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## The Right to Receive Foreign Speech

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## THE RIGHT TO RECEIVE FOREIGN SPEECH

JOSEPH THAI\*

*Foreign meddling in the 2016 presidential election—from Russian hacking and leaking of Democratic National Committee emails to the foreign power’s dissemination of fake news and other disruptive falsehoods on major social media platforms—deeply impacted the coverage of and campaigning by the candidates. Even if this sophisticated disinformation operation ultimately did not change the outcome of the election, it raises serious concerns about the vulnerability of our electoral democracy to foreign interference and basic questions about the nature and extent of First Amendment protection for speech from abroad, including from speakers affiliated with hostile foreign countries.*

*While the First Amendment generally does not protect foreign speakers outside of the United States, the openness of the internet to speech from abroad and the power of vast social networking platforms to spread such speech call for fresh consideration of First Amendment coverage on the listener’s end of the speech relationship. This Article does that. First, it examines the extent to which existing caselaw on the right to receive information and ideas either already protects or might extend to safeguard access to speech from abroad by foreign sources. Next, it considers how traditional justifications for protecting domestic speech—truth-seeking, self-governance, and self-realization—generally support open access to foreign speech, and possibly even to disinformation from hostile nations in the high stakes context of elections. Finally, this Article recommends disclosure of the identity of foreign-state speakers and early education to instill media literacy as policy responses to foreign meddling in the domestic marketplace of ideas that are consonant with both First Amendment doctrine and functions.*

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*I. Introduction*

Those of us who came of age watching movies in the 1980s expected certain things of the future. Foremost, we would have flying cars, even if time-traveling in them were not possible or advisable.<sup>1</sup> Second, a slasher might kill us in our sleep.<sup>2</sup> While these two scenarios may have played—none too seriously—to our collective adolescent optimism and anxieties, a third possibility loomed at the edge of reality during the peak of the Cold War: a Russian invasion.<sup>3</sup> Well, it's 2018, and we still don't have flying cars,<sup>4</sup> Freddy Krueger has not done us in,<sup>5</sup> and the Russians have not come—at least not by land, sea, or air. Instead, during the 2016 presidential campaign, the Russians invaded with words.

*The Russians.* Unprecedented, sophisticated, and still disputed in the highest quarters,<sup>6</sup> the full breadth and depth of Russian efforts to influence the outcome of the 2016 presidential election and sow social discord in the

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1. See *BACK TO THE FUTURE* (Universal Pictures 1985).

2. See *A NIGHTMARE ON ELM STREET* (New Line Cinema 1984).

3. See *RED DAWN* (MGM/UA 1984).

4. But see Andrew J. Hawkins, *Uber's 'Flying Cars' Could Arrive in LA by 2020—And Here's What It'll Be Like to Ride One*, *VERGE* (Nov. 8, 2017), <https://www.theverge.com/2017/11/8/16613228/uber-flying-car-la-nasa-space-act>.

5. But see *A NIGHTMARE ON ELM STREET* (New Line Cinema 2010).

6. See Angie Drobnic Holan, *2017 Lie of the Year: Russian Election Interference is a 'Made-Up Story.'* POLITIFACT (Dec. 12, 2017, 6:30 AM), <http://www.politifact.com/truth-o-meter/article/2017/dec/12/2017-lie-year-russian-election-interference-made-s/>.

United States is still being uncovered by U.S. intelligence agencies,<sup>7</sup> the news media,<sup>8</sup> academics,<sup>9</sup> and congressional<sup>10</sup> and law enforcement investigations.<sup>11</sup> Leading U.S. intelligence agencies such as the CIA and FBI have already concluded with “high confidence” that President Vladimir Putin authorized a Russian influence campaign to “undermine public faith in the US democratic process,” “harm [Hillary Clinton’s] electability and potential presidency,” and “help [Donald] Trump’s election chances” by “discrediting . . . Clinton and publicly contrasting her unfavorably to him.”<sup>12</sup> As part of a multifaceted campaign, Russian intelligence operatives and affiliated individuals hacked Democratic National Committee email accounts and shared large volumes of potentially damaging content with Wikileaks and other outlets for public disclosure;<sup>13</sup> employed Russian-owned cable and online outlets RT and Sputnik to cast Clinton negatively and Trump positively in news coverage laced with disinformation and to disseminate propaganda critical of U.S. democracy;<sup>14</sup> and employed a

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7. 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](https://www.dni.gov/files/documents/ICA_2017_01.pdf).

8. See, e.g., *Russian Hacking and Influence in the U.S. Election: Complete Coverage of Russia’s Campaign to Disrupt the 2016 Presidential Election*, N.Y. TIMES, <https://www.nytimes.com/news-event/russian-election-hacking> (last visited Apr. 19, 2018).

9. See, e.g., Andrew Guess et al., *Selective Exposure to Misinformation: Evidence from the Consumption of Fake News During the 2016 Presidential Campaign*, EUROPEAN RES. COUNCIL (Jan. 9, 2018), <http://www.dartmouth.edu/~nyhan/fake-news-2016.pdf>.

10. See, e.g., Brandon Carter, *Trump Asked Senate Republicans to End Russia Election Interference Investigation*, HILL (Nov. 30, 2017, 9:00 PM), <http://thehill.com/homenews/administration/362708-trump-asked-senate-republicans-to-end-russia-election-interference>; Mike Memoli & Marianna Sotomayor, *House Intelligence Committee Ends Russia Probe with Party-line Vote: Democrats Vow to Continue Investigation After GOP Votes Out a Report That Finds No Collusion*, NBC NEWS (Mar. 22, 2018, 12:20 PM), <https://www.nbcnews.com/politics/congress/house-intelligence-committee-ends-russia-probe-party-line-vote-n859126>.

11. See, e.g., Kara Scannell et al., *Mueller Indicts 13 Russian Nationals over 2016 Election Interference*, CNN (Feb. 17, 2018, 4:33 AM), <https://www.cnn.com/2018/02/16/politics/mueller-russia-indictments-election-interference/index.html>; Abigail Tracy, *Donald Trump’s Mueller Nightmare Is Coming True*, VANITY FAIR (Jan. 17, 2018, 11:54 AM), <https://www.vanityfair.com/news/2018/01/donald-trump-robert-mueller-steve-bannon>.

12. Office of the Dir. of Nat’l Intelligence, *supra* note 7, at ii.

13. See Raphael Satter, *Inside Story: How Russians Hacked the Democrats’ Emails*, AP (Nov. 4, 2017), <https://www.apnews.com/dea73efc01594839957c3c9a6c962b8a>.

14. See Office of the Dir. of Nat’l Intelligence, *supra* note 7, at 3–4, 6–12; Jim Rutenberg, *RT, Sputnik and Russia’s New Theory of War*, N.Y. TIMES MAG. (Sept. 13,

multitude of fake social media accounts, bot networks, and trolls to spread false and inflammatory news stories, ads, and posts from seemingly real individuals and organizations inside the United States.<sup>15</sup> Furthermore, when similarly sensational and slanted stories were fabricated by other speakers inside<sup>16</sup> and outside the United States<sup>17</sup> for financial or partisan gain, Russian-affiliated bots and trolls would amplify their popularity and online reach as part of the Kremlin's disinformation campaign.<sup>18</sup>

Russia's social media operations illustrate the sophistication and breadth of this campaign of electoral influence and social division. For example, leveraging Facebook's advanced algorithms to target ads based on the platform's deep knowledge of individual users, a Russian-linked company using fake accounts reached an estimated ten million people in the United States with ads spreading false and inflammatory stories, videos, and other posts attacking Clinton, supporting Trump, or playing to both sides (depending on the sympathies of the recipients) on hot-button issues such as policing, race, immigration, LGBT rights, and gun control—all for just \$100,000.<sup>19</sup> That so little money could spread Kremlin messaging so far

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2017), <https://www.nytimes.com/2017/09/13/magazine/rt-sputnik-and-russias-new-theory-of-war.html>.

15. See Office of the Dir. of Nat'l Intelligence, *supra* note 7, at 10–11; Massimo Calabresi, *Inside Russia's Social Media War on America*, TIME (May 18, 2017), <http://time.com/4783932/inside-russia-social-media-war-america/>; John Kruzel, *Russia's Social Media Efforts in 2016 Were Not Just False but Inflammatory*, POLITIFACT (Dec. 21, 2017, 10:23 AM), <http://www.politifact.com/truth-o-meter/article/2017/dec/21/russia-social-media-2016-false-inflammatory/>; Scott Shane, *The Fake Americans Russia Created to Influence the Election*, N.Y. TIMES (Sept. 7, 2017), <https://www.nytimes.com/2017/09/07/us/politics/russia-facebook-twitter-election.html>; Leslie Shapiro, *Anatomy of a Russian Facebook Ad*, WASH. POST (Nov. 1, 2017), <https://www.washingtonpost.com/graphics/2017/business/russian-ads-facebook-anatomy/>.

16. See Marc Fisher et al., *Pizzagate: From Rumor, to Hashtag, to Gunfire in D.C.*, WASH. POST (Dec. 6, 2016), [https://www.washingtonpost.com/local/pizzagate-from-rumor-to-hashtag-to-gunfire-in-dc/2016/12/06/4c7def50-bbd4-11e6-94ac-3d324840106c\\_story.html](https://www.washingtonpost.com/local/pizzagate-from-rumor-to-hashtag-to-gunfire-in-dc/2016/12/06/4c7def50-bbd4-11e6-94ac-3d324840106c_story.html).

17. See Samantha Subramanian, *Inside the Macedonian Fake-News Complex*, WIRED (Feb. 25, 2017), <https://www.wired.com/2017/02/veles-macedonia-fake-news/>.

18. See Shane, *supra* note 15; see also Natalia V. Osipova & Aaron Byrd, *Inside Russia's Network of Bots and Trolls*, N.Y. TIMES (Nov. 1, 2017), <https://nyti.ms/2z2TIHb>.

19. See Michelle Castillo, *\$100,000 in Russian-Bought Facebook Ads Could Have Reached Millions of Voters*, CNBC (Sept. 29, 2017), <https://www.cnbc.com/2017/09/29/russian-facebook-ads-how-many-people-could-you-reach-with-100000.html>; Katie Reilly, *Facebook Says 10 Million People in the U.S. Saw Russia-Linked Ads*, TIME (Oct. 3, 2017), <http://time.com/4966438/facebook-russia-linked-ads-election/>; Scott Shane, *These Are the Ads Russia Bought on Facebook in 2016*, N.Y. TIMES (Nov. 1, 2017), <https://www>.

evidences not only successful targeting, but also an extensive and coordinated campaign to amplify the reach of these ads through likes, shares, and comments from fake accounts.<sup>20</sup> For its part, Twitter has recently disclosed that it has discovered more than 50,000 Russian-linked accounts that, through bots and trolls, exposed nearly 700,000 Americans to Kremlin election propaganda during the 2016 election cycle.<sup>21</sup>

Whether this Russian disinformation campaign managed to sway the election is a matter of ongoing study<sup>22</sup> and debate.<sup>23</sup> Whatever consensus might eventually emerge on this question—if any will at all<sup>24</sup>—it seems safe to assume that the “new normal” is that Russia, if not other foreign

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nytimes.com/2017/11/01/us/politics/russia-2016-election-facebook.html; Scott Shane & Vindu Goel, *Fake Russian Facebook Accounts Bought \$100,000 in Political Ads*, N.Y. TIMES (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/technology/facebook-russian-political-ads.html>. In one vivid example of Russia stirring both sides of a hot-button social issue, it set up one fake group on Facebook called Heart of Texas, which announced a rally to “Stop Islamization of Texas” in Houston, and another fake group called United Muslims of America, which called for a counter-demonstration. Fake calls to action such as these reportedly yielded about 62,500 RSVPs. See Craig Timberg & Elizabeth Dwoskin, *Russians Got Tens of Thousands of Americans to RSVP for Their Phony Political Events on Facebook*, WASH. POST (Jan. 25, 2018), [https://www.washingtonpost.com/news/the-switch/wp/2018/01/25/russians-got-tens-of-thousands-of-americans-to-rsvp-for-their-phony-political-events-on-facebook/?hpid=hp\\_hp-top-table-main\\_facebook-815pm%3Ahomepage%2Fstory](https://www.washingtonpost.com/news/the-switch/wp/2018/01/25/russians-got-tens-of-thousands-of-americans-to-rsvp-for-their-phony-political-events-on-facebook/?hpid=hp_hp-top-table-main_facebook-815pm%3Ahomepage%2Fstory).

20. See Shapiro, *supra* note 15.

21. See Sam Machkovech, *Twitter Begins Emailing the 677,775 Americans Who Took Russian Election Bait*, ARS TECHNICA (Jan. 19, 2018, 6:28 PM), <https://arstechnica.com/information-technology/2018/01/twitter-begins-emailing-the-677775-americans-who-took-russian-election-bait/>. John Cornyn, the second-most senior Republican in the Senate, admitted to having interacted with such Russian propaganda on Twitter. See Brandon Carter, *Twitter Informs Cornyn He Interacted with Russia-Linked Content During 2016 Election*, HILL (Jan. 20, 2018, 4:05 PM) <http://thehill.com/policy/technology/369943-twitter-informs-cornyn-he-interacted-with-russia-linked-content-during-2016>.

22. See, e.g., Guess et al., *supra* note 9; see also Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, J. ECON. PERSP., Spring 2017, at 211, <https://web.stanford.edu/~gentzkow/research/fakenews.pdf>.

23. Compare, e.g., Warren Strobel, *CIA's Pompeo Asserts Russian Meddling Did Not Sway U.S. Election Result*, REUTERS (Oct. 19, 2017, 8:09 PM), <https://www.reuters.com/article/us-usa-trump-russia/cias-pompeo-asserts-russian-meddling-did-not-sway-u-s-election-result-idUSKBN1CP028>, with Graham Lanktree, *Did Trump Really Win the Election?*, NEWSWEEK (Nov. 8, 2017, 4:11 AM), <http://www.newsweek.com/did-trump-really-win-election-703431>.

24. Cf. *Bush v. Gore*, 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting) (observing that “we may never know with complete certainty the identity of the winner of this year’s Presidential election”).

adversaries as well, will expand on this playbook to meddle in future elections and attempt to sow further discord among the electorate with weaponized words from abroad.<sup>25</sup>

*The Court.* While the Russians to date have not directed their influence campaign at the judiciary, case law seems to have aligned in support of a robust right to receive foreign speech. Over the course of a century, and accelerating under the Roberts Court, precedents have given increasing substance and scope to a First Amendment right to receive information and ideas. By language and logic, if not always by express holdings, these decisions offer fair to firm support for a right extensive enough to protect domestic access to speech from foreign speakers and even hostile foreign governments, and strong enough to cast doubt on the constitutionality of restricting access to foreign speech—even if such speech may promote falsehoods in the electoral context.

Furthermore, while the sovereign power of the federal government may still give it some leeway to deny entry at the border to speech and speakers from abroad, the digitization and globalization of speech on the internet has made physical border restrictions largely irrelevant. Touching on this mass migration of expression onto the internet, the Court's online speech cases have made clear that the Court may be as vigilantly protective of speech in cyberspace as it is of speech in traditional public forums. In short, foreign speech has never been more abundant or accessible to domestic listeners, and the listeners' right to receive it has never been more robust as a matter of First Amendment doctrine.

