 (2006) (discussing how, in Utah, the neutrality principle led one school board to eliminate all extracurricular student clubs, rather than allow formation of a gay student support group).

[136] *See* James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from* Nike v. Kasky, 54 CASE W. RES. L. REV. 1091, 1096-97 (2004) ("[P]recisely because public discourse in the United States is so strongly protected, the realm dedicated to such expression cannot be conceived as covering the entire expanse of human expression. . . . Thus, in settings dedicated to some purpose other than public discourse, such as those dedicated to effectuating government programs in the government workplace, instruction in a public school classroom, or the administration of justice in the courtroom, government has far greater leeway to regulate the content of speech.").

[137] *See id.* at 1099-1100 ("In summary, the popular view that all content-based restrictions on speech are presumptively unconstitutional unless the speech falls within some unprotected category is not an accurate snapshot of First Amendment doctrine. Speech is too ubiquitous with too many real world consequences for there to be any such rule. Rather, the strong presumption against content discrimination operates only within a limited (albeit extremely important) domain."); *see also* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2167 (2015) (contesting the

And for related reasons, the Court's purported insistence on formal neutrality is normatively misguided in failing to acknowledge the ways in which factual distinctions sometimes *should* make a legal difference.[138] Indeed, identifying such distinctions is the project of much legal analysis: "treating things and people the same is different from treating them equally" when there are important and relevant distinctions between them.[139] This contributes to another paradox of the current doctrine: the more narrowly government tailors its regulation of expression by drawing distinctions targeted to the speakers or content that specifically threaten harm, the more likely it will trigger the Court's suspicion.[140]

Court's purportedly history-driven account of the categorical exceptions to First Amendment protection); Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. (forthcoming 2021) (manuscript at 5), https://ssrn.com/abstract=3689972 [https://perma.cc/6J54-RDAT] [hereinafter *Non-First Amendment Law*] (canvassing longstanding state and federal laws that distinguish on the basis of expression's content or speaker identity to further free speech and democracy values and concluding that "what we find are legal protections for speech and association that are based on *a different conception of freedom of speech* than that given voice in the First Amendment cases — one that is much more concerned with the threat that private economic power poses to expressive freedom, and much less *laissez faire* in its understanding of the government's responsibilities vis a vis the marketplace of ideas"); *id.* at 67 ("[T]he claim that the First Amendment forbids redistributive speech laws rests on an overly narrow — even somewhat mythological — view of the First Amendment, and of the American system of free expression as a whole. Redistributive speech laws are *not* alien to our regulatory traditions. Instead, they date back as far as the First Amendment itself, and even further (if we include the colonial voter intimidation laws).").

138 *See* Goldberg, *supra* note 126, at 695 (canvassing precedent to "demonstrate[] how pervasive and inevitable free speech consequentialism [balancing] already is within First Amendment doctrine" and that "free speech consequentialism, more than being ubiquitous, is in fact inevitable").

139 K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, *in* PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 55, 56 (Robert C. Post, K. Anthony Appiah, Judith Butler, Thomas C. Grey & Reva B. Seigel eds., 2001) [hereinafter PREJUDICIAL APPEARANCES]; *see also id.* at 57 ("Equality as a social ideal is a matter of not taking irrelevant distinctions into account. . . . To understand equality this way is to see it as requiring that we treat like cases alike and thus to consider what makes two people or two kinds of people morally alike for current purposes."). More generally, equality work *compels* observers to attend to particularisms, to the plural nature of identities, and to the many unequal starting points and fallouts. The pluralizing inquiry often leads to pluralizing responses, which makes for contextual distinctions that undermine the Court's asserted preference for simple, context-neutral theory and doctrine.

140 For an example where the Court identified more narrowly tailored speech restrictions as a vice rather than a virtue, see R.A.V. v. City of St. Paul, 505 U.S. 377, 383-88 (1992) (holding that the First Amendment permits government to forbid all fighting words, but not a subset of fighting words based on race or religion).

To be sure, First Amendment formalism has its advantages; in particular, it has affirmative value in constraining government decisionmakers.[141] This may especially be the case when a clear and simplistic message preemptively warns policymakers away from misguided speech-suppressive efforts.[142] Relatedly, context-specific speech rules and exceptions can be more difficult for lower courts to apply, and more expensive for government regulators to observe and enforce, than bright-line tests.[143]

But the Court's failure to acknowledge meaningful differences also has its costs.[144] For example, if it were true that *all* content-specific

[141] *See* Thomas C. Grey, *Cover Blindness*, *in* PREJUDICIAL APPEARANCES, *supra* note 139, at 85, 96 ("All parties, legalist and judicial, liberal and conservative, fear the consequences of too much judicial discretion. All might then converge on the substitution of rules that, although relatively crude, are also relatively objective and thus stable . . . ."). Formalistic approaches are also quicker and cheaper, as the more nuanced the doctrine or regulation, the more expensive to apply or enforce. But as Robert Post responds, "This tension between contextualism and formal consistency, however, is not entirely new to the law, and we are not without mechanisms for its ameliorization." Robert C. Post, *Response to Commentators*, in PREJUDICIAL APPEARANCES, *supra* note 139, at 153, 153. Tort law offers one of many examples, generally rejecting bright-line rules for the flexibility of the objective reasonable person standard.

