

Oklahoma Law Review

Volume 71 | Number 1

Symposium: Falsehoods, Fake News, and the First Amendment

2018

An Introductory Essay: Old Principles for an (Allegedly) Brave New World

Harry F. Tepker

Follow this and additional works at: <https://digitalcommons.law.ou.edu/olr>



Part of the [Constitutional Law Commons](#), [Election Law Commons](#), and the [First Amendment Commons](#)

Recommended Citation

Harry F. Tepker, *An Introductory Essay: Old Principles for an (Allegedly) Brave New World*, 71 OKLA. L. REV. 17 (2018).

This Panel 1: Falsehoods and the First Amendment is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

AN INTRODUCTORY ESSAY: OLD PRINCIPLES FOR AN (ALLEGEDLY) BRAVE NEW WORLD

HARRY F. TEPKER*

In times of turmoil, fear, and uncertainty, it is tempting to believe that our nation is suffering in an unprecedented way, even though history gives us many precedents and antecedents to underscore the old joke: “If history doesn’t repeat itself, it sure does rhyme.”¹ Today’s Americans view our current plight—“this post-truth, alternative facts moment—as some inexplicable and crazy *new* American phenomenon. In fact, what’s happening is just the ultimate extrapolation and expression of attitudes and instincts that have made America exceptional for its entire history—and really from its prehistory.”² Still, the nation is undergoing what might be described as a stress test: suspicions and investigations; a pattern of governmental lying; a pattern of political lying to gain power; overt and covert cultivation of haters, bigots, and the fearful; political polarization; a rising fear of authoritarian and autocratic patterns.³

* Professor of Law & Floyd and Irma Calvert Chair of Law and Liberty, the University of Oklahoma College of Law. This Essay is based on remarks on the First Amendment and Falsehood delivered at the 2018 *Oklahoma Law Review* Symposium on February 9, 2018.

1. The oft-used joke is attributed to Mark Twain, but like many quotations, it lacks verification. Brian Adams, *History Doesn’t Repeat, but It Often Rhymes*, HUFFPOST (Jan. 19, 2017), http://www.huffingtonpost.com.au/brian-adams/history-doesnt-repeat-but-it-often-rhymes_a_21657884/.

2. KURT ANDERSEN, *FANTASYLAND: HOW AMERICA WENT HAYWIRE* 11 (2017).

3. Inevitably, finger-pointing dominates and taints any too brief summary of our nation’s “stress test,” but we should not overlook the responsibility of the media, empowered by new and powerful technology. As summarized by commentator Franklin Foer:

Donald Trump is the culmination of the era. He understood how, more than at any moment in recent history, media need to give the public what it wants, a circus that exploits subconscious tendencies and biases. Even if media disdained Trump’s outrages, they built him up as a character and a plausible candidate. For years, media pumped Trump’s theories about President Obama’s foreign birth into circulation, even though they were built on dunes of crap. It gave endless attention to his initial smears of immigrants, even though media surely understood how those provocations stoked an atmosphere of paranoia and hate. Once Trump became a plausible candidate, media had no choice but to cover him. But media had carried him to that point. Stories about Trump yielded the sort of traffic that pleased the Gods of Data and benefited the

The assigned mission for this Essay was historical background. But this Essay also offers a brief plea for an old faith in the face of new fears; or more precisely, a faith in old, settled principles that we dare not discard because we are passing through times of ideological and partisan conflict. It is far, far better if we laugh. “It is by the goodness of God that in our country we have those three unspeakably precious things: freedom of speech, freedom of conscience, and the prudence never to practice either of them.”⁴ So wrote Mark Twain.

There have been many times in American history when citizens took solace in humor. Famously, the defeated presidential candidate Adlai Stevenson quoted a joke attributed to Abraham Lincoln: “I’m like the boy who stubbed his toe in the dark. I’m too old to cry and it hurts too much to laugh.”⁵ We must hope that most election defeats are like stubbed toes (no matter what we really think), but we should remember Oklahoma’s own Will Rogers: “On account of being a democracy and run by the people, we are the only nation in the world that has to keep a government four years, no matter what it does.”⁶

These days it is hard to avoid laughing, painfully, even when consulting old wisdom. James Madison hoped, “Knowledge will forever govern ignorance.”⁷ Reasonable citizens today might well doubt Mr. Madison’s powers of prophecy. And yet, who can deny Madison’s thinking? “[A] people who mean to be their own Governors, must arm themselves with the power knowledge gives.”⁸ “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a

bottom line. Trump began as Cecil the Lion, and then ended up president of the United States.

