

FREE SPEECH IN A POST-TRUTH SOCIETY

by Ellis Cose

In his book-length rumination on the post-truth world, philosopher Lee McIntyre traces the dawn of public consciousness to November 2016, when the Oxford Dictionaries named post-truth its international word of the year. “After seeing a 2,000 percent spike in usage over 2015, the choice seemed obvious...As a catch-all phrase, ‘post-truth’ seemed to capture the times. Given the obfuscation of facts, abandonment of evidential standards in reasoning, and outright lying that marked 2016’s Brexit vote and the US presidential election, many were aghast. If Donald Trump could claim—without evidence—that if he lost the election it would be because it was rigged against him, did facts and truth even matter anymore?” writes McIntyre (McIntyre, 2018, p. loc 110).

“Post truth,” noted the *New York Times*, had vanquished “a politically charged field that included ‘adulter,’ ‘alt-right,’ ‘Brexititeer,’ ‘glass cliff’ and ‘woke.’” Quoting Katherine Connor Martin, Oxford’s head of US dictionaries, the *Times* went on to explain, “The term, whose first known usage in this particular sense was in a 1992 essay in *The Nation* magazine citing the Iran-contra scandal and the Persian Gulf War, does not represent an entirely new concept. But it does, Ms. Martin said, reflect a step past ‘truthiness,’ the Stephen Colbert coinage...‘Truthiness is a humorous way of discussing a quality of specific claims,’ she said. ‘Post-truth is an adjective that is describing a much bigger thing. It’s saying that the truth is being regarded as mostly irrelevant.’”

The *Washington Post* greeted the news with, “It’s official: Truth is dead. Facts are passe.” And the *Christian Science Monitor* conjectured that “the term ‘post-truth’ may ultimately point to a fundamental shift in how objective truth is interpreted in the 21st century. With the collective knowledge of human civilization at our fingertips through the internet, information is no longer the purview of an intellectual elite...With this democratization of information, however, comes the problem of an oversaturation of information by anyone with an opinion on the facts to the point where it becomes harder to determine what is true and what is merely the product of someone’s political agenda.”

The Oxford Dictionaries’ decision is probably as good a place as any to start a discussion about the nature of truth in today’s world. But, as most commentators acknowledge, the anti-truth society did not arrive with Donald Trump’s candidacy. Trump just made it impossible to ignore that we had entered a dangerously fraught reality.

This paper, which previews a work-in-progress, is not concerned merely with the anti-truth movement but with how that movement impacts democracy and the concept of Free Speech in an increasingly economically stratified society.

In a sense we have been dealing with the issue of truth in public speech since the beginnings of the republic. Indeed, the Founders explicitly exempted members of Congress from any consequences for any words—including false or libelous words—uttered in Congress.

As stated in Article 1, section 6 of the Constitution, Senators and Representatives “shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.” The provision was an admission, in effect, that robust political debate might include provocative arguments based on “facts” that were not only controvertible but perhaps untrue.

As legal scholar Akhil Reed Amar explained in *America’s Constitution: A Biography*, “The core privilege in both England and America aimed to ensure that legislatures remained forums for robust political discourse. Parliament— from the French *parler*—functioned as a privileged parley place, a special speech spot. Neither the executive nor the judiciary could punish a lawmaker for any floor speech. Here, too, a private right vindicated the larger public interest, as James Wilson emphasized in 1791: ‘In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be

protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offence.” (Amar, 2005)

Citing Thomas Jefferson’s assertion that “to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive; and that their communications with their constituents should of right, as of duty also, be free, full, and unawed by any,” Kelly McGuire argues, that the clause “was aimed at preventing the other branches of government from punishing congressmen who express unpopular views” out of an assumption that “in order for the people to actively participate in government through their legislator, they must be adequately informed.” (McGuire, Fall 2012)

The Founder’s had no particular interest in protecting liars but they were wise enough to realize that, in order to encourage frank dialogue—in order, in other words, to have the best shot at getting at truth, talk needed to be as unrestricted as possible, even if that meant that lies would sometimes be the result. The Founders also did not extend that right to the executive branch; although Congress essentially took care of that itself with the Westfall Act, otherwise known as the Federal Employees Liability Reform and Tort Compensation Act of 1988—a measure that gave federal employees immunity against most claims of lying while acting in their official capacity.