Russia's influence campaign and the Court's free speech jurisprudence are thus on course to either collude or collide. This Article will attempt to sort out which. As background, Part II will set out the different constitutional statuses of foreign speakers inside and outside the United States, with the former enjoying some First Amendment protection and the latter enjoying none. Part III will trace the century-long doctrinal development of what Justice Marshall has referred to as the other side of

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25. Office of the Dir. of Nat'l Intelligence, *supra* note 7, at 5; see Nicole Gaouette, *U.S. Must Act Now to Ward Off More Russian Election Meddling, Report Says*, CNN (Jan. 10, 2018), <http://www.cnn.com/2018/01/10/politics/us-russia-election-meddling-cardin-report/index.html>; Miles Parks, *5 Ways Election Interference Could (and Probably Will) Worsen in 2018 and Beyond*, NPR (Jan. 27, 2018, 7:00 AM), <https://www.npr.org/2018/01/27/579683042/5-ways-election-interference-could-and-probably-will-worsen-in-2018-and-beyond>; Matthew Rosenberg et al., *Russia Sees Midterm Elections as Chance to Sow Fresh Discord, Intelligence Chiefs Warn*, N.Y. TIMES (Feb. 13, 2018), <https://www.nytimes.com/2018/02/13/us/politics/russia-sees-midterm-elections-as-chance-to-sow-fresh-discord-intelligence-chiefs-warn.html>.

the coin of the right to speak—the right to receive information and ideas—and its remarkable solidification under the Roberts Court. Although the Court has not said in so many words that this right to access an open marketplace of ideas, unfiltered by speaker, speech value, or perhaps even veracity, extends generally to all speech from abroad, its judicial opinions strongly suggest so. Part IV will then consider whether this precedential conclusion is consistent with the commonly agreed upon functions of the First Amendment—promoting the search for truth, democratic self-governance, and self-realization—concluding with some caveats that it is. Finally, among the various policy proposals responding to the perceived threat that the online spread of disinformation poses to democracy, Part V recommends pursuing at least two that may be both effective and consonant with First Amendment doctrine and functions: identifying and disclosing speech affiliated with foreign nations, and promoting education in media literacy from an early age.

## II. *The First Amendment Rights of Foreign Speakers*

Whether foreign speakers can invoke the protections of the First Amendment generally depends on whether they are physically inside or outside the United States.

Inside, foreign speakers appear to enjoy much—perhaps nearly all—of the freedom of speech that American citizens do. As a general matter, the Court has long recognized that “once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution.”<sup>26</sup> Indeed, over half a century ago, the Court declared that “[f]reedom of speech and of the press is accorded aliens residing in this country.”<sup>27</sup> Consistent with this recognition, the Court has since confirmed that aliens inside the country “enjoy certain constitutional rights,” including “First Amendment rights.”<sup>28</sup> The Court has not decided or suggested that the First Amendment rights enjoyed by aliens lawfully residing within the United States are less extensive than those enjoyed by U.S. citizens.<sup>29</sup>

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26. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953) (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)).

27. *Bridges*, 326 U.S. at 148 (majority opinion).

28. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270, 271 (1990).

29. Indeed, Chief Justice Rehnquist’s textual argument that the First Amendment protects “the people,” including aliens who are “part of the national community” because of their “sufficient connection with this country,” see *infra* notes 31-33 and accompanying text, implies that the free speech rights of lawful resident aliens and U.S. citizens are coterminous.



In contrast, outside the United States, foreign speakers would be hard pressed to claim any First Amendment protection for themselves. While the Court and scholars have assumed that “First Amendment protections reach beyond our national boundaries” for U.S. citizens abroad, restricting the ability of the government to burden citizens’ expressive activities outside the United States,<sup>30</sup> the Court has neither held nor assumed that foreign speakers abroad enjoy any First Amendment protection. Indeed, at least a plurality on the Court has assumed the opposite.

In *United States v. Verdugo-Urquidez*, Chief Justice Rehnquist’s plurality opinion held that the rights of “the people” protected by the text of the Fourth Amendment do not extend outside the United States to non-citizens.<sup>31</sup> They are not the “class of persons who are part of a national community or . . . have otherwise developed sufficient connection with this country to be considered part of that community.”<sup>32</sup> Of particular relevance here, the plurality noted that the text of the First and Second Amendments similarly extend their protections to—and only to—“the people.”<sup>33</sup> In his concurrence, Justice Kennedy disavowed this textual limitation on the reach of those amendments, instead arguing that “general principles of interpretation” must decide the applicability and extent of the constitutional restrictions the United States “must observe with reference to aliens beyond its territory.”<sup>34</sup> But neither Justice Kennedy nor any other Justice has since suggested that the First Amendment’s protections extend generally to foreigners outside the United States.

At most, *Boumediene v. Bush* cracked the door for aliens outside the United States to raise constitutional claims regarding the legality or conditions of their confinement.<sup>35</sup> There, the Court through Justice Kennedy held that the Constitution’s prohibition against suspending the writ of habeas corpus applied to Guantanamo Bay, Cuba, where alien terrorism

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30. *Haig v. Agee*, 453 U.S. 280, 308 (1981); *cf. Reid v. Covert*, 354 U.S. 1, 6 (1957) (“When the government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.”); see Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543, 1593 (2010) (“Extension of First Amendment protections to U.S. citizens located abroad would seem to be supported by text, theory, and precedent.”).

31. 494 U.S. 259, 275 (1990).

32. *Id.* at 265.

33. *Id.*

34. *Id.* at 276 (Kennedy, J., concurring).

35. 553 U.S. 723 (2008).

detainees sought to invoke the writ to challenge their detention.<sup>36</sup> But the Court underscored that its decision “does not address the content of the law”—including any constitutional claim—“that governs petitioners’ detention,” which is “a matter yet to be determined.”<sup>37</sup>

Even if any of the substantive protections of the Constitution might arguably protect aliens to some extent at Guantanamo Bay, the Court’s recognition of that possibility turned in large part on Guantanamo Bay’s unique status as a territory over which the United States exercises “de facto sovereignty” by virtue of its “complete jurisdiction and control over the base.”<sup>38</sup> Similarly, in *Hernandez v. Mesa*,<sup>39</sup> the Court confronted but ultimately avoided the question of whether the Fourth Amendment’s protection would extend to a foreign citizen shot and killed by a U.S. border patrol agent standing on the opposite side of a shared culvert across which ran the U.S.-Mexican border. Justice Breyer, however, argued in his dissent that, consistent with *Boumediene*, “practical concerns” such as the shared physical features and administration of this “special border-related area” established that the culvert had “sufficient involvement with, and connection to, the United States,” such that it was governed by the Fourth Amendment.<sup>40</sup>

Given the sui generis characteristics of the territories at issue in *Boumediene* and *Hernandez*, it is highly doubtful—and, at best, not foreclosed—that, as a matter of doctrine, the protections of the First Amendment would extend generally to foreigners outside of the territorial United States. Neither have scholars seriously argued for such an extension of the First Amendment.<sup>41</sup> Instead, if First Amendment protection is to extend to speech from foreign speakers outside of the United States, it must find its precedential footing elsewhere.

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36. *Id.* at 771.

37. *Id.* at 798.

38. *Id.* at 754.

39. 137 S. Ct. 2003 (2017).

40. *Id.* at 2009, 2011 (Breyer, J., dissenting).

41. Compare Helen Norton, (*At Least*) *Thirteen Ways of Looking at Election Lies*, 71 OKLA. L. REV. 117, 121 (2018) (“Foreign speakers may not have any autonomy interests protected by the First Amendment . . .”), with Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 288 (2009) (observing that the “functional approach” taken by *Boumediene* “do[es] not require the categorical denial of extraterritorial free speech rights either to citizens or to foreign nationals”).

### III. *The Right to Receive (Foreign) Information and Ideas*

Given that the sparse case law and scholarship are generally dismissive of First Amendment protection for foreign speakers abroad, it is useful to take stock of the extent to which their speech is already shielded by existing doctrine independent of the geographic location and national identity of the speaker. The most pertinent First Amendment principle, and potentially the most protective of foreign speech, is the right to receive information and ideas that the Court has recognized in different contexts throughout the last century.<sup>42</sup>

Scholars have acknowledged the existence of a right to receive information and ideas for decades,<sup>43</sup> and lower courts as well as scholars have recently focused on the application of that right in the context of video recording.<sup>44</sup> But the development and contours of a right to receive information and ideas have not received extensive treatment in either judicial decisions or scholarly literature.<sup>45</sup> Nor has discussion of the right

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42. Professors Massaro and Norton analogously explore the First Amendment interest in protecting the speech of robots, who themselves may enjoy rights as speakers, based on the “First Amendment value [of their speech] to human listeners.” Toni M. Massaro & Helen Norton, *Siri-ously? Free Speech Rights and Artificial Intelligence*, 110 NW. U. L. REV. 1169, 1178 (2016).

43. See, e.g., JEROME A. BARRON, *FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA* 145 (1973) (discussing a First Amendment focus on the listener as “a pioneering concept which is not yet fully developed or understood”); MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 47 (1984) (noting that, to further the self-realization function of the First Amendment, “the individual needs an uninhibited flow of information and opinion to aid him or her in making life-affecting decisions, in governing his or her own life”).

44. See, e.g., *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1196, 1197 (10th Cir. 2017) (noting agreement among circuit courts that “the First Amendment protects the recording of officials’ conduct in public” and recognizing that “the First Amendment provides at least some degree of protection for gathering news and information” (first citing *Fields v. City of Phila.*, 862 F.3d 353, 358 (3d Cir. 2017) and then quoting *ACLU of Ill. v. Alvarez*, 769 F.3d 583, 597 (7th Cir. 2012)); Marc Blitz et al., *Regulating Drones Under the First and Fourth Amendments*, 57 WM. & MARY L. REV. 49, 85–109 (2015) (considering the contours of a First Amendment right to record and gather information “on the ground and in the air”); Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991 (2016) (arguing that “video recording is a form of expression or at the very least, is conduct that serves as a necessary precursor of expression such that it counts as speech under the First Amendment”).

45. See Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PENN. J. CON. L. 223, 230 (1999) (noting that, “[d]espite its importance, the right to receive information remains a relatively unexplored aspect of the freedom of speech” both in case law and in scholarship).

caught up with the exceptionally broad, robust free speech decisions of the Roberts Court. This Part fills the gap in the literature by tracing the development of the right to receive information and ideas across key Supreme Court precedents.

*A. Establishing the Right to Receive Information and Ideas*

*Stanley*. A good starting place to survey the size and shape of the right to receive information and ideas is *Stanley v. Georgia*, the 1969 case that declared the right to be “now well established.”<sup>46</sup> *Stanley* overturned a conviction for in-home possession of obscenity, which was one of the “well-defined and narrowly limited classes of speech”<sup>47</sup> that the Court had reaffirmed a decade earlier as falling outside the protection of the First Amendment for being “utterly without redeeming social importance.”<sup>48</sup> Nevertheless, Justice Marshall’s opinion for the *Stanley* Court declared that the “right to receive information and ideas, regardless of their social worth, . . . is fundamental to our free society.”<sup>49</sup> The Court explained that this First Amendment liberty encompasses the right “to read or observe what [one] pleases,” and that it gains “an added dimension” when exercised “in the privacy of a person’s own home.”<sup>50</sup> In the home, the right to privacy recognized in *Griswold v. Connecticut* as a freedom from government intrusion<sup>51</sup> fortifies the right to receive information and ideas to such an extent that the state’s “broad power to regulate obscenity” is wholly curtailed.<sup>52</sup> The state consequently has “no business telling a man, sitting alone in his own house, what books he may read or what films he may watch,” even if those books or films otherwise lack First Amendment protection.<sup>53</sup>

*Pierce and Meyer*. In addition to leveraging *Griswold*, the *Stanley* Court cited a handful of cases to lend substance to the right to receive information and ideas and to support its statement that the right was well-established. Oldest among them was *Pierce v. Society of Sisters*, which in 1925

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46. 394 U.S. 557, 564 (1969).

47. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

48. *Roth v. United States*, 354 U.S. 476, 484 (1957).

49. *Stanley*, 394 U.S. at 564 (citing *Winters v. New York*, 333 U.S. 507, 510 (1948)).

50. *Id.* at 564, 565.

51. 381 U.S. 479, 484 (1965).

52. *Stanley*, 394 U.S. at 568; *cf.* *Miller v. California*, 413 U.S. 15, 44 (1973) (Douglas, J., dissenting) (disagreeing with the Court’s treatment and definition of obscenity as a category of unprotected speech, stating that “the right to know is the corollary of the right to speak or publish”).

53. *Stanley*, 394 U.S. at 565.

recognized the constitutional right of parents to educate their children outside the confines of state-run public schools.<sup>54</sup> *Pierce*, along with *Meyer v. Nebraska*, which in 1923 invalidated an English-only teaching requirement for public and private schools,<sup>55</sup> established that “the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.”<sup>56</sup> Such an unconstitutional contraction could occur not only on the giving end (abridging “the right to utter or to print”), but also, as these early cases illustrate, on the receiving end (abridging “the right to receive, the right to read”).<sup>57</sup> Moreover, the right to receive is broad enough to encompass the freedom of parents to have their children acquire knowledge of “foreign tongues and ideals”—even those of a nation recently at war with the United States.<sup>58</sup>

*Lamont*. While *Meyer* recognized that the “spectrum of available knowledge”<sup>59</sup> protected by the First Amendment extends to foreign information and ideas, the case only implicated speakers within the United States—teachers of “German, French, Spanish, Italian, and every other alien speech.”<sup>60</sup> But a second decision cited by the Court in *Stanley*, the 1965 case of *Lamont v. Postmaster General*,<sup>61</sup> made clear that the right to which it referred also extends to information and ideas disseminated by speakers abroad.

In *Lamont*, the Court struck down a federal statute directing the Postmaster General to detain “communist political propaganda” that “is printed or otherwise prepared in a foreign country,” to notify the addressee that the material was received, and to deliver it only upon the addressee’s request.<sup>62</sup> The statute incorporated the meaning of “political propaganda” from the Foreign Agents Registration Act of 1938, which defined the term broadly to encompass any expressive material intended to “influence a recipient . . . with reference to the political or public interests, policies, or relations” of a foreign country; any speech promoting “racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence”; and any advocacy for “the overthrow of any

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54. *Id.* at 564 (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925)).

55. 262 U.S. 390 (1923).

56. *Griswold*, 381 U.S. at 482.

57. *Id.*

58. *Meyer*, 262 U.S. at 401. The petitioner had been convicted under the Nebraska statute for teaching German in a parochial school. *See id.* at 396.

59. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

60. *Meyer*, 262 U.S. at 401.

61. 381 U.S. 301 (1965).

