



ESSAY

Priam's Folly: *United States v. Alvarez* and the Fake News Trojan Horse

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Introduction

2020 was a year of strain and reckoning in the United States. The COVID-19 pandemic, the continued growth of the Black Lives Matter movement, and the 2020 presidential election made for a tumultuous and uncertain year. An overarching similarity that impacted all three of these historical events was the continued proliferation of fake news.¹ Yet despite the harm to individuals, the movement for racial justice, public health, and our very democracy, fake news is largely protected under First Amendment doctrine. The most recent Supreme Court decision to address the protection of false statements was *United States v. Alvarez*² in 2012. In that case, the plurality, basing its decision on traditional free speech ideals, ruled that false statements are generally protected under the First Amendment.³ But the Court in *Alvarez* did not foresee the prodigious rise of socially damaging fake news, driven by the incentives and features of online media consumption. *Alvarez* was made for an older, truth-seeking United States; in post-truth America, it has posed a significant threat to individual safety and even democracy.

In Part I, this Essay discusses the *Alvarez* decision. Part II discusses the rise of fake news and how it squares with the traditional First Amendment justifications of the marketplace of ideas and counterspeech. Part III discusses three of the most egregious examples of fake news, exemplifying the damage

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1. See, e.g., Aoife Gallagher, *How Fake News Goes Viral: The Black Lives Matter Dallas Tape*, Institute for Strategic Dialogue (Oct. 16, 2020), <https://perma.cc/9JDP-Z48M>; Md Saiful Islam et al., *COVID-19-Related Infodemic and Its Impact on Public Health: A Global Social Media Analysis*, 103 AM. J. TROPICAL MED. & HYGIENE 1621, 1621-22, 1624, 1627 (2020); Marianna Spring, *The Deep Roots of Trump's "Voter Fraud" Strategy*, BBC NEWS (Nov. 22, 2020), <https://perma.cc/QX7Y-NJMJ>.

2. *United States v. Alvarez*, 567 U.S. 709 (2012).

3. *Id.* at 718, 729-30 (plurality opinion).

caused by the protection of false statements under *Alvarez*. Finally, Part IV concludes by looking to potential solutions to the fake news quagmire that has emerged in the years following *Alvarez*.

I. The Alvarez Decision

At his first meeting as a board member of the Claremont, California Three Valley Water District Board, Xavier Alvarez did what had become his habit: he lied.⁴ Alvarez introduced himself as a Congressional Medal of Honor awardee, a patently false statement.⁵ But unlike his previous lies, this one was a crime under the Stolen Valor Act of 2005.⁶ Facing prosecution, Alvarez admitted that he made the false statement but argued that the Stolen Valor Act was unconstitutional under the First Amendment.⁷ The Ninth Circuit ruled that the Act was unconstitutional,⁸ but a separate case in the Tenth Circuit ruled that it was constitutional,⁹ creating a circuit split.¹⁰ Alvarez's simple lie set up a monumental clash before the Supreme Court over the status of truth and deception under the First Amendment.

The case turned on the issue of whether false statements are protected under the First Amendment.¹¹ The government argued that, unlike speech that criticizes the Medal or the military in general, "false statements have no First Amendment value in themselves."¹² A plurality of the Court held that regulations of false statements, including the Stolen Valor Act, are content-based restrictions subject to strict scrutiny.¹³ Writing for the plurality, Justice Kennedy noted that constraints on the First Amendment have not been dictated by "relative social costs and benefits," and instead have been confined to a few "historic and traditional categories."¹⁴ Justice Kennedy's opinion applied strict scrutiny to the restrictions contained in the Stolen Valor Act, concluding that although the integrity of the military honors system is a compelling interest,¹⁵ the government failed to show that such a content-based restriction was actually necessary to protect this interest.¹⁶

4. *Id.* at 713-14.

5. *Id.* at 714.

6. *Id.* at 713-14.

7. *Id.* at 714.

8. *United States v. Alvarez*, 617 F.3d 1198, 1218 (9th Cir. 2010).

9. *United States v. Strandlof*, 667 F.3d 1146, 1170 (10th Cir. 2012).

10. *Alvarez*, 567 U.S. at 714.

11. *See id.* at 716.

12. *Id.*

13. *See id.* at 716-17.

14. *Id.* at 717 (citation and internal quotation marks omitted).

15. *Id.* at 724-25.

16. *Id.* at 725-28.