University of law school professor Aziz Huq, among others, see that as a problem. In an article (“When Government Defames”) published in the *New York Times* in 2017, Huq outlined the following scenario: “Imagine that a senior government official takes to Twitter, makes a call to a national news outlet or goes on national television to disparage you. Imagine that he tells lies about you to a national audience, lies harmful to your professional or personal future. What could you do to remedy the situation? You might seek a retraction. Perhaps you would go to colleagues and friends to privately plead your side of the case. Or if you were lucky enough to have a national platform of your own, maybe you would try to correct the defamatory statement in public.

“But one thing you couldn’t do is sue. No judicial remedy exists when a federal official defames someone. This gap in the law isn’t a result of a conscious decision by Congress or federal judges to protect the government’s ability to defame you. It was created inadvertently. In an age when the political lie is being weaponized to increasing effect, it’s an oversight Congress should redress.”

Up to this point, of course, Congress has not redressed that issue. Nor have we seen serious efforts to get rid of Congressional immunity. The reason, quite simply, is that society has not seen these things as serious problems. Sure, government officials and politicians, even presidents, sometimes lied. LBJ lied about the Vietnam War. President Richard Nixon lied about Watergate. Bill Clinton lied about Monica Lewinsky. But the Republic stood and was perhaps healthier for allowing people with political agendas to speak freely. So what, if anything, has changed?

One thing that seems to have changed is the brazenness of the lies—and the magnitude and scope of them—not just from politicians themselves but from their surrogates and partisans.

We saw that clearly during the 2004 presidential campaign, which pitted Vietnam-war-hero-turned-Vietnam-war-critic John Kerry against George W. Bush, who had spent the Vietnam War era serving in the Air National Guard. Nonetheless, a group calling itself Swift Boat Veterans for Truth did serious damage to Kerry’s reputation by very loudly lying about his past. Through TV advertisements and distribution of a book, *Unfit for Command*, Kerry’s political opponents convinced many voters that Kerry’s record was the opposite of what it actually was. (*Unfit for Command*, not coincidentally, was authored by John O’Neill and Jerome Corsi. Corsi famously went on to become a leading proponent of birtherism and a suspected conspirator with Russian interests in the 2016 presidential election.)

Kerry’s enemies branded him a dishonest opportunist who supposedly had lied about his exploits and his medals. As a letter circulated by a group of fellow veterans and Kerry supporters four years later put it, Kerry’s enemies “tarnished the sacrifices we made, called into question the medals we were awarded and challenged the very authenticity of our service.”

“They lied and lied and lied about everything. How many lies do you get to tell before someone calls you a liar? How many times can you be exposed in America today?” said Kerry during an interview with the *New York Times* in 2006.

Four years after the falsehood-based assault on Kerry's reputation, Barack Obama was similarly attacked. The issue this time was not military service but the contention that he was a militant Muslim who had somehow infiltrated the American political system. One email that reached millions asserted that because of his Muslim beliefs, Obama won't “recite the Pledge of Allegiance nor will he show any reverence for our flag. While others place their hands over their hearts, Obama turns his back to the flag and slouches.” The email went on to ask, “Would you want this man leading our country? NOT ME!!!”

Despite the fact that the email was roundly debunked, it circulated for years. And it seems to have had an impact, at least among voters looking for a reason to dislike Obama. In a poll released by the Pew Research Center in July 2008, equal numbers of Republicans and Democrats—12 percent—thought Obama was a Muslim. In a poll conducted by Alex Theoridis (of the University of California at Merced) in the fall 2014, nearly six years into Obama's presidency, the numbers had diverged sharply. Only 10 percent of Democrats thought Obama was Muslim, compared to 54 percent of Republicans.

In the interim, an even more nefarious smear swept through Republican circles, as opponents spread the idea that Obama was not American-born and therefore was illegally serving as president. One of the biggest boosters of that slur was Donald Trump, who, in part because of the traction gained by his pushing that outrageous and easily disprovable lie, became the Republican candidate for president in 2016.