FRANKLIN FOER, *WORLD WITHOUT MIND: THE EXISTENTIAL THREAT OF BIG TECH* 149 (2017).

4. MARK TWAIN, *FOLLOWING THE EQUATOR* 195 (New York, Doubleday & McClure 1897), <https://archive.org/details/followingequator00twaiuoft>.

5. Jena McGregor, *Remembering a Speech from ‘The Most Beautiful Loser’ After Trump Won’t Commit to Accepting Results*, WASH. POST (Oct. 20, 2016), https://www.washingtonpost.com/news/on-leadership/wp/2016/10/20/remembering-a-speech-from-the-most-beautiful-loser-after-trump-wont-commit-to-accepting-results/?utm_term=.883217d2b447.

6. *Quotes*, OFFICIAL WEBSITE OF WILL ROGERS, <https://www.cmgtw.com/historic/rogers/about/photos/> (last visited Apr. 11, 2018).

7. Letter from James Madison to W.T. Barry (Aug. 4, 1822), in *Epilogue: Securing the Republic*, FOUNDERS’ CONST., <http://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html> (last visited May 23, 2018).

8. *Id.*

Tragedy, or, perhaps both.”⁹ The wit and wisdom are part of the traditions of our republic that require remembrance and defense, even when we lack confidence.

Origins and Evolution: Beyond Blackstone to Madison’s Report

History is essential preface. Constitutional debate usually begins with some sort of discussion that asks the question: What did the framers think about freedom of expression? When resisting a bill of rights on the theory that it would do little good, Alexander Hamilton asked a question that courts were forced to answer, though it took a century and a half to begin the interpretive process. “What signifies a declaration, that ‘the liberty of the press shall be inviolably preserved’? What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion?”¹⁰

If you were a lawyer in 1776 or 1788 or 1798, there was not much doctrine to respond to Mr. Hamilton’s rhetorical question. A lawyer did not have much law to read, except Blackstone in his commentaries on the law of England. And there he gave what is probably the central beginning point of American doctrine defining free speech:¹¹ there shall be no censorship or prior restraint; but there is no protection or immunity for dangerous or disruptive expression.¹² So, we must understand that our liberty today is much broader, greater and more comprehensive than it was at the creation of our new republic. While the framers thought clearly and extensively about religious liberty,¹³ they didn’t do much thinking about freedom of expression.¹⁴

9. *Id.*

10. THE FEDERALIST NO. 84 (Alexander Hamilton).

11. 4 WILLIAM BLACKSTONE, COMMENTARIES *150–53.

The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.

Id.

12. LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY at ix (1960) (“I have been reluctantly forced to conclude that the generation which adopted the Constitution and the Bill of Rights did not believe in a broad scope for freedom of expression, particularly in the realm of politics.”).

13. See, e.g., James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), in *Amendment I (Religion)*, FOUNDERS’ CONST., <http://press->

The best evidence of this was the enactment of the Sedition Act of 1798, signed into law by John Adams.¹⁵ The law declared that, if you criticize the government or the President or the Congress in a way that will bring them into public contempt, you will go to jail.¹⁶ If the law of the past applied today, you can imagine the number of people who could be going to jail: the entire cast of Saturday Night Live; Stephen Colbert; the staffs of CNN and MSNBC; and the author of this Essay, yours truly. Only the names would change if we took the measure of the President's critics in 2013; one vulnerable celebrity who would suffer from enhanced punishment for alleged or proved lies damaging to the reputation of the incumbent President would have been the "birther-in-chief" himself.¹⁷

When measuring the course of our nation's history, we should be chastened to remember that Federalist federal courts upheld the Sedition Act of 1798: it was not prior restraint, and it embodied all of the elements of a modern liberal law, at least for the 1790s.¹⁸ The only progress was theoretical. Madison published a new libertarian theory of free speech, but at first it was only political propaganda to denounce the Adams administration.¹⁹ Still, Madison claimed the First Amendment goes beyond

pubs.uchicago.edu/founders/documents/amendI_religions43.html (last visited May 18, 2018).

14. LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* xii (1985) [hereinafter LEVY, *EMERGENCE*] ("[T]he theory of freedom of political expression remained quite narrow until 1798. . . . The revolutionary generation did not seek to wipe out the core idea of seditious libel, that government may be criminally assaulted by mere words . . .").