The plurality understood that if truly open and vigorous discussion is to take place, some false statements are inevitable.¹⁷ The government had cited earlier Supreme Court precedent stating that false statements are less valuable or valueless under the First Amendment, but those statements were made in cases concerning a legally cognizable harm, such as defamation or fraud.¹⁸ In *Alvarez*, the question was whether a law could target “falsity and nothing more.”¹⁹ The plurality held that it could not, concluding that there was no “general exception to the First Amendment for false statements.”²⁰ Justice Kennedy expressed alarm at how sweeping the Act was, with its bare restriction on all false statements regarding military honors regardless of the circumstances; a “clear limiting principle” was needed.²¹ The “interest in truthful discourse alone” was not sufficient to uphold a ban on speech, as it would create a chilling censorial power akin to that in George Orwell’s *Nineteen Eighty-Four*.²² Instead, Justice Kennedy reasoned that counterspeech in the marketplace of ideas would suffice to achieve the Act’s aim.²³ Indeed, he unequivocally stated that “[t]he remedy for speech that is false is speech that is true.”²⁴

But in his concurring opinion, Justice Breyer, joined by Justice Kagan, emphasized that a First Amendment question is frequently evaluated by “examin[ing] the fit between statutory ends and means.”²⁵ He advocated for applying a less stringent intermediate scrutiny standard to false statements, looking to whether the false statements could present dangers to society and whether their regulation would present a disproportional threat to free speech.²⁶ Justice Breyer reasoned that in weighing the ends and means of government regulations of false speech, the government would often have very good reasons to prohibit stating false facts, but that there was still a danger that such regulation could pose speech-related harms.²⁷ Intermediate scrutiny, he argued, strikes a better balance than the near-automatic condemnation of strict scrutiny or the near-automatic approval of rational basis review.²⁸ He remarked that other statutes had made false statements unlawful, but were more narrowly tailored than the Stolen Valor Act.²⁹ Indeed, Justice Breyer thought that the

17. *Id.* at 718.

18. *Id.* at 718-19.

19. *Id.* at 719.

20. *Id.* at 718.

21. *Id.* at 723.

22. *Id.*

23. *Id.* at 727.

24. *Id.* at 727.

25. *Id.* at 730 (Breyer, J., concurring in the judgment).

26. *See id.* at 731-32.

27. *Id.* at 732.

28. *Id.* at 731.

29. *Id.* at 734-36.

Stolen Valor Act could be constitutional if it not only required knowledge of falsity, but also narrowed the breadth of coverage.³⁰ Thus, in stark contrast to the plurality's more robust protection of false statements, the concurrence foresaw a future need to restrict false speech. It advocated for the less stringent test of intermediate scrutiny, which could better balance protecting free speech and limiting societal harm from false information under specific circumstances.

The dissent, in contrast, argued that the Stolen Valor Act met even a strict scrutiny standard. The Act's coverage was limited to objective facts, conviction required actual knowledge and proof beyond a reasonable doubt, and the Act was strictly viewpoint neutral.³¹ Justice Alito, joined in dissent by Justice Scalia and Justice Thomas, emphasized that the long-held First Amendment theory of counterspeech is a poor fit for remedying false information about military honors, as there is no comprehensive, authoritative database.³² Indeed, Justice Alito highlighted that false information could be spread by the media and increase confusion.³³ But Justice Alito went further than merely arguing that the Act passed strict scrutiny. His dissent also criticized false speech more robustly than the plurality or concurrence, stating that false statements like Alvarez's "served no valid purpose" and that Alvarez's brief is a "veritable paean to lying."³⁴ But the dissent pulled back from wanting to make all false speech unlawful, instead articulating a rule that First Amendment protections should not be available for false statements "unless their prohibition would chill other expression that falls within the Amendment's scope."³⁵

II. The Rise of Fake News and the Collapsing Marketplace

The Supreme Court decided *United States v. Alvarez* in 2012. By that time, the spreading of false information was hardly a new phenomenon, and the Internet was well established.³⁶ But two phenomena that were only nascent in 2012—profit models for fake news and media consumption bubbles—would soon grow to new heights and pose significant challenges to the United States and our idealistic conception of the marketplace of ideas.

The two traditional justifications for robust free speech in the United States are the marketplace of ideas and counterspeech. False information has

30. *Id.* at 737-38.

31. *Id.* at 739-40 (Alito, J., dissenting).

32. *Id.* at 745.

33. *Id.*

34. *Id.* at 750.

35. *Id.*

36. Joel Timmer, *Fighting Falsity: Fake News, Facebook, and the First Amendment*, 35 CARDOZO ARTS & ENT. L.J. 669, 672 (2017).

consistently been protected under the First Amendment on these grounds.³⁷ They originated in the first half of the twentieth century in the opinions of Justice Oliver Wendell Holmes, in *Abrams v. United States*, and Justice Louis Brandeis, in *Whitney v. California*.³⁸ In *Abrams*, Justice Holmes wrote that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”³⁹ Similarly in *Whitney*, Justice Brandeis stated that “the fitting remedy for evil counsels is good ones.”⁴⁰ Justice Brandeis supported this statement with the concept of counterspeech: That we must “expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”⁴¹ Despite Justice Holmes’s opinion in *Abrams* being a dissent and Justice Brandeis’s opinion in *Whitney* being a concurrence, the two concepts have become foundational First Amendment doctrine that have often been cited by the Supreme Court.⁴² In short, the marketplace of ideas is where all ideas and statements are circulated like currency or goods of trade, while counterspeech is the reaction to speech, resulting in a clash between ideas with the truth (ideally) winning out. This whole concept of the marketplace of ideas is premised on the assumptions that the marketplace can determine the truth and that it places a greater value on the truth than on false statements.⁴³ But the reality of truth and information in 2021 is a poor match for these two traditional justifications.

