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# Our Imperiled Absolutist First Amendment

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## OUR IMPERILED ABSOLUTIST FIRST AMENDMENT

Zachary S. Price\*

### ABSTRACT

*For roughly half a century, First Amendment doctrine has provided Americans with unusually expansive protection for freedom of expression. In the wake of the divisive 2016 presidential election, this symposium contribution offers some tentative reflections on whether and how the current judicial consensus supporting this doctrinal structure could unravel—and why it may be particularly important in the current moment to prevent that from happening.*

*This Article pursues this inquiry, first, by highlighting the current understanding’s historical emergence against the backdrop of the Civil Rights Movement. The Article then explores three salient recent developments that could place increasing pressure on the current consensus view: (1) the problem of “fake news,” meaning deliberate propagation of manifestly false news stories that shape public opinion; (2) the apparent disinhibition of bigoted and hateful expression; and (3) the ongoing risk of both foreign and domestic terrorism and political violence more generally. Although speech-repressive solutions to these problems may well gain increasing popular appeal, weakening First Amendment protection in any of these areas could open the door to highly selective and discriminatory enforcement at different levels of government in our sharply divided polity. At the same time, because different sides of our divided polity hold divergent perceptions of what speech is most dangerous, erosion along any of these axes could increase pressure for reciprocal changes along the others.*

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## INTRODUCTION

For roughly half a century, First Amendment doctrine has provided Americans with exceptionally broad protection for freedom of expression. To a degree that is unusual around the world, even among other constitutional democracies, American constitutional law generally protects expression of even the most hateful, offensive, illiberal, and dangerous ideas.<sup>1</sup> This First Amendment absolutism, moreover, has been a striking point of judicial consensus, even on our current, badly fractured Supreme Court. To be sure, judges and justices have disagreed sharply on some important implications of this principle, most notably the scope of constitutional protection for campaign finance<sup>2</sup> and commercial advertising.<sup>3</sup> Yet the core notion that “[t]he First Amendment recognizes no such thing as a ‘false’ idea”<sup>4</sup>—and indeed that this broad freedom of belief and expression is a structural imperative of democratic self-government<sup>5</sup>—has been a principle that Justices Alito<sup>6</sup> and Ginsburg,<sup>7</sup> or in an earlier day Justices Rehnquist<sup>8</sup> and Brennan,<sup>9</sup> could

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<sup>1</sup> See *infra* Part I.

<sup>2</sup> See, e.g., *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 361–62 (2010) (holding that a ban on independent election-related expenditures by for-profit corporations violated the First Amendment).

<sup>3</sup> See, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011) (holding that statutory restrictions on the sale, disclosure, and use of records revealing the prescribing practices of doctors violated the First Amendment).

<sup>4</sup> *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)).

<sup>5</sup> See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.” (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964))). See generally Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1098 (2016) (describing “broad consensus” among scholars and on the Supreme Court that “the primary—albeit not necessarily the only—reason why the First Amendment protects freedom of speech is to advance democratic self-governance”).

<sup>6</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (Alito, J.) (plurality opinion) (“[T]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers” (quoting *Street v. New York*, 394 U.S. 576, 592 (1969))).

<sup>7</sup> *Wood v. Moss*, 134 S. Ct. 2056, 2066 (2014) (Ginsburg, J.) (“It is uncontested and uncontestable that government officials may not exclude from public places persons engaged in peaceful expressive activity solely because the government actor fears, dislikes, or disagrees with the views those persons express.”).

<sup>8</sup> *Hustler Magazine*, 485 U.S. at 55–56 (Rehnquist, C.J.) (“[I]f it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.” (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978))).

<sup>9</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (Brennan, J.) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply

agree on. Just last year, the Supreme Court unanimously reaffirmed it as First Amendment “bedrock.”<sup>10</sup>

But in the longer term how stable is this consensus? Could it be imperiled? In other areas of our public life, previously settled good-governance norms and constitutional understandings seem to be undergoing steady erosion, as partisan animus drives us along a downward spiral of tit-for-tat degradation. In the separation-of-powers context (the focus of my own scholarship<sup>11</sup>), numerous important long-unresolved questions—including questions about recess appointments, recognition power, treaty confirmation, senatorial obligation to consider nominees, and faithful execution—have lately come to the fore (and often required judicial resolution) as each side’s clawing for position has stripped away buffers of convention and self-restraint that previously spared us from reaching bare questions of legality.<sup>12</sup> With respect to the First Amendment, much the same process may already be evident with respect to non-judicial protections for free expression, as evidenced by such disparate phenomena as violent disruption of controversial speakers on university campuses, apparent declining popular support for free expression, and the current President’s statements celebrating violence against protesters and journalistic critics.

Could this process extend as well to judicial doctrines? Although the Constitution insulates federal courts from direct political pressure, for better or worse judges have never been entirely immune to the intellectual climate of their times; nor do they control the social conditions that generate cases presented to them.<sup>13</sup> This brief and modest symposium Article thus offers

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because society finds the idea itself offensive or disagreeable.”).

<sup>10</sup> *Matal*, 137 S. Ct. at 1751 (Alito, J.) (plurality opinion) (identifying as a “bedrock First Amendment principle” that “[s]peech may not be banned on the ground that it expresses ideas that offend”); *id.* at 1765 (Kennedy, J., concurring) (“Aside from [certain] narrow exceptions [for categories of unprotected speech], it is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys.”).

<sup>11</sup> See generally Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014) (analyzing limits on executive enforcement discretion); Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357 (2018) (discussing Congress’s authority to control executive powers through funding constraints); Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937 (2017) (assessing whether due process principles protect reliance on federal nonenforcement policies).

<sup>12</sup> See, e.g., *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550 (2014) (interpreting Recess Appointments Clause); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (addressing scope of President’s recognition power); *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (addressing scope of executive immigration nonenforcement authority), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016); Jonathan H. Adler, *The Senate Has No Constitutional Obligation to Consider Nominees*, 24 GEO. MASON L. REV. 15 (2016) (addressing question whether Senate had duty to consider Supreme Court nominee); Michael D. Ramsey, *Evading the Treaty Power?: The Constitutionality of Nonbinding Agreements*, 11 FLA. INT’L U. L. REV. 371 (2016) (addressing questions regarding absence of Senate confirmation for controversial recent international agreements).

<sup>13</sup> The precise relationship between public opinion and judicial decision-making is a complex topic

some tentative reflections on whether and how the expansive character of existing First Amendment doctrine might come under increasing pressure—and why it may be particularly important in the current moment to prevent that from happening.

I pursue this inquiry here along two dimensions. First, to place current developments in context, I highlight the historical circumstances under which expansive protection for expressive freedom took hold in this country. In my view, whether current doctrine is correct should ultimately turn on consideration of first principles and objective legal analysis. Nevertheless, the fact is that, as a matter of judicial enforcement, the First Amendment largely lay dormant until the late 1930s and 1940s. What is more, it took on its now-familiar absolutist cast only in the 1960s and 1970s, against the backdrop of the Civil Rights Movement. I developed these thoughts for a symposium panel entitled “Free Speech as a Response to Hate Crimes.” In some sense, our bedrock First Amendment doctrine was just that: we gained expansive First Amendment freedoms (and diverged from other western democracies in the breadth of this protection) in response to the atrocities of Jim Crow.<sup>14</sup> (As a useful if imprecise shorthand, I use the terms “absolutist,” “absolute,” and “near-absolute” throughout this Article to describe the doctrinal structure, described in more detail in Part I below, that requires government neutrality with respect to even the most contemptible ideas, subject only to narrow categorical exceptions.)

This history is worth emphasizing in its own right, yet past contingency also highlights the possibility of future change, and recent political developments in both the United States and Europe should make clear that continued governmental support for civil liberties is hardly inevitable.<sup>15</sup> My second objective in this Article is thus to explore—tentatively and speculatively—several recent developments in American society and culture that might place pressure on the current judicial consensus supporting broad expressive freedom.

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addressed in a voluminous literature. For evidence of some connection between public opinion and Supreme Court decisions, see, for example, BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 14 (1st ed. 2009) (“[O]ver time, as Americans have the opportunity to think through constitutional issues, Supreme Court decisions tend to converge with the considered judgment of the American people.”); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 5 (2004) (“This book argues that because constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political context of the times.”); Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 *MICH. L. REV.* 431, 488 (2005) (presenting evidence that “may suggest that the Court’s legitimacy flows less from the soundness of its legal reasoning than from its ability to predict future trends in public opinion”).

<sup>14</sup> See *infra* Part II.

<sup>15</sup> For a recent comparative study of pathways to constitutional retrogression, see generally Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 *UCLA L. REV.* 78 (2018).

Although one could surely point to other changes as well, I highlight three developments in American society that emerged out of the divisive 2016 national election: (1) the problem of “fake news,” by which I mean deliberate propagation, particularly through social media, of demonstrably untrue factual assertions that nonetheless shape public opinion; (2) the apparent (or at least perceived) disinhibition, particularly on the internet but also now in public demonstrations, of hateful and bigoted expression; and (3) the ongoing risk of both foreign and domestic terrorism and political violence more generally.