[142] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 109 (14th ed. 2002) ("[E]ven though a justice must know deep down that no one can *really* mean there can be no restraints of free speech, there is value in his putting it that way nonetheless."); LAWRENCE LESSIG, FIDELITY AND CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION 315, 375 (2019) (drawing from Meir Ben-Cohen's theory of acoustic separation to explain how courts sometimes assert one message to policymakers and the public, and another more nuanced message to lawyers and observing that "the Court speaks as if the standard is the same, affirming the public's overwhelming view that the standard should be the same. But it practices a role that allows more accommodation than would [otherwise be tolerated]").

[143] They also invite litigation, which may trigger the capacity apprehensions regarding judicial resources so powerfully illuminated by Andrew Coan. *See generally* ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING (2019) (arguing that vague standards "generate greater uncertainty, increasing the volume of litigation and the frequency of conflict among lower-court decisions").

[144] *See* Brown, *supra* note 72, at 973 ("[W]hen a regulation seeks to address harm that is not produced by the dissemination of an idea, but rather the government offers a persuasive non-censorial theory of how the speech causes harm, then the Court has tended to be sympathetic and has found a way to make an end run around the cardinal rule. The lack of acknowledgment of this important role of the harm principle in free-speech jurisprudence, however, leaves the matter easily open to inappropriate considerations, in-group biases, and error."); Lakier, *Non-First Amendment Law*, *supra* note 137 (manuscript at 5, 60) (describing the historical tradition of state and federal free speech law as considerably "less committed to the principles of content- and value-neutrality" than acknowledged by the Court's description of our free speech tradition and concluding that the Court's inaccurate description "is a problem not only because

regulation triggers the same, very strict scrutiny, the Court might well retreat from covering large swaths of speech altogether.[145] (Recall, for instance, Justice Hugo Black's claim to First Amendment absolutism, an insistence that sometimes led him to define "speech" very narrowly to avoid hard First Amendment problems.[146])

Possibilities for tweaks here include widening the cracks in the Court's formalist wood by exposing and underscoring the reality that the Court sometimes does adjust its doctrine in different settings, and often with good reason, as it generates different rules for commercial speech, professional speech, speech at work and at school, speech in courtrooms, and speech at polling places.[147] This, in turn, invites more

it produces incoherent doctrinal distinctions but because it permits the Court to proclaim a commitment to principles — in particular, the principle of free speech *laissez faire* — that in reality it cannot sustain").

[145] *See* Frederick Schauer, *Every Possible Use of Language?*, *in* THE FREE SPEECH CENTURY 33, 43 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019) (expressing concern that expanding the coverage of the First Amendment would ultimately lead to less rigorous protection — in the form of watered-down strict scrutiny — of speech that is currently covered); *id.* at 47 ("[I]t may be no coincidence that those jurisdictions with an expansive understanding of the coverage of the right to freedom of speech (or expression, or communication) turn out also to have a significantly less stringent degree of protection for the speech that is covered, and even for the speech that lies at the center of the principle of free speech. It is perhaps unreasonable to make a strong causal claim, but at the very least the existence in the United States of a limited domain of coverage and a high degree of protection within that limited domain suggests that this correlation reflects a causal relationship. If that is correct, then it may be that the willingness explicitly to limit the coverage of the First Amendment is a source of the First Amendment's greatest strength.").

[146] *See, e.g.*, Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting) (characterizing the message "Fuck the Draft" displayed on a jacket as "mainly conduct and little speech"); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 517 (1969) (Black, J., dissenting) (minimizing students' free speech interests); *see also* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 384 (2009) ("Justice Black trimmed the most problematic results of his absolutist test by finding categorical exceptions to the categorical rule. Indeed, he was quicker than many balancing-inclined Justices to find that certain speech acts fell completely outside the bounds of the First Amendment.").

[147] Justice Alito recently suggested this possibility for attending to relevant distinctions: "The Court should be more attentive to the implications of its rhetoric for, contrary to the Court's suggestion, there are important differences between cyberspace and the physical world." Packingham v. North Carolina, 137 S. Ct. 1730, 1743 (2017) (Alito, J., concurring). Relatedly, lower courts often recognize the cracks in the Court's formal neutrality narrative. *See* William D. Araiza, *Invasion of the Content-Neutrality Rule*, 2019 BYU L. REV. 875, 912 ("[E]ven relatively recent lower court opinions have continued to resist imposing strict scrutiny on commercial speech regulations, despite *Sorrell*'s implication that they should."); Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 816 (observing in other First Amendment contexts that "the lower courts are not

attention to when and how distinctions should make a difference, especially in light of information and power differentials among speakers and listeners.[148] In other words, we do not propose to abandon the neutrality narrative, but instead to recognize its limitations and complications.