The rise of the Internet has led to the circulation of more false statements,⁴⁴ but more fake news in the atmosphere does not necessarily lead to serious problems if lively and open debates between Americans continue in the manner envisioned by existing First Amendment doctrine. The issue is how information is communicated over the Internet. The modern Internet uses artificial-intelligence systems to tailor what we see to the Internet’s preconceived notions about us. Media law scholar Nabiha Syed has identified five features of online

37. See Philip M. Napoli, *What if More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L.J. 55, 63-65 (2018).

38. Rodney A. Smolla, *The Meaning of the "Marketplace of Ideas" in First Amendment Law*, 24 COMM. L. & POL'Y 437, 437-38 (2019).

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

40. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

41. *Id.* at 377.

42. See, e.g., *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981) (“The Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas.”); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”).

43. Napoli, *supra* note 37, at 61.

44. See Timmer, *supra* note 36, at 674 (describing how fake news proliferated due to the easy access of every Internet user to vast online audiences).

media access that restrict the viewpoints to which consumers are exposed.⁴⁵ The first feature is filters, which operate both in an objective form—search terms returning best fit results—and a subjective form—algorithms matching results to our perceived preferences and prior online behaviors.⁴⁶ The second feature is digital communities, which allow groups of likeminded individuals to communicate among themselves, creating insular “echo chambers.”⁴⁷ Third, amplification is where more popular media sources picking up fringe stories through seeing them as newsworthy and then circulating them to a larger public.⁴⁸ Fourth, online news is shared at an incredible speed, both through automation software and human social media-sharing.⁴⁹ Fifth, online advertising has creative profit incentives that encourage clicks—and stories that require as little effort to create as possible.⁵⁰ These five features combine to narrow consumer exposure to diverse sources of information, creating media-consumption bubbles in which individuals are only interacting with likeminded people and media. If one’s bubble includes fake news, there is more likely to be an abundance of this false information in their online feed and a lack of countervailing truthful information.⁵¹

Media and public policy scholar Philip Napoli has concluded that the technological advances of the past twenty years have shattered the rational marketplace of ideas.⁵² Many of the dangerous trends he has identified are those identified by Syed. The rise of fake news as a profitable model and the decline of serious professional journalism have created an imbalance of information in the marketplace.⁵³ The open access nature of the Internet has caused a flood of information, and the architecture of news aggregators and social media platforms have undermined the average consumer’s ability to distinguish truth from lies.⁵⁴ The factors identified by Syed have led to effective filter bubbles where individuals are not exposed to countervailing ideas, the premise upon which the marketplace of ideas and counterspeech theories depend.⁵⁵ These online media consumption trends reflect Justice Alito’s concern in his dissent in

45. Nabiha Syed, *Real Talk About Fake News: Towards a Better Theory for Platform Governance*, YALE L.J. FORUM 337, 345-53 (2017).

46. *Id.* at 346-47.

47. *Id.* at 347-48.

48. *Id.* at 348-50.

49. *Id.* at 350-52.

50. *Id.* at 352-53.

51. *See id.* at 349.

52. *See generally* Napoli, *supra* note 37 (examining the underlying rationales for the First Amendment under today’s radically different media ecosystem and concluding that they are no longer appropriate).

53. *See id.* at 69-71.

54. *Id.* at 79-85.

55. *See* Syed, *supra* note 43, at 349.

Alvarez: How will truth triumph when truth is not readily ascertainable?⁵⁶ In short, today's model of media consumption is a poor fit for the century-old theories of the marketplace of ideas and counterspeech doctrines.

In addition to online media consumption features in and of themselves being a poor fit for the marketplace of ideas and counterspeech theories, modern media consumption has led to social trends that also put those theories under siege. A 2019 study by the Pew Research Center found that Americans have diverse views on fake news, with politically aware Americans, older Americans, and those that do not prefer social media over news being more attuned to the risks of fake news.⁵⁷ Even defining fake news has proven challenging, with many, especially conservatives, seeing it as biased agenda-driven reporting.⁵⁸ This perception of biased news sources has accelerated the polarization that was already becoming the norm in American society, in part through our filtered social media bubbles.⁵⁹ The spread of false information inside these social bubbles is harmful, as individuals view repeated statements as more likely to be true—especially if not confronted by counterspeech.⁶⁰ But algorithmic sorting of news is not the only culprit; humans also have a tendency to want to find sources that confirm their preexisting thoughts, resulting in confirmation bias in fake news stories.⁶¹ These social side effects have aggravated the risks posed by fake news.