I emphasize these three issues because all were particularly salient following the 2016 election (when the remarks on which this Article is based were prepared), because all are hard problems with no easy solution, and because all three may implicate existing pressure-points in the doctrine—areas where case law permits plausible arguments for weaker protection, and indeed where substantial arguments exist that more limited expressive freedom could be consistent with some set of principled First Amendment protections.<sup>16</sup> The risk I see in each of these areas is precisely that, whatever the benefits of weakening protection, doing so could carry considerable costs. Within our sharply divided polity, weakening protection in any of these areas—for false statements, offensive expression, or incitement of violence—could open the door to highly selective and discriminatory enforcement, as officials on one side or the other of our political divide cherry-pick statements they find most objectionable for repression. In addition, precisely because each side of our divided polity may hold quite different intuitions about what speech is most dangerous or worthy of repression, erosion of protection along any of these axes could produce reciprocal changes along the others.

I intend this exploration to be cautionary rather than predictive, and it is not my purpose here to defend every feature of current First Amendment doctrine. Perhaps we could tolerate minor adjustments in the core First Amendment principles I address; though I am skeptical, perhaps some adjustments would even be merited. If we are going to travel down this path, however, we should do so with our eyes open to the risks. The great virtue of the current absolutist approach in First Amendment doctrine is precisely the clarity of the rule it enforces. By tightly cabinning the exceptions to First Amendment protection, current doctrine squarely protects overheated rhetoric on all sides, thus leaving wide and unambiguous protection for the rest of us. Given current high political passions, such protection strikes me as a valuable heritage that we abandon at our peril.<sup>17</sup>

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<sup>16</sup> See *infra* Part III.

<sup>17</sup> I address here only the expressive rights of United States citizens and speakers within the United States. Whether equivalent protections apply to expression aimed at the United States by hostile overseas actors is a question beyond the scope of this Article.

My discussion proceeds as follows. I begin in Part I with a very brief overview of existing First Amendment doctrine. I emphasize ways in which current doctrine protects expression of even the most outrageous ideas, while at the same time leaving the door open to government punishment when hateful ideas manifest themselves in concrete criminal or discriminatory conduct. Part II then sketches the historical path that brought us to this point. It highlights in particular the civil rights context in which this absolutist form of protection took hold in the United States, even as it failed to do so in other Western democracies. Part III then addresses the three developments noted earlier that could weaken the consensus supporting this doctrine and open pathways to reciprocal erosion of expressive protection. The Article ends with a brief conclusion highlighting the value of the existing doctrine in our unsettled current moment.

### I. A CURSORY OVERVIEW OF FIRST AMENDMENT DOCTRINE

The “soul” of our First Amendment, as one leading First Amendment lawyer recently put it, is its “anti-censorial” character—its radical insistence, at least when expression relating to political ideas and social movements is at stake, that “the dangers of permitting the government to decide what may and may not be said, far more often than not, outweigh any benefits that may result from suppressing or punishing offensive speech.”<sup>18</sup> In doctrinal terms, two basic principles embody this anti-censorial soul.

First, as a general rule, the First Amendment demands strict governmental neutrality between topics and ideas. Any governmental restriction based on what is said—the speech’s “content,” meaning either viewpoint or subject-matter—must generally satisfy “strict scrutiny,” which requires demonstrating that the law is narrowly drawn to achieving some compelling governmental purpose.<sup>19</sup> Federal and state governments may impose some reasonable “time, place, or manner” restrictions on expressive activities.<sup>20</sup> They may, for

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<sup>18</sup> FLOYD ABRAMS, *THE SOUL OF THE FIRST AMENDMENT*, at xiv, xvii (2017). As Frederick Schauer has observed, the First Amendment’s threshold boundaries—what verbal acts trigger First Amendment scrutiny to begin with—may be harder to characterize, although in general expression relating to public normative and political questions most clearly implicates the First Amendment. See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1766–67, 1801–02 (2004) (noting difficulty of determining “threshold applicability” and suggesting, based on prior work by Kent Greenawalt, that “the First Amendment plainly appears to be implicated . . . when the defendant’s speech is public rather than face-to-face, when it is inspired by the speaker’s desire for social change rather than for private gain, when it relates to something general rather than to a specific transaction, and when it is normative rather than informational in content”).

<sup>19</sup> *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 805 (2011).

<sup>20</sup> *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014).

example, limit the size and placement of outdoor signs or the timing of protests in public streets and parks.<sup>21</sup> But any such restriction must be content-neutral; it may not discriminate based on the message being expressed.<sup>22</sup> What is more, permitting requirements for public protests may not give undue discretion to those administering them, nor may they impose differential fees on protesters based on the likely audience response to the message (and resulting need for police protection or other public services).<sup>23</sup>

At the same time, as a second countervailing principle, the Court has identified certain categories of expression (often defined in part by their content) that are either unprotected or subject to lesser degrees of protection.<sup>24</sup> Examples include obscene speech, fraudulent utterances, certain defamatory statements, and “fighting words” (face-to-face personal insults).<sup>25</sup> The Court has generally defined these exceptions narrowly,<sup>26</sup> and in recent cases it has seemed to call a halt to further recognition of more.<sup>27</sup> Nevertheless, several such categories are relevant here.

Most notably, “incitement,” meaning advocacy of illegal violence, may be punished, but only within the confines of the narrow standard articulated in *Brandenburg v. Ohio*:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.<sup>28</sup>

Similarly, threats of violence or illegal conduct may be punished, but the Court has limited this category to “statements where the speaker means to

<sup>21</sup> *Id.*; *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 806–08 (1984).

<sup>22</sup> *Coakley*, 134 S. Ct. at 2529.

<sup>23</sup> *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130–31, 133–34 (1992).

<sup>24</sup> *See, e.g.*, *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (listing examples and collecting cases); *see also* *United States v. Alvarez*, 567 U.S. 709, 717–18 (2012) (plurality opinion) (listing examples and collecting cases).

<sup>25</sup> *Alvarez*, 567 U.S. at 717; *Stevens*, 559 U.S. at 468–69. Though “fighting words” are listed in *Alvarez* as an unprotected category, other recent cases suggest that any remaining “fighting words” exception is exceedingly narrow. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 454 (2011) (barring tort liability for offensive protest even though “a few of the signs—such as ‘You’re Going to Hell’ and ‘God Hates You’—were viewed as containing messages related to [the plaintiffs] specifically”); *see also* *Rosenfeld v. New Jersey*, 408 U.S. 901, 906 (1972) (Powell, J., dissenting) (dissenting from vacatur and remand in a case where the Court’s decision apparently rejected the view that “a verbal assault on an unwilling audience may be so grossly offensive and emotionally disturbing as to be the proper subject of criminal proscription”).

<sup>26</sup> *Stevens*, 559 U.S. at 468–69 (stressing the “limited” and “narrow[]” character of exceptions).

<sup>27</sup> *See, e.g.*, *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790, 792–93 (2011) (declining to exempt violent video games from First Amendment protection); *Stevens*, 559 U.S. at 468–70 (declining to recognize exception for certain depictions of animal cruelty).

<sup>28</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).



communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>29</sup>

Liability for some false or defamatory statements also remains possible, but an elaborate body of cases stemming from *New York Times Co. v. Sullivan* blocks even private tort liability for many false statements about public officials or public figures (specifically, those propagated without “actual malice,” meaning either knowledge of their falsity or reckless indifference to their truth).<sup>30</sup> As for false statements more generally, a recent plurality opinion applied strict scrutiny to invalidate a restriction on certain non-defamatory false statements,<sup>31</sup> but a narrower concurring opinion appeared to leave the government broader latitude to restrict some false statements under a more open-ended balancing test.<sup>32</sup> The Court has more clearly rejected any general exception to protection for offensive speech. In addition, although it once upheld a prohibition on “group libel” (what we would today call “hate speech”),<sup>33</sup> more recent decisions have effectively repudiated this exception, lumping racist invective into the general category of offensive expression that remains protected unless it falls within some other unprotected category such as incitement, threats, or fighting words.<sup>34</sup>

Modern First Amendment doctrine thus provides near-absolute protection for expression of ideas, no matter how hateful, offensive, indecent, or illiberal. Bigots and radicals of all stripes fall under the First Amendment’s banner, but by the same token so do flag-burners, anti-police activists, persecuted minorities, and others whom beleaguered, malicious, or intolerant public officials might wish to repress.

The doctrine, moreover, balances its near-absolute protection for expression of ideas with near-absence of protection for concrete criminal or discriminatory actions. Accordingly, although abstract expression of bigoted views is protected, the government is free to impose enhanced sentences on

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<sup>29</sup> *Virginia v. Black*, 538 U.S. 343, 359 (2003); *see also* *Watts v. United States*, 394 U.S. 705, 706, 708 (1969) (per curiam) (rejecting prosecution for the “political hyperbole” of a draft protester’s statement that “[i]f they ever make me carry a rifle the first man I want to get in my sights is L. B. J.”); *cf.* *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) (interpreting a federal threat statute to require threatening intent and thus avoiding First Amendment issues).

<sup>30</sup> *See, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (requiring proof of “actual malice” in defamation suits brought by public officials); *see also* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (extending the actual malice standard to public figures in general).

<sup>31</sup> *United States v. Alvarez*, 567 U.S. 709, 724 (2012) (plurality opinion).

<sup>32</sup> *Id.* at 730–32 (Breyer, J., concurring).

<sup>33</sup> *Beauharnais v. Illinois*, 343 U.S. 250, 258–59 (1952) (allowing criminal liability for “wilful purveyors of falsehood concerning racial and religious groups”).