62. *Id.* at 302.

government” within the United States by “force or violence.”<sup>63</sup> Though the barrier to receipt of this extensive class of speech from abroad could be lifted by an addressee simply returning a notice card, the Court through Justice Douglas unhesitatingly found the “limitation on the unfettered exercise of the addressee’s First Amendment rights” to be “at war with the ‘uninhibited, robust, and wide-open’ debate and discussion that are contemplated by the First Amendment.”<sup>64</sup> The government could not, consistent with the freedom of speech, “control the flow of ideas to the public” even in this limited and pregnable fashion, and even with respect to the speech of hostile foreign governments advocating civil riot or violent upheaval.<sup>65</sup>

The concurring opinion by Justice Brennan, which was cited in *Stanley*,<sup>66</sup> made explicit that the “uninhibited, robust, and wide-open” marketplace of ideas to which the *Lamont* majority referred (quoting his landmark opinion for the Court in *New York Times Co. v. Sullivan*<sup>67</sup>) necessarily includes “the right to receive” speech.<sup>68</sup> “The dissemination of ideas can accomplish nothing,” he wrote, “if otherwise willing addressees are not free to receive and consider them,” leaving “a barren marketplace of ideas that had only sellers and no buyers.”<sup>69</sup> In the face of this essential relationship between the free speech rights of speakers and recipients, the government’s asserted interest in protecting “the unwilling recipient” from potentially offensive speech cannot trump the right of other audience members to receive it where a ready self-help remedy (for instance, requesting that the Post Office block such material) could “fully safeguard[]” their sensibilities.<sup>70</sup>

*Martin*. Supporting Justice Brennan’s points and completing *Stanley*’s citation list is *Martin v. City of Struthers*, where the Court invalidated a municipal ban on door-to-door distribution of handbills, circulars, and advertisements.<sup>71</sup> The Court explained that the “broad scope” of the freedom of speech “embraces the right to distribute literature and necessarily protects the right to receive it.”<sup>72</sup> Both are so “clearly vital to the preservation of a free society” that any “naked restriction of the

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63. *Id.* at 302 n.1 (quoting 22 U.S.C. § 611(j) (internal quotations omitted)).

64. *Id.* at 305, 307 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

65. *Id.* at 306.

66. *Stanley*, 394 U.S. at 564.

67. *See supra* note 64 and accompanying text.

68. *Lamont*, 381 U.S. at 308 (Brennan, J., concurring).

69. *Id.*

70. *Id.* at 310.

71. 319 U.S. 141 (1943).

72. *Id.* at 143 (internal citation omitted).

dissemination of ideas” on either end cannot stand where “traditional legal methods” can address any purported “dangers of distribution.”<sup>73</sup> As examples, the Court cited trespass-after-warning statutes and similar laws that “leave[] the decision as to whether distributors of literature may lawfully call at a home where it belongs—with the homeowner.”<sup>74</sup>

*In sum*, piecing together *Stanley* and the cases it collects under the rubric of the right to receive information and ideas, a picture emerges of the nature and extent to which that right was recognized. First, it can be said that *Stanley*’s view of the right as “now well established” was not a stretch.<sup>75</sup> In multiple cases, across different decades and contexts, the Court invoked that right to strike down regulations that interfered with the ability of individuals to receive speech.<sup>76</sup> Second, the right protects speech regardless of the subject or viewpoint. Indeed, the right even extended to speech advocating violent overthrow (*Lamont*) and, at least with reinforcement from the right to privacy in the home, to speech that otherwise lacked sufficient social worth to warrant First Amendment protection (*Stanley*). Third, the right to receive information and ideas operated prophylactically, preventing the government from restraining speech distribution on a wholesale basis in order to protect potentially unwilling listeners who themselves possessed the power to block receipt on an individual basis (*Lamont* and *Martin*). Fourth, and most significantly for the subject of this Article, the right to receive information and ideas did not seem to depend on either the nationality of the speaker or the geographic origin of the speech. The right had secured uninhibited access to foreign speakers from both inside (*Meyer*) and outside (*Lamont*) the country, from humble foreign language teachers to hostile foreign powers.

#### *B. Limiting the Right to Receive Information and Ideas at the Borders*

The broad and robust right to receive information and ideas delineated above well served the *Stanley* Court’s substantive end: striking down the

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73. *Id.* at 146–47.

74. *Id.* at 148.

75. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

76. In addition to the cases cited or discussed in *Stanley*, a handful of other pre-*Stanley* decisions directly or indirectly reference the right to receive information and ideas. *See, e.g.*, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (in upholding FCC’s “fairness doctrine,” observing that “[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here”); *Thomas v. Collins*, 323 U.S. 516, 534 (1945) (invalidating registration requirement for soliciting union membership as both a restriction on “right to speak” of labor organizers as well as “rights of the workers to hear”).

application of the obscenity statute to in-home consumption of expressive material. But the right was drawn incompletely in a number of important respects, and subsequently limited at the borders by Court majorities with less expansive views of the right.

For starters, with one exception, neither *Stanley* nor the cases on which it relied suggested any specific or significant limits on the reach of the right. The exception was *Stanley's* acknowledgement that the state's "broad power" to regulate obscenity—and, presumably, other historically unprotected categories of speech<sup>77</sup>—is not disturbed outside of the home, where the right to receive information and ideas is not commingled with "an added dimension" of the right to privacy.<sup>78</sup> Apart from this exception, the right to receive information and ideas at *Stanley's* time seemed to extend as far as the right to utter or print them, with "buyers and sellers" deemed equally essential for a functioning marketplace of ideas.<sup>79</sup>

But even viewing the right to receive information and ideas as co-dependent and co-extensive with the right to speak, some limits suggest themselves. Most basically, just as the First Amendment famously would not protect a speaker "shouting fire in a theatre and causing a panic,"<sup>80</sup> the right to receive information and ideas surely is not absolute either. A listener in a crowded theater could not insist on a right to hear someone shouting "fire." Other easy examples come to mind. For instance, just as one could not claim a First Amendment right to break into someone else's home to speak to them,<sup>81</sup> one would not enjoy the right to break into someone's home to listen to them speak.

More significantly, the federal government's historically broad power to control the movement of materials and people at the national border can conflict directly with an unlimited right to receive information and ideas from abroad. The Court has repeatedly recognized the "long-standing right of the sovereign to protect itself" against the entry of harmful items and individuals.<sup>82</sup> Consequently, the Court has time and again upheld warrantless border searches and seizures against Fourth Amendment

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77. *See supra* note 52 and accompanying text.

78. *See supra* note 50 and accompanying text.

79. *See supra* note 69 and accompanying text.

80. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

81. *See Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 568 (1972) ("[T]his Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only.").

82. *United States v. Ramsey*, 431 U.S. 606, 616, 619 (1977).



challenges as “reasonable simply by virtue of the fact that they occur at the border.”<sup>83</sup>

*12 200-Ft. Reels of Super 8MM. Film.* First Amendment challenges to the denial of entry have not fared well either, even in the wake of *Stanley* and *Lamont*. For example, in 1973, the Court through Chief Justice Burger upheld the application of the Tariff Act of 1930, which banned the importation of “obscene or immoral” materials,<sup>84</sup> to the border seizure of sexually explicit films, slides, photographs, and prints from Mexico.<sup>85</sup> Responding to the contention that *Stanley* prevented the government from restricting the transportation of obscenity “for private, personal use and possession only”—including the importation of obscenity from abroad—the Court first noted that “[i]mport restrictions and searches of persons or packages at the national borders rest on different considerations and different rules of constitutional law from domestic regulations.”<sup>86</sup> With respect to packages and other items, those “different considerations and different rules” derive from “the complete power of Congress over foreign commerce” pursuant to Article I, Section 8 of the Constitution and its consequent “plenary power . . . to regulate imports.”<sup>87</sup> The Court curtly limited and distinguished *Stanley* on the ground that “*Stanley*’s emphasis was on the freedom of thought and mind in the privacy of the home,” and that “a port of entry is not a traveler’s home.”<sup>88</sup> The Court made no mention of the right to receive information and ideas, even though *Stanley*, in reinforcing the right within the home, had recognized it as “well established” outside of the home.

*Mandel and R.A.V.* As with expressive items, so too with individuals seeking entry to address domestic audiences. Most notably, in the 1972 case of *Kleindienst v. Mandel*, the Court upheld the exclusion of a Belgian who sought a non-immigrant visa to participate in academic conferences and give lectures across the country.<sup>89</sup> The foreigner speaker, Ernest Mandel, was a self-described “revolutionary Marxist” subject to the categorical exclusion of communists under the Immigration and Nationality Act of

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83. *Id.* at 616.

84. 19 U.S.C. § 1305(a) (2012).

85. *United States v. 12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 129 (1973).

86. *Id.* at 125.

87. *Id.* at 126 (quoting *Buttfield v. Stranahan*, 192 U.S. 470 (1904)).

88. *Id.* at 128–29 (internal quotation marks omitted). The quoted language comes from *United States v. Thirty-Seven (37) Photographs*, wherein a plurality of the Court had reached the same conclusion, albeit in dicta. See 402 U.S. 363, 376 (1971).

89. 408 U.S. 753, 770 (1972).

1952 unless granted a waiver by the Attorney General on the recommendation of the Secretary of State.<sup>90</sup> Mandel had entered the country twice before on waivers—once to work as a journalist and a second time to give speeches at universities—but this third time he was denied a waiver on the ground that his last visit had exceeded its stated purposes.<sup>91</sup>

In an opinion by Justice Blackmun, the Court first foreclosed any possibility that Mandel himself could assert a First Amendment or other constitutional claim to entry. Starkly put, given “plenary congressional power” to regulate the entry of foreigners, “an unadmitted and nonresident alien” has “no constitutional right of entry to this country as a nonimmigrant or otherwise.”<sup>92</sup>

With Mandel’s own claims foreclosed, the case presented the question whether the government’s exclusion violated the First Amendment right to receive information and ideas of the academics who had invited him to speak and joined in his lawsuit.<sup>93</sup> The Court was not impressed with the government’s attempt to sidestep this free speech question with the argument that it had only limited “physical movement” into the country.<sup>94</sup> After all, the Court noted, *Lamont* also involved the government’s regulation of physical entry (there, of mail) into the country.<sup>95</sup> Nor did the Court buy the government’s argument that the domestic audience members’ right to receive information and ideas was not burdened because they still had access to Mandel’s books and published speeches, as well as to recordings and telephonic communications.<sup>96</sup> Drawing perhaps from its own individual and institutional experiences, the Court was “loath to hold” that such alternatives would extinguish an audience’s First Amendment interest in receiving information and ideas in person given the “particular qualities inherent in sustained, face-to-face debate, discussion and questioning.”<sup>97</sup>

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90. *Id.* at 755, 756 (internal quotation marks omitted).

91. *Id.* at 756–57. He gave lectures at more universities than stated in his visa application and, contrary to the terms of his visa, appeared at an event where political contributions were solicited. *See id.* at 758 n.5.

92. *Id.* at 762, 769.

93. *See id.* at 754, 762.

94. *Id.* at 764.

95. *Id.* at 765.

96. *See id.*

97. *Id.* Justice Marshall explicitly drew on “the essential place of oral argument in this Court’s work” that “the availability to us of briefs and exhibits does not supplant.” *Id.* at 776 n.2 (Marshall, J., dissenting).

Having recognized the burden on the right to receive information and ideas imposed by the government's denial of entry to a foreign speaker, the Court nevertheless rejected the claim on the merits. On one hand, the Court again invoked the plenary power of Congress to regulate entry and "to exclude aliens altogether"—a "firmly established" power "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers."<sup>98</sup> On the other hand, the Court reasoned that the audience members' First Amendment argument "would prove too much."<sup>99</sup> Either every domestic audience member's claim would prevail, thereby rendering the historic power of the political branches to exclude aliens "a nullity," or courts would be required to weigh the strength of the audience's First Amendment interests against the government's interests as to each particular alien, "[t]he dangers and the undesirability" of such a judicial approach appearing "obvious" to the Court.<sup>100</sup> Therefore, as long as the government offered a "facially legitimate and bona fide" reason for excluding an alien, the Court would neither "look behind" that justification "nor test it by balancing [the] justification against the First Amendment interests" of affected audience members.<sup>101</sup>

In dissent, Justice Marshall, joined by Justice Brennan, argued that "established First Amendment law" compelled the opposite outcome.<sup>102</sup> Echoing Justice Brennan's opinion in *Lamont*, Justice Marshall stressed that "the right to speak and hear—including the right to inform others and to be informed about public issues—are inextricably part of [the same] process" of public discussion protected by the First Amendment—"two sides of the same coin."<sup>103</sup> Furthermore, dismissing the unpalatable First Amendment approaches posited by the majority, Justice Marshall contended that the Court's cases already settled on a different approach, prohibiting the government from restricting the advocacy of ideas, including communist doctrine, "divorced from incitement to imminent lawless action."<sup>104</sup> Consequently, short of excluding incitement as narrowly defined in

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98. *Id.* at 765, 766 (majority opinion) (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1983)).

99. *Id.* at 768, 769.

100. *Id.* at 769.

101. *Id.* at 770.

102. *Id.* at 781 (Marshall, J., dissenting).

103. *Id.* at 775.

104. *Id.* at 780.

*Brandenburg v. Ohio*,<sup>105</sup> the government “may not selectively pick and choose which ideas it will let into the country.”<sup>106</sup>

Together, *12 200-Ft. Reels of Super 8MM. Film*<sup>107</sup> and *Mandel* permit the government to erect two kinds of barriers, different in substance and scope, to the entry of foreign items and individuals for expressive purposes. *12 200-Ft. Reels of Super 8MM. Film* at least allows the government to stop the cross-border “flow of ideas to the public” when those ideas are obscene. In addition, if *Stanley* did not disturb the government’s “broad power” to regulate obscenity outside the home as a class of unprotected speech, then it presumably did not curtail the government’s power to regulate other categories of unprotected speech outside the home, including at the border.<sup>108</sup>

*Mandel* seems to sweep much more broadly, permitting the exclusion of any foreign speaker regardless of the First Amendment status of the anticipated speech. Thus, as a precedential matter, it appears that the government’s historically plenary power to control the entry of items and individuals into the country might be fairly limited by the First Amendment when it comes to the former—items—but hardly limited, if at all, when it comes to the latter—individuals.

The scope of any restrictions on the government’s power to control entry remains an open question in several significant respects. First, with respect to the import of expressive materials, do *Lamont* and *12 200-Ft. Reels of Super 8MM. Film* cover the entire range of First Amendment outcomes? Possibly. Justice Douglas’s characteristically capacious rights language for the majority in *Lamont* lends itself to maximalist construction. Any restriction on the “unfettered exercise” of the right to receive information and ideas, even a temporary and pregnable one at the border, is arguably “at war” with the “uninhibited, robust, and wide-open” marketplace of ideas protected by the First Amendment.<sup>109</sup> Indeed, the opinion notes that it was not “deal[ing] with the right of Customs to inspect material from abroad for contraband,” and that qualification can be read to suggest that the government’s power to restrict the importation of expressive materials from abroad is limited to the narrow categories of speech that the government

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105. 395 U.S. 444, 447–48 (1969).

106. *Mandel*, 408 U.S. at 780 (Marshall, J., dissenting).