15. Ch. 74, 1 Stat. 596.

16. *Id.*

17. *See, e.g.*, ANDERSEN, *supra* note 2, at 417, 424 ("Donald Trump is a pure fantasyland being, its apotheosis Trump launched his political career by embracing a brand-new conspiracy theory twisted around to other deep American taproots—fear and loathing of foreigners and nonwhites. In 2011 Trump became chief spokesperson for the fantasy that President Barack Obama was born in Kenya, a fringe idea that he brought into the mainstream."); KATY TUR, *UNBELIEVABLE* 222–24 (2017) ("You remember that, right? Trump's one-man crusade to prove, without evidence, that the first African American president was illegitimate because he was born in Kenya [I]t's not as though Trump had apologized for the birtherism But instead of apologizing, he kept lying.").

18. LEVY, *EMERGENCE*, *supra* note 14, at 202–03 (stating that the sponsors and authors of the statute "acted in full consistency with [their] opinions expressed . . . [that] falsehoods and scandals against the government should be punished 'with becoming rigour.' . . . Why, asked [Justice] Cushing, need an honest man 'be afraid of truth? The guilty only fear it.'").

19. James Madison, Report on the Virginia Resolutions (Jan. 1800), in *Amendment I (Speech and Press)*, FOUNDERS' CONST., http://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html (last visited May 18, 2018) [hereinafter Report on the Virginia Resolutions].

Blackstone's prior restraint principle: "It would seem a mockery to say that no laws should be passed preventing publications from being made, but that laws might be passed for punishing them in case they should be made."²⁰ He claimed that free speech must exist for the sake of progress of the nation and western civilization: "[C]an the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression"²¹ Though law and doctrine might not have evolved, the nation owed a great debt to the actualities of a functioning free press: "Had 'Sedition Acts' . . . been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?"²²

Madison also argued that "truth as a defense," explicitly embodied in the Sedition Act, was not enough to guarantee the benefits of free expression: "[O]pinions . . . may often be more the objects of the prosecution than the facts themselves"²³ Madison's Report also began a long tradition of defending free expression for the sake of democracy. After all, the people's right to choose their leaders "depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively."²⁴ Reflecting the democratic traditions of the republic, Madison posited that free speech is essential to the sovereignty of "we, the people." Madison's argument reflects a modern sensibility:

What will be the situation of the people? Not free; because they will be compelled to make their election between competitors whose pretensions they are not permitted by the act equally to examine, to discuss, and to ascertain. And from both these situations will not those in power derive an undue advantage for continuing themselves in it, which, by impairing the right of election, endangers the blessings of the Government founded on it?²⁵

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

Inspired by the pleas of Madison, expressive liberty developed, but slowly. Law outgrew original meanings, but it took decades. After the Sedition Act and well into the twentieth century, state government had primary responsibility for defining freedom of expression. And in the few cases falling within federal jurisdiction, doctrine hardly did anything for the cause of liberty.

One example of the prevailing doctrine in the World War I era is chilling. A Vermont minister mimeographed (the media of the day) a statement that Christ prohibited his disciples from fighting for him on the eve of his crucifixion; this meant that no good Christian could draw a sword on behalf of the city where he dwells.²⁶ The minister gave that to a number of other ministers—a couple of old men and one young man of military age. He was prosecuted by the federal government for a violation of the Espionage Act of 1917.²⁷ He was sentenced to jail for fifteen years for this one piece of mimeographed paper, and he served one year.²⁸

This case is illustrative of doctrine in place in America during World War I,²⁹ and it is the type of case that inspired new academic and judicial theories of free expression, including the famous dissents of Oliver Wendell Holmes and, later, Louis Brandeis.³⁰

26. ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 55–56 (1941) (discussing the case of Rev. Clarence H. Waldron).

27. *Id.*

28. *Id.*

29. *Id.* at 50–51.

30. *See, e.g.,* *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis J., concurring) (“Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 44 (1969); *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (“If 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.”); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Democracy: Leaving the Truth of Political Opinion to “We, the People”

After the Sedition Act and well into the twentieth century, there was not much protection for free speech. Until the modern era (and well after 1937, the usual date for the modern era) hardly a word was heard from the courts to protect a broader freedom of speech.³¹ Most judges still deferred to democratic process and outcome.³² Felix Frankfurter spoke most clearly for judicial self-restraint even in cases presenting First Amendment claims: he argued free speech was not an exception to the principle of majority rule.³³

The evolution of federal constitutional law seemed to take a long time, primarily because the Court did not endorse anything remotely resembling a libertarian theory of free speech until the Warren Court. Only in the aftermath of the McCarthyism trauma, during the civil rights era and the 1960s did courts act on a sense that they had a judicial duty to remedy executive, legislative, and prosecutorial abuse.³⁴ The courts struggled—but ultimately succeeded—in developing manageable, enforceable principles to protect expressive liberty. The courts settled on a consensus approach that defined a categorical hostility to government discrimination against ideologies, philosophies, and viewpoints.³⁵ That consensus approach is the foundation of the law today.