<sup>34</sup> *See, e.g.*, *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (plurality opinion) (striking down a statutory provision that prohibited registering disparaging trademarks); *see also* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (invalidating a city ordinance that specifically punished “bias-motivated” fighting words (internal quotation marks omitted)).

bias-motivated crimes,<sup>35</sup> to proscribe various forms of discrimination in employment and commercial dealings,<sup>36</sup> and to punish criminal conspiracies motivated by political beliefs.<sup>37</sup> It may even use protected expression as evidence to establish particular proscribed motivations.<sup>38</sup> Although some have questioned this distinction's coherence,<sup>39</sup> modern free expression case law thus seeks to balance two central imperatives of democratic self-government—guaranteeing personal and public security, on the one hand, and protecting freedom of opinion, on the other—by drawing a sharp line between expression and action, word and deed.

## II. CONTINGENT ORIGINS

How did we get to this place? According to one recent comparative survey, both sides of the American doctrine regarding intolerant speech—the degree of protection for expression and the degree of proscription for bias-motivated conduct—appear distinctive among other advanced democracies.<sup>40</sup> Simply put, other western democracies may often allow broader punishment for hate speech and incitement of violence, but may also impose less vigorous restrictions on bias-motivated conduct.<sup>41</sup> This anomalousness notwithstanding, whether

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<sup>35</sup> See *Wisconsin v. Mitchell*, 508 U.S. 476, 487–88 (1993) (upholding enhanced penalties for bias-motivated criminal acts).

<sup>36</sup> See Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 2 (1994) (arguing that the Supreme Court has “implicitly acknowledged” that the First Amendment provides no defense to workplace harassment claims).

<sup>37</sup> See, e.g., *United States v. Hassan*, 742 F.3d 104, 127 (4th Cir. 2014) (rejecting a First Amendment challenge to a terrorism conspiracy conviction “where the appellants engaged in extensive conversations . . . about the necessity of waging violent jihad and their shared goal of reaching the jihadist battlefield”).

<sup>38</sup> *Mitchell*, 508 U.S. at 489 (indicating that a defendant's speech can be used as evidence of a biased motive).

<sup>39</sup> See, e.g., ERIK BLEICH, *THE FREEDOM TO BE RACIST?: HOW THE UNITED STATES AND EUROPE STRUGGLE TO PRESERVE FREEDOM AND COMBAT RACISM* 109 (2011) (“Legal theorists and Supreme Court Justices have struggled with how to distinguish speech from conduct.”); cf. FREDERICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* 89–102 (1999) (discussing “[t]he slipperiness of the speech-conduct distinction”). For a defense of the speech-conduct distinction, see, for example, FRANKLYN S. HAIMAN, “SPEECH ACTS” AND THE FIRST AMENDMENT 4–9 (John K. Wilson ed. 1993) (“[I]t is necessary to distinguish speech from action if the First Amendment is to have any meaning other than the senseless proposition that the government shall make no laws.”).

<sup>40</sup> BLEICH, *supra* note 39, at 11 (characterizing the United States as “the major exception to the post-war trend toward limiting freedom in favor of penalizing racism”); *id.* at 107–08 (indicating that “the United States was a leader in making racial discrimination and hate crimes illegal” and that although European governments have “followed in the United States’ footsteps,” these governments have “seldom” acted “with similar vigor” in “establishing laws against racial discrimination and hate crimes”).

<sup>41</sup> *Id.* at 108; see also ABRAMS, *supra* note 18, at xv–xvii (comparing the types of speech that are protected by the First Amendment in the United States with those protected in other democratic nations).

American First Amendment doctrine is correct ultimately turns on questions of interpretive theory regarding our own distinctive constitutional text and tradition—questions far beyond the scope of this modest Article. Assuming for present purposes that our basic doctrine is sound—or at least (as nearly every mainstream interpretive theory now recognizes) that overturning entrenched decisions should require an exceptionally powerful justification<sup>42</sup>—it nonetheless provides helpful context for current questions to appreciate the historical circumstances in which key building blocks of modern First Amendment doctrine were laid.

Summarizing greatly, although the First Amendment of course was included in the original Bill of Rights of 1791 and has featured in political and judicial debates over expressive freedom ever since, the robust judicial protection for free expression that we now enjoy first took hold in the 1930s and 1940s, during the formative period for modern constitutional law following the New Deal.<sup>43</sup> To be sure, progressive reaction to the federal government’s repression of subversive speech during World War I provided one important impetus for greater civil-liberties consciousness during the inter-war period.<sup>44</sup> Nevertheless, and despite recognizing in principle that speech posing no “clear and present danger” was constitutionally protected, the Supreme Court’s classic First Amendment decisions from the first decades of the twentieth century were remarkably tolerant of government repression.<sup>45</sup> As Laura

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<sup>42</sup> For some recent discussion of the appropriate force of precedent, see generally RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* (2017) (offering a general theory of stare decisis). See also William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2358–61 (2015) (addressing the force of precedent within originalist interpretive theory).

<sup>43</sup> The historical account offered in this paragraph draws heavily from LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA’S CIVIL LIBERTIES COMPROMISE* (2016) [hereinafter WEINRIB, *THE TAMING OF FREE SPEECH*]. For some other classic historical accounts, see, for example, ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT* (2007); GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (1st ed. 2004). On the connection between First Amendment freedom and other central features of post-New Deal constitutional law, see Laura M. Weinrib, *Civil Liberties Outside the Courts*, 2014 SUP. CT. REV. 297, 321 (2014) (noting that “[s]trong judicial enforcement of the Bill of Rights is properly regarded as a keystone of the New Deal settlement,” with other key elements being “a relaxation of structural constraints on Congress’s control over the economy” and “an invigoration of constitutional protections for ‘discrete and insular minorities’ along with free speech” (footnote omitted) (citing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 122 (2004))). Capturing the basic logic of this constitutional understanding, Weinrib observes: “judicial deference to the outcome of democratic processes requires robust debate, with ample protection for minority interests, as state policy is formulated and implemented.” *Id.* at 321–22 (citing MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* 158–59 (1991)).

<sup>44</sup> WEINRIB, *THE TAMING OF FREE SPEECH*, *supra* note 43, at 4–5.

<sup>45</sup> STONE, *supra* note 43, at 192–211 (discussing key post-World War I Supreme Court cases that interpreted the First Amendment).

Weinrib has recently shown, more robust, counter-majoritarian judicial protection took hold only later, against the backdrop of fascism's rise around the world, as key elements of the American labor movement shed their *Lochner*-era hostility towards courts and sought constitutional protection for rights of protest.<sup>46</sup> An intellectual consensus supporting judicial enforcement of the First Amendment thus “grew out of a state-skeptical brand of labor radicalism, grafted onto a conservative legal tradition of individual rights.”<sup>47</sup>

Even with this groundwork in place, however, Supreme Court decisions from the 1930s to 1950s were decidedly mixed regarding the extent of First Amendment protection for potentially violent illiberal groups.<sup>48</sup> In *Beauharnais v. Illinois* in 1952, for example, the Court upheld a state law forbidding what we would now call “hate speech.”<sup>49</sup> (Using terminology from David Riesman's scholarship on fascist subversion of European democracies, the Court at the time called it “group libel” and lumped it together with individualized libel as a form of unprotected expression.<sup>50</sup>) With memories of fascist and communist revolutions in Europe fresh in their minds, some of the Court's leading liberals, particularly Justices Frankfurter and Jackson, worried openly about the degree to which our Constitution should protect advocacy by groups bent on destroying it.<sup>51</sup>

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<sup>46</sup> WEINRIB, THE TAMING OF FREE SPEECH, *supra* note 43, at 11.

<sup>47</sup> *Id.* at 5; see also Reuel E. Schiller, *Free Speech & Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 96 (2000) (tracing the “emergence of the modern, libertarian conception of the Free Speech Clause of the First Amendment” to post-war “changes in political culture” including economic growth, heightened fears of totalitarianism, and worries about “bureaucratic ineptitude”).

<sup>48</sup> See WILLIAM M. WIECEK, THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953, at 146 (2006) (describing free speech doctrine between 1917 and 1957, particularly with respect to subversive activities, as oscillating between liberal and “speech-repressive” impulses).

<sup>49</sup> 343 U.S. 250, 258–59 (1952).

<sup>50</sup> *Id.* at 259 n.9 (citing David Riesman, *Democracy & Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942)); see also David Riesman, *Civil Liberties in a Period of Transition*, 3 PUB. POL'Y 33, 53–54 (1942) (discussing questions presented by allowing Nazis and Communists to freely advocate restricting the rights of other groups).

<sup>51</sup> See, e.g., *Beauharnais*, 343 U.S. at 258–59 (Frankfurter, J.) (“Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that wilful [sic] purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community.” (footnote omitted) (citing Karl Loewenstein, *Legislative Control of Political Extremism in European Democracies*, 38 COLUM. L. REV. 727, 1085 (1938)); *Am. Commc'ns Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 422 (1950) (Jackson, J., concurring and dissenting) (emphasizing “the decisive differences between the Communist Party and every other party of any importance in the long experience of the United States with party government”); *Terminiello v. City of Chi.*, 337 U.S. 1, 23 (1949) (Jackson, J., dissenting) (characterizing a rally as “a local manifestation of a world-wide and standing conflict between two organized groups of revolutionary fanatics, each of which has imported to this country the strong-arm technique developed in the struggle by which their kind has devastated Europe”).

