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Editor's Introduction

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EDITOR'S INTRODUCTION: FALSEHOODS, FAKE NEWS, AND THE FIRST AMENDMENT

MITCHELL B. BRYANT

Fake news, election lies, and other falsehoods are certainly nothing new. Throughout our history, falsehoods—be they white lies, distortions, prevarications, misrepresentations, or outright lies—have been prevalent in public discourse.¹ Private citizens lie. The media embellishes and exaggerates.² Politicians and elected officials misrepresent, stretch the truth, and even intentionally deceive.³ And the First Amendment, for the most part, protects these lies based on the principle that the marketplace of ideas is beneficial to—and critical for—democracy.⁴

And yet, it seems that public discourse has transmogrified. Today, the President lies not only in the manner of conventional politicians, but also in a way that “corrodes political discourse and is consistent with the practice of many authoritarian leaders.”⁵ Other candidates and elected officials have followed suit.⁶ Media outlets—and entities impersonating media outlets—peddle verifiably false stories.⁷ The effects of these lies are magnified by

1. See, e.g., Erwin Chemerinsky, *False Speech and the First Amendment*, 71 OKLA. L. REV. 1, 1–2 (2018).

2. See, e.g., *id.* at 2.

3. See, e.g., *Text: Bush's Speech on Iraq*, N.Y. TIMES (Mar. 18, 2003), <http://www.nytimes.com/2003/03/18/politics/text-bushs-speech-on-iraq.html> (alleging the existence of weapons of mass destruction in Iraq); Angie Drobnic Holan, *Lie of the Year: 'If You Like Your Health Care Plan, You Can Keep It,'* POLITIFACT (Dec. 12, 2013, 4:44 PM), <http://www.politifact.com/truth-o-meter/article/2013/dec/12/lie-year-if-you-like-your-health-care-plan-keep-it/>. Indeed, as Justice Scalia aptly commented, “campaign promises are—by long democratic tradition—the least binding form of human commitment.” *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002).

4. See, e.g., *United States v. Alvarez*, 567 U.S. 709 (2012).

5. James Pfiffner, *Trump's Lies Corrode Democracy*, BROOKINGS (Apr. 13, 2018), <https://www.brookings.edu/blog/fixgov/2018/04/13/trumps-lies-corrode-democracy/>.

6. See, e.g., Janet Hook, *In GOP Primaries, Candidates Battle to Be the Trumpiest*, WALL ST. J. (Aug. 31, 2017, 2:10 PM), <https://www.wsj.com/articles/new-dynamic-in-republican-primaries-candidates-who-want-to-be-like-trump-1504194180>.

7. See, e.g., Marc Jonathan Blitz, *Lies, Line Drawing, and (Deep) Fake News*, 71 OKLA. L. REV. 59, 59–66 (discussing the rise of fake news and so-called “deep-fakes”); Scott Shane, *From Headline to Photograph: A Fake News Masterpiece*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/2017/01/18/us/fake-news-hillary-clinton-cameron-harris.html> (discussing the dissemination of a verifiably false claim of ballot tampering by a fabricated newspaper).

their rapid dissemination via social media and other mediums,⁸ degrading public discourse and precipitating seemingly insurmountable partisan and ideological divides.⁹ Perhaps most perniciously, foreign powers have exploited these divides—and amplified them through lies of their own—in a full-fledged attack on the Western order.¹⁰

These challenges beg an obvious question: what can and should we do about it? Should we keep faith in the marketplace of ideas and trust that truth will out? Should we make incremental changes within the constraints of current First Amendment doctrine? Or should we reconsider recent First Amendment jurisprudence and the assumptions on which it is based?

In this symposium issue, First Amendment scholars attempt to answer these critical questions. Dean Erwin Chemerinsky and Professors Harry F. Tepker, Jonathan D. Varat, and Marc Jonathan Blitz begin the issue by addressing a broad question: whether—and to what extent—the First Amendment does, or should, protect false speech. Dean Chemerinsky and Professors Tepker and Varat argue for faith in old principles,¹¹ while Professor Blitz posits that “where false statements do not merely state false facts, but are also given in a form that carries with it indicia for reliability (such as a falsified newspaper or video or audio tape), the government should have greater power to regulate than it typically has to regulate false words.”¹²

Next, Professors Helen Norton, Joshua S. Sellers, and James Weinstein examine the constitutional implications of falsehoods in the context of political campaigns. Professor Norton proposes a novel approach to taxonomizing election lies, theorizing that understanding the subtle differences between types of election lies will further our ability to

8. See generally Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200 (2017).

9. See Pfiffner, *supra* note 5.

10. See, e.g., Office of the Dir. of Nat'l Intelligence, *Background to “Assessing Russian Activities and Intentions in Recent US Elections”*: *The Analytic Process and Cyber Incident Attribution*, NAT'L INTELLIGENCE COUNCIL (Jan. 6, 2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf.

11. Erwin Chemerinsky, *False Speech and the First Amendment*, 71 OKLA. L. REV. 1 (2018); Harry F. Tepker, *An Introductory Essay: Old Principles for an (Allegedly) Brave New World*, 71 OKLA. L. REV. 17 (2018); Jonathan D. Varat, *Truth, Courage, and Other Human Dispositions: Reflections on Falsehoods and the First Amendment*, 71 OKLA. L. REV. 35 (2018).

12. Blitz, *supra* note 7, at 110.

determine how best to deal with them.¹³ Professor Sellers explores three possible regulations of election lies that would be constitutionally permissible under current First Amendment doctrine.¹⁴ Conversely, Professor Weinstein proposes a wholesale change in First Amendment doctrine, abandoning the current “All-Inclusive” approach for a “Domain-Based” approach that would allow greater regulation of some election lies.¹⁵

Finally, Professors Gregory P. Magarian, Joseph Thai, and Sonja R. West discuss fake news and foreign meddling on social media, a President who is challenging traditional free speech norms, and other emerging First Amendment topics. Professor Magarian describes the impact of the fall of traditional, television-age speech intermediaries and discusses the need for new forms of intermediation.¹⁶ Professor Thai scrutinizes citizens’ right to receive foreign speech and its possible effects on regulating foreign speech—including foreign interference in elections.¹⁷ And Professor West considers whether the First Amendment can restrain the speech of the President.¹⁸

At a time when falsehoods seem more prevalent and more egregious—infiltrating our news, our politics, and our emerging technologies—understanding the contours of the First Amendment is as important as ever. Whether the First Amendment should provide robust protection or permit robust regulation of falsehoods in public discourse, or whether it should strike a more nuanced balance, understanding the First Amendment’s reach in the context of fake news, election lies, and other falsehoods is key to understanding an issue central to our society and our politics. I hope you find the discussion to be valuable and informative.

13. Helen Norton, *(At Least) Thirteen Ways of Looking at Election Lies*, 71 OKLA. L. REV. 117 (2018).

14. Joshua S. Sellers, *Legislating Against Lying in Campaigns and Elections*, 71 OKLA. L. REV. 141 (2018).

15. James Weinstein, *Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibitions of Lies in Political Campaigns*, 71 OKLA. L. REV. 167 (2018).

16. Gregory P. Magarian, *Forward Into the Past: Speech Intermediaries in the Television and Internet Ages*, 71 OKLA. L. REV. 237 (2018).

17. Joseph Thai, *The Right to Receive Foreign Speech*, 71 OKLA. L. REV. 269 (2018).

18. Sonja R. West, *Suing the President for First Amendment Violations*, 71 OKLA. L. REV. 321 (2018).