107. It is no doubt possible to short form this case name further, but the name would then be less fun.

108. See *supra* notes 77–78 and accompanying text.

109. *Lamont*, 381 U.S. at 307 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

can lawfully outlaw, such as obscenity and incitement, because they lie beyond the protection of the First Amendment.<sup>110</sup> Domestic audiences are entitled to receive all other speech from abroad, even propaganda from hostile foreign powers or speech advocating domestic lawlessness and violence.<sup>111</sup>

This maximalist reading of *Lamont* is supported by Justice Brennan's concurring opinion in that case, which refused to countenance even a "minor" restriction on the right to receive information and ideas from abroad on the ground that it would open the door to worse encroachments.<sup>112</sup> His concurrence also read the First Amendment as barring the government from blocking foreign propaganda at the border.<sup>113</sup> In short, notwithstanding the government's plenary power to regulate imports, it has no more constitutional authority to restrict foreign speech from reaching domestic audiences than it has to restrict the distribution of speech within its borders because of the First Amendment right of domestic audience members to receive both.

Second, the Court's subsequent decision in *R.A.V. v. City of St. Paul* might limit the government's "plenary power" to exclude expressive materials and aliens seeking entry to speak to domestic listeners.<sup>114</sup> Under *R.A.V.*, the government may censor any kind of unprotected speech "because of [its] constitutionally proscribable content," but may not suppress such speech for content-based reasons "unrelated to [its] distinctively proscribable content," such as suppressing political viewpoints that the government disagrees with.<sup>115</sup> If applied to the border, *R.A.V.* would allow the government to continue blocking speakers and speech to protect the country from the particular social harms associated with obscenity, incitement, and other kinds of unprotected speech, but would bar the government from denying entry to "drive certain ideas or viewpoints" unrelated to those harms "from the marketplace"—for example, to suppress

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110. *Id.* at 307.

111. *See supra* note 65 and accompanying text.

112. *Lamont*, 381 U.S. at 309 (Brennan, J., concurring).

113. *See id.* at 310 ("That the governments which originate this propaganda themselves have no equivalent guarantees only highlights the cherished values of our constitutional framework; it can never justify emulating the practice of restrictive regimes in the name of expediency.")

114. 505 U.S. 377 (1992).

115. *Id.* at 383, 384, 388 (italics omitted).

content critical of the United States or democracy.<sup>116</sup> *R.A.V.* therefore strongly suggests that excluding aliens at the border based on the political viewpoints they would share with domestic listeners would not qualify as a “facially legitimate and bona fide” reason under *Mandel*.<sup>117</sup>

*Keene*. In *Meese v. Keene*, the Court upheld a provision of the Foreign Agents Registration Act of 1938 requiring foreign agents seeking to distribute “political propaganda” within the United States to file a copy with the Attorney General, report on the extent of the dissemination, and label the expressive material with certain information, including the identity of the foreign agent and the fact that the material is registered with the Department of Justice.<sup>118</sup> Justice Stevens’s majority opinion distinguished *Lamont* on the ground that “the Act places no burden on protected expression,” as it “does not pose any obstacle” to domestic distribution of or access to the foreign political propaganda, but “simply require[s] the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda.”<sup>119</sup> As for the government’s designation of the material as “political propaganda”—the same statutory definition that was adopted by the regulation at issue in *Lamont*, and which ranged from expressive materials intended to influence opinions about other countries to advocacy of civil riot and violent overthrow in the United States<sup>120</sup>—the Court asserted that the term is “a broad, neutral one rather than a pejorative one.”<sup>121</sup> Given this “neutral definition,” the majority concluded that any “constitutional concerns” with the government burdening disfavored speech with a scarlet letter “completely disappear.”<sup>122</sup>

Justice Blackmun’s dissent, joined by Justices Brennan and Marshall, called into question the majority’s neutral characterization of the “political propaganda” label. He noted that the Act grew out of the House Un-American Activities Committee’s efforts to counter foreign agents and propaganda.<sup>123</sup> Furthermore, he argued that the classification would both chill the dissemination of the regulated materials, as “individuals and

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116. *Id.* at 387 (internal quotations omitted). Though *R.A.V.* did not involve border crossings, the categorical language and logic of Justice Scalia’s majority opinion do not invite exception either. *See id.* at 383–90.

117. *See supra* note 101 and accompanying text.

118. 481 U.S. 465, 470–71 (1987).

119. *Id.* at 480.

120. *See supra* note 63 and accompanying text.

121. *Keene*, 481 U.S. at 483.

122. *Id.* at 485.

123. *See id.* at 487.

institutions are bound to calculate the risk of being associated with materials officially classified as propaganda,” and “reduce the effectiveness of the speech” that is disseminated through a label that “lessen[s] its credence with viewers.”<sup>124</sup> Finally, he contended that such a “saddling” of speech could not be justified, as it must, by “a compelling governmental interest.”<sup>125</sup>

*In sum*, after *Stanley* in 1969 declared the right to receive information and ideas “well established,” putting it on a seemingly equal footing with the right to speak, a series of border cases cast into doubt the reach and robustness of the right. At minimum, the traditional plenary power of the sovereign to exclude dangerous substances at the border permits it to block the importation of expressive material that domestic audience members cannot claim a right to receive because the content is obscene or otherwise lacking in First Amendment protection. Furthermore, even if the expressive material does not fall into a category of unprotected speech, the government may require that materials of a political nature from foreign governments and agents (that is, “political propaganda”) be disclosed in some fashion so that the public may be informed of its nature and source. Finally, the government may deny foreigners entry—including foreigners invited to speak to domestic audiences—without First Amendment constraint so long as it offers a “facially legitimate and bona fide” reason for doing so.<sup>126</sup>

Importantly, however, because the reason upheld in *Mandel* involved violations of past visa conditions rather than speech-related reasons, it is not clear whether the wide berth the Court gave to the “firmly established” power of the government “to exclude aliens altogether”<sup>127</sup> would allow it to deny aliens entry for anticipated speech that might be protected, but that the government views as dangerous—for example, because the speaker might spread “fake news”<sup>128</sup> or other inimical foreign propaganda. The *Mandel*

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124. *Id.* at 491–92, 493.

125. *Id.* at 493.

126. *See supra* note 102 and accompanying text.

127. *See supra* note 99 and accompanying text.

128. I use the term “fake news” throughout this article to refer to news stories that promote factual falsehoods for the purpose of misleading the listener. *Cf.* Allcott & Gentzkow, *supra* note 22, at 213–14 (defining “fake news to be news articles that are intentionally and verifiably false, and could mislead readers,” but not “unintentional reporting mistakes,” “rumors,” “conspiracy theories,” “satire,” “false statements by politicians,” or “reports that are slanted or misleading but not outright false”). Commentators have validly criticized the continued use of this term because it “oversimplifies a very complex problem” and has been appropriated by politicians and partisans to undermine independent journalism by attaching the label to “any piece of information that [they] didn’t

Court's unanimous recognition of the burden that the exclusion of foreign speakers imposed on the right of domestic audiences to receive their ideas, dispositive for the dissent but not the majority, at least indicates that a speech-related denial would present a closer question. And the Court's subsequent decision in *R.A.V.* strongly suggests that the government indeed cannot bar speakers or speech (even unprotected) at the border based on its disagreement with the foreign message or viewpoint.

*C. Fortifying the Right to Receive Information and Ideas*

In the decades since cases such as *Mandel*, decisions involving expression as diverse as sexually explicit speech, school libraries, electioneering communications, prescription drug marketing, violent video games, crush videos, and military lies have tended to add further support and shape to the previously "well established" right to receive information and ideas. Several of these cases come from the highly speech-protective Roberts Court, which has vigorously fortified the right in all but name.

*1. Erogenous Zoning*

Cases upholding government authority to zone sexually explicit or indecent speech could be taken to further limit the right to receive information and ideas, extending the government's authority to block entry into the marketplace of ideas physically beyond the border and topically beyond obscene or otherwise unprotected speech. In *Young v. American Mini Theaters*, for example, Justice Stevens, writing for the majority, upheld a regulation zoning adult movie theaters away from residential neighborhoods partly on the ground that "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice."<sup>129</sup> Dissenting against the implication that popular opinion or perceived value determines how widely speech may be disseminated for the "few" who may have interest in receiving it, Justice Stewart responded that "[t]he guarantees of

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like." Hossein Derakhshan & Claire Wardle, *Ban the Term 'Fake News,'* CNN (Nov. 27, 2017, 3:12 PM), <http://www.cnn.com/2017/11/26/opinions/fake-news-and-disinformation-opinion-wardle-derakhshan/index.html>; see also Meg Kelly, *President Trump Cries 'Fake News,' and the World Follows*, WASH. POST (Feb. 6, 2018), <https://www.washingtonpost.com/news/fact-checker/wp/2018/02/06/president-trump-cries-fake-news-and-the-world-follows/>. For convenience's sake, however, this Article uses the term in the sense described.

129. 427 U.S. 50, 70 (1976).



the Bill of Rights were designed to protect against precisely such majoritarian limitations on individual liberty.”<sup>130</sup>

Along similar lines, for a plurality in *FCC v. Pacifica Foundation*, Justice Stevens upheld the authority of the FCC to fine a radio station for broadcasting George Carlin’s non-obscene “Filthy Words” monologue in the afternoon, partly to protect children and unwilling adults from tuning in unwittingly.<sup>131</sup> Not surprisingly, Justice Brennan in dissent decried the public’s loss of the “free[dom] to choose those communications worthy of its attention from a marketplace unsullied by the censor’s hand.”<sup>132</sup>

Finally, subsequent cases made it even easier for the government to engage in “erogenous zoning”<sup>133</sup> by treating asserted interests—such as mitigating crime and protecting property values—as content neutral and, therefore, subject only to intermediate scrutiny. A prime example of such treatment is *Renton v. Playtime Theatre*, where the Rehnquist Court found a zoning ordinance targeting adult movie theaters to be content neutral and constitutional under intermediate scrutiny.<sup>134</sup>

The potential reductive impact of these cases on the right to receive information and ideas, if not entirely eliminated, has at least been blunted outside the context of physical zoning or broadcast media. Of particular relevance to this Article, the Court recently has come to treat the regulation of sexually explicit content in newer media as content based and therefore presumptively invalid under the more speech-protective strict scrutiny test. For instance, in *United States v. Playboy Entertainment Group*, the Court invalidated a federal requirement that cable operators fully scramble or block sexually oriented programming as a content-based restriction.<sup>135</sup> The requirement failed strict scrutiny because less restrictive alternatives would

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130. *Id.* at 86.

131. 438 U.S. 726, 748–49 (1978).

132. *Id.* at 772. Justice Brennan’s constitutional preference for consumers—including children—to choose which sexual information and ideas to accept or reject subsequently prevailed in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). Justice Marshall’s majority opinion recognized not only the right of parents to “truthful information bearing on their ability to discuss birth control and make informed decisions,” but also the “significant” First Amendment right of minors to receive information. *Id.* at 74, 74 n.30; *see also id.* at 79 (Rehnquist, J., concurring) (agreeing that a ban on mailing unsolicited advertisements for contraceptives “den[ies] parents access to information about birth control that might help them make informed decisions”).

133. LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 934 (2d ed. 1988).

134. 475 U.S. 41, 47–48 (1986).

135. 529 U.S. 803 (2000).

have left access to or blocking of such speech up to cable subscribers.<sup>136</sup> Contradicting the “few-of-us-would-march-our-sons-and-daughters” majoritarian justification in *American Mini Theaters*, and rejecting the paternalism of *Pacifica*, Justice Kennedy’s majority opinion observed that “even with the mandate or approval of a majority,” the First Amendment “exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature,” are left “for the individual to make.”<sup>137</sup>

Moreover, in *Reno v. ACLU*, Justice Stevens himself authored the majority opinion limiting the applicability of *Pacifica* to the “particular medium” of broadcasting, where “warnings could not adequately protect the listener from unexpected program content.”<sup>138</sup> Setting aside *Pacifica*, the Court invalidated a federal ban on “indecent” and “patently offensive” online materials accessible to minors partly on First Amendment overbreadth grounds, concluding that the ban “effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.”<sup>139</sup> And in *Ashcroft v. ACLU*, Justice Kennedy’s majority opinion applied *Playboy* to uphold a preliminary injunction against a federal ban on sexually oriented commercial online postings “harmful to minors.”<sup>140</sup> The Court concluded that the regulation was likely to fail the least restrictive alternative prong of strict scrutiny, as filtering software might well be more effective at protecting children’s access to harmful materials while allowing adults to “gain access to speech they have a right to see.”<sup>141</sup>

## 2. Student Speech

In the landmark student speech case *Tinker v. Des Moines Independent Community School District*, the Court upheld the First Amendment right of students to wear armbands to protest the Vietnam War.<sup>142</sup> Justice Fortas’s majority opinion also recognized that the rights of other students to receive the armband-wearing students’ speech were at stake, declaring, “In our

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136. *See id.* at 818–26.

137. *Id.* at 818.

138. 521 U.S. 844, 867 (1997).

139. *Id.* at 874. Earlier, in *Houchins v. KQED, Inc.*, Justice Stevens also embraced “[t]he preservation of a full and free flow of information to the general public” as “a core objective of the First Amendment.” 438 U.S. 1, 30 (1978) (Stevens, J., dissenting).

140. 542 U.S. 656, 661 (2004).

141. *Id.* at 667.

142. 393 U.S. 503 (1969).

system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.”<sup>143</sup> This right of students to receive information and ideas was reaffirmed forcefully in Justice Brennan’s plurality opinion in *Board of Education, Island Trees Union Free School District v. Pico*.<sup>144</sup> In the lengthiest discourse to date on the right to receive information and ideas, Justice Brennan drew from cases such as *Martin*, *Griswold*, *Stanley*, *Mandel*, and *Lamont* and authorities ranging from Madison to Meiklejohn to demonstrate not only the established nature of “the right to receive ideas” as “an inherent corollary of the rights of free speech and press,”<sup>145</sup> but also to ground the right in theoretical principles of self-governance.<sup>146</sup> Accordingly, his plurality opinion held that school boards cannot remove books from their libraries “simply because they dislike the ideas contained in those books,” as access to unorthodox ideas “prepares students for active and effective participation in a pluralistic society.”<sup>147</sup>

### 3. *The Roberts Court*

The Court’s increasing unwillingness to countenance limitations on marketplace access to protected speech reflects a modern trend toward greater speech protection that reaches new heights under the Roberts Court.<sup>148</sup> The burgeoning and generally speech-protective free speech jurisprudence of the Roberts Court has fortified the right to receive information and ideas in a number of potentially significant ways for speech from abroad.

*Citizens United* and *Bluman*. Perhaps most consequentially, a majority of the Roberts Court in *Citizens United v. FEC* declared, in sweeping terms, that “the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity,” as such restrictions are “all too often simply a means to control content.”<sup>149</sup> The Court applied what Justice

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143. *Id.* at 511.

144. 457 U.S. 853 (1982).

145. *Id.* at 867.

146. *See infra* notes 264–71 and accompanying text.

147. *Pico*, 457 U.S. at 868, 872.