First Amendment doctrine took on its now-familiar absolutist cast only in the 1960s and 1970s, against the backdrop of the Civil Rights Movement.<sup>52</sup> Many foundational First Amendment decisions, including *New York Times Co. v. Sullivan*,<sup>53</sup> *Street v. New York*,<sup>54</sup> *Wood v. Georgia*,<sup>55</sup> and *NAACP v. Button*,<sup>56</sup> were in fact civil rights decisions. In *Sullivan*, for example, the Court interpreted the First Amendment to protect an open “interchange of ideas” by limiting defamation liability for criticism of public officials.<sup>57</sup> But the decision’s immediate effect was to shut down abusive litigation against civil rights leaders and northern newspapers by Jim Crow authorities.<sup>58</sup> Likewise, in *Street*, the Court called it “firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers,” yet it did so in a case where this principle supported invalidating a civil rights protester’s conviction for flag-burning.<sup>59</sup> Even *Police Department of Chicago v. Mosley*, the 1972 decision establishing the rule of strict scrutiny for content-based limitations on expression, not only was itself a civil rights decision (the speaker in question was protesting racial discrimination), but also imported its framework for analyzing speech restrictions from earlier cases applying strict scrutiny to race-based legal classifications.<sup>60</sup>

In his comparative study, Erik Bleich notes that the United States diverged from major European democracies with respect to its protection of hate speech during precisely this period.<sup>61</sup> Bleich points to contemporary civil rights and

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52 For a discussion of interconnections between free speech and anti-discrimination case law, see MARK J. RICHARDS, *THE POLITICS OF FREEDOM OF EXPRESSION: THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES* 58–82 (2013). See also, e.g., Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 42 (1996) (“During the 1950s and 1960s, free speech became intertwined in popular and legal consciousness with another substantive cause that was beginning to prosper—that of the civil rights movement.”).

53 376 U.S. 254, 256 (1964) (addressing a libel suit against civil rights activists).

54 394 U.S. 576, 578, 594 (1969) (invalidating the appellant’s conviction for burning the flag in a civil rights protest).

55 370 U.S. 375, 379, 395 (1962) (invalidating a contempt-of-court conviction based on criticism of a grand-jury investigation that targeted African-American voters and activists).

56 371 U.S. 415, 428–29 (1963) (protecting the associational rights of a civil rights advocacy group).

57 376 U.S. at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

58 For background on this litigation campaign against the civil rights movement, see Christopher W. Schmidt, *New York Times v. Sullivan and the Legal Attack on the Civil Rights Movement*, 66 ALA. L. REV. 293, 295–96 (2014) [hereinafter Schmidt, *Sullivan and the Legal Attack*] (describing the impact of the segregationist countermovement on civil rights activity and the Supreme Court); see also Christopher W. Schmidt, *Litigating Against the Civil Rights Movement*, 86 U. COLO. L. REV. 1173, 1177 (2015) (discussing legal defenses of Jim Crow more generally).

59 *Street*, 394 U.S. at 592.

60 *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”). For a discussion of the case’s background and its connection to racial equality concerns, see RICHARDS, *supra* note 52, at 1–5, 48–57.

61 BLEICH, *supra* note 39, at 74 (noting that, in the 1960s and 1970s, while “most European countries . . . were restricting speech that evoked the Nazi era or that tried to aggravate societal divisions

antiwar dissident movements as a possible explanation.<sup>62</sup> “During this volatile era” in the United States, Bleich observes, “protecting [minorities’ and dissidents’] right to protest trumped any interest in restricting racist speech.”<sup>63</sup>

Whatever the precise causal relationship between this historical context and the Court’s decision-making, the key point here is that the Court’s formative decisions guaranteeing a robust governmental neutrality between ideas must be understood against this civil rights backdrop.<sup>64</sup> In *Brandenburg*, for example, the Court’s narrow standard for incitement served to protect white supremacists’ violent rhetoric from government sanction,<sup>65</sup> yet the Justices surely understood that in other cases dissidents and minorities of other sorts would benefit from its decision. After all, as Michael Klarman rather cynically observes, the Court “supplied its most robust interpretations of the First Amendment” only after “the complete collapse of the internal [Communist] subversion threat in the 1960s” and substantial weakening of the Ku Klux Klan.<sup>66</sup>

In the ensuing decades, as we have seen, the Supreme Court has by and large only built out still broader protections from this foundation. Applying the rule of strict scrutiny for content-based limitations, courts have laid waste to everything from pornography restrictions<sup>67</sup> and campaign finance limitations<sup>68</sup> to municipal signage ordinances<sup>69</sup> and data privacy protections.<sup>70</sup> Categories of unprotected speech have shrunk down or disappeared,<sup>71</sup> while the category of “speech” subject to First Amendment protection in the first place has steadily expanded.<sup>72</sup> To some minds, this case law has slipped its

between groups,” the U.S. Supreme Court’s “decision[s] in those decades permitted aggressive, vituperative, or hateful speech, even when aimed at racial, ethnic, and religious groups”).

62 *Id.* at 75 (“The civil rights and antiwar movements . . . converged in the 1960s around the principle of free speech.” (footnote omitted)).

63 *Id.*

64 See, e.g., Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. (forthcoming 2019) (on file with author) (noting the Supreme Court’s suspicion of southern juries as a motivating consideration in developing modern speech-protective judicial doctrines); Schmidt, Sullivan *and the Legal Attack*, *supra* note 58, at 313 (“[W]hen the legal attacks on the Civil Rights Movement made their way to the Supreme Court, the Justices were predisposed to come to the aid of those who were struggling to advance the cause of civil rights.”).

65 *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (per curiam) (invalidating the conviction of a Ku Klux Klan member under a “Criminal Syndicalism” statute).

66 Klarman, *supra* note 52, at 36.

67 See, e.g., *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 332 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986) (invalidating an anti-pornography ordinance).

68 See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 318–19 (2010) (invalidating restrictions on election-related expenditures by corporations).

69 See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015) (invalidating a town signage law).

70 See, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011) (invalidating a medical privacy law because the First Amendment protects “[s]peech in aid of pharmaceutical marketing”).

71 See *supra* Part I.

72 See Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1614–16 (2015) (describing the expansion of speech categories subject to First Amendment protection).

moorings in some applications.<sup>73</sup> Some also worry that the very expansion risks diluting the First Amendment's meaning where it most matters.<sup>74</sup> Rather than rehearse these concerns about the doctrine's outermost projections, however, I will turn here to some speculative concerns about more novel threats to the bedrock itself.

### III. A CONTINGENT FUTURE?

Highlighting the historical circumstances in which First Amendment absolutism took hold raises the question whether contemporary circumstances remain as conducive to maintaining these civil libertarian commitments. For the moment, the core principle of neutrality between ideas seems stable; the Supreme Court just collectively reaffirmed it.<sup>75</sup> Furthermore, because the First Amendment is so robustly judicially enforced, the existing judicial consensus regarding its meaning should provide substantial protection for expressive freedom even if political support weakens. Free expression is an area where judicial review's counter-majoritarian power is real and important.

Nevertheless, in the longer term, changes in the intellectual climate, the character of cases that come before the Court, or the social and technological contexts in which disputes arise could push First Amendment doctrine in less absolutist directions. A major feature of our social and political context, moreover, is increasing partisan polarization and distrust. This context could (and should, in my view) push each side to recognize the value of mutual toleration of opposing viewpoints, yet it may also drive each side towards increasingly intolerant and repressive attitudes.<sup>76</sup>

We may already be seeing a sort of downward spiral with respect to First Amendment freedoms protected by norms and conventions rather than judicial doctrine. Among other examples, apparent declining expectations of public disclosure and press questioning for presidents and presidential candidates, disruption of controversial speakers on college campuses, threats to

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<sup>73</sup> See, e.g., Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1917–18 (2016) (criticizing emerging First Amendment challenges to economic regulations); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1399–1400 (2017) (arguing that an emerging “libertarian” free speech jurisprudence gives undue protection to corporate expression).

<sup>74</sup> Schauer, *supra* note 72, at 1635 (“When the coverage of the First Amendment expands . . . there is an increased possibility that, out of necessity, some of the existing doctrinal tools developed for a smaller area of coverage will have to be modified, possibly with unfortunate consequences.”).

<sup>75</sup> See *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (plurality opinion) (invalidating registration restrictions for trademarks considered disparaging); *id.* at 1765 (Kennedy, J., concurring) (supporting the same result).

<sup>76</sup> For an account of increasing partisan polarization generally, see NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY & UNEQUAL RICHES* (2d ed. 2016).

private communication from surveillance and data collection,<sup>77</sup> and President Trump's illiberal campaign rhetoric may all suggest declining commitment to the First Amendment outside of courts. In this modest Article, though, I will just highlight three areas where a process of reciprocal degradation could conceivably take hold within judicial doctrine itself, even if that possibility still appears unlikely. As noted earlier, I have selected the three areas I address here—fake news, hate speech, and terrorism—because they fall along arguable pressure points in the case law, places where at least incremental adjustments in the degree of First Amendment protection seem possible, and maybe even desirable in the abstract. I have also picked them because they are hard problems. Threats from propagandistic manipulation, hateful advocacy, and terrorist violence are real; they may well be getting worse; and the burdens they impose are not necessarily distributed evenly across our society. How to address them thoughtfully in a manner consistent with our constitutional traditions and the requirements of personal security and public order are issues that require much greater thought and attention—an enterprise to which this symposium contributed.

The only theme I want to explore here is how addressing these problems as a matter of First Amendment doctrine could intersect in unfortunate ways with our current polarized political environment. Whatever their faults, the great virtue of current narrow definitions of applicable First Amendment exceptions is the clarity of the rule they enforce. By protecting overheated and exaggerated rhetoric on all sides, current doctrine cuts off risks of discriminatory enforcement that otherwise could be quite pronounced amid current partisan dynamics. It also may prevent a certain downward spiral, in which weakening the rule of broad expressive freedom along any one dimension produces greater pressure to weaken it along others. Though these concerns are admittedly quite speculative and uncertain, I will elaborate them briefly here by addressing each problem in turn and then reflecting on the broader dynamics.