To this end, compelling evidence of the democratic harms that speech sometimes inflicts can and should matter. Contemporary courts, though, too rarely test expression's connection to promised benefits and threatened harms.[149] Even when empirical data are available, the Court too often waves off their implications in favor of simple storytelling and formalist abstractions unsupported by evidence.[150] As an illustration, consider the area of election law, where courts routinely accept states' assertion that voter fraud justifies increasingly restrictive voting laws[151]

following the Supreme Court's marching orders"); David L. Hudson, Jr., *The Content-Discrimination Principle and the Impact of* Reed v. Town of Gilbert, 70 CASE W. RES. L. REV. 259, 281 (2019) ("*Reed*'s impact has been minimized, however, as courts have continued to follow two longstanding doctrines in First Amendment law: the commercial-speech and the secondary-effects doctrine."); Kyle Langvardt, *A Model of First Amendment Decision-Making at a Divided Court*, 84 TENN. L. REV. 833, 851 (2017) ("*Reed*'s hard line is almost certainly too extreme to hold, and there is evidence even now that the lower courts are already at pains to minimize its practical effects.").

148 *See* Cohen, *Tailoring Election Regulation*, *supra* note 21, at 662-63 ("[T]he free speech imperative should not be interpreted to shelter the deliberate construction and fine-tuning of an information environment optimized to unravel the most basic preconditions for democratic self-government. . . . Platform functions and dysfunctions therefore should supply the frame for assessing constitutionally-required goodness of fit, and legislation appropriately tailored to the platform-based environment and its particular democratic failure modes should be correspondingly more likely to survive review.").

149 Many of these theoretical disputes may be better seen, at root, based on dueling and untested empirical assumptions. *See* Toni M. Massaro, *Post, Fiss, and the Logic of Democracy*, 64 U. COLO. L. REV. 1145, 1157 (1993) (maintaining that "as to many — perhaps most — of the factors relevant to the community/autonomy balance that is our free speech Tradition, we often lack empirical data. How, for example, does one 'prove' that people are not autonomous? That hate speech silences? Or that these silences are worse than the silences that might be inspired by a hate speech code?").

150 *See, e.g.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 746 (2011) (striking down Arizona's matching funds provision within its public campaign finance law and asserting that "we do not need empirical evidence to determine that the law at issue is burdensome").

151 *See* BEN MERRIMAN, CONSERVATIVE INNOVATORS: HOW STATES ARE CHALLENGING FEDERAL POWER 94 (2019); *see also* POST, CITIZENS DIVIDED, *supra* note 102, at 164 (describing "the absence of any factual demonstration that confidence [in electoral integrity] was actually at risk despite severe and demonstrable curtailments of the right to vote").

— even though there is very little evidence of such fraud.[152] Meanwhile, "[o]wing in part to a deep aversion to statistical evidence, the judiciary has also been unreceptive to the most compelling evidence that new [voting restrictions] do indeed restrict voting."[153]

But the tide on this may yet turn. Empirically savvy legal scholars are beginning to address the evidence gap in some of these zones with growing sophistication.[154] Better evidence of the costs and the benefits of competing doctrinal alternatives can advance our understanding about how speech actually works.[155] And courts may be increasingly hard-pressed to ignore these assessments of how doctrine is — or is not — producing the outcomes it claims to promote.

These sorts of tweaks — exposing that the Court's actual practice is often more context-sensitive than it claims and offering solid evidence documenting the specific injuries inflicted by certain speech — can and should help justify government's speaker- and content-based distinctions when those distinctions explain how the regulated expression harms free speech and democracy. These steps enable us to understand not only when and why the First Amendment protects certain speech, but also why it permits laws that require certain speakers to tell the truth about matters like the mechanics of elections or their identities as campaign speakers, campaign contributors, and even

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[152] *See* FAMIGHETTI ET AL., *supra* note 34, at 1 (finding that election officials referred only approximately thirty incidents of suspected noncitizen voting for further investigation or prosecution out of 23.5 million votes cast in the 2016 election, and that forty out of forty-two jurisdictions studied reported no known incidents of noncitizen voting).

[153] MERRIMAN, *supra* note 151, at 25. For a promising counterexample, see Fish v. Schwab, 957 F.3d 1105, 1144 (10th Cir. 2020) (striking down state law that required voters to provide documentary proof of citizenship after carefully attending to both the evidence of significant burden to voters and the lack of evidence of voter fraud).

[154] *See, e.g.*, Ho & Schauer, *supra* note 40, at 1163 (noting complexities of the empirical claims that may underpin the "marketplace of ideas" theory of free speech and setting forth possible means of testing some of them).