148. As one prominent commentator put it, free speech claims have, “in the hands of the current court, become an engine of deregulation.” Linda Greenhouse, *An Indecent Burial*, N.Y. TIMES (Apr. 16, 2014), <https://www.nytimes.com/2014/04/17/opinion/an-indecent-burial.html>; *see also* Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 BROOKLYN J.L. & POL’Y. 63, 64 (2016) (contending that the Roberts Court is “the most speech-protective Supreme Court in memory”).

149. 558 U.S. 310, 340 (2010).

Stevens denominated a “glittering generality”<sup>150</sup> to invalidate federal bans on corporate expenditures that support express advocacy or electioneering communications related to a political candidate, holding that “the Government may not suppress political speech on the basis of the speaker’s corporate identity.”<sup>151</sup>

If the identity of the speaker cannot serve as a basis for suppressing political speech, then foreign speakers would seem to benefit as much from *Citizens United*’s categorical rule as corporate speakers. Indeed, the central rationale supporting the rule reinforces this conclusion. In rejecting the antidistortion rationale of *Austin v. Michigan Chamber of Commerce*—which previously upheld corporate speech restrictions on the ground that the aggregate wealth and other advantages of the corporate form give corporations an outsized advantage in the marketplace of ideas unrelated to the value of their speech<sup>152</sup>—the Court reasoned that *Austin* itself “interferes with the ‘open marketplace’ of ideas protected by the First Amendment” by “prevent[ing] voices and viewpoints from reaching the public and advising voters.”<sup>153</sup> Consequently, the majority concluded, when the government restricts “where a person may get his or her information or what distrusted source he or she may not hear,” it violates “the freedom to think for ourselves” that the First Amendment protects.<sup>154</sup>

Because the corporate bans at issue were not targeted at foreign corporations, the majority in *Citizens United* reserved the question whether its sweeping prohibition on speaker-based restrictions of political speech would extend to federal bans on contributions by foreign individuals or associations.<sup>155</sup> But in dissent, Justice Stevens argued that, “[i]f taken seriously,” the majority’s categorical rule and sweeping rationale would reach foreign speakers (including propagandists like Tokyo Rose during World War II) as well as foreign-controlled corporations.<sup>156</sup> He criticized this outcome, observing that “[t]he notion that Congress might lack the authority to distinguish foreigners from citizens” in regulating electioneering communications within the country “would certainly have

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150. *Id.* at 394 (Stevens, J., dissenting).

151. *Id.* at 365 (majority opinion).

152. 494 U.S. 652 (1990).

153. *Citizens United*, 558 U.S. at 354 (quoting *N.Y. State Bd. Of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)).

154. *Id.* at 355.

155. *See id.* at 362 (“We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process.”).

156. *Id.* at 424 (Stevens, J., dissenting).

surprised the Framers, whose obsession with foreign influence derived from a fear that foreign powers and individuals had no basic investment in the well-being of the country.”<sup>157</sup>

On the merits, there is much force to Justice Stevens’s dissent, including his historical point about the Framers’ fear of foreign meddling in a fledgling democracy.<sup>158</sup> But the force of that historical argument does not undermine his conclusion that the logical endpoint of the majority’s decision is the preclusion of government regulation of campaign speech based on the foreign identity of the speaker. Regulations barring foreign speakers from sharing their “voices and viewpoints” with the public on electoral matters would interfere with “the open marketplace of ideas” in similar fashion to the corporate bans invalidated in *Citizens United*. Both kinds of restrictions deny the public “information” from “distrusted source[s]” by government fiat rather than listener choice, thereby limiting the public’s “freedom to think for ourselves.”<sup>159</sup> Furthermore, just as corporations might “possess valuable expertise” in their areas, “leaving them best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials,”<sup>160</sup> so too might foreign speakers possess specialized information and perspectives that would help the public assess the foreign policy positions of candidates, elected officials, and the country.

Of course, there is much in the majority’s simplistic and sanguine use of the marketplace of ideas metaphor that is subject to criticism, which Justice Stevens aptly leveled in his dissent.<sup>161</sup> But the pertinent point here is that, however unpersuasive, the majority relied on that marketplace metaphor to support its categorical rule against speaker-based distinctions. As in prior opinions recognizing and rationalizing the right to receive information and ideas, *Citizens United* favored unrestricted access to information and ideas—even from potentially dangerous or distrustful speakers—as essential to “the rights of free thought”<sup>162</sup> and “the freedom to think for

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157. *Id.* at 424 n.51 (quoting Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 393 n. 245 (2009)).

158. *See, e.g.*, U.S. CONST. art. II, § 1, cl. 4 (“No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President.”).

159. *Citizens United*, 558 U.S. at 356.

160. *Id.* at 364.

161. *See id.* at 465–78 (Stevens, J., dissenting); *see also infra* notes 253–254 and accompanying text.

162. *Stanley v. Georgia*, 394 U.S. 557, 560 n.3 (1969) (internal quotation marks omitted).

ourselves”<sup>163</sup> that *Stanley* and *Citizens United* respectively characterized as the ultimate right protected by the First Amendment.

*Citizens United* thus offers more than just reaffirmation of the right to receive information and ideas. It adds substantive content to that right in the form of a general prohibition on regulating political speech based on the speaker’s identity.<sup>164</sup> This constitutional command of speaker neutrality bolsters earlier decisions such as *Meyer* and *Lamont* that denied the government’s regulatory power to exclude information and ideas of foreign origin because of the domestic audience’s overriding First Amendment right to receive them.

Given the categorical language and broad reasoning of *Citizens United*, it is perhaps susceptible to over-reading as further precedent for a right to receive speech from abroad, including from foreign individuals, associations, and states. But this reading is further supported by Justice Scalia’s concurrence, in which he argued that, because the First Amendment is “written in terms of ‘speech,’ not speakers,” it textually “offers no foothold for excluding *any* category of speaker.”<sup>165</sup> Election law scholar Richard Hasen has also concluded that “it is difficult to see how any of the arguments supporting a foreign spending limit could be squared with the reasoning of the majority in *Citizens United*.”<sup>166</sup>

Yet a follow-up case does offer some cause for caution against over-reading *Citizens United*. In *Bluman v. FEC*, two resident aliens challenged the federal bans on campaign and political contributions by foreigners.<sup>167</sup> They argued that those bans ran afoul of “the Court’s condemnation of speaker-based restrictions on political speech” in *Citizens United*.<sup>168</sup> A three-judge district court ruled against them, relying on a line of pre-*Citizens United* cases upholding the exclusion of foreigners from “activities ‘intimately related to the process of democratic self-government,’” such as voting, holding elective office, teaching in public schools, and serving as police officers.<sup>169</sup> As for *Citizens United*, the district court observed that the

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163. *Citizens United*, 558 U.S. at 356.

164. Of course, the categorical solidity of that prohibition is subject to question, as Justice Stevens pointed out in dissent. *See id.* at 420–21 (Stevens, J., dissenting).

165. *Id.* at 392–93 (Scalia, J., concurring) (emphasis added).

166. Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 606 (2011).

167. *See Bluman v. FEC*, 800 F. Supp. 2d 281, 282–83 (D.D.C. 2011).

168. Jurisdictional Statement at \*7, *Bluman v. FEC*, No. 11-275 (U.S. Sept. 1, 2011), 2752011 WL 3919650.

169. *Bluman*, 800 F. Supp. 2d at 287 (quoting *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)).

majority had left the question open and opted to follow Justice Stevens's dissent as an "accurate indicator of where the Supreme Court's jurisprudence stands on the question of foreign contributions and expenditures."<sup>170</sup> Furthermore, the panel limited its ruling to the monetary bans at issue, disclaiming any decision on "whether Congress could prohibit foreign nationals from engaging in speech" apart from political contributions and expenditures.<sup>171</sup>

On appeal, the Court unanimously upheld the district court ruling, without any attempt at explanation, in a summary affirmance.<sup>172</sup> Perhaps it could not cobble together an explanation upon which the remaining *Citizens United* dissenters<sup>173</sup> and majority could agree. More pointedly, as Professor Hasen has argued, the Court could only reconcile the reasoning of *Citizens United* with the result in *Bluman* "through doctrinal incoherence."<sup>174</sup>

Thus, in theory, *Bluman*'s summary affirmance may imply a limit to *Citizen United*'s anti-discrimination rule for speakers. But as the district court in *Bluman* was careful to observe, it at least remains an open question after *Citizens United* whether the government may exclude from the domestic marketplace of ideas the political speech of foreigners, as opposed to their campaign contributions and expenditures. And given the Court's increasingly strong embrace of the open marketplace of ideas, culminating in *Citizens United*, it hardly seems likely that question would be answered in the affirmative.<sup>175</sup>

*Sorrell and Zemel*. In *Sorrell v. IMS Health, Inc.*, the Court invalidated a state law that prohibited pharmacies from selling or disclosing and banned pharmaceutical companies from using physician-identifiable prescribing

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170. *Id.* at 289.

171. *Id.* at 292.

172. *See* *Bluman v. FEC*, 565 U.S. 1104 (2012).

173. Justice Stevens, in the interim between *Citizens United* and *Bluman*, had retired. His dissent in *Citizens United*, from which he read during the Court's hand down of the decision, was his last and longest dissent.

174. Hasen, *supra* note 166, at 610.

175. In his symposium essay, Professor Joshua Sellers makes the narrower claim that lying by foreign nationals in expressly advocating the election or defeat of a candidate remains proscribable even after *Alvarez*. *See* Joshua Sellers, *Legislating Against Lying in Campaigns and Elections*, 71 OKLA. L. REV. 141, 157 (2018) ("[I]f foreign nationals are prohibited from making contributions and expenditures—rights that, especially in the case of expenditures, have enjoyed substantial constitutional protection—it naturally follows that their right to engage in intentionally false speech expressly advocating for or against the election of a candidate may be similarly regulated.").

records for marketing purposes.<sup>176</sup> Justice Kennedy’s majority opinion observed that, because “facts” are “the beginning point” for much speech, “[t]here is . . . a strong argument that prescriber-identifying information is speech for First Amendment purposes.”<sup>177</sup> In any case, because the law “imposes a speaker- and content-based burden on protected expression” against marketers and marketing, respectively, the Court deemed “heightened scrutiny” appropriate.<sup>178</sup>

*Sorrell* bolstered the right to receive information and ideas in two ways. Most obviously, it reaffirmed *Citizens United*’s general rule against speaker-based restrictions as a backdoor for content-based censorship of disfavored ideas.<sup>179</sup> More importantly, though, it added another potential dimension to the right to receive information and ideas, suggesting an extension to “the beginning point” of the formation of speech—that is, the acquisition of information on which speech is based.<sup>180</sup>

This contrasts somewhat with the Court’s apparent rejection of a claim of information-gathering as speech half a century earlier in *Zemel v. Rusk*.<sup>181</sup> In *Zemel*, the Court dismissed the contention that the State Department’s refusal to validate a passport for travel to Cuba—to make the traveler “a better informed citizen”—implicated the First Amendment, as the travel embargo was “an inhibition of action” rather than speech.<sup>182</sup> But restrictions on conduct can incidentally burden speech and give rise to First Amendment claims,<sup>183</sup> so the conclusion that the travel embargo regulated conduct did not preclude the traveler from raising a valid free speech claim. Perhaps recognizing this, the Court alternatively declared that “[t]he right to speak and publish does not carry with it the unrestrained right to gather information.”<sup>184</sup>

Significantly, while this statement in *Zemel* may appear to reject the claim that information-gathering is a First Amendment protected activity, it actually acknowledges the possibility of such a claim in denying that the

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176. *See* 564 U.S. 552, 557 (2011).

177. *Id.* at 570.

178. *Id.* at 571. The Court did not find it necessary to determine whether strict scrutiny was appropriate, as is generally the case for content- and speaker-based restrictions, or whether the intermediate scrutiny test for commercial speech was appropriate, because it determined that the state law would fail both. *See id.*

179. *See id.* at 580.

180. *See id.* at 570.

181. 381 U.S. 1 (1965).

182. *Id.* at 4, 16.

183. *See* *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

184. *Zemel*, 381 U.S. at 17.



right is “unrestrained.”<sup>185</sup> *Sorrell* all but confirms that acknowledgement in recognizing the “strong argument” that information gathering of prescriber practices “is speech for First Amendment purposes.”<sup>186</sup> And a direct endorsement of information gathering as a protected First Amendment activity would strengthen the claim that gathering facts and opinions from other speakers, including foreign nationals and nations, is protected by the First Amendment as well.

*Entertainment Merchants* and *Stevens*. Another potentially significant precedent from the Roberts Court’s speech-protective portfolio is *Brown v. Entertainment Merchants Ass’n*, which struck down a state ban on the sale of violent video games to minors.<sup>187</sup> Most notably—and vividly, given Justice Scalia’s authorship—the Court endorsed the principle that all protected speech, regardless of its cultural and intellectual worth, is subject to the same First Amendment standards, including strict scrutiny for content-based restrictions:

Reading Dante is unquestionably more cultured and intellectually edifying than playing *Mortal Kombat*. But these cultural and intellectual differences are not *constitutional* ones. Crudely violent video games, tawdry TV shows, and cheap novels and magazines are no less forms of speech than *The Divine Comedy*, and restrictions upon them must survive strict scrutiny . . . .<sup>188</sup>

That First Amendment protection generally does not depend on the social value of the speech is, of course, a point made in many previous cases, including *Stanley*.<sup>189</sup> But the Roberts Court’s forceful reaffirmation of that point is nonetheless significant—especially when applied to speech, like extremely violent video games, that puts the point to the test.

Another recent test case was *United States v. Stevens*, which invalidated a federal ban targeting fetishistic depictions of animal cruelty known as

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185. Which, of course, no constitutional right, including any First Amendment right, is. See *supra* note 80 and accompanying text. For further examination of the nature and limits of information-gathering as a First Amendment right, particularly in light of *Zemel*, see *Blitz*, *supra* note 44, at 89–91, 102–03.

186. See *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570 (2011).

187. 564 U.S. 786 (2011).

188. *Id.* at 796 n.4. The majority’s recognition that minors have a right of access to speech that concededly may be of very little social worth extends the “significant” First Amendment protection that children possess, as recognized by the Court in *Bolger*. See *supra* note 132.

189. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

“crush videos.”<sup>190</sup> Rejecting as “startling and dangerous” the proposition that “an ad hoc balancing of relative social costs and benefits” might serve as “a general precondition” for protecting speech that does not fall into a historically unprotected category, Chief Justice Roberts’s majority opinion noted that “[m]ost of what we say to one another . . . lacks value . . . but it is still sheltered from Government regulation.”<sup>191</sup>

Of course, statements like these are scattered throughout the U.S. Reports.<sup>192</sup> But these reaffirmations are particularly significant for a number of reasons. First, the simple fact of the Roberts Court reaffirming these statements confirms their continuing vitality. Second, the strength of their reaffirmation puts them on the same categorical plane as *Citizens United*’s rule against speaker-based restrictions.