#### A. *Enlightenment Protections Without Enlightenment Minds*

A first possible threat to the current First Amendment absolutism is the recent apparent success of manifest falsehoods—“fake news”—in manipulating voters' beliefs during the 2016 campaign. This new and troubling development, which is largely a function of new internet technologies and social media, presents both a long-term intellectual risk and a more immediate practical concern regarding expressive freedom.<sup>78</sup>

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<sup>77</sup> On this concern, see generally Ronald J. Krotoszynski, Jr., *Reconciling Privacy and Speech in the Era of Big Data: A Comparative Legal Analysis*, 56 WM. & MARY L. REV. 1279 (2015).

<sup>78</sup> For an overview of social media technology's role in the 2016 presidential campaign, see Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63, 64–69 (2017).



To start with the intellectual risk, continued success of internet propaganda in shaping beliefs could easily induce widespread corrosive cynicism about the value of free expression. One classic justification for free speech has always been a notion that open debate will enable truth and justice to prevail. Though recognizing that truth will not necessarily gain immediate acceptance, John Stuart Mill famously argued in *On Liberty* that “collision with error” may produce a “clearer perception and livelier impression of truth” and that

when an opinion is true, it may be extinguished once, twice, or many times, but in the course of ages there will generally be found persons to rediscover it, until some one of its reappearances falls on a time when from favourable circumstances it escapes persecution until it has made such head as to withstand all subsequent attempts to suppress it.<sup>79</sup>

Two centuries earlier, the poet John Milton put the point still more emphatically. “Let [Truth] and Falshood grapple,” Milton argued in a classic defense of free expression; “who ever knew Truth put to the wors, in a free and open encounter?”<sup>80</sup>

These assertions, which the Supreme Court invoked in a key free speech decision,<sup>81</sup> reflect a certain Enlightenment optimism that underlies important features of our institutions, the First Amendment included. If people are only given freedom to make their own choices, determine their own beliefs, and govern themselves, then over time government policy will converge around desirable outcomes rooted in sound empirical judgments.<sup>82</sup>

But it turns out we have Enlightenment institutions without Enlightenment minds. Open debate may well be a necessary precondition for truth’s emergence, but it is hardly sufficient; human beings’ views are often governed by considerations of interest, emotion, and cognitive bias rather than objective rationality. We now have the benefit of whole literatures demonstrating this point. Even apart from longstanding romantic, theological, and materialist critiques of human rationality, psychological and behavioral economics research has demonstrated our minds’ fallibility in rich detail,<sup>83</sup> while political scientists

<sup>79</sup> JOHN STUART MILL, *ON LIBERTY* 33, 54 (London, John W. Parker & Son 1859).

<sup>80</sup> JOHN MILTON, *AREOPAGITICA* 35 (1644).

<sup>81</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964).

<sup>82</sup> *Cf.* MILL, *supra* note 79 (“As mankind improve, the number of doctrines which are no longer disputed or doubted will be constantly on the increase: and the well-being of mankind may almost be measured by the number and gravity of the truths which have reached the point of being uncontested.”). *But see* HAIMAN, *supra* note 39, at 7 (arguing, with reference to Mill, that “a free and unfettered marketplace of ideas is the best way to conduct a search for truth—not because truth will always prevail over falsehood . . . but because there is ordinarily a better chance of approximating truth when ideas are challenged by competing ideas than when they are dogmatically asserted and accepted”).

<sup>83</sup> For general accounts of this body of research, see, for example, DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011); CASS R. SUNSTEIN, *REPUBLIC.COM 2.0* (2007); RICHARD H. THALER, *MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS* (2015).

have shown how emotional attachments and group identities frequently override rational policy assessment in determining voting behavior.<sup>84</sup>

Partisan polarization, moreover, appears to make these problems considerably worse. As a result of so-called “confirmation bias”—peoples’ tendency to attend to assertions that confirm existing beliefs and discredit those that do not—voters’ perception of even basic facts often gets filtered through the distorting lenses of partisan attachment and suspicion of the other side’s good faith.<sup>85</sup> At the same time, new technologies such as the internet, social media, and cable news today enable citizens to inhabit information worlds shaped predominantly by their partisan preconceptions. In the internet context, moreover, deceptive or manipulative communications may be targeted specifically at narrow groups considered likely to be receptive, and the communications may not even be visible to outsiders (and thus subject to rebuttal) unless they are shared beyond the targeted circle of like-minded individuals.<sup>86</sup>

The 2016 election cycle offered vivid evidence of these problems. The build-up to the election witnessed an extraordinary profusion of fake news reports, particularly on social media.<sup>87</sup> Many demonstrably untrue stories, some apparently manufactured and distributed by hostile actors overseas, took on a life of their own as social media sharing and computerized news-feeds diffused such stories uncritically through networks of like-minded individuals.<sup>88</sup> What precise impact such “fake news” stories had is unclear; some

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<sup>84</sup> See CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* 232–38 (2016) (canvassing literature on this point).

<sup>85</sup> See *id.* at 267–84, 294–96.

<sup>86</sup> See, e.g., Philip Bump, *The Investigation Goes Digital: Did Someone Point Russia to Specific Online Targets?*, WASH. POST (July 12, 2017), [https://www.washingtonpost.com/news/politics/wp/2017/07/12/the-investigation-goes-digital-did-someone-point-russia-to-specific-online-targets/?utm\\_term=.7c503b345469](https://www.washingtonpost.com/news/politics/wp/2017/07/12/the-investigation-goes-digital-did-someone-point-russia-to-specific-online-targets/?utm_term=.7c503b345469) (discussing targeted advertisements used by the Trump presidential campaign in 2016).

<sup>87</sup> For general discussion of these developments, see Persily, *supra* note 78, at 67–71.

<sup>88</sup> *Id.* at 68; see also, e.g., Amit Chowdhry, *Facebook Launches a New Tool that Combats Fake News*, FORBES (Mar. 5, 2017, 5:34 PM), <https://www.forbes.com/sites/amitchowdhry/2017/03/05/facebook-fake-news-tool/#5e5bcb1e7ec1> (describing measures adopted by Facebook and Google to address the spread of false news stories during the 2016 election); Olivia Solon, *Facebook Staff Mount Secret Push to Tackle Fake News, Reports Say*, GUARDIAN (Nov. 14, 2016, 8:29 PM), <https://www.theguardian.com/technology/2016/nov/14/facebook-fake-news-us-election-news-feed-algorithm> (describing Facebook’s use of an “an algorithm that subsequently trended several fake stories”); Olivia Solon, *In Firing Human Editors, Facebook Has Lost the Fight Against Fake News*, GUARDIAN (Aug. 29, 2016, 4:28 PM), <https://www.theguardian.com/technology/2016/aug/29/facebook-trending-news-editors-fake-news-stories> (discussing Facebook’s firing of human news editors in 2016 and suggesting that because “Facebook’s algorithm . . . decides which content people see in their news feeds, it is arguably irresponsible for the company to allow misinformation to spread unfettered when it is now so influential in the daily distribution of news”); Laura Sydell, *We Tracked Down a Fake-News Creator in the Suburbs. Here’s What We Learned*, NPR (Nov. 23, 2016, 3:31 PM), <http://www.npr.org/sections/alltechconsidered/2016/11/23/503146770/npr-finds-the-head-of-a-covert-fake-news-operation-in-the-suburbs> (describing the production and spread of false news stories).

analysis suggests it was limited.<sup>89</sup> Yet the problem may get worse. New technology already enables production of manufactured conversations with real peoples' voices, and such fake recordings will likely soon be indistinguishable from the real thing.<sup>90</sup> Soon the answer to the Marx Brothers' famous question, "who are you going to believe, me or your own eyes?," may no longer be obvious.<sup>91</sup> Objective validation of information may be more important than ever, yet at the same time public trust in traditional mediating institutions like newspapers that could vet and verify claims is declining.<sup>92</sup>

What is more, false claims in the 2016 cycle proved remarkably impervious to debunking. The most salient falsehood suffices to illustrate this point. Donald Trump, who of course ultimately won the presidency, rose to political prominence by ostentatiously associating himself with the "birther" movement that questioned whether President Barack Obama was born in the United States.<sup>93</sup> He was (and even if he wasn't, his right to citizenship from birth by virtue of his mother's citizenship would have made him a "natural born citizen" eligible for the presidency).<sup>94</sup> But it didn't matter. To this day, and even though Trump ultimately disclaimed the birther myth when it became politically inconvenient, polls suggest that more than a quarter of Americans believe Obama was definitely or probably born outside the United States.<sup>95</sup> A political environment in which this outcome is possible is not one in which we can be confident that truth will come out ahead "in a free and open encounter."<sup>96</sup>

In my view, the human fallibility demonstrated by such examples does nothing to undermine the Supreme Court's broad construction of First

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<sup>89</sup> See Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSPECTIVES 211, 232 (2017) (questioning whether fake news had a meaningful impact on the 2016 election). For some critical commentary on this study, see Persily, *supra* note 78, at 69–70.