A Public Policy Polling survey released in May 2016, two months before the Republican convention, found that a whopping 65 percent of voters who favored Trump believed Obama to be a Muslim and 59 percent believed he was not American.

So why have I chronicled this abbreviated history of political lies—and the protection given such lies? The answer requires me to focus briefly on our right to free speech.

The Bill of Rights, as we all know, was ratified in 1791. But the way we think of the First Amendment is a relatively recent phenomenon.

It's worth recalling that the Bill of Rights was drafted at a time when the Founders had rejected foreign tyranny. They were wary of the potential power of the centralized state. So the Bill of Rights was a balancing act, weighing not only the rights of individuals vs. government in general, but the rights of states vs. the federal government. As David Yassky pointed out in a 1991 *Columbia Law Review* article, “The First Amendment, like the rest of the Bill of Rights, did not originally apply to the states. The ‘guarantee’ it effected was therefore quite weak—at least to contemporary eyes. A citizen in 1800 had no absolute right to free speech; if the speech-restricting law was a state law, the Constitution was silent.” (Yassky, November 1991, p. 1704).

Vikram David Amar of U.C. Davis makes much the same point: “At the nation's founding, some read the First Amendment quite narrowly, arguing that it prohibited before-the-fact injunctions against speech—so-called prior restraints—but no more. Just a few years after the Constitution was ratified, Congress enacted the self-dealing Sedition Act of 1798, which allowed congressional incumbents to criticize their challengers but prohibited challengers from criticizing incumbents. (Because the act sought to punish the government's critics after the fact... its supporters argued the statute didn't run afoul of the First Amendment.” (Amar V. D., 2009, p. 13)

When it came to speaking out against slavery, for instance, the First Amendment mattered not at all. What did matter was the hostility of southern slaveholders to such talk. Southern antebellum states essentially criminalized advocating freedom for slaves. As Akhil Reed Amar points out, “Across the South, mere criticism of slavery became a crime, and the Republican Party was in effect outlawed via the threat of after-the-fact punishment rather than prior restraint.” (Amar A. R., *The Document and the Doctrine*, November 2000, p. 58)

Eventually, as we know, that changed; and that had a lot to do with the Civil War, the end of slavery and the 14th Amendment. But even after Reconstruction, notes Vikram Amar, “federal courts were slow to respond favorably to speech claimants. After having stood by while Southern

states effectively criminalized the antebellum Republican Party, federal courts for more than a half century after the Civil War refused to implement the ‘incorporation’ of the First Amendment against the states that the Fourteenth Amendment clearly commanded. And when in 1907 the Supreme Court assumed for the sake of argument that incorporation existed, it did so only to insist that freedom of expression was limited to freedom from prior restraint and thus permitted judges to fine a newspaper publisher who politically satirized the very judges in question.”

The point is that, for all the talk about free speech being central to American identity, what was meant by free speech in the 18th and 19th Centuries is very different from what it means now. Free speech, as we understand it today is very much an invention of the 20th Century, which brings us to the American Civil Liberties Union, which was born in 1920.

The ACLU’s predecessor organization, the American Union Against Militarism, formed in 1915, had a considerably different mission than the ACLU came to have. The AUAM was focused principally on two things: keeping the United States out of war—with Mexico and in Europe—and beating back the militaristic mindset.

In early 1917, America was on the verge of entering World War 1, which meant that the AUAM had failed in its paramount mission. So with the United States preparing to put troops in the field, the focus shifted to those soldiers and prospective inductees. It defended conscientious objectors and took on the cause of people whom the government targeted because they disagreed with the war. That mission required a different type of organization. So in July 1917, the AUAM created the National Civil Liberties Bureau, which eventually became the ACLU.

The same year America entered the war, the Justice Department indicted 166 members of the International Workers of the World, the Wobblies, including all its top leaders. They were charged with willfully interfering with the war effort. By the time opening arguments began in July, 113 defendants were in the dock. Of the 166 indicted, one had died, one had been dismissed, four had been severed from the trial, and others had disappeared. Nonetheless, as the *New York Times* observed, “more men were under indictment than in any other case in the history of American criminal jurisprudence.” They

were convicted and sentenced to hard time, despite the efforts of the ACLU and other progressive organizations to exonerate them.