31. See generally Alan Brinkley, *The Debate over the Constitutional Revolution of 1937*, 110 AM. HIST. REV. 1046 (2005) (discussing the modern era).

32. See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951).

33. *Beauharnais v. Illinois*, 343 U.S. 250, 262 (1952) (Frankfurter, J., for the Court) (“[I]t would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation.”); *Dennis*, 341 U.S. at 539 (Frankfurter, J., concurring) (“Free-speech cases are not an exception to the principle that we are not legislators, that direct policy-making is not our province.”).

34. See generally *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (discussing judicial duty).

35. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 112 (1980).

If . . . history . . . teaches us anything, it is that attempts to evaluate the threat posed by the communication of an alien view inevitably become involved with the ideological predispositions of those doing the evaluating, and certainly with the relative confidence or paranoia of the age. If the First Amendment is even to begin to serve its central function of assuring an open political dialogue and process, we must seek to minimize assessment of the dangerousness of the various messages people want to communicate. [When] state officials seek to silence a message because they think it’s dangerous, . . . we insist that the message fall within some clearly and narrowly bounded category of expression we have designated in advance as unentitled to protection.

Id.

The principal case addressing falsehood and the First Amendment—and in so doing, defining the central meaning of the First Amendment—is *New York Times v. Sullivan*.³⁶ The facts are simple and basically undisputed. Police Commissioner Sullivan sued the authors of a newspaper advertisement in the *Times* and the *Times* itself for libel.³⁷ Sullivan was concerned about an advertisement in defense of Dr. Martin Luther King, Jr.³⁸ It described the heroic efforts of Dr. King and condemned the southern strategies of repression.³⁹ The problem was that the advertisement was inaccurate in several particulars: they got some dates wrong and they got some details about the location of events wrong.⁴⁰ There was no specific reference to Police Commissioner Sullivan, but the ad contained criticism of the agency he led.⁴¹

What was going on? Needless to say, the lawsuit reflected no desire to vindicate truth or fact. If Sullivan prevailed, the lawsuit would certainly silence the civil rights movement in Alabama as well as the newspaper that covered the issue; as two commentators put it, “Silence, not money, was the goal.”⁴² If the defamation judgment of the Alabama courts in *Sullivan* had been upheld—combined with other defamation actions confronting the *Times* at the time—there was reasonable fear that the greatest paper in America could not survive.⁴³

The question before the United States Supreme Court was whether this law, as applied to public criticism of public officials in the performance of their public duties, violated the First Amendment.⁴⁴ In a magnificent

36. 376 U.S. at 254.

37. *Id.* at 256.

38. *Id.*

39. *Id.*

40. *Id.* at 258.

41. *Id.*

42. GENE ROBERTS & HANK KLIBANOFF, *THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION* 231 (2006).

If the [Alabama] officials could win, they would almost certainly silence the civil rights movement in Alabama – as well as the newspaper that consistently covered it. Silence, not money, was the goal. Alabama had some experience in forcing its opposition off the playing field. The NAACP in Alabama had been barred from doing business and been wiped out five years earlier; two more years before the ban could be lifted.

Id.

43. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 35, 146 (1991).

44. *Sullivan*, 376 U.S. at 279.

opinion by Justice William Brennan, the Supreme Court struck down the judgment and the award:

[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.⁴⁵

Brennan's opinion in *Sullivan* is celebrated, glorified, and controversial. Justice Antonin Scalia proclaimed that the case was wrongly decided because it was inconsistent with the framers' understanding.⁴⁶ And in a real sense, he was probably right: the holding was quite far removed from original understanding. But so are the campaign finance cases;⁴⁷ the hate speech cases;⁴⁸ and the flag desecration cases.⁴⁹ Indeed, almost all First Amendment doctrine is far removed from original understandings, and Justice Scalia supported the bulk of it.⁵⁰ It may not be enough to be "originalism," strictly speaking, but Justice Brennan's rationale tracked the view of James Madison, the author of the First Amendment and the Bill of Rights—at least, the view of the "father of the Constitution" eleven years after the Philadelphia convention and seven years after ratification of the First Amendment. If Brennan did not draw from thinking prior to

45. *Id.* at 270.