<sup>90</sup> See Natasha Lomas, *Lyrebird Is a Voice Mimic for the Fake News Era*, TECHCRUNCH (Apr. 25, 2017), <https://techcrunch.com/2017/04/25/lyrebird-is-a-voice-mimic-for-the-fake-news-era/> (indicating that computerized voice mimicking that is "indistinguishable from the real thing" will be possible "in a matter of years" (internal quotation marks omitted) (quoting Alexandre de Brébisson)).

<sup>91</sup> DUCK SOUP (Paramount Productions 1933).

<sup>92</sup> Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP (Sept. 14, 2016), <http://www.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx>.

<sup>93</sup> For one account of this sorry episode in the midst of the campaign, see David A. Graham, *An Unrepentant Trump Finally Acknowledges Obama as American*, ATLANTIC (Sept. 16, 2016), <https://www.theatlantic.com/politics/archive/2016/09/trump-birther/500327> (describing how "Trump spent five years fanning the racist conspiracy theory" that Obama was not born in the United States).

<sup>94</sup> Paul Clement & Neal Katyal, *On the Meaning of "Natural Born Citizen,"* 128 HARV. L. REV. FORUM 161, 161 (2015) (indicating the phrase "natural born citizen" means "someone who was a U.S. citizen at birth with no need to go through a naturalization proceeding at some later time").

<sup>95</sup> THE ECONOMIST/YOUGOV POLL, 2016, at 58 tbl. 50 (2016), [https://d25d2506sfb94s.cloudfront.net/cumulus\\_uploads/document/ljv2ohxzmj/econTabReport.pdf](https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/ljv2ohxzmj/econTabReport.pdf).

<sup>96</sup> MILTON, *supra* note 80, at 35.

Amendment freedoms. On the contrary, it shows only that the truth-will-prevail theory, though invoked in some key First Amendment decisions,<sup>97</sup> was never adequate to justify the doctrine's basic features. Broad expressive freedom is better understood as a vital underpinning of popular sovereignty. If the government must answer to the people, and not vice versa, then the people must remain free to formulate views, however misguided, that challenge government orthodoxy. Indeed, some have argued that deep suspicion of government—a fear that government officials themselves may misjudge public interests and seek to distort public opinion—provides the most cogent rationale for the reigning free speech absolutism.<sup>98</sup> From that point of view, human vulnerability to deception and propaganda may only make it more imperative to keep the channels of communication open to competing viewpoints. The best statements of free speech absolutism have always recognized as much.<sup>99</sup>

Nevertheless, popular acceptance of the Supreme Court's free speech absolutism could yield to corrosive cynicism if the problem of fake news and deliberate falsehood grows worse. Simply put, if significant elements of the electorate—on whichever side—perceive truth as consistently losing in open debate, expressive freedom may lose some of its luster, and people might then develop less tolerant attitudes towards expression of views they perceive as untrue. Polarization, moreover, may compound this problem: Americans'

<sup>97</sup> See, e.g., *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984) (“[I]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . .” (internal quotation marks omitted) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969))).

<sup>98</sup> See, e.g., Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 2 (1989) (“Not only the first amendment, but also the very idea of a principle of freedom of speech, is an embodiment of a risk-averse distrust of decisionmakers.”); cf. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985) (arguing that “in adjudicating first amendment disputes and fashioning first amendment doctrines, courts ought to adopt what might be termed the pathological perspective,” meaning that “the overriding objective at all times should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically”); Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 3 (2008) (advocating constitutional protection for some false statements based on an understanding that “the First Amendment is not, in the end, primarily about protecting the individual’s right to speak; rather, the First Amendment is primarily about constraining the collective authority of temporary political majorities to exercise their power by determining for everyone what is true and false, as well as what is right and wrong”).

<sup>99</sup> The classic statement of this view, expressed with trademark fatalism, is from Justice Holmes’s dissent in *Gitlow v. New York*:

Every idea is an incitement. . . . Eloquence may set fire to reason. But . . . [i]f in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

268 U.S. 652, 673 (1925) (Holmes, J., dissenting); see also, e.g., *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985) (“[T]he Constitution does not make the dominance of truth a necessary condition of freedom of speech.”), *aff’d mem.*, 475 U.S. 1001 (1986).

increasing tribalism and resulting imperviousness to persuasion may discourage efforts at reasoned persuasion in the first place. Such intolerance, in time, could then legitimate efforts to more actively manage public opinion in the name of truth, thus eroding consensus support for the Supreme Court's robust neutrality between good and bad ideas.

A more hopeful alternative, of course, is that the public will gradually inoculate itself against online manipulation, much as it eventually did with respect to earlier forms of propaganda. As we adjust to a new world in which truth is less apparent on the face of things, new antibodies may develop in the body politic. The public may grow more skeptical, and thus less gullible; new intermediaries and objective measures of validity may emerge as well.

In the meantime, though, proposals to regulate political falsehoods might well gain greater traction, and perhaps even a sympathetic audience among some judges. Some new regulations in the internet context might even be prudent. Given their effective functioning as public forums rather than private advocates, some evenhanded regulation of social media platforms might be consistent with First Amendment principles. Likewise, some form of disclosure requirement for micro-targeted advertising, so as to facilitate its exposure and rebuttal, might be justifiable, and so might some general restrictions on particular deceptive techniques, such as use of the new voice-simulation technology to manufacture fake recordings, or swapping of photos from other contexts into fake stories about current events. Finally, speech by hostile overseas actors need not necessarily receive the same protection afforded to citizens and domestic speakers.

Yet going beyond such measures and restricting political falsehoods more generally, though an option current case law does not entirely rule out,<sup>100</sup> might well open the door to selective repression of the false assertions those in power at any given time perceive to be most damaging.<sup>101</sup> To be blunt about

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<sup>100</sup> Compare *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (plurality opinion) (“Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition.”), *with id.* at 732 (Breyer, J., concurring) (“The dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts that do not concern such subject matter. Such false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas.”), and *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (“Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements.” (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974))).

<sup>101</sup> Cf. *Alvarez*, 567 U.S. at 723 (plurality opinion) (“The mere potential for the exercise of [censorial power over false statements] casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.”); *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002) (noting that “while false statements may be unprotected for their own sake, “[t]he First Amendment requires that we protect some falsehood in order to protect *speech that matters*” (alteration in original) (quoting *Gertz*, 418 U.S. at 341)); *Susan B. Anthony List v. Driehaus*,

it, a free-floating power to restrict political assertions because they are false may well be attractive to those dismayed by a gullible electorate, but it is not a power we can entrust to a government we now know may be led by a President willing to selectively disparage even honest and legitimate criticism as “fake news.”

### B. *Hate’s New Disinhibition*

A second threat to expressive freedom emerging out of the recent election involves the apparent ongoing “disinhibition” of hateful expression.<sup>102</sup> Whatever his own views on race and religion, unabashedly bigoted, anti-Semitic, and anti-Islamic “alt-right” and “white nationalist” groups embraced President Trump as their own.<sup>103</sup> One consequence was reemergence into public debate of openly racist views, not only online in various forms, but also in public demonstrations.<sup>104</sup> Meanwhile, high-profile acts of hate-motivated vandalism and violence following the election have stoked fears that this rising invective may have tangible consequences.<sup>105</sup> Combining the two trends, a recent white nationalist demonstration in Charlottesville, Virginia led to a terroristic attack on counter-protesters that killed one individual and injured others.<sup>106</sup>

Racism, anti-Semitism, and the like are obviously not new to the United States, and much as with fake news, the real impact of these developments remains unclear. Some have suggested it is better to have hateful views out

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814 F.3d 466, 474–76 (6th Cir. 2016) (invalidating under strict scrutiny a state law restricting certain election-related false statements); 281 Care Comm. v. Arneson, 766 F.3d 774, 785 (8th Cir. 2014) (same). For an argument that some narrow restrictions on false election-related speech may remain permissible under *Alvarez*, see Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 56–57 (2013).

<sup>102</sup> The source of this phrase appears to be John Marshall, *The Great Disinhibition*, TALKING POINTS MEMO (Nov. 18, 2016, 10:57 PM), <http://talkingpointsmemo.com/edblog/the-great-disinhibition>.

<sup>103</sup> See, e.g., Graeme Wood, *His Kampf*, ATLANTIC, June 2017, at 40, 43, 51 (discussing “alt-right” leader Richard Spencer’s support for Trump’s candidacy); Sarah Posner & David Neiwert, *How Trump Took Hate Groups Mainstream*, MOTHER JONES (Oct. 14, 2016, 10:00 AM), <http://www.motherjones.com/politics/2016/10/donald-trump-hate-groups-neo-nazi-white-supremacist-racism> (noting online approval of Trump by neo-Nazi, anti-Semitic, anti-immigrant, and white nationalist websites).

<sup>104</sup> See, e.g., *White Supremacy: Are US Right-Wing Groups on the Rise?*, BBC NEWS (Aug. 13, 2017), <http://www.bbc.com/news/world-us-canada-40915356> (assessing the strength of far-right groups and discussing their online activity and public rally in Charlottesville, Virginia).

<sup>105</sup> See, e.g., G. Reginald Daniel & Jasmine Kelekay, *From Loving v. Virginia to Barack Obama: The Symbolic Tie that Binds*, 50 CREIGHTON L. REV. 641, 663–65 (2017) (listing “bomb threats to Jewish community centers and synagogues across the nation,” the burning of mosques, and requests “for the genocide of liberals and deportation of Jewish people” as results of Trump’s political ascent).