[155] *See* RonNell Andersen Jones & Lisa Grow Sun, *Freedom of the Press in Post-Truthism America*, 98 WASH. U. L. REV. 419, 437 (2020) [hereinafter *Freedom of the Press*] (excavating the social science evidence that demonstrates how press audiences — that is, individual information consumers — actually "seek out and process information," and explaining how this evidence supports an understanding of the Press Clause to provide the press with constitutional protections distinct from those guaranteed by the Free Speech Clause); Kapczynski, *supra* note 99, at 203 ("Historical experience and empirical evidence can and should inform courts' understandings of the markets and regulators in question. Where evidence shows — as in the examples of drug detailing and evidence production about medicines and tobacco — that markets exhibit patterned forms of power and disempowerment, First Amendment analysis can and should take this into account.").

robots.[156] So too of election laws that regulate speakers based on their foreign identity by barring foreign actors from influencing U.S. elections, as well as voter-approved initiatives that restrict party insiders from serving on state redistricting commissions to prevent partisan gerrymandering.[157] Defending these laws requires that one articulate *why* such content- and speaker-based speech restrictions preserve healthy democracy. And judicial acceptance of this evidence, in turn, allows advocates to show when and why that reasoning applies in other contexts too.[158]

D. Confronting How the Government's Own Speech Can Threaten Free Speech

How does the government threaten free speech? To date, First Amendment doctrine focuses on the government's hard law regulation — that is, the traditional exercise of its coercive power to censor others' speech. But as the government's expressive capacities grow, so too does their potential for squelching others' speech and distorting public discourse.[159]

Government speech is inevitable; the government cannot further its inevitably viewpoint-sensitive policy agenda if precluded from speaking to advance these ends.[160] And government speakers obviously can effectively deploy their expressive powers to resist other governmental entities' policies with which they disagree.[161] The government's speech

156 *See supra* notes 122–24 and accompanying text.

157 *See supra* notes 103–05 and accompanying text.

158 *See, e.g.*, Jones & Sun, *Freedom of the Press*, *supra* note 155, at 458-60 (proposing that Press Clause protections should turn on whether an individual or entity performs functions that enhance, rather than inhibit, the marketplace of ideas).

159 *See* HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION 157 (2019) ("At times the government deploys its speech as a weapon to quash less powerful speakers, to smother expression with which it disagrees. This, in turn, can undermine the core values that inform the First Amendment's Free Speech Clause.").

160 Matal v. Tam, 137 S. Ct. 1744, 1757-58 (2017) ("When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture. Here is a simple example. During the Second World War, the Federal Government produced and distributed millions of posters to promote the war effort. There were posters urging enlistment, the purchase of war bonds, and the conservation of scarce resources. These posters expressed a viewpoint, but the First Amendment did not demand that the Government balance the message of these posters by producing and distributing posters encouraging Americans to refrain from engaging in these activities.").

161 *See* Toni M. Massaro & Shefali Milczarek-Desai, *Constitutional Cities: Sanctuary Jurisdictions, Local Voice, and Individual Liberty*, 50 COLUM. HUM. RTS. L. REV. 1, 58-59

thus is constitutionally valuable even when it makes us crazy: even at its most infuriating, the government's speech educates the public about the government's principles and priorities, which provides us with more information with which to evaluate the government. The Court thus has appropriately recognized that the First Amendment does not bar the government from expressing its own views when doing the government's business.[162]

But the Court's doctrine remains dangerously incomplete in its failure to "grapple with the ways in which the government's speech sometimes affirmatively threatens specific constitutional values."[163] In particular, the government imperils democracy at its core when it abuses its expressive power in ways that escape political accountability. The government also distorts democratic self-governance and the marketplace of ideas when government officials propagate flat-out lies, monopolize information conduits, skew scientific discourse, bully political dissenters, or demonize the press.[164] When we add to this mix

(2018) (discussing how "sanctuary jurisdictions" have used speech to challenge federal immigration policy they perceive as undermining local power to assure community safety and civil rights).

162 Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015) ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. . . . Were the Free Speech Clause interpreted otherwise, government would not work.").

163 Helen Norton, *The Government's Manufacture of Doubt*, 16 FIRST AMEND. L. REV. 342, 349 (2018); *see also* Massaro, *Tread on Me!*, *supra* note 1, at 402 (cautioning that government speech may undermine free speech itself when it imposes "so much expressive power that its actions are tantamount to direct speech regulation").