Indeed, *Citizens United*, *Entertainment Merchants*, and *Stevens* together present a formidable pair of rules that fortify the right to receive information and ideas on two fronts—one barring the denial of marketplace access based on the identity of the speaker, the other barring the denial of marketplace access based on the value of the speech. Neither these categorical rules nor their marketplace rationales easily yield to an exception. If the protection of violent video games and crush videos are as essential for people “to think for ourselves” as corporate electioneering communications,<sup>193</sup> then it is difficult to see why information and ideas from abroad, whether from foreign individuals or even hostile foreign nations, are not either. Finally, on top of *Playboy*, *Reno*, and *Ashcroft*, the unhesitating and unstinting application of First Amendment principles to relatively new expressive media such as video games leaves no doubt that the right to receive information and ideas extends to wherever speakers and listeners may find each other, including online platforms and social networks.<sup>194</sup>

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190. 559 U.S. 460, 465–66, 482 (2010).

191. *Id.* at 470, 479.

192. For example, Chief Justice Roberts quoted Justice Harlan’s majority opinion in *Cohen v. California*, 403 U.S. 15 (1971). See *Stevens*, 559 U.S. at 479–80 (“Even “[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats’ poems or Donne’s sermons.” (quoting *Cohen*, 403 U.S. at 25 (internal quotation marks omitted))). And Justice Scalia reached back over half a century to (re)make the point that even if certain expressive materials have “nothing of any possible value to society . . . , they are as much entitled to the protection of free speech as the best of literature.” *Entertainment Merchs. Ass’n*, 564 U.S. at 796–97 n.4 (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948)).

193. *Citizens United v. FEC*, 558 U.S. 310, 356 (2010).

194. See *infra* Section III.D.

*Alvarez*. Whether the government may regulate fake news and other falsehoods from abroad will partly turn on *United States v. Alvarez*.<sup>195</sup> In that case, an elected member of a local water district board falsely boasted that he had received the Congressional Medal of Honor for acts of valor as a marine.<sup>196</sup> That lie was a crime under the Stolen Valor Act, a federal law that banned lying about receiving congressional military honors.<sup>197</sup>

A diverse plurality of the Court, led by Justice Kennedy and joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor, invalidated the law on First Amendment grounds.<sup>198</sup> In a familiar pattern for the Roberts Court, the plurality dismissed any possibility that lying about military honors should be considered unprotected speech pursuant to a balancing of the social costs and benefits of the speech.<sup>199</sup> As in *Stevens* and *Entertainment Merchants*, the plurality firmly limited that balancing approach to justifying “historic and traditional categories” of unprotected speech.<sup>200</sup>

In addition, the plurality rejected the government’s broader argument that the Court has traditionally treated false speech as lacking in value and First Amendment protection.<sup>201</sup> While acknowledging that certain kinds of false statements, such as defamation, fraud, and perjury, fall outside of the First Amendment, the plurality confined unprotected falsehoods to statements that cause some “legally cognizable harm” apart from the potential of all falsehoods to interfere with “the truth-seeking function of the marketplace of ideas.”<sup>202</sup> For example, defamation damages reputation, fraud inflicts financial harm, and perjury undermines the integrity of the judicial system.<sup>203</sup>

The plurality declined to endorse the government’s proposed “categorical rule” that “false statements receive no First Amendment protection.”<sup>204</sup> If “the interest in truthful discourse alone is sufficient to sustain a ban on speech,” the plurality warned, then the government “could compile a list of subjects about which false statements are punishable” with

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195. 567 U.S. 709 (2012).

196. *Id.* at 713.

197. *Id.* at 714.

198. *Id.* at 715.

199. *See id.* at 717.

200. *Id.* (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010)) (internal quotation marks omitted).

201. *See id.* at 718.

202. *Id.* at 718–19 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988)).

203. *See id.* at 719–21.

204. *Id.* at 719.

“no clear limiting principle.”<sup>205</sup> Instead of “Oceania’s Ministry of Truth,” the plurality endorsed the familiar First Amendment refrain that “[t]he remedy for speech that is false is speech that is true.”<sup>206</sup> For military honors, the remedy could take the form of online databases to verify claims and expose false ones.<sup>207</sup> Quoting Justice Holmes, the plurality concluded that this “competition of the market” would be “the best test of truth,” consistent with “[t]he theory of our Constitution.”<sup>208</sup>

Justice Breyer, concurring in the judgment with Justice Kagan, distanced himself from the “strict categorical analysis” of the plurality.<sup>209</sup> Instead, he favored an ad-hoc “proportionality review” that neither results in “near-automatic condemnation” nor “near-automatic approval,” and that he equated with “what the Court has termed ‘intermediate scrutiny.’”<sup>210</sup> As he further explained, this approach asks “whether the statute works speech-related harm that is out of proportion to its justifications,” as well as “whether there are other, less restrictive ways” of achieving the government’s objectives.<sup>211</sup>

Applying his approach, Justice Breyer accepted that the statute had a “substantial justification” in protecting military honors from dilution, but concluded that “a more finely tailored statute” that “insist[s] upon a showing that the false statement caused specific harm” or “focus[es] its coverage on lies most likely to be harmful,” would be more proportionate and consistent with narrower common law and statutory instances in which falsehoods have been outlawed.<sup>212</sup> He distinguished the law at issue from “[l]aws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like,” which have triggered strict scrutiny because of “[t]he dangers of suppressing valuable ideas.”<sup>213</sup> And, of particular relevance here, Justice Breyer cautioned:

In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the

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205. *Id.* at 723.

206. *Id.* at 723, 727.

207. *Id.* at 729.

208. *Id.* at 728 (plurality) (“The theory of our Constitution is ‘that the best test of truth is the power of the thought to get itself accepted in the competition of the marketplace.’” (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting))).

209. *Id.* at 730 (Breyer, J., concurring) (internal quotation marks omitted).

210. *Id.* at 730–32 (internal quotation marks omitted).

211. *Id.* at 730.

212. *Id.* at 734, 737–38.

213. *Id.* at 731–32.

speaker), but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas. Thus, the statute may have to be significantly narrowed in its applications.<sup>214</sup>

Justice Breyer's concurrence thus left open the possibility of "significantly" narrow regulations of false political speech, including fake news and other misleading speech from abroad, to prevent the public in general and voters in particular from being misled. At the same time, his concurrence made clear that the needle would—and should—be especially difficult to thread given the risk of censorship. This possibility and its qualifications are especially significant given that his and Justice Kagan's less categorical views tipped the outcome of the case.

Justice Alito's dissent, joined by Justices Scalia and Thomas, also bears on the constitutionality of any proposal to regulate false or misleading speech. The dissenters' take on the constitutional status of falsehoods was the categorical inverse of the plurality's—"false factual statements possess no intrinsic First Amendment value" and "merit no First Amendment protection in their own right."<sup>215</sup> Rather, some false statements warrant "a measure of strategic protection" where necessary "to prevent the chilling of other, valuable speech," such as in the context of defamation of public officials or figures.<sup>216</sup>

However, in apparent agreement with both the plurality and the concurrence—making for a unanimous Court—the dissenters qualified that "there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech."<sup>217</sup> Those areas include "philosophy, religion, history, the social sciences, the arts, and other matters of public concern," where the state might very well proscribe falsehoods "for political ends."<sup>218</sup> Given this caveat—and, importantly, given its consistency with the categorical views of the plurality and more qualified views of the concurrence—it appears that a wide majority, if not the entirety, of the Roberts Court would strike down regulations on false political speech given the intolerable risk of government bias and meddling in this quintessential

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214. *Id.* at 738.

215. *Id.* at 746, 748–49.

216. *Id.* at 750, 751 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974)).

217. *Id.* at 751.

218. *Id.* at 751, 752.

sector of the marketplace of ideas.<sup>219</sup> Consequently, as Professor Joshua Sellers observes in his contribution to this symposium issue, *Alvarez* also “clearly renders laws regulating false campaign and election speech constitutionally suspect.”<sup>220</sup>

*In sum*, the Court in recent decades has fortified the right to receive information and ideas in a variety of contexts, adding breadth and vitality to that right. Perhaps most consequentially, the Court in *Citizens United v. FEC* generally forbade regulating speech on the basis of the identity of the speaker, and its categorical rule and far-reaching rationale inescapably extend to all manner of foreign speakers. Additionally, in *Sorrell v. IMS Health, Inc.*, the Court broadly recognized that information gathering is entitled to First Amendment protection as a predicate to speech. Together, these cases fortify the right of domestic listeners to gather information and ideas from speakers regardless of their nationality or locality. Furthermore, *Entertainment Merchants* and *Stevens* augment *Citizens United*’s categorical ban on speaker-based discrimination with their bar against restrictions based on the asserted lack of social value of certain expressive materials that fall outside the historically unprotected categories of speech. These cases could hinder the government from justifying on social value grounds any attempt to block false or misleading foreign speech from entering the domestic marketplace. Finally, in *Alvarez*, an otherwise-splintered Roberts Court united to express skepticism about the ability of the government to regulate false political speech, with a wide majority appearing to rule it out. Considered together, these decisions likely preclude the government from barring the entry of political speech from abroad on the ground that the speaker is foreign or that the speech is valueless or false—not because foreign speakers abroad have a First Amendment right to speak, but because the First Amendment demands an open marketplace of ideas for domestic listeners.

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219. For further discussion of the impact of *Alvarez* on the First Amendment status of falsehoods, see Sellers, *supra* note 175, at 146-49; Erwin Chemerinsky, *False Speech and the First Amendment*, 71 OKLA. L. REV. 1, 9-10 (2018); Jonathan D. Varat, *Truth, Courage, and Other Human Dispositions: Reflections on Falsehoods and the First Amendment*, 71 OKLA. L. REV. 35, 39-47 (2018).

220. Sellers, *supra* note 175, at 149 n.52 (citing Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections*, 74 MONT. L. REV. 53, 56 (2013) (“The result of *Alvarez* is that laws regulating false campaign speech are in even more constitutional trouble than they were before, and any attempts to regulate such speech will have to be narrow, targeted, and careful in their choice of remedies.”)).

*D. Receiving Foreign Information and Ideas Online*

The rise of online media platforms, particularly social networks, as the primary channels for the dissemination of speech worldwide has mitigated—if not rendered obsolete—the traditional sovereign authority upheld by the Court in previous decades to deny physical entry to certain expressive materials and speakers from abroad. And, building on the Court’s earlier online speech opinions in *Reno v. ACLU* and *Ashcroft v. ACLU*,<sup>221</sup> a majority of the Roberts Court at least appears ready to protect access to information and ideas online, including from abroad, to the same, robust extent as speech in traditional public forums.

While the federal government has stepped up searches of electronic devices belonging to travelers entering at the border<sup>222</sup> and expanded its screening of visa applicants to include their social media activities,<sup>223</sup> it has not yet attempted to screen and block online speech from abroad. Whether this regulatory inaction arises from the technical and pragmatic difficulties inherent in filtering online content from abroad,<sup>224</sup> or whether legal or political considerations have kept the United States from joining other regimes that attempt to control the cross-border flow of information,<sup>225</sup> the federal government at present focuses its enforcement efforts on domestic recipients and distributors of proscribed speech.<sup>226</sup> Consequently, as Professor Timothy Zick has concluded, “the digitization of speech has fundamentally altered the scope of the First Amendment by reducing governmental power to bar information and ideas at the nation’s territorial borders.”<sup>227</sup> On the worldwide web, in other words, the marketplace of ideas has become “unalterably de-territorialized.”<sup>228</sup>

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221. See *supra* notes 138–141 and accompanying text.

222. See Ron Nixon, *Cellphone and Computer Searches at U.S. Border Rise Under Trump*, N.Y. TIMES (Jan. 5, 2018), <https://www.nytimes.com/2018/01/05/us/politics/trump-border-search-cellphone-computer.html>.

223. See Yeganeh Torbati, *Trump Administration Approves Tougher Visa Vetting, Including Social Media Checks*, REUTERS (May 31, 2017, 6:58 PM), <https://www.reuters.com/article/us-usa-immigration-visa/trump-administration-approves-tougher-visa-vetting-including-social-media-checks-idUSKBN18R3F8>.

224. See Zick, *supra* note 30, at 1603 (“It is one thing to prevent the entry of harmful persons, packages, and other tangible materials into the United States. It is quite another to stop bits and bytes at territorial borders.”).

225. See *Key Internet Controls By Country*, FREEDOM HOUSE, <https://freedomhouse.org/report/key-internet-controls-table-2017> (last visited May 31, 2018).

226. See Zick, *supra* note 30, at 1605.

227. *Id.* at 1606.

228. *Id.*

The truth of this claim is apparent to anyone in the United States with an internet connection. Content from abroad is a simple click, tap, or swipe away; moreover, such content is often commingled with domestic content without distinction. It has never been so easy to receive so much information and so many ideas from so many sources, both foreign and domestic.

But on the flip side, as various investigations are uncovering, it has also never been so easy for foreign speakers—including hostile foreign powers—to exploit this open marketplace of ideas maliciously to disseminate misinformation.<sup>229</sup> In particular, the 2016 presidential election cycle vividly illustrates how popular social networks such as Facebook and Twitter, with the voluntary clustering of politically likeminded individuals and the application of sophisticated ad targeting, can greatly amplify the reach—if not also the effectiveness—of a sensational story from a foreign speaker seeking to influence the domestic political marketplace.

There is no doubt that a majority of the current Court views this open online marketplace as a vital forum for speech, and that the ease of access to information and ideas from abroad is generally regarded as a virtue rather than a vice. Just this past term, in *Packingham v. North Carolina*, the Court through Justice Kennedy extolled “the ‘vast democratic forums of the Internet.’”<sup>230</sup> Moreover, the Court singled out social media for its “relatively unlimited, low-cost capacity for communications of all kinds,”<sup>231</sup> and Facebook in particular for facilitating speech among a worldwide user base “three times the population of North America.”<sup>232</sup> Because of the “vast potential” for the online marketplace of ideas to “alter how we think, express ourselves, and define who we want to be,” the Court cautioned against any suggestion that the First Amendment should not vigorously protect “access to vast networks in that medium.”<sup>233</sup>

Accordingly, the Court struck down a state statute that barred registered sex offenders from accessing social networks and other websites where they may contact minors.<sup>234</sup> Assessed against the state’s interest in protecting minors online from sex offenders, the Court found the statute fell far short of narrow tailoring even under the assumption that it was content neutral and subject to the less demanding means-ends fit of intermediate

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229. *See supra* notes 7–12 and accompanying text.

230. 137 S. Ct. 1730, 1735 (2017) (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

231. *Id.* (quoting *Reno*, 521 U.S. at 870).

232. *Id.*

233. *Id.* at 1736.