<sup>106</sup> Joe Heim, Ellie Silverman, T. Rees Shapiro & Emma Brown, *One Dead as Car Strikes Crowds Amid Protests of White Nationalist Gathering in Charlottesville; Two Police Die in Helicopter Crash*, WASH. POST (Aug. 13, 2017), [https://www.washingtonpost.com/local/fights-in-advance-of-saturday-protest-in-charlottesville/2017/08/12/155fb636-7f13-11e7-83c7-5bd5460f0d7e\\_story.html?utm\\_term=.7df3bc9a2f83](https://www.washingtonpost.com/local/fights-in-advance-of-saturday-protest-in-charlottesville/2017/08/12/155fb636-7f13-11e7-83c7-5bd5460f0d7e_story.html?utm_term=.7df3bc9a2f83).

in the open than swept under the rug.<sup>107</sup> Furthermore, important efforts are being made to return hate groups to the fringes where they belong.<sup>108</sup> Only time will tell whether we are witnessing a real retrogression in public attitudes or only an atavistic spasm that will recede as quickly as it arose.

Again as with fake news, though, perceptions may be at least as important as realities. Simply put, if people feel menaced by hate groups, they will be less willing to brush off expression of threatening ideas. Already, serious arguments exist for withdrawing First Amendment protection from some narrow category of hate speech, as indeed is done in other western democracies and once appeared to be the law in the United States.<sup>109</sup> Such arguments may well gain momentum if the problem of hateful expression grows more salient and direct prohibitions on hate-motivated violence or discrimination are perceived as ineffective means of combatting it. At the same time, continued political success of figures lauded by bigoted groups could heighten calls for counter-majoritarian constitutional protection against their hateful advocacy.

More immediately, at any rate, hard cases might well generate pressure for incremental expansion of existing standards for unprotected threats and incitement. Although the Supreme Court has narrowly defined the standard for “true threats,” the standard’s application badly divided the Supreme Court in its last major threats case.<sup>110</sup> Some lower court opinions, moreover, have controversially applied the standard to allow suppression of violent online advocacy.<sup>111</sup> For its part, the *Brandenburg* incitement test, though designed to tightly constrain the domain of unprotected subversive advocacy,

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107 See, e.g., LEWIS, *supra* note 43, at 162 (“One of the arguments for allowing hateful speech is that it makes the rest of us aware of terrible beliefs and strengthens our resolve to combat them.”).

108 See, e.g., Arnel Hecimovic, *Anti-Racist Rallies Across the United States—In Pictures*, GUARDIAN (Aug. 14, 2017), <https://www.theguardian.com/us-news/gallery/2017/aug/14/anti-racist-rallies-across-the-united-states-in-pictures> (reporting rallies responding to the white supremacist demonstration in Charlottesville).

109 See, e.g., JEREMY WALDRON, *THE HARM IN HATE SPEECH* 3–6 (2012) (arguing against the protection of hate speech).

110 In *Virginia v. Black*, one majority on the Court held that a burning cross could constitute an unprotected “true threat,” while a different majority nonetheless invalidated a statutory provision treating cross burnings as prima facie evidence of intent to intimidate. See 538 U.S. 343, 360 (2003) (“Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so.”); *id.* at 365 (plurality opinion) (holding that the prima facie provision “would create an unacceptable risk of the suppression of ideas” because “[t]he act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation” or “only that the person is engaged in core political speech” (internal quotation marks and citations omitted)); *id.* at 386 (Souter, J., concurring) (“To the extent the prima facie evidence provision skews prosecutions, then, it skews the statute toward suppressing ideas.”). More recently, in *Elonis v. United States*, the Court reversed a conviction under a federal threats statute where the speaker’s intent was ambiguous, but the Court did so on statutory grounds without reaching First Amendment issues. 135 S. Ct. 2001, 2004, 2007–12 (2015).

111 See, e.g., *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1062–63 (9th Cir. 2002) (en banc) (upholding a damages judgment and injunction against a

could conceivably expand in application to cover more hateful invective if such advocacy's effects come to seem more immediate. As discussed below, in the terrorism context the Supreme Court may have already opened a doctrinal pathway for an end run around *Brandenburg* altogether when risks of violence appear grave enough.<sup>112</sup>

Again, how best to design the doctrine in these areas as a matter of first principles is not my topic here. Nevertheless, the history highlighted earlier should make clear that weakening existing near-absolute protection for expression of ideas could carry perils for minorities and dissidents of all stripes, not just retrograde white supremacists. Unambiguous protection for bigoted expression arose during a period when it served the evident corollary function of shielding civil rights advocates from bigoted government repression. To the extent we are indeed undergoing a revival of prejudice—a period in which perceived white grievances have gained new political traction, and officials of different parties may have quite distinct intuitions about what advocacy is most threatening and offensive—that protection may be more important than it has been as well.<sup>113</sup>

### C. *The Terrorism Problem*

A last source of pressure for change could come from the ongoing threat of ideological terrorism and political violence. As the September 11 attacks and the many incidents here and abroad since then demonstrate, the United States and other western democracies face a persistent terrorist threat from groups and individuals motivated by radical jihadist beliefs. At the same time, newly emboldened anti-government militias and domestic terrorist groups could pose new threats to public safety as well,<sup>114</sup> and recent incidents, including violence at public demonstrations and a politically-motivated murderous assault on Republican members of Congress and their staff, raise fears that the rising tensions in our divided polity could yield a new season of political violence.<sup>115</sup>

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pro-life website that listed abortion providers and crossed out the names of those who had been murdered); *id.* at 1089–92 (Kozinski, J., dissenting) (faulting the majority for ignoring the narrow limits on the standard for true threats).

<sup>112</sup> See *infra* Part III.C.

<sup>113</sup> If this concern seems abstract, consider that a leaked recent FBI intelligence report identifies a putative movement of “black identity extremists” as a significant threat to law enforcement. Jana Winter & Sharon Weinberger, *The FBI's New U.S. Terrorist Threat: 'Black Identity Extremists,'* FOREIGN POLY (Oct. 6, 2017, 11:42 AM), <http://foreignpolicy.com/2017/10/06/the-fbi-has-identified-a-new-domestic-terrorist-threat-and-its-black-identity-extremists/>.

<sup>114</sup> See Jared A. Goldstein, *To Kill and Die for the Constitution: Nullification and Insurrectionary Violence*, in NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT 179, 209–10, 215–20 (Sanford Levinson ed., 2016) (discussing anti-government groups' violent ideology and growing strength).

<sup>115</sup> See Peter Beinart, *The Rise of the Violent Left*, ATLANTIC, Sept. 2017, at 13–15 (describing the violent



Terrorism and political violence, sadly, are also not new problems. What makes them noteworthy here is that they are ideologically motivated. As a result, restricting advocacy may appear to be a congenial solution to the violence itself, particularly if attacks prove difficult or impossible to prevent. Already, other western countries proscribe broader categories of incendiary speech than our Supreme Court's *Brandenburg* test allows.<sup>116</sup> Even our Supreme Court, moreover, recently opened up a possible pathway to upholding speech-restrictive anti-terrorism laws without confronting *Brandenburg* head on. In *Holder v. Humanitarian Law Project*, the Court held that a federal law could validly prohibit providing "material support" (which the Court assumed could include advice and expert assistance) to designated foreign terrorist groups, even for non-terrorist purposes of the organization.<sup>117</sup> The Court reached this result, however, not by applying any First Amendment exception or even by characterizing the regulated support as a form of "conduct," but instead by applying the "more demanding standard" applicable to laws that "regulate[] speech on the basis of its content" and yet still deferring to Congress's judgment that the law was necessary to achieve compelling anti-terrorism purposes.<sup>118</sup>

As Eugene Volokh has argued, this type of strict-scrutiny end run around the categorical exceptions is a potential Achilles' heel to those categories' narrow definitions.<sup>119</sup> Preventing violent crime is a government purpose of the highest order, and it is not always obvious that punishing such crimes or their planning after the fact is a less restrictive means of preventing them than is limiting their advocacy or encouragement.<sup>120</sup> The *Brandenburg* test's doctrinal function is thus not only to limit the domain of unprotected incitement, but also to cut off arguments that restricting political advocacy outside the test's narrow bounds may be justified under strict scrutiny.<sup>121</sup> *Humanitarian*

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"Antifa" movement committed to countering right-wing protest activities); Peter Hermann, Amber Phillips, Paul Kane & Rachel Weiner, *Lawmaker Steve Scalise is Critically Injured in GOP Baseball Shooting; Gunman James T. Hodgkinson is Killed by Police*, WASH. POST (June 14, 2017), [https://www.washingtonpost.com/local/public-safety/multiple-people-injured-after-shooting-in-alexandria/2017/06/14/0289c768-50f6-11e7-be25-3a519335381c\\_story.html?utm\\_term=.6fcada4035ae](https://www.washingtonpost.com/local/public-safety/multiple-people-injured-after-shooting-in-alexandria/2017/06/14/0289c768-50f6-11e7-be25-3a519335381c_story.html?utm_term=.6fcada4035ae) (recounting the shooting of Republican congressmen by "[a] man angry with President Trump").

<sup>116</sup> See, e.g., Steven G. Gey, *Free Speech and the Incitement of Violence or Unlawful Behavior: Statutes Directed at Speech*, in GLOBAL PERSPECTIVES ON CONSTITUTIONAL LAW 146, 156–61, 164–65 (Vikram David Amar & Mark V. Tushnet eds., 2009) (describing European and British law on incitement and comparing it with that of the United States).

<sup>117</sup> 561 U.S. 1, 39–40 (2010).