46. See JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* 377–78 n.37 (2009) ("I'm critical of [Sullivan] because if there's anything that is counter to originalism, it's that. The Court made up a new libel law."); John W. Dean, *Justice Scalia's Thoughts, and a Few of My Own, on New York Times v. Sullivan*, FINDLAW (Dec. 2, 2005), <https://supreme.findlaw.com/legal-commentary/justice-scalias-thoughts-and-a-few-of-my-own-on-new-york-times-v-sullivan.html> ("Scalia revealed that he felt the landmark 1964 ruling in *New York Times v. Sullivan* was wrong. . . . 'I don't think that's what the founding fathers intended,' Scalia said . . .").

47. See, e.g., BRUCE ALLEN MURPHY, *SCALIA: A COURT OF ONE* 405 (2014) (discussing *Citizens United* and *Austin v. Michigan Chamber of Commerce*, Professor Murphy notes that Scalia "could not call upon the wisdom of the Founders" in support of his "more speech is better" view).

48. *Id.* at 195 (discussing *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), Professor Murphy notes Scalia's "willingness to protect all speech, even that which he did not like").

49. *Id.* But see, e.g., *id.* at 228 (noting a case, *McIntyre v. Ohio Elections Commission*, in which Justice Scalia turned away from his pattern of being "a self-proclaimed champion of nearly unlimited free speech," to argue against a right to engage in anonymous electioneering because after searching through original historical materials, "[e]vidence that anonymous electioneering was regarded as a constitutional right is sparse").

50. *Id.*

ratification of the First Amendment, as Scalia notes, he did rely heavily on political arguments of the Jeffersonian opponents of the Sedition Act, best articulated by James Madison in his famous “Virginia Report” of 1800.⁵¹

In his opinion, Justice Brennan made a number of important, specific Madisonian observations. First, punishing falsehood alone is not enough justification to silence or deter public debate: “[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”⁵² Doctrine had turned away from “any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker.”⁵³ Protection did not and should not depend “upon ‘the truth, popularity, or social utility of the ideas and beliefs which are offered.’”⁵⁴ Punishment of falsehood, even in defense of someone’s reputation, was not enough justification for suppressing public debate.⁵⁵ And even more boldly (because no court had gone to this point before), proof of falsehood plus proof of damaged reputation plus proof of negligence (for instance, failure to verify all the facts in the advertisement) was not sufficient to hold the *New York Times* responsible.⁵⁶

The Court also embraced the Madisonian view, identified by some scholars as the central meaning of the First Amendment: free speech exists for the sake of democracy. The people’s power to govern depends upon their ability to judge the merits and demerits of candidates, and if incumbents can rig the game by preventing criticism of incumbents, the people’s ability to govern by free choice is threatened.⁵⁷ Madison had

51. See Report on the Virginia Resolutions, *supra* note 19.

52. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (2004)).

53. *Id.* at 271 (comparing with *Speiser v. Randall*, 357 U.S. 513, 525–26 (1958)).

54. *Id.* (citing *Button*, 371 U.S. at 445).

55. *Id.* at 273.

56. *Id.*

57. Laurent B. Frantz, *Is the First Amendment Law?*, 51 CALIF. L. REV. 729, 735 (1963).

If the Constitution is viewed as adopting representative government *as a device by which the people are to govern themselves*, a significant function of the freedom of speech clause is at once apparent. The device calls for reciprocal government; for the people to govern the delegated authority by which they are governed. This cannot work unless there is an independent popular consensus, protected from governmental intervention, to which the delegated authority can be held responsible. If the delegated authority is permitted to prescribe what may and may not be advocated, especially in the realm of political theory and

emphasized the link between free expression and representative government:

[T]he right of electing the members of the Government [is] the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, of consequently, examining and discussing these merits and demerits of the candidates respectively.”⁵⁸

The Court’s opinion made the same point:

Earlier, in a debate in the House of Representatives, Madison had said: “If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.” . . . The right of free public discussion of the stewardship of public officials was thus, in Madison’s view, a fundamental principle of the American form of government.⁵⁹

America cherishes free speech primarily as a way to preserve democratic influence over republican institutions.