164 *See* Nathan Cortez, *Information Mischief Under the Trump Administration*, 94 CHI.-KENT L. REV. 315, 315-18 (2019); Jones & Sun, *Enemy Construction*, supra note 15, at 1303. During the coronavirus crisis, President Trump's press conferences often contained misleading and inaccurate statements about the virus. Ryan Grenoble, *10 of Trump's Most Damaging Coronavirus Lies*, HUFFPOST (Mar. 27, 2020, 1:16 PM ET), https://www.huffpost.com/entry/trump-coronavirus-liescovid19_n_5e7b7d1ac5b6b7d80959966f [https://perma.cc/8LN5-9FX7] (listing false statements by Trump). Among the most alarming of these statements by President Trump — which he later described as "sarcastic" and taken out of context — involved his suggestion that disinfectant might treat the disease. Daniel Funke, *In Context: What Donald Trump Said About Disinfectant, Sun and Coronavirus*, POLITIFACT (Apr. 24, 2020), https://www.politifact.com/article/2020/apr/24/context-what-donald-trump-said-about-disinfectant-/ [https://perma.cc/5ENU-WH5R]. This prompted manufacturers and health officials to immediately renounce the statement to prevent people from acting on Trump's nationally televised suggestion. Katie Rogers, Christine Hauser, Alan Yuhas & Maggie Haberman, *Trump's Suggestion That Disinfectants Could Be Used to Treat Coronavirus Prompts Aggressive Pushback*, N.Y. TIMES (Apr. 24, 2020), https://www.nytimes.com/2020/04/24/us/politics/trump-inject-disinfectant-bleachcoronavirus.html [https://perma.cc/F6P7-68BA].

the government's many and varied expressive roles,[165] we see the dangers of entirely excepting the government's speech from Free Speech Clause scrutiny. The Supreme Court itself has begun to recognize this concern,[166] and some lower courts are increasingly aware of the threats to free speech and democracy that may be posed by the government's expressive choices.[167]

As one of us has written, litigants should build on this recognition by demonstrating how the government's threats sometimes silence its targets' speech as effectively as its hard law action, and how its expressive attacks sometimes incite or encourage third parties to punish its targets for their speech.[168] Indeed, the Supreme Court has recognized that the government's speech can violate the First Amendment through credible threats to unleash its coercive power against disfavored speakers.[169] Lower courts also have observed that the government's lies

165 NORTON, *supra* note 159, at 11 ("The government is unique among speakers because of its coercive power as sovereign, its considerable resources, its privileged access to key information, and its wide variety of speaking roles as policymaker, commander-in-chief, employer, educator, health care provider, property owner, and more.").

166 *See Walker*, 576 U.S. at 208 ("That is not to say that a government's ability to express itself is without restriction. Constitutional and statutory provisions outside of the Free Speech Clause may limit government speech. And the Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech.").

167 *See, e.g.*, Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d. 226, 230 (2d Cir. 2019) (holding that President Trump violated the First Amendment when he blocked some of his critics from the Twitter account that he uses to speak to the world as president); Davison v. Randall, 912 F.3d 666, 672-73 (4th Cir. 2019) (holding that the chair of a county's board of supervisors violated the First Amendment when she blocked a political critic from the county's social media site).

168 *See* NORTON, *supra* note 159, at 160 ("When the government uses its lawmaking or other regulatory power to punish dissent – as is the case, for example, when it jails, taxes, or fines its critics – it violates the Free Speech Clause. And under some circumstances, the government can achieve the same results through its expressive choices, as is the case of its speech that threatens, or encourages retaliation against, certain speakers.").

169 Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 71-72 (1963) (holding that a state commission violated the First Amendment when it sent threatening letters to distributors of sexually explicit but non-obscene books and magazines); *cf.* Backpage.com, LLC v. Dart, 807 F.3d 229, 234-35 (7th Cir. 2015), *cert. denied*, 137 S. Ct. 46 (2016) (enjoining, on First Amendment grounds, a sheriff's speech that sought to shut down sexually explicit advertisements through false threats of legal action); Okwedy v. Molinari, 333 F.3d 339, 344 (2d Cir. 2003) ("A public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decisionmaking authority over the plaintiff, or in some less-direct form.").

and misrepresentations about its critics can violate the First Amendment when they encourage and provoke nongovernmental third parties to fire or otherwise retaliate against its targets.[170] Others have found that the government's verbal "campaigns of harassment and humiliation" of its targets can violate the Free Speech Clause if "reasonably likely to deter" protected speech.[171] And the Court has acknowledged the threats to free speech posed by a government's punishment of disfavored speakers through its expressive choices that take the form of certain derogatory labels or designations.[172]

Available tweaks thus may be drawn from these pockets of precedent to develop a coherent doctrine for addressing the ways in which the government's speech itself can threaten meaningful public discourse.[173]

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[170] *See* Paige v. Coyner, 614 F.3d 273, 284 (6th Cir. 2010) (refusing to dismiss a plaintiff's constitutional claim alleging that the government had retaliated against her speech with false and threatening speech of its own to her employer that led to her firing); *see also* ACLU v. King, 84 F.3d 784, 785 (5th Cir. 1996) ("The Mississippi State Sovereignty Commission ('Commission') gathered personal information about Mississippi citizens from 1957 to 1977, with the purpose of thwarting desegregation and other civil rights work. The Commission records included information, some of which was not true, about individuals' sexual preferences and activities, financial dealings, political and religious beliefs and affiliations, and drug and alcohol use. This information was disseminated by the Commission to law enforcement agencies, employers, and others prior to 1977."); ACLU v. Mississippi, 911 F.2d 1066, 1070 (5th Cir. 1990) ("We echo the district court in stating that the thwarting of constitutional imperatives is not a legitimate and proper concern.").