Shortly thereafter Roger Baldwin, founding director of the National Civil Liberties Bureau, went to jail for draft evasion. In jail, he became more radicalized. Upon his release, he announced that he was done, with “social reform as a method because I think the world has passed it by.” Instead, he was “going to do what a so-called intellectual can do in the labor movement and aid in the struggle of the workers to control society in the interest of the mass.”

Baldwin, who became executive director of the ACLU when it was created in 1920, was a man whose view of the First Amendment and of civil liberties was not so much rooted in constitutional history as in a certain brand of progressive activism—and that view ultimately became inextricably intertwined with how America viewed free speech.

To quote Laura Weinrib, author of *The Taming of Free Speech*, “When the ACLU was founded in the aftermath of the First World War, it declared itself an adjunct of the radical labor movement. Its defense of free speech was motivated by a deep-seated distrust of state institutions stemming from decades of hostile treatment of unions in the courts as well as the political branches; the rights it championed were the rights to picket, boycott, and strike.” (Weinrib, 2016, p. 1)

Given that history, it stood to reason that the ACLU became deeply involved in the case of Benjamin Gitlow. In November 1919, Gitlow, a former Bronx assemblyman, was arrested along with James “Big Jim” Larkin. Both were Communist Labor Party members. Their alleged crime was violating New York State’s criminal anarchy law. The question was whether, by distributing the Communist newspaper, the men had supported the violent overthrow of the government.

The jury took two-and-a-half hours to find them guilty. They were sentenced to five to ten years. The New York Court of Appeals affirmed the verdicts.

Several months later, Governor Al Smith pardoned Larkin who, at that point, had been imprisoned for more than two years. “There is no evidence that Larkin ever

endeavored to incite any specific act of violence or lawlessness,” Smith pointed out. He was also willing to pardon Gitlow; but the ACLU asked Gitlow to fight the conviction all the way to the Supreme Court, which he agreed to do.

Gitlow lost. Writing for the 7-2 majority, Justice Edward Terry Sanford concluded that freedom of speech and the press were not “absolute” rights. Advocating overthrow of the government was simply not permitted.

In dissenting, Justices Oliver Wendell Holmes Jr. and Louis Brandeis pointed to a precedent requiring a “clear and present danger” before the government clamped down on speech. “Eloquence may set fire to reason,” they wrote, but words alone were not a fuse. The “only meaning of free speech” in a democracy is that even distasteful opinions, they wrote, “should be given their chance and have their way.”

Even though he lost, Gitlow inspired the majority to make a stunning concession. “Freedom of speech and of the press,” the Court declared, “are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”

With that phrase, Gitlow changed forever the presumption that the Bill of Rights’ pertained only to the federal government. Those rights were thereby incorporated into the protections of the 14th Amendment.

A few years later, another case inspired Brandeis to speak out. It revolved around Charlotte Anita Whitney, a wealthy Californian born in 1867 who claimed ancestors from the Mayflower. After graduating from Wellesley, she moved to New York City to work in a settlement house. That job inspired her to dedicate her life to social work and public service. When she returned to the West Coast, she became active in progressive causes. She also became a socialist and, later, a communist.

In 1919, when America was in the throes of the red scare, California authorities arrested Whitney in Oakland following a talk she had given on “The Negro Problem in America.” She was convicted of violating the criminal syndicalism law—which meant she had conspired against the state.

In May 16, 1927, in a unanimous opinion, the Supreme Court ruled against Whitney, saying that the law in question did not violate the 14th Amendment. Something about her situation unsettled Louis Brandeis. In a concurring opinion, joined by Oliver Wendell Holmes, Brandeis waxed poetic on the Founder’s hopes and the value of free speech. “They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth,” he wrote.

“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.”

Brandeis, as some scholars have noted, portrayed the Founders as stronger defenders of speech than they actually were. But his opinion is nonetheless seen as an invaluable aspirational essay.