Politicians have also recognized the possibilities of harnessing fake news for their own ends. Sarah Haan has found that entities from bloggers to corporations to politicians have used post-truth tactics, spreading dissension and creating a breakdown of trust in U.S. institutions.⁶² In the post-truth era, “politicians tell [the public] things that ‘feel true’ but have no basis in fact” to score political points.⁶³ This strong interest in telling lies rather than truths poses inherent “political dangers—growing partisanship, a resurgence of extremist ideologies, and the shadow of fascism.”⁶⁴ As Haan has argued, post-truthism—defined as people relying on emotion, intuition, and belief, instead of using evidence-based

56. See *United States v. Alvarez*, 567 U.S. 709, 745 (2012) (Alito, J., dissenting) (“Because a sufficiently comprehensive database is not practicable, lies about military awards cannot be remedied by what the plurality calls ‘counterspeech.’”).

57. Amy Mitchell et al., *Many Americans Say Made-Up News Is a Critical Problem That Needs To Be Fixed*, PEW RES. CTR. 33-46 (June 5, 2019).

58. *Id.*

59. *Id.*

60. See Syed, *supra* note 45, at 349-50.

61. Terry Lee, *The Global Rise of “Fake News” and the Threat to Democratic Elections in the USA*, 22 PUB. ADMIN. & POL’Y 15, 17 (2019).

62. Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L.J. 1351, 1358, 1362 (2019).

63. *Id.* at 1353 (quoting *Post-Truth Politics: Art of the Lie*, ECONOMIST (Sept. 10, 2016), <https://perma.cc/7HKH-8HPG>.)

64. *Id.*

reasoning to make decisions—offers a normative account of contemporary American information use.⁶⁵ For example, when President Trump called CNN “fake news,” he was signaling to his audience that they should heed his emotional call and not trust information provided by CNN, not that they should think critically about whether CNN is a trustworthy news source or not.⁶⁶

In *Alvarez*, Justice Kennedy wrote that “[o]nly a weak society needs government protection or intervention before it pursues its resolve to preserve the truth.”⁶⁷ Perhaps contemporary American society is weak and vulnerable. The swift rise of fake news has largely shut down the marketplace of ideas. Counterspeech is no longer circulating in large parts of the marketplace. Half of Americans see fake news as a problem, one that is an even greater problem in the United States than violent crime, climate change, or racism.⁶⁸ Most Americans also see a need to regulate fake news; a Pew study found that eight in ten adult Americans favored some form of fake news restrictions.⁶⁹ Political commentators have found that fake news poses grave risks to the Constitution and the very fabric of American society.⁷⁰

The underlying justifications for protecting false statements—the marketplace of ideas and counterspeech—are thus inadequate to address fake news in the Internet age. The principle of free speech is one of the most sacred in U.S. law, but the serious breakdown of the marketplace of ideas forces us to reconsider how we understand free speech. Free speech in a marketplace of ideas where truth will triumph is an attractive notion, but one that ignores modern reality. In the concurrence and dissent in *Alvarez*, five Justices argued that a balancing test should be applied to false statements, rather than strict scrutiny.⁷¹

65. *Id.* at 1364.

66. *Id.* at 1364-65.

67. *United States v. Alvarez*, 567 U.S. 709, 729 (2012) (plurality opinion).

68. *See Mitchell et al.*, *supra* note 57, at 11 (“Half of adults say made-up news and information is a very big problem for the country. That places it above terrorism, illegal immigration, racism and sexism—and roughly on par with the gap between the rich and poor, violent crime, the way our political system operates and climate change.”).

69. *Id.* at 13.

70. *See Haan*, *supra* note 62, at 1353 (“The [political] dangers of post-truthism are political dangers—growing partisanship, a resurgence of extremist ideologies, and the shadow of fascism.”).

71. *See Alvarez*, 567 U.S. at 731-32 (Breyer, J., concurring in the judgment) (advocating for applying the less stringent intermediate scrutiny standard to the regulation of false statements); *id.* at 750 (Alito, J., dissenting) (arguing that First Amendment protections should not be available for false statements “unless their prohibition would chill other expression that falls within the Amendment’s scope”). Justice Elena Kagan joined Justice Breyer in his concurrence, while Justices Clarence Thomas and Antonin Scalia joined Justice Samuel Alito in his dissent. Therefore, there were five justices who advocated for a lower standard for the regulation of false statements than the strict scrutiny standard that was applied by the plurality.

Having shown that the longstanding justifications for protecting false statements are flawed, this Essay next turns to the concrete harms that have been caused by the free flow of fake news.