An Illustrative Story: Pursuing “Lies” After Campaigns

Every case is also a story. One little-known, little-noted case, *Chavez v. Citizens for a Fair Farm Labor Law*,⁶⁰ illustrates the need to leave controversies about the truth or falsity of opinion to the judgment of the voters. In 1978, California courts considered a lawsuit brought by the heroic, legendary leader of California farm workers who had campaigned for “Proposition 14,” a statewide initiative on the ballot in November

policy, then, *pro tanto*, it is no longer responsible to a popular will independent of its own, but to a reflection of its own will. The people can still select, at the ballot box, those by whom they are to be governed, but they can no longer govern through them. The government may still be representative in form, but self-government is not its substance.

Id.; see also, e.g., ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

58. *Sullivan*, 376 U.S. at 275 n.15.

59. *Id.* at 275.

60. 148 Cal. Rptr. 278 (Ct. App. 1978).

1976.⁶¹ Proposition 14 would have allowed union organizers to access private property to speak to farm workers. Farm owners opposed the measure.⁶² Their political argument used ordinary rhetoric of a political character: Proposition 14 was an attack on the “rights” of farm owners.⁶³ Chavez and allies cried “foul” and “smear.”⁶⁴ The people rejected the initiative by a large margin. Chavez and allies went to court to relitigate and vindicate their defeated argument.

Chavez and his allies pointed out—accurately—that a labor law creating access rights for union organizers did not violate constitutional rights.⁶⁵ After the new jurisprudence of the “New Deal” era, property could be the subject of reasonable regulation for a variety of reasons. For their part, the farm owners pointed out—also accurately—that without some sort of legally mandated access, a property owner has the “right” to bar unwelcome persons from private property.⁶⁶ A law that creates such access diminishes the otherwise rightful power of the owner over their own property.⁶⁷

The argument was a clash between competing accuracies, competing oversimplifications, and competing claims of lies. It was a classic issue about which reasonable minds have differed throughout the history of our republic. Debating our “rights” is the real national pastime. Arguments fashioned in the rhetoric of rights as arguments for rights dominated the push for national independence, for and against slavery, for and against civil rights laws in the nineteenth century and again in the mid-twentieth century. The problem is that voters and citizens do not always think like lawyers and they do not speak of their “rights” in precise legal terms. Another problem is that the legal definition of “rights” changes, sometimes quite dramatically.

The *Chavez* plaintiffs took the unusual position that the farm owners “lied,” because argument against the initiative did not reflect current federal constitutional law or current state law.⁶⁸ They sought money damages to compensate for campaign costs suffered because of the “lies.”⁶⁹ There were several elementary problems with the doomed theory of the *Chavez*

61. *Id.* at 279.

62. Full disclosure requires that the author of this Essay state that he was a junior member of the legal team representing the farm owners.

63. *Chavez*, 148 Cal. Rptr. at 280.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

plaintiffs. The farm owners' campaign arguments against the Proposition were statements of opinion, not fact. The arguments focused genuine issues of legitimate public concern. And all arguments for and against Proposition 14 were political expression. Pure politics. Ordinary politics. For better or worse, it was the ordinary stuff of democracy.

In this long-forgotten case, many of the ideas polarizing debate today can be observed. There was passion and many accusations of lying and alternative facts. There was anger and concern about the imbalance in campaign spending: the rich versus the poor. There was an unspoken but obvious lack of confidence in the ability of the voters to sort out truth versus falsehood. The *Chavez* plaintiffs were trying to prove that they did not deserve to lose the political debate. And if they succeeded, it might have been a first chapter in a new regime of government and judicial regulation of political argument measured against a standard of "truth" and "fact." The law might have become a source of endless struggle embodied in intrusive, restrictive election codes. Virtually every campaign in California and throughout the nation would entail expensive re-litigation.

The California trial court dismissed the claims of the *Chavez* plaintiffs in an appropriately summary fashion.⁷⁰ The California Court of Appeal rejected the arguments of the *Chavez* plaintiffs.⁷¹ The judges offered a brief opinion with a straightforward explanation. *Chavez* was not a landmark case, because so few losing candidates and losing causes seek remedies in the courts. The judges knew this: "There [were] only a few published cases where a plaintiff seeks damages for fraudulent misrepresentation in a political campaign."⁷² But the opinion is consistent with oft-quoted elements of celebrated Supreme Court pronouncements. First, as the judges agreed, "[t]he basic issue in this case is whether we are dealing with a statement of fact or an opinion."⁷³ The distinction was decisive, because "courts apply the Constitution by carefully distinguishing between statements of opinion and fact, treating the one as constitutionally protected and imposing on the other civil liability for its abuse."⁷⁴ Second, the appropriate treatment of the case was guided by the overriding goal "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."⁷⁵ Third, "[t]he Constitution, and

70. *Id.* at 279.