As Vincent Blasi put it, “Brandeis sounds almost like a dewy-eyed idealist in the way he articulates the argument for a strong principle of freedom of speech. It is, I believe, the idealism that permeates his Whitney opinion that makes it arguably the most important essay ever written, on or off the bench, on the meaning of the first amendment.” (Blasi, 1988, p. 668)

Roger Baldwin apparently agreed. He announced his retirement from the ACLU in 1949, right after the trial of a group dubbed the Communist Party 11. The members of that group, like Whitney, were not accused of any violent crime. Instead they were simply charged with being communists. After a nine-month trial, the jury took seven hours to find them guilty.

Two days after the verdict, Baldwin published a lengthy article in the *New York Herald Tribune* entitled “Free Speech Works Both Ways.” He wrote, “Communists are

entitled to speak. But they must expect to hear in return a chorus of voices against them and feel the impact of the democratic truths. In short, the answer to abuses of free speech is more free speech—with those of us who believe in democracy speaking out loud and clear.” In short, good ideas will inevitably drive out bad ideas—as people rationally decide what’s in society’s best interest. In other words, the remedy to bad speech is more speech—presumably of a higher, more enlightening variety.

I go into the history to make several points. (1) Back in those days when the idea of civil liberties was being reborn there was a faith in the proposition that shining a light on truth would inevitably benefit those of the side of justice; that a free speech movement on the side of the angels, arguing on behalf of unions, minorities, women’s liberationists and social equality, would lead to a society that held those things dear. (2). There was faith in something else: that rational debate, rational dialogue was both necessary and possible, and that it would lead to rational and just decisions, because that is what society ultimately would demand.

That faith—that optimism—was rooted in a grand illusion. And we are now dealing with the consequences of the grand self-delusion. There is nothing inherently liberal, progressive, or radical in free speech: And at some point, the wealthy class, the class of industrialists and union breakers, was bound to realize that.

To be blunt, neither the Founders, Brandeis, or Baldwin ever envisioned anything remotely like the situation we have today—in which a president chronically lies without consequence and, in which, made up facts are widely deemed to be more credible than the truth, and in which it is all but impossible to “avert the evil by the processes of education” that “falsehoods and fallacies’ can wreak on society.

Trump made his feeling clear in 1918 at a Veterans of Foreign Wars rally in Kansas City when, gesturing at reporters, he told a roaring crowd, “Stick with us. Don’t believe the crap you see from these people, the fake news. ... What you’re seeing and what you’re reading is not what’s happening.”

In August 2018, some 300 newspapers led by the *Boston Globe* jointly criticized Trump’s practice of attacking and

denigrating fact-based journalism: “Today in the United States we have a president who has created a mantra that members of the media who do not blatantly support the policies of the current US administration are the ‘enemy of the people,’” observed the *Globe’s* editorial page. Less than two months after that display of press unity, the Saudi Arabian government murdered journalist Jamal Khashoggi and hacked his body to pieces. Trump responded with fulsome praise for the government even as he first whitewashed then downplayed or excused the murder itself. Meanwhile, his rate of lying—as measured by the *Washington Post* and other fact-checkers accelerated; and he continued to pound away at what he called fake news.

Trump, as already noted, did not create this fact-free approach to government. He is as much its product as its instigator. But he also is its most prominent practitioner; and in his governance, he has taken that practice to unprecedented height. He dismissed his own government’s Fourth National Climate Assessment and its warnings that action must be “taken to reduce greenhouse gas emissions and to adapt to the changes that will occur” with a dismissive “Next time we will have better scenarios.” Months later he drove home his point by responding to Amy Klobuchar’s snow-accompanied announcement of her candidacy for the presidency with, “Well, it happened again. Amy Klobuchar announced that she is running for President, talking proudly of fighting global warming while standing in a virtual blizzard of snow, ice and freezing temperatures. Bad timing. By the end of her speech she looked like a Snowman(woman)!”

Similarly, he responded to his intelligence chiefs’ Global Threat Assessment with an equally dismissive, “Perhaps intelligence should go back to school.”

Indeed, whenever confronted with inconvenient facts—whether a peaceful southern border or an aggressive North Korea— Trump responds with lies. And his lies are disseminated widely by the media—even as responsible news outlets try to fact-check his most outlandish flights from reality.