III. The Disastrous Consequences of Fake News

In May 2017, Karri Twist, an Indian restaurant in London, was flooded with angry complaints about its practice of selling human meat—a practice it did not, in fact, engage in.⁷² Business dropped precipitously and the owner worried the restaurant would not survive.⁷³ This nightmarish scenario was caused by a fake news story created on a “prank” fake news website; but prank or not, the danger caused by public belief in the story nearly wiped out a sixty-year-old business.⁷⁴ Karri Twist is only the tip of the iceberg as far as fake news’s dangers, but it highlights how quickly even “joke” fake news stories can spread and the havoc they can sow. *Alvarez* granted broad protection to false statements in the United States, but false statements have caused grave injuries to individuals and the United States at large. The dissent saw the potential dangers of false statements being allowed to flow freely through the marketplace of ideas,⁷⁵ but the plurality chose the ideal of broad free speech over concerns about the dangers of false information.⁷⁶ In the United States, in addition to the broader fake news epidemic, fake news has egregiously harmed U.S. lives and society during three specific moments: the 2016 presidential election campaign, the COVID-19 pandemic, and in the aftermath of the 2020 presidential election. While these are three of the most egregious examples, potential fake news regulation should not consider only calamitous fake news crises, but also pernicious false statements in general.

The lead-up to the 2016 presidential election was perhaps the moment when fake news became a serious mainstream phenomenon for many Americans. A variety of fake news stories proliferated. In one publication, Pope Francis endorsed the future president, Donald Trump.⁷⁷ In another, Democratic candidate Hillary Clinton was accused of running a sex trafficking ring out of a Washington, D.C. pizza parlor.⁷⁸ And false information was circulated not only

72. Craig Silverman & Sara Spary, *Trolls Are Targeting Indian Restaurants with a Create-Your-Own Fake News Site*, BUZZFEED NEWS (May 29, 2017, 2:58 PM), <https://perma.cc/6MZ5-D9KQ>.

73. *Id.*

74. *Id.*

75. *Alvarez*, 567 U.S. at 745 (Alito, J., dissenting).

76. *Id.* at 727 (plurality opinion).

77. Mike Isaac, *Facebook Mounts Effort to Limit Tide of Fake News*, N.Y. TIMES (Dec. 15, 2016), <https://perma.cc/HN2W-N4P4>.

78. Amanda Robb, *Anatomy of a Fake News Scandal*, ROLLING STONE (Nov. 16, 2017, 3:07 PM), <https://perma.cc/T3GV-T5LD>.

by Americans, but also by foreign powers, namely Russian operatives.⁷⁹ Russia created social media accounts that claimed to be American and took advantage of the features of online media to infiltrate and spread fake news in various social media bubbles.⁸⁰ A BuzzFeed News study found that in the lead up to the 2016 election, top fake news election stories generated more user activity than top election stories from reputed traditional media sources such as the *New York Times* and the *Washington Post*.⁸¹ Another study found that 25% of posts on Twitter that linked to an outside news source in the five months prior to the election spread fake or biased news.⁸² In an empirical study on fake news favorable to each of the presidential candidates, Stanford and New York University researchers found that it was unlikely that fake news caused enough of a difference in voting behaviors to affect the election outcome.⁸³ Fake news was perhaps not of pivotal importance in the outcome of the 2016 election, but the sheer frequency of circulation of fake news undermined public trust and heightened the deep partisan divide that separates us into social spheres that are more susceptible to fake news.⁸⁴

COVID-19 has been an unprecedented public health crisis in the United States, marked by over 500,000 dead Americans, millions filing for unemployment, and long months of social distancing.⁸⁵ And as the coronavirus and necessary public health measures have wreaked havoc on our lives and the economy, fake news has been playing a supporting role. False statements about how COVID-19 functions, where it came from, and how to treat it have been promulgated on social media.⁸⁶ These fake news stories have influenced individual behaviors, including compliance with public health guidance—such as regularly sanitizing one's hands, wearing masks, and working from home—as well as belief in scientific opinion.⁸⁷ A significant portion of the U.S. population

79. Scott Shane, *The Fake Americans Russia Created to Influence the Election*, N.Y. TIMES (Sept. 7, 2017), <https://perma.cc/PM7A-Z7AD>.

80. *See id.*

81. Craig Silverman, *This Analysis Shows How Fake Election News Stories Outperformed Real News on Facebook*, BUZZFEED NEWS (Nov. 16, 2016), <https://perma.cc/Q6RN-ZYBX>.

82. Alexandre Bovet & Hernán A. Makse, *Influence of Fake News in Twitter During the 2016 US Presidential Election*, 10 NATURE COMMS. 1 (2019).

83. *See* Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSPECTIVES 211, 232 (2017).

84. *See* JOSHUA A. TUCKER ET AL., SOCIAL MEDIA, POLITICAL POLARIZATION, AND POLITICAL DISINFORMATION: A REVIEW OF THE SCIENTIFIC LITERATURE 49-53 (2018), <https://perma.cc/4264-UGZC>.