[171] Coszalter v. City of Salem, 320 F.3d 968, 975-77 (9th Cir. 2003); *see also* Addison v. City of Baker City, 758 F. App'x 582, 584 (9th Cir. 2018) (holding that "the district court properly found that [the police chief] engaged in a campaign of harassment over a period of years" — a campaign directed to the plaintiff's employer that ultimately led to the plaintiff's job loss).

[172] *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 139 (1951) (recognizing the effect of the Attorney General's inclusion of an organization on its list of "subversive" organizations as "crippl[ing] the functioning and damag[ing] the reputation of those organizations"); *id.* at 142 (Black, J., concurring) ("In the present climate of public opinion it appears certain that the Attorney General's much publicized findings, regardless of their truth or falsity, are the practical equivalents of confiscation and death sentences for any blacklisted organization not possessing extraordinary financial, political or religious prestige and influence."); *see also* Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 12, 28-29 (1991) (explaining the free speech harms of the government's "informational sanctions").

[173] For a detailed discussion of these possibilities, see NORTON, *supra* note 159, at 156-82.

E. Confronting State Action and Private Power

Who and *what* threaten free speech and democracy? The government, of course, and, as we have just seen, in a variety of ways. But not just the government: the many examples include the bots unleashed by private parties that flood social media; private information conduits that sometimes act as monopsonic[174] and monopolistic speech gatekeepers; and new technologies run by private actors that fortify information silos in ways that may isolate, beguile, and steer listeners in ways they may not even apprehend.[175] This, too, current First Amendment doctrine fails to adequately address.

As Charles Black observed, the state action doctrine may be the most important in all of constitutional law.[176] The basic structure of modern constitutional liberties, including but not limited to freedom of expression, rests on the contested notion that private actors cannot violate them (with one key exception: the Thirteenth Amendment's prohibition on slavery[177]). According to this account, liberties lie on only one side of the equation: we protect liberty only when we restrain the government and not when we empower it.[178]

This libertarian narrative is the result of the Court's more general inattention to the ways in which private power sometimes smothers liberty.[179] But this has not always been the case. Earlier doctrine took into account how the government's support for private parties' discrimination in various settings enabled that discrimination as a functional matter, and thus required the government's disassociation

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[174] A monopsony is a market with a single buyer that has the power to drive down prices.

[175] *See supra* notes 12–37 and accompanying text.

[176] See Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 69 (1967).

[177] U.S. CONST. amend. XIII.

[178] *See* FISS, *supra* note 107, at 83 ("We must learn to embrace a truth that is full of irony and contradiction: that the state can be both an enemy and a friend of speech; that it can do terrible things to undermine democracy but some wonderful things to enhance it as well.").

[179] *See* Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1241, 1304, 1307 (2020) (observing that "private economic power could limit the exercise of constitutional rights just as government coercion could" and identifying the Court's *Lochner*-era mistake as insisting "on construing constitutional rights as largely negative autonomy rights — as rights that entitled the individual to freedom from governmental regulation, but not rights that entitled the individual to anything more positive (such as a meaningful choice about where and how to contract)").

from these ends.[180] The contemporary Court, in contrast, is slow to grasp the government's role in enabling private parties' growing capacity to threaten free speech and democracy.[181] Responsive tweaks would build on the pockets of precedent identified in the preceding subpart to urge courts to recognize when and how government enables the weaponization of speech by private actors.[182]

Even so, courts are not the only game in town, and this reality creates additional opportunities for constructive democracy-driven interventions.[183] Private actors may play a role in improving democratic discourse, even though they are not constitutionally required to do so. Some of the threats we identify thus can be attacked from other angles: if voters and consumers demand better information, they may compel its production. Reformers can take their democracy-enhancing proposals directly to the tech-complex settings where decisionmakers may be more technologically astute and representative than the courts.

In other words, private actors' freedom from constitutional constraint ideally empowers them to experiment.[184] Private-sector actors may

[180] *See* Norwood v. Harrison, 413 U.S. 455, 464-65 (1973) (striking down, on equal protection grounds, state's financial support of textbooks for racially segregated private schools); Evans v. Newton, 382 U.S. 296, 299-302 (1966) (holding that a city's ongoing support and maintenance of a racially segregated park that had been donated to the city by a private party constituted state action for equal protection purposes); Burton v. Wilmington Parking Auth., 365 U.S. 715, 721-26 (1961) (holding that city's housing of private, racially segregated, coffee shop in its building constituted entanglement sufficient to establish state action for equal protection purposes); Shelley v. Kraemer, 334 U.S. 1, 14-23 (1948) (holding that judicial enforcement of racially discriminatory property covenant constituted state action for equal protection purposes).