There is a danger in this beyond having a President garner a reputation as a chronic liar. As Margaret Sullivan, media columnist for the *Washington Post* put it, “When news organizations hand a megaphone to lies—or liars—they do actual harm.”

One of those harms is that in slavishly repeating falsehoods—even if reporters later attempt to debunk them—news organizations give the falsehoods a certain legitimacy. It is a dilemma that stems from the very honorable intention of wanting to tell both sides of story. It is the dilemma historians have faced with Holocaust deniers.

Deborah Lipstadt, author of *Denying the Holocaust*, recalls the day that David Irving, a notorious Holocaust denier, burst into her classroom and promised \$1,000 to anyone who could prove Hitler had ordered the final solution. As she recounted in an interview with *The Guardian* newspaper, “I was a deer in the headlights. I didn’t know what to do. If I started debating with him it would suggest to students that there were two sides. If I didn’t debate it suggested I was afraid.”

Lipstadt compared Irving’s gambit to Trump’s oft-repeated lie that he had witnessed thousands of Muslims dancing in Jersey City on the night of the 9/11 attack. “You would have thought some evidence would have emerged. Some shred of evidence. And he says, ‘Oh, no. I know it. It’s true. 100 people called me and said the same thing.’ There is no need to provide the evidence. Opinion becomes fact,” observed Lipstadt. “I am very worried that there is a general sentiment out there that you have your facts, I have my facts, and whoever yells loudest wins.”

In *Post-Truth*, McIntyre observed, “In the past we have faced serious challenges—even to the notion of truth itself—but never before have such challenges been so openly embraced as a strategy for the political subordination of reality. Thus what is striking about the idea of post-truth is not just that truth is being challenged, but that it is being challenged as a mechanism for asserting political dominance. (McIntyre, 2018, p. loc. 78)

In support of his point, McIntyre recounts an exchange between a CNN reporter and Trump supporter Newt Gingrich, in which Gingrich is insisting that the reporter accept a Trump lie that crime is at a historic high. As the reporter pushes back, Gingrich insists that the reality people feel is more important than the reality FBI statistics portray. “I’ll go with how people feel and let you go with the theoreticians,” says Gingrich.

Certainly, as noted, other administrations and politically active institutions have lied: “In *Merchants of Doubt*, Oreskes and Conway make the case that a straight line can be drawn from the ‘tobacco strategy’ of the 1950s to today’s ‘controversy’ over global warming. In this case, the funding appears to have come from the fossil fuel industry and the ‘think tank’ in question is the Heartland Institute. It is dispiriting to learn that some of the earliest money behind Heartland came from tobacco giant Philip Morris. It is perhaps less surprising to learn that some of their other funders over the years have included ExxonMobil and the Koch brothers.” (McIntyre, 2018, p. loc. 459) And that of courses, raises another facet of the problem, which is that it is not simply politicians lying, but lavishly-funded institutions helping them to sell their twisted versions of supposed facts—which takes us to the issue of money and corporate influence in politics.

In his review of Adam Winkler’s *We the Corporations: How American Businesses Won Their Civil Rights*, ACLU legal director David Cole points out that Citizens United, decided in 2010, was one of the most unpopular Supreme Court decisions ever. The problem, many say, is that the Court wrongly extended constitutional rights to corporations. But Cole rejects that criticism, pointing out that the Supreme Court has a long history of doing that.

In his book, Winkler tells the story of Roscoe Conkling, a former Senator who, in an 1882 case involving the Southern Pacific Railroad, tried to show that the drafters of the Fourteenth Amendment wanted corporations to be treated as human beings. It turned out that Conkling was wrong but that did not stop corporations from pushing the argument. Winkler points out that “Between 1868, when the amendment was ratified, and 1912, when a scholar set out to identify every Fourteenth Amendment case heard by the Supreme Court, the justices decided 28 cases dealing with the rights of African Americans—and an astonishing 312 cases dealing with the rights of corporations.”