<sup>118</sup> *Id.* at 27–28, 35–36, 39–40 (quoting *Texas v. Johnson*, 491 U.S. 397, 403 (1989)).

<sup>119</sup> Eugene Volokh, Essay, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2441, 2444 (1996).

<sup>120</sup> *Id.* at 2436.

<sup>121</sup> *Id.* at 2445; cf. Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WISC. L. REV. 115, 206 (characterizing *Brandenburg's* "concrete definition of harm and imposition of causation requirements" as designed to "make[] evasion more difficult and force[] jurists to take a sober second look at their thought processes before coming to a conclusion" (footnote omitted) (citing

*Law Project* could prove significant if it has cracked open the door to this type of defense for anti-terrorism legislation targeting speech or speech-related activities. *Humanitarian Law Project*, to be sure, was a peculiar case. Infused with concerns about congressional foreign affairs powers that are normally absent in domestic disputes, the decision need not be read broadly.<sup>122</sup> But if terrorism fears find a political outlet in more repressive domestic counter-terrorism legislation, the government is sure to push an expansive reading of *Humanitarian Law Project* in defending the statute.<sup>123</sup>

As with other topics addressed earlier, my main objective here is not to take any firm view on the correct standard for unprotected incitement.<sup>124</sup> As a matter of first principles, balancing expressive freedom against imperatives of personal and government security may be a hard problem, one that requires different standards in different societal contexts. As with fake news and hate speech, however, weakening First Amendment protections in the current partisan context could easily send us skidding down a quite slippery slope. Overheated rhetoric is endemic to the filter-bubbles and echo-chambers of the internet. Sorting fits of pique from genuine threats is already a challenge for law enforcement, one that could only be complicated by forcing expression of extreme opinion deeper underground.<sup>125</sup> At any rate, if we open the door to punishing the advocacy itself without any tight standard of immediacy such as *Brandenburg*'s, there may well be targets enough to go around—and state and federal prosecutors with different political inclinations could find themselves competing to root out each side's angriest elements.<sup>126</sup> At the least, historical experience under the Supreme Court's more permissive pre-*Brandenburg* "clear and present danger" test suggests that even

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Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMP. L. REV. 1, 47 (2003)).

<sup>122</sup> See *Humanitarian Law Project*, 561 U.S. at 35 (emphasizing that "[i]n this litigation," unlike domestic free speech precedents, "Congress and the Executive are uniquely positioned to make principled distinctions between activities that will further terrorist conduct and undermine United States foreign policy, and those that will not"). For a narrow interpretation and defense of the decision, see Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 670–75, 697–707 (2017). For a critique that advocates confining the case to its facts, see David Cole, *The First Amendment's Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147, 149–50 (2012).

<sup>123</sup> See *Humanitarian Law Project*, 561 U.S. at 62 (Breyer, J., dissenting) (faulting the majority for "fail[ing] to examine the Government's justifications with sufficient care").

<sup>124</sup> For a thoughtful recent discussion of restrictions on online terrorist advocacy that current case law might allow, see Tsesis, *supra* note 122, at 664, 667, 670, 684, 692.

<sup>125</sup> See, e.g., David Gray et. al, *Fighting Cybercrime After United States v. Jones*, 103 J. CRIM. L. & CRIMINOLOGY 745, 788 (2013) ("Cyberharassment is a widespread and growing challenge for law enforcement in the United States.").

<sup>126</sup> Again, as one illustration of the sorts of advocacy that some might seek to prosecute, consider the FBI's recent identification of "black identity extremists" as a significant public safety threat. See Winter & Weinberger, *supra* note 113.

fairly mild forms of anti-government protest could be targeted for repression in an environment of public fear and military mobilization.<sup>127</sup>

#### D. Corrosive Political Dynamics and Doctrinal Downward Spirals

In each of these areas, then, societal pressure for greater speech restriction could conceivably find a doctrinal outlet, yet in each case doing so could conceivably backfire on some groups most inclined at present to advocate it. However worthy the goal, if we begin attempting to cleanse public debate of falsity, hatred, and illiberalism, there will be defendants enough to go around, and the targets of repression might often turn as much on the political affinities of the prosecutor as on the real dangerousness of the speech in question.

A last concern to consider, moreover, is that doctrinal evolution along any of these fronts could increase pressure for movement along the others as well. Though there is room for partisan application within each category, the topics I highlighted have rough political valences, at least in the immediate political context. As a rough generalization, fake news and media fragmentation is at present a predominantly liberal concern, and regulating hate speech likewise appeals mostly to progressive groups; on the other hand, although terrorism is certainly a bipartisan fear, conservatives at present appear most likely to advocate harsh additional legal measures, at least with respect to jihadist groups.<sup>128</sup> This context could magnify the dynamics already noted. Eugene Volokh has noted the psychological phenomenon of “censorship envy”: repression of speech others fear can promote arguments that, out of fairness, speech one fears oneself should likewise be repressed.<sup>129</sup> As a political matter, that seems likely in the contexts addressed here: regulating left-wing radicalism would make it harder to justify tolerating right-wing radicalism (and vice versa).

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<sup>127</sup> See, e.g., STONE, *supra* note 43, at 208–11 (discussing the Supreme Court’s speech-restrictive understanding of the test during the World War I period); see also *id.* at 13 (noting a general historical pattern of going “too far in sacrificing civil liberties—especially the freedom of speech”—during periods of national-security emergency); Wells, *supra* note 121, at 119 (offering a case study of anti-communist prosecutions to “explore[] the psychological influences that may lead judges to succumb to fear and prejudice in times of crisis and, consequently, to abdicate their judicial role”).

<sup>128</sup> See, e.g., David M. Jackson, *Trump Advocates Waterboarding and ‘Much Worse’ to Battle Terrorists*, USA TODAY (June 29, 2016) <https://www.usatoday.com/story/news/politics/onpolitics/2016/06/29/donald-trump-istanbul-airport-attack-hillary-clinton/86504460/> (reporting “aggressive rhetoric” by then-candidate Donald Trump).

<sup>129</sup> Eugene Volokh, *Censorship Envy*, WASH. POST: VOLOKH CONSPIRACY (Jan. 16, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/16/censorship-envy/?ut-m\\_term=.8281d4d2248c](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/16/censorship-envy/?ut-m_term=.8281d4d2248c); see also Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1059–61 (2003) (describing “censorship envy,” which is what happens “when a free speech exception is created for one constituency” as opposed to another, and those “others may resent even more the absence of an exception for their own favored cause”).

Judges and justices should be less susceptible to this type of response than others. But the judiciary is sharply divided as well, and judges and justices from different parties may well share some differences in perception of relative dangerousness reflected in public opinion at large. As a result, self-reinforcing downward spirals could be possible in doctrinal evolution as well, possibly even without judges being aware of them. At the least, we have been through periods of constitutional retrogression before, most notably during the slow judicial abandonment of racial equality at the close of Reconstruction.<sup>130</sup>

Ever since it took hold several decades ago, our First Amendment absolutism has been largely self-reinforcing: it has promoted cases and arguments that further expand the First Amendment's coverage, building out an ever-more elaborate structure of expressive protections.<sup>131</sup> But the same sort of process could also work in reverse. Acute current problems, such as those I have highlighted here, could yield a set of cases and arguments in which familiar First Amendment platitudes stick in the throat. But if precedent moves in a less protective direction, and if we do not think carefully in advance about future lines of argument and principled responses to them, we might find several decades hence that not only the structure's outer emanations, but also the First Amendment bedrock itself is chipped and cracked in ways we scarcely anticipated when the process began.

#### CONCLUSION

Whatever its merits as a matter of first principles, our country's distinctive approach to expressive freedom has been a point of broad judicial consensus. In all likelihood, it will remain so. But in this fevered political season, it seems worth giving thought to the historical circumstances that generated this consensus and how current circumstances might cause it to erode.

As I have tried to sketch briefly here, current doctrine reflects a particular emphasis on neutrality between ideas that took hold during a period when civil rights protesters and other progressive groups were obvious prime beneficiaries of this understanding. Ever since, this absolutist approach has guaranteed freedom for radicals and dissidents of all stripes to express even dangerous and despicable ideas—and in doing so the doctrine has anchored an unambiguous protection for the rest of us to express our own views without fear of government repression. A central question today is how, if at all, this understanding should adapt to the new challenges of our time, including the three I have highlighted here: (1) new communications technologies and their

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<sup>130</sup> For recent analysis of this history, see generally PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 184–205 (2011); 2 G. EDWARD WHITE, *LAW IN AMERICAN HISTORY* 426–31, 491, 493–94 (2016).

<sup>131</sup> Schauer, *supra* note 72, at 1625–28.

power to propagate falsity as well as truth; (2) apparent reinvigoration of bigoted and hateful groups and ideas; and (3) ongoing threats of ideologically motivated terrorism and political violence.

These are all hard problems that will require thoughtful responses by courts, governments, and citizens in the years ahead. In this brief Article, I have tried only to highlight how the current partisan context may make certain speech-repressive solutions to these problems both more appealing than they have been in the past, but also potentially more perilous. In a sharply divided polity with deep differences over what speech is most threatening or offensive, any new equilibrium is unlikely to favor one side or the other unambiguously. Instead, weakening the current expansive approach will open doors for repressive forces on both sides to hunt their own preferred quarry.

We appear to be on a downward spiral in other areas of our political life. We should take care to avoid one here. In this season of dissent and distrust, the right to advocate any idea, however offensive, distasteful, or dangerous, remains an important underpinning of democratic self-government. It is a heritage we abandon at our peril.