85. *COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University*, JOHNS HOPKINS CORONAVIRUS RESOURCE CTR., <https://perma.cc/S9ZM-CT65> (archived Feb. 24, 2021).

86. Islam et al, *supra* note 1, at 1621.

87. Jon Roozenbeek et al., *Susceptibility to Misinformation about COVID-19 Around the World*, 7 ROYAL SOC'Y OPEN SCI. 1, 11-13 (2020).

has been found to encounter and trust this fake news, meaning that the spread of false information poses a significant threat to suppressing the pandemic response.⁸⁸ In one example, a widely publicized “miracle cure” for COVID-19 involved drinking concentrated alcohol; this false advice led to an estimated 800 deaths and over 5,000 hospitalizations.⁸⁹ The World Health Organization (WHO) has dubbed the overabundance of information, including the spread of false information, an “infodemic” and urged countries around the world to take action to reduce fake news about COVID-19.⁹⁰ One study found that misinformation in 2020 led to a decrease in the percentage of people in the U.S. and the U.K. willing to take a COVID-19 vaccine, though a supermajority of the population needs to be vaccinated to achieve herd immunity.⁹¹ Proper public health measures are essential to combatting COVID-19 and limiting casualties, but fake news undermines those necessary measures.

Finally, in an escalation of fake news during the 2016 election, democratic principles in the United States were further eroded when President Trump and conservative media outlets questioned the legitimacy of the outcome of the 2020 presidential election.⁹² This denial of the election results was not an unexpected phenomenon, as President Trump had publicly sowed doubt in mail-in voting process for months.⁹³ Sometimes egged on by President Trump, fake news stories that alleged serious flaws in the security of mail-in ballots proliferated.⁹⁴ After the election results were released, conspiracy theories spread across the

88. See Mark Jurkowitz & Amy Mitchell, *Early in Outbreak, Americans Cited Claims About Risk Level and Details of Coronavirus as Made-Up News*, PEW RES. CTR. (Apr. 15, 2020), <https://perma.cc/UZ9F-G7FB> (finding that 79% of Americans reported encountering fake news about COVID-19 in early to mid March 2020); Katherine Schaeffer, *Nearly Three-in-Ten Americans Believe COVID-19 Was Made in a Lab*, PEW RES. CTR. (Apr. 8, 2020), <https://perma.cc/HW3Z-7K5L> (finding that 29% of Americans incorrectly thought that COVID-19 had been created in a lab); Jonathan Rothwell & Sonal Desai, *How Misinformation Is Distorting COVID Policies and Behaviors*, BROOKINGS (Dec. 22, 2020), <https://perma.cc/BRB7-CB5E> (suggesting that people following fake news about COVID-19 will lead to lower vaccine acceptance).

89. Islam et al., *supra* note 1, at 1624.

90. *COVID-19 Pandemic: Countries Urged to Take Stronger Action to Stop Spread of Harmful Information*, WORLD HEALTH ORG. (Sept. 20, 2020), <https://perma.cc/68FS-QAE>.

91. See Sahil Loomba et. al, *Measuring the Impact of COVID-19 Vaccine Misinformation on Vaccination Intent in the UK and USA*, 5 NATURE HUM. BEH. 337, 338-40 (2021).

92. See John Cassidy, *The Long Term Damage of Trump's Antidemocratic Lies*, NEW YORKER (Nov. 13, 2020), <https://perma.cc/Z3ET-ULX4>; *How The 2020 Election Has Changed Trust In U.S. Democracy*, NPR (Nov. 15, 2020, 7:52 AM), <https://perma.cc/R2SD-ZPFR>.

93. See Spring, *supra* note 1.

94. Linda Qiu, *Fact-Checking Falsehoods on Mail-In Voting*, N.Y. TIMES (Jan. 5, 2021), <https://perma.cc/A32C-YTZD>.

Internet, convincing millions that fraud played a role in the 2020 election.⁹⁵ Some individuals in particular acted as false-election-theory “superspreaders” whose social media posts were widely shared.⁹⁶ These fake news stories had a significant role in discrediting the 2020 election results: A recent YouGov poll found that 88% of Trump supporters denied that Biden was legitimately elected.⁹⁷ The spread of fake news is sowing further dissension in the United States and, as former President Barack Obama lamented, it is not “delegitimising just the incoming Biden administration, but democracy generally, and that’s a dangerous path.”⁹⁸ The culmination of the spread of fake news about the election led to an angry mob of President Trump’s supporters storming the U.S. Capitol on January 6, 2021, in a blatant attack on American democracy.⁹⁹

IV. Paths Forward

The more mild-mannered false information contemplated by the Supreme Court in *Alvarez* has clearly been surpassed. Free speech is a noble aim that convinced the plurality to grant broad protections to fake news, but the more sinister side of fake news only emerged in full after *Alvarez* was decided. By undermining presidential elections and inflaming an unprecedented pandemic, among other effects, fake news has shown itself to be a serious risk to the very fabric of American society. Allowing harmful fake news to continue unabated will pose significant risks to the United States. But there are a few potential solutions to counter the Trojan horse that the *Alvarez* Court allowed into American society: private regulation, categorizing false statements inside existing First Amendment exceptions, revising existing First Amendment doctrine, and utilizing inherent powers such as those over public health.