Citizens United, it turns out, was only a dramatic development in a long-established trend. And that trend has been extended, with the Court deciding that chain stores have religious liberty rights and can refuse to service same sex couples, and that big companies don’t have to include birth control in health plans.

David Cole says, “The problem with Citizens United is ... not in its protection of corporate rights or its view of money as speech, but in its inability to recognize a broader set of justifications for limiting the distorting effects of concentrated wealth.” (Cole, 2018)

It’s hard to argue with the legal logic of that; but there is no reason, in the constitution or the law itself, why justices should feel compelled to recognize that broader set of justifications. And meanwhile, the forces of corporatism and regressive chauvinism—who are locked in an unholy alliance—will take full advantage of their free speech rights to argue that government is justified in helping to concentrate wealth, in preserving an inequitable status quo, in punishing people for being foreign, colored and or poor.

Some 28 percent of respondents to a 2018 survey by The Democracy Project rated “big money in politics” as one of their top two issues of concern among 11 possibilities offered—putting it in a statistical tie with “racism and discrimination.” In addition, a large majority (80 percent) believe that the “influence of money in politics” is getting worse rather than better. And over three-quarters (77 percent) agree that “the laws enacted by our national government these days mostly reflect what powerful special interests and their lobbyists want.” Only 17 percent believe, “The laws enacted by our national government these days mostly reflect what the people want.”

It is not coincidental that historically huge disparities in income have occurred at a time when monied interests increasingly control political dialogue and power. In today’s America, the ability to speak and reach a receptive audience has a lot to do with wealth. One of the largest tax cuts in American history was sold as a boon to working class people. It was not. That positioning was possible because the people making the argument were able to message their way into the hearts of people whose economic interests they do not serve. To the extent political speech shapes our democracy (including voting preferences and policies) and therefore our governance, it can be both cause and casualty of economic inequality.

The unsettling impact of money on politics has long been recognized, as evidenced by the Bipartisan Campaign Reform Act of 2002, which blocked corporations and unions from funding “electioneering communications”

during the immediate run-up to an election or primary. In changing the rules with its *Citizens United* decision, the Supreme Court brought a new urgency to the discussion of corporate wealth on politics and government. The Court assumed “that so-called outside groups would not corrupt the political system because they would be legally separated from the candidates,” noted Lee Fang in *The Nation*. But as we have seen over the past several years, that legal separation has been more symbolic than real. And although the decision superficially treats unions and corporations equally, the playing field in actuality is anything but equal. As Harvard law professor Benjamin Sachs has pointed out, “federal law prohibits a union from spending its general treasury funds on politics if individual employees object to such use,” whereas “corporations are free to spend their general treasuries on politics even if individual shareholders object.”

The problem, however, is not just that unions are neither as empowered nor as wealthy as big corporations, but that individual citizens have virtually no voice at all. And to make matters worse, they have little assurance that the speech inundating them is worth listening to.

The First Amendment guarantee of freedom of speech was rooted in the idea that in competition of ideas, good ideas generally crowd out bad ideas. It was rooted in the idea that people were basically rational and were skilled in recognizing the better argument when they heard it. It was also rooted in the idea that dialogue was dominated by real people with an interest in ideas, not by corporations and wealthy individuals hiding behind PACs and other creations, using trickery, appeals to base prejudice and outright lies to gather gullible people to their side in the interest of commerce.

As I have noted, Brandeis assumed that the better argument would almost invariably win, that exposure “through discussion” would reveal “falsehoods and fallacies” and society would make the just and rational choice. But that is far less certain than Brandeis assumed, especially given that we live in a society in which lies are endemic, omnipresent and purposeful—and backed by the most powerful economic engine the world has ever seen.

One of our most important industries—advertising—is almost totally based on lies and misinformation. And we have brought the worst values of advertising into the

political sphere and wedded that to long established tactics of political propaganda, even as our political class has learned to use social media to spread disinformation that propagates at a breath-taking rate.

The ease of access to social media complicates the problem. Many social media advocates once believed that social media would be a great force for social cohesion. While it has been that, to some extent, it has also become a major force for divisiveness. As one technology expert told the New York Times, “The challenge faced by any platform that allows everything permitted under U.S. law is that, if left unabated, the most objectionable content will inevitably take over.” So the result may be an online community “dominated by porn, beheadings or white supremacists.”