234. *See id.* at 1734–35.



scrutiny.<sup>235</sup> The state could not “bar[] access to what for many are the principle sources for knowing current events . . . speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.”<sup>236</sup> This and similar language in Justice Kennedy’s majority opinion<sup>237</sup> not only come off as paeans to the internet as a modern speech forum “of historic proportions,”<sup>238</sup> but also as expressions of the importance of protecting the right to receive information and ideas in its “vast realms.”<sup>239</sup>

It was precisely this “loose rhetoric” comparing the internet to traditional public forums that “troubled” Justice Alito, who along with the Chief Justice and Justice Thomas only concurred in the judgment.<sup>240</sup> Though agreeing with the majority that the law was not narrowly tailored,<sup>241</sup> Justice Alito’s opinion criticized the Court for failing to “be cautious in applying our free speech precedents to the internet” given “important differences between cyberspace and the physical world.”<sup>242</sup> According to Justice Alito, differences relevant to the statutory context at issue included “[the] unprecedented degree of anonymity” online that “easily permits” speakers to “assume a false identity.”<sup>243</sup>

*In sum*, unfiltered domestic access to the internet has made foreign information and ideas available in “historic proportions.”<sup>244</sup> Any attempt at limiting such access would run up against the *Packingham* majority’s

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235. *Id.* at 1736.

236. *Id.* at 1737.

237. *See, e.g., id.* at 1738 (concluding that the state “may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture”).

238. *Id.* at 1736.

239. *Id.* at 1737. These sentiments in Justice Kennedy’s majority opinion echo those of Justice Stevens’ opinion for the Court in *Reno*, at the advent of widespread public internet usage, that “[t]he Internet is a unique and wholly new medium of worldwide human communication” in which “tens of millions” can communicate and access “vast amounts of information from around the world.” *Reno v. ACLU*, 521 U.S. 844, 850 (1997).

240. *Packingham*, 137 S. Ct. at 1738. Justice Gorsuch did not join the Court in time to participate in the decision. *Id.*

241. *Id.* at 1741 (Alito, J., concurring) (“The fatal problem for [the law] is that its wide sweep precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child.”).

242. *Id.* at 1743.

243. *Id.* at 1743–44.

244. *Id.* at 1736.

strongly worded warnings against restricting the internet's "vast democratic forums" for "speaking and listening."<sup>245</sup>

#### *IV. Foreign Speech and First Amendment Functions*

Given the exploitation of our online marketplace of ideas by foreign individuals affiliated with the Russian government to sway the 2016 election and sow social discord with sensational and false speech, it is essential to consider whether this current state of affairs is consistent not only with case law, but moreover with the primary functions of the First Amendment. Three functions are commonly cited as underlying the First Amendment: facilitating the search for truth, promoting democratic self-governance, and furthering self-realization.<sup>246</sup>

*Truth-seeking.* It seems safe to conclude that unfettered access to foreign speech that is truthful facilitates the oft-cited marketplace function of sorting truth from falsehood.<sup>247</sup> Listeners exposed to truthful speech gain the opportunity to weigh it against false speech and decide for themselves which to accept. For example, data, studies, and other speech from abroad on the existence of and threats posed by climate change, including from foreign scientists and organizations,<sup>248</sup> offer counterpoints to the domestic suppression or denial of such empirical facts and scientific consensus.<sup>249</sup> At best, the truths from abroad are adopted. At worse, they are not, but at least remain available for reconsideration. The search for truth is thereby either advanced or at least not made any worse off.

On matters where truth is not settled or on matters of opinion, it also is advantageous, if not imperative, to truth-seeking to protect access to information and ideas from every interested speaker, including both friends and foes. For instance, suppose the President makes a case for war against a foreign nation based on an unproven assertion that it is illegally harboring weapons of mass destruction.<sup>250</sup> Before American lives and resources are

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245. *Id.* at 1735, 1737 (quoting *Reno v. ACLU*, 621 U.S. 844, 868 (1997)).

246. See KATHLEEN M. SULLIVAN & NOAH FELDMAN, *FIRST AMENDMENT LAW* 5–9 (6th ed. 2016); Marceau & Chen, *supra* note 44, at 999; Zick, *supra* note 30, at 1593.

247. See *supra* note 202 and accompanying text.

248. See, e.g., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *FIFTH ASSESSMENT REPORT* (2013–2014), <http://www.ipcc.ch/report/ar5/>.

249. See, e.g., Sarah Sax, *See How Trump Is Hiding Climate Change*, VICE NEWS (Jan. 11, 2018), [https://news.vice.com/en\\_us/article/gywmx3/before-and-after-images-show-how-trump-is-hiding-climate-change](https://news.vice.com/en_us/article/gywmx3/before-and-after-images-show-how-trump-is-hiding-climate-change).

250. Cf. *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>.

committed, it would seem crucial for the public to hear what other world leaders—not least the one against whose nation war is threatened—might have to say with respect to the truth of those accusations or the desirability of the threatened conflict. Even if “the competition of the marketplace” does not operate swiftly enough for the public to accurately assess the asserted basis for going to war or the wisdom of it,<sup>251</sup> at least such competition would allow the public to make a more informed judgment. Thus, unfiltered access to counter-speech from abroad seems essential, particularly in the foreign policy context, where the full array of facts and perspectives on international disputes may not otherwise be advanced by domestic leaders.

When an adversary as resourceful and sophisticated as Russia broadly disseminates speech weaponized to deceive,<sup>252</sup> the truth-facilitating function of access to foreign information and ideas might be difficult to perceive. One might theoretically propound that marketplace competition is “the best test of truth”<sup>253</sup> and that, when “[Truth] and Falsehood grapple; who ever knew Truth put to the [worse], in a free and open encounter?”<sup>254</sup> But as the nation’s experience with Russia’s extensive disinformation campaign during the 2016 election has illustrated, falsehoods may not be exposed and truths may not emerge until well after voters leave the ballot booth.<sup>255</sup> As one scholar has observed, “In the long run, true ideas do tend to drive out false ones,” but “the short run may be very long.”<sup>256</sup>

Moreover, “[t]he remedy for speech that is false”<sup>257</sup> may not reach the highly polarized echo chambers of social media and news coverage consumed by millions of Americans.<sup>258</sup> Indeed, a recent study by the European Research Council concluded “that fact-checking largely failed to effectively reach consumers of fake news” on Facebook, which the study

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251. See *supra* note 208 and accompanying text.

252. See *supra* notes 7–25 and accompanying text.

253. See *supra* note 208 and accompanying text.

254. JOHN MILTON, *AREOPAGITICA* 35 (Percy Lund, Humphries & Co. Ltd. 1927) (1644). But see Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641 (1967) (arguing that “a self-operating marketplace of ideas . . . has long ceased to exist” because of concentrated ownership and control of “the media of mass communications”).

255. See *supra* notes 22–25 and accompanying text.

256. Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1130 (1979).

257. *United States v. Alvarez*, 567 U.S. 709, 727 (2012).

258. See Roheeni Saxena, *The Social Media “Echo Chamber” Is Real*, ARS TECHNICA (Mar. 13, 2017, 1:25 PM), <https://arstechnica.com/science/2017/03/the-social-media-echo-chamber-is-real/>.

also found to be “the most important mechanism facilitating [its] spread.”<sup>259</sup> That study also found, however, that the most avid fake news consumers generally were the highest consumers of traditional news,<sup>260</sup> and another study found that most Americans do not turn to social media as their “most important” source of news.<sup>261</sup>

Because of the unprecedented nature of the spread of fake news during the 2016 election, further study is needed on how it affects consumers and the marketplace at large.<sup>262</sup> While “the clearer perception and livelier impression of truth” may in theory be “produced by its collision with error,”<sup>263</sup> it is impossible to say at present whether, as an empirical matter, unrestricted access to false and misleading foreign speech ultimately tends to further, frustrate, or not affect the truth-seeking function of the First Amendment.

*Self-governance.* Closely related to the truth-seeking function of the First Amendment is its promotion of democratic discussion and decision-making. As Justice Harlan articulated in *Cohen v. California*, the First Amendment

is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity.<sup>264</sup>

For the public to be better informed, debate on public issues needs to be “uninhibited, robust, and wide-open,” which in turn is facilitated by access to information and ideas beyond those curated by government officials.<sup>265</sup>

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259. Guess et al., *supra* note 9, at 2.

260. *See id.* at S24.

261. Allcott & Gentzkow, *supra* note 22, at 212 (internal quotation marks omitted).

262. *See* Guess et al., *supra* note 9, at 11–12; Allcott & Gentzkow, *supra* note 22, at 232.

263. JOHN STUART MILL, ON LIBERTY 25 (Oxford Univ. Press 1975) (1859).

264. 403 U.S. 15, 24 (1971); *see also* *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (arguing that the Founders “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”); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 63 (1948) (arguing for greater protection of “public” speech than “private” speech because of its promotion of “self-government”). *But see* Zechariah Chafee Jr., *Book Review, Free Speech: And Its Relation to Self-Government*, 62 HARV. L. REV. 891 (1949) (criticizing Meiklejohn’s conception of the First Amendment as too narrow and not protective of art and literature).

265. *Abernathy v. Sullivan*, 376 U.S. 254, 270 (1964); *see also* Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 WRITINGS OF JAMES MADISON 103 (Gaillard

Indeed, on foreign policy matters and other global issues, it seems indisputable generally that input from abroad benefits public understanding, discussion, and decision-making by supplying the public with a wider set of facts and views to consider, including those that domestic leaders may not wish to publicize. In addition to the example of climate change, consider the increasingly threatening exchanges between President Trump and Kim Jong Un last fall.<sup>266</sup> Without knowledge of how North Korea's leader responded, not to mention the reactions of other world leaders, it would have been difficult if not impossible for the public to assess the President's words and policies toward the hostile nuclear state. So in our interconnected times, open access to information and ideas from abroad seems essential for self-governance at home, including in the context of electoral campaigns, where foreign policy can take center stage.<sup>267</sup>

As with truth-seeking, whether unrestricted access to fake news and other falsehoods from abroad improves public discussion and decision-making is a more difficult question. Again, the answer is affirmative if the marketplace functions efficiently and effectively in sorting truths from falsehoods.<sup>268</sup> But that is a big "if" requiring further empirical study with respect to the marketplace effects of a massive misinformation campaign such as Russia's in 2016.<sup>269</sup> It may turn out that such sizable and sophisticated operations by foreign states do cloud public debate and adversely affect democratic decision making, and, furthermore, that suppressing such disinformation operations by state actors would not chill other valuable speech from home or abroad.<sup>270</sup> If so, then perhaps some

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Hunt ed., 1910) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.").

266. See Peter Baker & Rick Gladstone, *With Combative Style and Epithets, Trump Takes America First to the U.N.*, N.Y. TIMES (Sept. 19, 2017), <https://www.nytimes.com/2017/09/19/world/trump-un-north-korea-iran.html> (reporting on President Trump's U.N. address, in which he vowed to "totally destroy North Korea" if it threatens the United States); *Full Text of Kim Jong-un's Response to President Trump*, N.Y. TIMES (Sept. 22, 2017), <https://www.nytimes.com/2017/09/22/world/asia/kim-jong-un-trump.html> (responding that North Korea "will consider with seriousness exercising of a corresponding, highest level of hard-line countermeasure in history").

267. See Joshua Berlinger, *Nukes, Terrorists and Hackers: Trump and Clinton Debate Global Threats*, CNN (Sept. 27, 2016), <https://edition.cnn.com/2016/09/27/politics/presidential-debate-global-topics/index.html>.

268. See *supra* notes 253–63 and accompanying text.

269. See *supra* notes 22–23, 262 and accompanying text.

270. See *supra* note 216 and accompanying text.

speaker-based disclosures at the nation-state level may be justified in principle to protect democratic self-governance, as proposed in Part V.<sup>271</sup>

*Self-realization.* The First Amendment is also recognized as furthering self-development and fulfillment—the freedom of speech “make[s] men free to develop their faculties,”<sup>272</sup> enables each individual to “realize[] his or her full potential,”<sup>273</sup> and protects against “[the] denial of autonomy . . . over [an individual’s] own reasoning.”<sup>274</sup> Allowing unfiltered access to foreign information and ideas, including calculated and coordinated falsehoods by hostile foreign states, seems entirely consistent with this First Amendment function.<sup>275</sup>

If individuals prefer news and other speech from abroad that align with their political or social leanings—and studies suggests that is generally so<sup>276</sup>—then government restrictions should not stand in the way of “what . . . [they] may read or what . . . [they] may watch” as matters of personal choice.<sup>277</sup> Even if personal development may be shaped by individuals’ choices of what to consume from abroad, the First Amendment affords them those choices, for good or ill.<sup>278</sup> To be sure, the freedom to further one’s development through the consumption of the speech of one’s choosing should end where it denies the autonomy of another.<sup>279</sup> But mere

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271. See, e.g., *infra* notes 303–314 and accompanying text.

272. *Whitney v. California*, 274 U.S. 357, 375 (1927).

273. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (internal quotation marks omitted).

274. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 354 (1991); see also *Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring in result) (stating that the First Amendment “secures as well the liberty of each man to decide for himself what he will read and to what he will listen . . . in short, a society of free choice”); *supra* note 233 and accompanying text. But see Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25 (1971) (arguing that self-realization as a free speech principle is too broad and “indistinguishable from the functions or benefits of all other human activity”).

275. See REDISH, *supra* note 43, at 47.

276. See Allcott & Gentzkow, *supra* note 22, at 212; Guess et al., *supra* note 9, at 1.

277. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

278. See *id.* (“Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”); cf. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 794 n.4 (2011) (“Reading Dante is unquestionably more cultured and intellectually edifying than playing Mortal Kombat. But these cultural and intellectual differences are not constitutional ones.”).

279. See, e.g., *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (holding that in-home possession of child pornography is not protected by First Amendment because of “compelling” state interest in “safeguarding the physical and psychological well-being of a minor,” and distinguishing *Stanley* on the ground that the primary state concern in *Stanley*

concern that access to foreign falsehoods may “poison the mind”<sup>280</sup> does not suffice to overcome the autonomy principle that some Justices and scholars find in the First Amendment.

*In sum*, open access to foreign information and ideas seems generally consistent with the commonly identified functions of the First Amendment to further truth-seeking, democratic self-governance, and self-realization. The difficult case of a large-scale, sophisticated misinformation campaign by a hostile foreign power requires further empirical study to determine whether, to what extent, and in what ways the truth-seeking and democracy-promoting functions of the First Amendment may be undermined.

#### V. Policy Responses and Recommendations

In response to the continuing threat that fake news and foreign meddling in the marketplace of ideas may undercut democratic governance and influence elections, a number of industry and government responses have been advanced.

*Evolving Responses.* Out of political pressure<sup>281</sup> if not also out of a sense of social responsibility,<sup>282</sup> Facebook, Twitter, Google, and other major online platforms have begun making various changes to their platforms to combat fake news.<sup>283</sup> As the platform responsible for the most dissemination of fake news,<sup>284</sup> Facebook’s evolving playbook illustrates the technological and policy challenges in effectively identifying and remedying that kind of misinformation.

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was that obscenity would “poison the mind of its viewers” (quoting *New York v. Ferber*, 485 U.S. 747, 756–58 (1982))).

280. *See id.*

281. *See* Cecelia Kang et al., *Tech Executives Are Contrite About Election Meddling, but Make Few Promises on Capitol Hill*, N.Y. TIMES (Oct. 31, 2017), <https://www.nytimes.com/2017/10/31/us/politics/facebook-twitter-google-hearings-congress.html>.

282. *See, e.g.*, Mark Zuckerberg, FACEBOOK (Jan. 4, 2018, 9:40 AM), <https://www.facebook.com/zuck/posts/10104380170714571>.