The first of these potential solutions—private regulation—is already underway. In the wake of the 2016 election, major social media platforms like Facebook and Twitter started to self-regulate and remove fake news from their websites.¹⁰⁰ In perhaps the greatest test for these platforms, both blocked President Trump’s accounts following the January 2021 attack on the U.S.

95. Fergal Gallagher, *Why Millions Don't Trust the Election Results, Despite No Evidence of Widespread Fraud: Experts*, ABC NEWS (Nov. 22, 2020, 12:04 PM), <https://perma.cc/QS4C-9RAL>.

96. Sheera Frenkel, *How Misinformation "Superspreaders" Seed False Election Theories*, N.Y. TIMES (Nov. 23, 2020, 12:09 PM), <https://perma.cc/368N-J5CY>.

97. Kathy Frankovic, *Trump Voters Still See Biden's Victory as Illegitimate*, YOU.GOV (Nov. 19, 2020, 5:10 PM), <https://perma.cc/A8YH-KTEK>.

98. *US Election: Obama Says Fraud Claims Undermining Democracy*, BBC NEWS (Nov. 13, 2020), <https://perma.cc/3TDZ-XWZD>.

99. Julian Borger, *Maga Mob's Capitol Invasion Makes Trump's Assault on Democracy Literal*, GUARDIAN (Jan. 7, 2021, 12:06 AM), <https://perma.cc/5JT7-GE6S>.

100. Amélie Heldt, *Let's Meet Halfway: Sharing New Responsibilities in a Digital Age*, 9 J. INFO. POL'Y 336, 350 (2019).

Capitol.¹⁰¹ In many ways, this private regulation is similar in form to government regulation,¹⁰² and as scholar Kate Klonick has argued, these self-regulation procedures operate in line with the free speech norms of their users and society.¹⁰³ This platform self-regulation utilizes both algorithms and human reporting and scrutinizing.¹⁰⁴ But at least one study has questioned the efficacy of self-regulation, since online platforms are immune from government liability under Section 230.¹⁰⁵ Platforms committed to truth could attract more users, creating a sort of twenty-first century marketplace of ideas. But on the other hand, U.S. citizens already attracted to post-truthism might opt for alternative platforms that have laxer rules than Facebook and Twitter, as happened with the rise of conservative social media platforms Parler and Gab.¹⁰⁶

Another possible solution is to regulate fake news through pre-existing First Amendment exceptions. A significant portion of fake news is initially created to drive advertising revenue, which, it could be argued, aligns these statements with commercial speech. Commercial speech is defined as “expression related solely to the economic interests of the speaker and its audience.”¹⁰⁷ False information has always been potentially profitable for individuals, from would-be rulers claiming noble lineages to applicants listing false information on resumes.¹⁰⁸ But the Internet opened up a new source of profitability for false statements: profit-generating clickbait.¹⁰⁹ The Internet offers the financial incentives of advertising revenues to even small blogs,

101. Kate Conger, Mike Isaac & Sheera Frenkel, *Twitter and Facebook Lock Trump's Accounts After Violence on Capitol Hill*, N.Y. TIMES, <https://perma.cc/79BA-9D9X> (last updated Jan. 14, 2021).

102. See Heldt, *supra* note 100, at 354 (“Since the Cambridge Analytica scandal, Facebook has adopted a tone that resembles that of the state and its actions tend to imitate governmental behavior (when describing its internal governance structure), that is, it announced structures and procedures similar to administrative law.”)

103. See Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1601-02, 1615 (2018) (“[S]elf-regulation involves both reflecting the norms of their users around speech as well as keeping up as much speech as possible.”).

104. *Id.* at 1635-39.

105. STIGLER COMMITTEE ON DIGITAL PLATFORMS, FINAL REPORT 10 (Sept. 2019), <https://perma.cc/5P XK-U3J4>.

106. Shannon Bond, *Alternative Social Media Platforms Become Popular Among Some Trump Supporters*, NPR (Jan. 25, 2021, 4:16 PM), <https://perma.cc/74FY-RA7A>.

107. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n N.Y.*, 447 U.S. 557, 561 (1980).

108. See e.g., Evan Andrews, *7 People Who Pretended to Be Royals*, HISTORY (May 21, 2013), <https://perma.cc/M35Z-3JF2>; Valerie Bolden-Barrett, *More Than a Third of People Admit to Lying on Resumes*, HR DRIVE (Jan. 17, 2020), <https://perma.cc/QN5A-GU2R>.