71. *Id.* at 282.

72. *Id.* at 280.

73. *Id.*

74. *Id.*

75. *Id.* at 281 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1987)).

public policy, require open public debate on initiative issues without the ‘chilling’ effect of legal reprisals.”⁷⁶

Our courts do not entertain litigation over truth or falsehood in election campaigns. The strikingly small number of attempts is a symptom of a core idea—influenced most by the rationale in *New York Times v. Sullivan*: government agencies, including courts, are not permitted to measure the arguments of any advocate in the electoral arena against some idealized—and no doubt flawed—standard of truth and accuracy.

The First Amendment and the Sovereignty of the People

If the nation is suffering a stress test, it should surprise no one that First Amendment doctrine is also challenged and tested. In the dissenting opinions of Justices Holmes and Brandeis, eloquent and inspiring words articulate reasons why freedom of expression is important, fundamental, and deserving of special protection.⁷⁷ One of the most famous arguments points toward a kind of intellectual Darwinism in which facts and the strongest ideas survive.⁷⁸ Belief in the unregulated marketplace of ideas, as influentially described by Justice Holmes, is still widely quoted, though perhaps not so widely believed:⁷⁹

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.⁸⁰

76. *Id.*

77. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

78. *Id.* at 630.

79. *See, e.g.*, ANDERSEN, *supra* note 2, at 5 (“The American experiment, the original embodiment of the great Enlightenment idea of intellectual freedom, every individual free to believe anything she wishes, has metastasized out of control. . . . In America those more exciting parts of the Enlightenment idea have swamped the sober, rational, empirical parts.”).

80. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

The “old faith” underlying our commitment to expressive liberty rests on the judgment that some basics are “common ground.” For example, “[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”⁸¹ Our nation will do no better if it tries—through legislation and judicial decree—to hold political rhetoric to standards of “fairness,” or “accuracy,” or government-prescribed “truth.” We will have no more wisdom—and considerably less freedom—if government agencies, including courts, begin to measure political arguments in the electoral arena against some idealized, and no doubt flawed, standard of truth and accuracy.

It may seem odd or strange now, but for many years, the legal profession confronted cases resting on case-by-case assessments of gain and pain, cost and benefit, advantages of liberty versus threats to order. “Ad hoc balancing” seemed inevitable and dominant, and so lawyers wrestled with doubts about whether the First Amendment was really law, or merely a label attached to a process that lacked any real rules.⁸² Today, such doubt sounds strange because a categorical approach emerged. Learned Hand had criticized the Holmes clear and present danger test, because he preferred “a qualitative formula, hard, conventional, difficult to evade. If it could become sacred by the incrustations of time and precedent, it might be made to serve just a little to withhold the torrents of passion.”⁸³ Hand did not live to see the full impact of his observation,⁸⁴ but the collective work of the federal judiciary sought a more coherent and more conceptual First Amendment, because “balancing” seemed to be a subjective, unpredictable process. The controversy once divided Justice Frankfurter from Justice Black.⁸⁵ More recently, ideologies have shuffled: a categorical approach was championed by Justice Brennan and Scalia, while flexibility was

81. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974).

82. Compare Frantz, *supra* note 57, with Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962); see also ALEXANDER M. BICKEL, *MORALITY OF CONSENT* 57 (1975) (“The rights which the First Amendment creates cannot be established by any theoretical definition, as Burke said of the rights of man, but are in ‘balance between differences of good, in compromises sometimes between good and evil, and sometimes between evil and evil.’ . . . The First Amendment is no coherent theory that points our way to unambiguous decisions . . .”).

83. *Learned Hand, REASON AND IMAGINATION – THE SELECTED CORRESPONDENCE OF LEARNED HAND* 103 (Constance Jordan ed. 2013).

84. GERALD GUNTHER, *LEARNED HAND: THE MAN AND JUDGE* 169, 603 (1994).

85. See *Adamson v. California*, 332 U.S. 46 (1947).

thought to be a virtue, at least in the view of Justice Stevens⁸⁶ and Chief Justice Rehnquist.⁸⁷ If there is common ground in that overextended and overemphasized debate, it is in the consensus surrounding *New York Times v. Sullivan*.