[181] For a recent illustration, see Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019) (holding that the private entity that administers public access channels of a New York cable system was not a state actor despite having been designated to perform that function by the City of New York, and thus rejecting the argument that the public access channels were a public forum from which the entity could not block access based on disagreement with its content).

[182] *See* Wu, *supra* note 7, at 550 (suggesting that we explore "accomplice liability under the First Amendment" by asking "when the state or political leaders may be held constitutionally responsible for encouraging private parties to punish critics"); *supra* notes 163–72 and accompanying text.

[183] *See* GINSBURG & HUQ, *supra* note 5, at 173 ("Democracy demands from its participants a certain political morality. In the absence of that political morality, nothing in the toolkit of constitutional designers will save constitutional democracy. Design, in short, can go only so far without decency.").

[184] *See* PERSILY, *supra* note 12, at 5-7 (identifying possibilities for reform of the digital speech environment as including deletion, demotion, disclosure, delay, dilution, diversion, deterrence, and digital literacy).

voluntarily embrace norms of free speech and democracy.[185] Indeed, the new information technologies have enabled what Kate Klonick terms "new governors" — private actors with substantial power over platforms and information that sometimes choose to adopt procedures and policies that are informed by free speech values.[186] Start-ups come in many forms, and some may develop means of attacking the disinformation distortions we lament with creative tech-savvy interventions that can leverage artificial intelligence power to distill expression and enable motivated listeners to cut a more direct path to reliable information, without slogging through the Sargasso Sea of unreliable feeds and falsehoods.

To this end, the private sector's relative freedom to think anew about free speech governance offers it opportunities to reimagine responses to the excesses of speech that threaten democratic values.[187] Policy and design, for example, can privilege listeners' interests to democratic ends.[188] As Karen Kornbluh and Ellen Goodman urge: "Too often, the

[185] Jack Goldsmith and Andrew Woods argue that during the coronavirus pandemic, American tech platforms moved toward significant speech control and digital surveillance, showing just how responsive private actors can be to arguments for such steps in situations where the government almost certainly could not require them. Jack Goldsmith & Andrew Keane Woods, *Internet Speech Will Never Go Back to Normal*, ATLANTIC (Apr. 25, 2020), https://www.theatlantic.com/ideas/archive/2020/04/what-covid-revealed-about-internet/610549/ [https://perma.cc/HD5A-CJYX].

[186] Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1603 (2018); *see also* Thomas E. Kadri & Kate Klonick, Facebook v. Sullivan: *Public Figures and Newsworthiness in Online Speech*, 93 S. CAL. L. REV. 37, 37 (discussing how public and private governance systems handle doctrinal questions in identifying public figures and newsworthiness and suggesting how courts and platforms might use these examples to address some challenges posed by online speech).

[187] *See* Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662-64 (1998) (observing that in addition to law, other alternatives for regulating harmful human behavior include code, markets, and norms). Along these lines, some writers concerned with the dangers of speech in cyberspace argue the solution should aim at systemic design flaws rather than content regulation.

[188] KAREN KORNBLUH & ELLEN P. GOODMAN, FIVE STEPS TO COMBAT THE INFODEMIC 5 (2020); *see also* KAREN KORNBLUH & ELLEN P. GOODMAN, SAFEGUARDING DIGITAL DEMOCRACY: DIGITAL INNOVATION AND DEMOCRACY INITIATIVE ROADMAP 3 (2020) [hereinafter SAFEGUARDING DIGITAL DEMOCRACY], https://www.gmfus.org/sites/default/files/Safeguarding%20Democracy%20against%20Disinformation_v7.pdf [https://perma.cc/6VA4-65ZX] (discussing digital-era threats to democracy posed by foreign and domestic disinformation campaigns that "reduc[e] trust and corrupt[] the information ecosystem needed for democratic debate"); *id.* at 5 ("The new digital media policy roadmap we layout would steer clear of vague rules that empower governments to define 'good' or 'bad' content and would instead focus on updating offline protections, fostering

only alternative proposed to today's laissez-faire approach would increase government control over content. This false choice — between allowing platforms or government to act as censor — has hobbled the policy debate. A new approach should empower users."[189]

Whether and when private actors will act with a First Amendment conscience to design a better free speech mousetrap, however, remains to be seen. Sometimes they do.[190] But many observers remain understandably pessimistic about platforms' First Amendment inclinations, especially in light of their profit motives.[191] For this reason, as Jack Goldsmith and Andrew Woods note, "governments must play a large role in these [private platform] practices to ensure that the internet is compatible with a society's norms and values."[192]

To illustrate, private actors can design and deploy "user interface defaults that favor transparency (through better labeling)" to enable users easily "to distinguish transparent and ethical journalistic practices from trolling content and to tell if video has been altered."[193] And governments can enact legislation like the Honest Ads Act to "impose broadcast disclosure rules on platform ads," require platforms to "verify who is actually funding ads rather than listing front groups," and prohibit platforms from micro-targeting political ads.[194] The tweaks

user choice, amplifying the signal of independent news, supporting civic information, and holding platforms accountable for share, unambiguous, and transparent rules.").