109. Timmer, *supra* note 36, at 674.

encouraging the driving of traffic to one's website.¹¹⁰ Enticing headlines draw in more traffic, which in turn leads to increased advertising revenue as more consumers visit the website.¹¹¹ But as long as the headlines are alluring to consumers, whether they are true or not matters little to whether they generate advertising revenue. In fact, it is often significantly more expensive to write true, well-researched stories than false ones.¹¹² For example, one false headline reading "BREAKING: 'Tens of Thousands' of fraudulent Clinton votes found in Ohio warehouse," was widely shared, and generated \$5,000 in Google advertising revenue for the website that published it.¹¹³ The prolific fake news site National Report has written false stories that have generated as much as \$10,000 each in advertising revenue.¹¹⁴ There are even fake news generators that are stocked with human-created fake news stories and premises.¹¹⁵

Commercial speech receives less First Amendment protections, and fraudulent commercial speech is not protected at all.¹¹⁶ Fake news about particular individuals would also potentially fall into the impermissible category of defamation.¹¹⁷ Expanding our understanding of fake news and striking at its commercial and defamatory uses could help curb it.

Perhaps the most needed solution, however, is to reevaluate First Amendment parameters for the twenty-first century. As shown by the utter failure of the *Alvarez* decision to plan for or restrain the fake news disasters of the 2016 and 2020 elections and COVID-19, robust protections for the vast majority of false statements are not in the best interests of the United States. Both the concurrence and dissent in *Alvarez*—a combined majority of five justices—advocated for some lower balancing test for false information being excluded from First Amendment protections.¹¹⁸ Although there is a danger to

110. Brittany Vojak, Note, *Fake News: The Commoditization of Internet Speech*, 48 CAL. W. INT'L L.J. 123, 124 (2017).

111. *Id.*

112. Noah Feldman, *Fake News May Not Be Protected Speech*, BLOOMBERG (Nov. 23, 2016, 1:22 PM), <https://perma.cc/6ECX-GTGZ>.

113. Scott Shane, *From Headline to Photograph, a Fake News Masterpiece*, N.Y. TIMES (Jan. 18, 2017), <https://perma.cc/L6DE-HVWC>.

114. *The Rise and Rise of Fake News*, BBC (Nov. 6, 2016), <https://perma.cc/J9VA-DLAW>.

115. Silverman & Spary, *supra* note 72.

116. *See, e.g.*, *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n N.Y.*, 447 U.S. 557, 564 (1980) ("If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed.").

117. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that the law "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not").

118. For a breakdown of how the justices voted in *Alvarez*, see the text of note 71 above.

the government being the ultimate arbiter of truth,¹¹⁹ these proposed balancing tests would help constrain the risks of fake news. The marketplace of ideas is broken, and counterspeech is screened out by filtered social media bubbles. Strict scrutiny, as applied by the plurality in *Alvarez*, poses enormous dangers in the current post-truth climate in the United States.¹²⁰ Existing exceptions to the First Amendment are based on harm to individuals or society; restrictions on fake news that undermines democratic institutions or public health systems would appear to serve the same purposes. Doctrinal reform could take the form of application of intermediate scrutiny, at the very least, or a broader rule excluding most false statements from First Amendment protection.

Finally, for at least certain categories of fake news, the government could look to inherent powers as providing an alternative regulatory justification. For example, federal and state governments have long held inherent powers over public health that allow the restriction of civil liberties for the greater good in the form of quarantines of people and goods.¹²¹ Inherent powers could similarly allow the restriction of fake news about public health dangers such as COVID-19 as necessary to preserve U.S. public health.¹²²

No matter which path or paths are pursued, the past five years have shown how far removed *Alvarez* is from modern reality. A nation that values and is exposed to truth is a worthy ideal, but online and social media have created perverse incentives to spread false information and have sectioned off society into filtered bubbles that are isolated from the truth. *Alvarez* reflected the ideal of the truth-seeking United States of the pre-Internet era; a new First Amendment regime is needed to confront the dangers of fake news in post-truth America.

119. See, e.g., Jane E. Kirtley, *Getting to the Truth: Fake News, Libel Laws, and "Enemies of the American People,"* 43(4) HUM. RTS. MAG., <https://perma.cc/P6CU-8Z8Q> (providing examples of where government censorship and regulation of speech has created risks to individual liberties).

120. See *supra* Parts I & II.

121. See, e.g., *Gibbons v. Ogden*, 22 (9 Wheat.) U.S. 1, 205 (1824) ("[T]hey are treated as quarantine and health laws, are so denominated in the acts of Congress, and are considered as flowing from the acknowledged power of a State, to provide for the health of its citizens.")

122. For more discussion by the Author on this topic, see Michael P. Goodyear, *Inherent Powers and the Limits of Public Health Fake News*, SSRN (2020), <https://perma.cc/3SMV-TH3E> (last revised Jan. 15, 2021).