It may be also be found in the careful workmanship of Justice John Marshall Harlan II in *Cohen v. California*.⁸⁸ The facts of the case seem trivial. An angry draft protester wore a jacket with a prominent, profane epithet in the Los Angeles County Courthouse; as a result, he was arrested and convicted for disturbing the peace.⁸⁹ The Harlan opinion is a useful toolkit for a variety of First Amendment problems, but it also spoke to first principles and an old faith. In his view, the states lack a general power to “maintain . . . a suitable level of discourse within the body politic.”⁹⁰ Endorsing the emerging categorical approach, the Harlan analysis held that states have legitimate reasons to act only when expression falls within the “various established exceptions” to the “usual rule that government bodies may not prescribe the form or content of individual expression.”⁹¹ The principles serve a central purpose. They “remove governmental restraints from the arena of public discussion” so that ideas and information will flow freely “in the hope that the use of such freedom will ultimately produce a more capable citizenry.”⁹² From Madison to Brennan to Harlan comes the idea that doctrine must serve democracy.

At least, that is, when a case involves political speech on matters of public interest, including elections, government regulation is restricted. As the Court wrote in *Mills v. Alabama*:

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes

86. In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), Justice Stevens wrote one of his opinions designed to question the categorical approach, because it “sacrifices subtlety for clarity and is, I am convinced, ultimately unsound. As an initial matter, the concept of ‘categories’ fits poorly with the complex reality of expression. Few dividing lines in First Amendment law are straight and unwavering, and efforts at categorization inevitably give rise only to fuzzy boundaries.” *Id.* at 426.

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

88. 403 U.S. 15 (1971).

89. *Id.* at 16–17.

90. *Id.* at 23.

91. *Id.* at 24.

92. *Id.*

discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.⁹³

The viewpoints, philosophies, and substantive ideas of those who participate in the political process are not subject to the scrutiny or punishment of any governmental agency based on notions of fact or truth. If plaintiffs genuinely seek to reduce the amount of falsehood in campaign rhetoric, their only recourse is to rebuttal, to enter the marketplace of ideas, to appeal to the good judgment of voters whose will is supposed to be sovereign.

The concept of fraud is not easily translated from the context of commercial advertising to political argument. In *Virginia Pharmacy Board v. Virginia Consumer Council*,⁹⁴ Justice Potter Stewart offered a concurring opinion that explained “the important differences” between commercial speech and ideological communication:

The Court’s determination that commercial advertising of the kind at issue here is not ‘wholly outside the protection of the First Amendment indicates by its very phrasing that there are important differences between commercial price and product advertising, on the one hand, and ideological communication on the other. Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought—thought that may shape our concepts of the whole universe of man. Although such expression may convey factual information relevant to social and individual decisionmaking, it is protected by the Constitution, whether or not it contains factual representations and even if it includes inaccurate assertions of fact. Indeed, disregard of the ‘truth’ may be employed to give force to the underlying idea expressed by the speaker. . . .

Commercial price and product advertising differs markedly from ideological expression because it is confined to the promotion of specific goods or services. The First Amendment protects the advertisement because of the “information of potential interest and value” conveyed, rather than because of any direct contribution to the interchange of ideas. Since the factual claims contained in commercial price or product

93. 384 U.S. 214, 218–19 (1966).

94. 425 U.S. 748 (1976).

advertisements relate to tangible goods or services, they may be tested empirically and corrected to reflect the truth without in any manner jeopardizing the free dissemination of thought. Indeed, the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking.⁹⁵

Our past is messy—filled with conspiracy theories, nightmare fantasies, whitewashing myths, historical amnesia and misunderstandings, bigotry, ignorance, and partisan lies. Our law—in the past half-century at least—is dedicated to the idea that the messiness is a symptom of freedom, and that freedom serves self-government. Worries may be reasonable and understandable,⁹⁶ but Justice Harlan spoke for the dominant view of the legal profession, which sees the First Amendment as an expression of confidence. “That the air may at times seem filled with verbal cacophony is . . . not a sign of weakness but of strength.”⁹⁷

95. *Id.* at 779–81 (Stewart, J., concurring) (footnotes and internal citations omitted).

96. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985).

[T]he 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. The first amendment, in other words, should be targeted for the worst of times.

Id.

97. *Cohen*, 403 U.S. at 25.