189 KORNBLUH & GOODMAN, SAFEGUARDING DIGITAL DEMOCRACY, *supra* note 188, at 5.

190 *Id.* at 27 (noting the news media's voluntary adoption of professional and ethical standards that "not only included sourcing and editorial practices but also the provision of easy to understand information by clearly separating news from opinion, providing bylines and datelines at the top of stories, a masthead, and codes and standards"); Dawn C. Nunziato, *Misinformation Mayhem: Social Media Platforms' Efforts to Combat Medical and Political Misinformation*, 19 FIRST AMEND. L. REV. (forthcoming 2020) (manuscript at 68) (reviewing social media companies' responses to false and misleading speech about COVID-19 and political matters and concluding "[s]ocial media companies have been generally inspired by First Amendment free speech values – both substantive and procedural – to protect a vibrant marketplace of ideas online while imposing limited, moderately effective checks on harmful false and misleading speech").

191 *See, e.g.*, Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 501-02 (2019) (calling attention to the potential costs of the "information-fiduciary" framework); Olivier Sylvain, *Recovering Tech's Humanity*, 119 COLUM. L. REV. 252, 282 (2019) (asserting that reform "should address social media companies as commercial enterprises whose priority is to maximize user attention and engagement for advertisers").

192 Goldsmith & Woods, *supra* note 185.

193 KORNBLUH & GOODMAN, SAFEGUARDING DIGITAL DEMOCRACY, *supra* note 188, at 5.

194 *Id.*

identified above explain why the First Amendment can and should be understood to permit these measures.[195]

In short, private power — like government power — can be both an enemy of, and a friend to, free speech and democracy. Government and powerful private actors alike can, and do, weaponize speech as a tool for controlling others' speech and frustrating meaningful public discourse and democratic outcomes. Conversely, both government and private parties can, and do, choose to incorporate the democracy-promoting tweaks identified above when moderating content.

CONCLUSION

As we have seen, the pace of change in the speech environment—as in all areas that involve information technology — has become more exponential than incremental. This produces a peril and a paradox.

The peril is that bold strategies may soon be required if law is to deal adequately with the democracy-damaging consequences of the twenty-first-century speech environment. The paradox is that these rapid transformations also counsel judicial and scholarly modesty because their full consequences are ill understood.

Tweak or topple, we must think creatively and critically. Here we have focused on tweaks out of respect for the many unknowns and the many practical barriers to reform, but especially out of respect for the vital importance of freedom of expression in a healthy democracy. At the same time, we recognize that the worsening pathologies of our contemporary speech environment understandably inspire some (if not many) to call for topples. Either way, we should be unwilling to hew to free speech bromides and practices where they no longer serve us or actively mislead us. We need to respond to the disconnect (that grows

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[195] Jack Balkin makes a related claim for the reform of free speech law:

> Neither judge-made doctrines of First Amendment law nor private companies will prove reliable stewards of the values of free expression in the twenty-first century. This means that we must rethink the First Amendment's role in the digital era. On the one hand, the First Amendment retains its central purpose of guarding against state censorship through new devices of control and surveillance. On the other hand, courts should not interpret the First Amendment to prevent the state from regulating infrastructure companies in order to protect the values of a democratic culture and the ability of individuals to participate in the public sphere. Thus, the state, while always remaining a threat to free expression, also needs to serve as a necessary counterweight to developing technologies of private control and surveillance.

Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 UC DAVIS L. REV. 1149, 1152 (2018).

larger each day) between existing First Amendment theory and doctrine and the new speech realities.

To this end, we have identified some key features of contemporary First Amendment theory and doctrine that invite scholarly and litigation interventions to address the threats posed by the twenty-first-century speech environment to free speech and democracy. We have also introduced a process for considering and addressing foundational obstacles for constructive First Amendment reform. And we have flagged productive tweaks to those core features.

Our suggestions are geared to explaining not only when and why the First Amendment protects speech that furthers speech and democracy values, but also when and why it permits the carefully designed regulation of speech that frustrates those values. In short, we have proposed a structure for thinking about when speech is a means to democracy and when it is occasionally instead an obstacle to that first principle. We hope that scholars, lawyers, and policymakers will find this structure helpful in assessing when and why the First Amendment permits carefully calibrated interventions designed to promote free speech and democracy values.