The forces of modernity are teaching us just how much everyday thinking is influenced by things that have nothing to do with either logic or reality. We have learned—as Swift boat and Muslim slur researchers Cristian Vaccari and Marco Morini point out—that repetition of even the most outlandish ideas make them more believable. So if you have the money—or social media expertise—to constantly push a slur forward, it gains traction.

We are also learning—researchers Brendan Nyhan and Jason Reifler call this the “backfire effect”—that fact-checking may have the precise opposite result of its intended effect. In other words, if the fact-checking is telling people things they don’t want to hear, they don’t just tune it out, they double-down on their original misconception. Facts, in other words, aren’t allowed to get in the way of preferred perceived truths. Or, as Nyhan and Reifler put it, “If people counterargue unwelcome information vigorously enough, they may end up with ‘more attitudinally congruent information in mind than before the debate’, which in turn leads them to report opinions that are more extreme than they otherwise would have had. (Nyhan & Reifler, 2010).

Interestingly—and relevantly—when politicians (in at least one experiment) were told that they would be exposed if they made false statements, they seemed to become more honest. Or, as the researchers described it, legislators sent warnings about making “questionable” claims “were substantially less likely to receive a negative fact-checking rating or to have their accuracy questioned publicly,

suggesting that fact-checking can reduce inaccuracy when it poses a salient threat.” (Nyhan & Reifler, The Effect of Fact-Checking on Elites: A Field Experiment on U.S. State Legislators, July 2015)

Interestingly, it appears possible that people who hold so-called conservative political beliefs may be more easily manipulated than more liberal thinkers. As McIntyre put it, “Experimental evidence has shown that the fear-based amygdala tends to be larger in conservatives than in liberals. Some have speculated that this is why the lion’s share of fake news stories during the 2016 election were targeted toward a conservative audience. If you are trying to sell a conspiracy theory, perhaps the right wing is more fertile ground.” Post Truth: loc 867)

Virtually none of this provides any evidence of good ideas pushing out bad, or, citing Thomas Jefferson’s ideal, of free speech giving “the will of the people the influence it ought to have.” So, instead of the Brandeisian model of rational decision making, we are left with a model in which preconceptions, repetition, fear, and skillfully presented propaganda pretty much trump everything.

So it stands to reason that a reality star from a fantasy world created by a television network would sit at the top of the American pyramid—and that once there, he would decide that it makes perfect sense to weave lies together to create a fake national emergency and then to conduct government policy (including the movement of money and troops) as if that emergency is real.

This has been perhaps a long journey to get to a couple of basic points. So let me restate:

- 1) In those days when the idea of civil liberties was being reborn there was a faith in the proposition that shining a light on truth would inevitably benefit those on the side of justice; that a free speech movement on the side of the angels, arguing on behalf of unions, minorities, women’s liberationists and social equality, would lead to a society that held those things dear. (2) There was faith in rational debate, along with a sense that rational dialogue was both necessary and possible, and that it would lead to rational and just decisions, because that is what society ultimately would demand.

That faith—that optimism—seems to have been ill-founded. And we are now dealing with the consequences of that self-delusion. There is nothing inherently liberal, progressive, or radical in free speech; and the wealthy class (in league with the forces of regression) has opted, more and more, to manipulate free speech to its own perceived ends.

Free speech always had limits. But because of our new technological realities, because of the unexpected weaponization of speech, we are having to consider those limits in a new light. We live in a world where, sooner or later, we will have to face the fact that the answer to bad speech is not necessarily more speech. We live in a world where a foreign power, thanks to our freedom of speech, may well be responsible for the election of a U.S. president. We live in a time when a frightened portion of the majority fights to maintain control and in which big corporations and cynical functionaries—eager to exploit fear—have a bigger megaphone than anyone speaking for the powerless and dispossessed.

That raises a host of interesting questions (far beyond the scope of this initial paper), starting with the big one: Can we change this? And, if so, how? And what impact would any of those changes have on our politics, and on the policies skewed against the economically and politically powerless?

To be continued.

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