283. *See, e.g.*, Elizabeth Dwoskin, *Twitter Is Looking for Ways to Let Users Flag Fake News, Offensive Content*, WASH. POST (June 29, 2017), <https://www.washingtonpost.com/news/the-switch/wp/2017/06/29/twitter-is-looking-for-ways-to-let-users-flag-fake-news/>; Seith Fiegerman, *Facebook, Google, Twitter to Fight Fake News with ‘Trust Indicators,’* CNN (Nov. 16, 2017, 3:35 PM), <http://money.cnn.com/2017/11/16/technology/tech-trust-indicators/index.html>; Nick Wingfield et al., *Google and Facebook Take Aim at Fake News Sites*, N.Y. TIMES (Nov. 14, 2016), <https://www.nytimes.com/2016/11/15/technology/google-will-ban-websites-that-host-fake-news-from-using-its-ad-service.html>.

284. *See supra* note 259 and accompanying text.

In December 2016, Facebook partnered with independent fact-checking organizations to flag fake news articles for users.<sup>285</sup> After a year of trial, however, Facebook found that the flags did not clearly or sufficiently convey the reasons for disputing the article, that they could sometimes backfire and further entrench a user's beliefs, and that the process took too long given the massive amount of potentially fake news on its platform.<sup>286</sup> Instead, Facebook began surfacing fact-checked related articles next to disputed ones, and found that although the "click-through rates" for the fake news articles did not meaningfully decline, the rate of sharing such articles did.<sup>287</sup> Along with other major online platforms, Facebook has also purged fake accounts and added "trust indicators" to news articles, where users can find information uploaded by publishers about their publication, ownership structure, and fact-checking, corrections, and ethics policies.<sup>288</sup> Most recently, Facebook has announced that it will crowdsource the trust rankings of news sources to its immense userbase, characterizing this approach as the "most objective" while confessing that it was not "comfortable" taking on the role itself.<sup>289</sup> Critics swiftly condemned this new approach, however, as "the path of least responsibility for Facebook"<sup>290</sup> and one that could further entrench the political echo chambers on its platform.<sup>291</sup>

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285. See Jeff Smith et al., *Designing Against Misinformation: Facebook Design*, MEDIUM (Dec. 20, 2017), <https://medium.com/facebook-design/designing-against-misinformation-e5846b3aa1e2>.

286. See *id.*

287. See *id.*; see also Thuy Ong, *Facebook Found a Better Way to Fight Fake News*, VERGE (Dec. 20, 2017), <https://www.theverge.com/2017/12/21/16804912/facebook-disputed-flags-misinformation-newsfeed-fake-news>.

288. See Casey Newton, *Facebook Adds Trust Indicators to News Articles in an Effort to Identify Real Journalism*, VERGE (Nov. 16, 2017, 5:00 AM), <https://www.theverge.com/2017/11/16/16658538/facebook-trust-indicators-fake-news-trust-project>; Shane, *supra* note 15.

289. Elizabeth Dwoskin & Hamza Shaban, *Facebook Will Now Ask Users to Rank News Organizations They Trust*, WASH. POST (Jan. 19, 2018), [https://www.washingtonpost.com/news/the-switch/wp/2018/01/19/facebook-will-now-ask-its-users-to-rank-news-organizations-they-trust/?hpid=hp\\_hp-more-top-stories\\_facebook-410pm%3Ahomepage%2Fstory](https://www.washingtonpost.com/news/the-switch/wp/2018/01/19/facebook-will-now-ask-its-users-to-rank-news-organizations-they-trust/?hpid=hp_hp-more-top-stories_facebook-410pm%3Ahomepage%2Fstory).

290. Nitasha Tiku, *Facebook's Latest Fix for Fake News: Ask Users What They Trust*, WIRED (Jan. 19, 2018, 8:39 PM), <https://www.wired.com/story/facebooks-latest-fix-for-fake-news-ask-users-what-they-trust/> (internal quotation marks omitted).

291. See Scott Clement & Callum Borchers, *Facebook Plans to Crowdsource Media Credibility. This Chart Shows Why That Will Be So Difficult*, WASH. POST (Jan. 24, 2018), [https://www.washingtonpost.com/news/the-fix/wp/2018/01/24/facebook-plans-to-crowdsource-media-credibility-this-chart-shows-why-that-will-be-so-difficult/?hpid=hp\\_hp-cards\\_hp-card-technology%3Ahomepage%2Fcard](https://www.washingtonpost.com/news/the-fix/wp/2018/01/24/facebook-plans-to-crowdsource-media-credibility-this-chart-shows-why-that-will-be-so-difficult/?hpid=hp_hp-cards_hp-card-technology%3Ahomepage%2Fcard).



Policymakers also have advanced proposals for fighting fake news. For example, at the state level, California legislators have proposed two starkly different approaches. The first proposal would have broadly banned any “false or deceptive statement designed to influence the vote” on “[a]ny issue” or “[a]ny candidate,” but this proposal was withdrawn after withering criticism over its breadth.<sup>292</sup> The second proposal mirrors measures in other states calling for the creation of a K-12 curriculum in “media literacy” that would teach students to consume media critically and to differentiate between real and fake news.<sup>293</sup> On the federal level, one bill, co-sponsored by Senators Amy Klobuchar, John McCain, and Mark Warner, would require disclosure of the purchaser of online political ads.<sup>294</sup> Another bill recently introduced by Senators Chris Van Hollen and Marco Rubio would require the Director of National Intelligence to report on foreign interference after each federal election and would call for sanctions on foreign states caught meddling through misinformation campaigns or hacking.<sup>295</sup> In addition, the Federal Election Commission has proposed extending the purchaser disclosure requirement for certain political and campaign ads<sup>296</sup> to online buys.<sup>297</sup> Internationally, a number of countries

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292. *Cyber Fraud Bill Would Make Political ‘Fake News’ Against the Law*, CBS L.A. (Mar. 31, 2017, 10:46 AM), <http://losangeles.cbslocal.com/2017/03/31/cyber-fraud-bill-would-make-political-fake-news-against-the-law/>.

293. See Ryan J. Foley, *Alarmed by Fake News, Schools Push Media Literacy*, KPCC (Dec. 30, 2017), <https://www.scpr.org/news/2017/12/30/79400/fake-news-schools-media-literacy/>; Chris Nichols, *Stalled Bill to Help California Schools Fight Fake News to Be Revived*, CAPITOL PUB. RADIO (Dec. 11, 2017), <http://www.capradio.org/articles/2017/12/11/stalled-bill-to-help-california-schools-fight-fake-news-to-be-revived/>.

294. See Steven T. Dennis, *Senators Propose Social-Media Ad Rules After Months of Russia Probes*, BLOOMBERG (Oct. 19, 2017, 4:49 PM), <https://www.bloomberg.com/news/articles/2017-10-19/russia-probes-spur-lawmakers-on-election-security-social-media>. In an attempt to fend off such regulations, Facebook and other social media platforms voluntarily implemented disclosure requirements of varying degrees. See, e.g., Tony Romm, *Who’s Behind Those Political Ads on Facebook? Now You Can Find Out.*, WASH. POST (May 24, 2018), [https://www.washingtonpost.com/news/the-switch/wp/2018/05/24/whos-behind-those-political-ads-on-facebook-now-you-can-find-out/?noredirect=on&utm\\_term=.61d7fd508c9c](https://www.washingtonpost.com/news/the-switch/wp/2018/05/24/whos-behind-those-political-ads-on-facebook-now-you-can-find-out/?noredirect=on&utm_term=.61d7fd508c9c).

295. See Morgan Chalfant, *Senators Unveil Bipartisan Push to Deter Future Election Interference*, HILL (Jan. 16, 2018, 7:30 AM), <http://thehill.com/policy/cybersecurity/369056-bipartisan-senators-move-to-deter-future-election-interference>.

296. See *Advertising and Disclaimers*, FEC, <https://www.fec.gov/help-candidates-and-committees/making-disbursements/advertising/> (last visited May 31, 2018).

297. See John Shinal, *Tighter Rules for Online Political Ads Gain Momentum—But Trump’s Tweets May Remain Disclaimer-Free*, CNBC (Nov. 15, 2017), <https://www.cnbc.com/2017/11/15/google-facebook-twitter-political-disclosure-fec-comments.html>.

have responded to the threat of fake news, including Germany, which has required social media companies to delete hate speech,<sup>298</sup> and France, which has proposed legislation that would empower judges to remove and block fake news during election periods and require the disclosure of ad sponsors.<sup>299</sup>

*Recommendations.* It is beyond the scope of this article to assess the myriad responses to combat the spread and influence of disinformation online.<sup>300</sup> It may be premature, in any event, to evaluate the constitutionality of responses that continue to evolve in a technological cat-and-mouse game with the resources and sophistication of a foreign state,<sup>301</sup> especially given that the marketplace impact of such foreign manipulation is not sufficiently understood.<sup>302</sup> But at least two responses seem consonant with First Amendment doctrine and functions and worth pursuing on top of any others that may also prove feasible and constitutional.

First, at a minimum, online platforms should work to uncover speech affiliated with foreign states and disclose that affiliation to users. Platforms are already attempting to do so voluntarily,<sup>303</sup> and most likely could be required to do so. While *Citizens United* generally barred discrimination on the basis of speaker identity,<sup>304</sup> the majority's reservation of that rule with respect to foreign speakers,<sup>305</sup> coupled with the unanimous result in *Bluman*

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298. See Melissa Eddy & Mark Scott, *Delete Hate Speech or Pay Up, Germany Tells Social Media Companies*, N.Y. TIMES (June 30, 2017), <https://www.nytimes.com/2017/06/30/business/germany-facebook-google-twitter.html>.

299. See James McAuley, *France Weighs a Law to Rein In 'Fake News,' Raising Fears for Freedom of Speech*, WASH. POST (Jan. 10, 2018), [https://www.washingtonpost.com/world/europe/france-weighs-a-law-to-rein-in-fake-news-raising-fears-for-freedom-of-speech/2018/01/10/78256962-f558-11e7-9af7-a50bc3300042\\_story.html](https://www.washingtonpost.com/world/europe/france-weighs-a-law-to-rein-in-fake-news-raising-fears-for-freedom-of-speech/2018/01/10/78256962-f558-11e7-9af7-a50bc3300042_story.html).

300. See Andrew Marvell, *To His Coy Mistress*, in MISCELLANEOUS POEMS 19 (London 1681) (“Had we but World enough, and Time . . .”).

301. See Shane, *supra* note 15; Jackie Snow, *Can AI Win the War Against Fake News?*, MIT TECH. REV. (Dec. 13, 2017), <https://www.technologyreview.com/s/609717/can-ai-win-the-war-against-fake-news/>.

302. See *supra* notes 262, 269 and accompanying text.

303. See Dennis, *supra* note 294; Romm, *supra* note 294; Valentina Palladino, *YouTube Will Put Disclaimers on State-Funded Broadcasts to Fight Propaganda*, ARS TECHNICA (Feb. 2, 2018, 9:51 AM), <https://arstechnica.com/gadgets/2018/02/youtube-will-put-disclaimers-on-state-funded-broadcasts-to-fight-propaganda/>.

304. See *Citizens United v. FEC*, 558 U.S. 310, 340, 350 (2010).

305. See *id.* at 362 (“We need not reach the question whether the government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process.”).

upholding the ban on foreign political contributions,<sup>306</sup> suggests that *Keene*'s earlier approval of a registration and labeling requirement for political speech from foreign powers<sup>307</sup> remains a viable doctrinal source of support for similar or less restrictive disclosure requirements. Certainly, the constitutionality of applying the FEC's narrower political and campaign ad disclosure requirements to online platforms<sup>308</sup> does not seem in doubt after *Citizens United* broadly reaffirmed support for them.<sup>309</sup>

Furthermore, the disclosure of political speech by foreign nations, particularly in the electoral context, seems consistent with the truth-seeking and self-governance functions of the First Amendment in "enabl[ing] the electorate to make informed decisions and give proper weight to different speakers and messages."<sup>310</sup> Speaker identity generally can be a valuable indicator to listeners of credibility, quality, knowledge, motivation, and reliability,<sup>311</sup> and the identity of a foreign-state speaker can greatly impact each of these trust factors. At the same time, because foreign nations themselves do not possess any First Amendment interests<sup>312</sup>—including any anonymity, autonomy, or self-governance interests—compelling the disclosure of their identity would not impose any speaker-side harms to offset the benefits of disclosure to listeners. Moreover, those truth-seeking and self-governance benefits matter even more to the extent that, as Professor Helen Norton argues, there is less First Amendment value and greater harm in deliberate lies by foreign governments.<sup>313</sup> But it remains to be seen whether voluntary or compelled disclosures could effectively ferret out the identities of sophisticated actors adept at obfuscating them, particularly given the sheer volume of potentially suspect content on major social platforms like Facebook.<sup>314</sup>

Second, to paraphrase Uncle Ben, with great rights comes great responsibility.<sup>315</sup> A robust right to receive foreign information and ideas arguably comes with a social duty to consume them with discernment. While it may be difficult to change the consumption preferences and trust

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306. See *Bluman v. FEC*, 565 U.S. 1104 (2012).

307. See *supra* notes 118–122 and accompanying text.

308. See *Shinal*, *supra* note 297.

309. See *Citizens United*, 558 U.S. at 366–71.

310. *Id.* at 370.

311. See Norton, *supra* note 41, at 131 (“[L]isteners often use the speaker’s identity as a proxy for the message’s quality and credibility.”).

312. See *supra* Part II.

313. Norton, *supra* note 41, at 120–21.

314. See *Shane*, *supra* note 15.

315. See *SPIDER-MAN* (Columbia Pictures Corp. 2002).

inclinations of the most avid adult consumers of fake news,<sup>316</sup> “the processes of education” may “avert the evil” of “falsehood and fallacies” if offered earlier.<sup>317</sup> A K-12 media literacy curriculum designed to teach students to critically assess the quality of content and the credibility of sources could give the next generation of the electorate the skills needed to grapple with increasingly complex streams of information at their disposal.<sup>318</sup> That education could continue in college as an elective or as part of a core curriculum, and potentially beyond college as part of professional or continuing education offerings.<sup>319</sup>

As noted, a number of states are considering or already creating media literacy education curricula.<sup>320</sup> Other nations have started doing so as well.<sup>321</sup> This early and ongoing prophylactic approach may not inoculate the nation against meddling in the next several election cycles, but it could prove more durable in the long run against continually evolving forms and modes of disinformation by improving the savviness of buyers in the marketplace of ideas.<sup>322</sup> And educating listeners to better discern for themselves the value and veracity of the information and ideas that they consume from speakers worldwide furthers the truth-seeking, self-governance, and self-realization ends of the First Amendment.

### VI. Conclusion

A First Amendment right to receive information and ideas has gained doctrinal solidity and scope over the course of the past century. Outside of the campaign finance and physical border-crossing contexts, the robust

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316. See Clement & Borchers, *supra* note 291; Allcott & Gentzkow, *supra* note 22, at 218.

317. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

318. See *Educator Resources*, CTR. FOR MEDIA LITERACY, <http://www.medialit.org/educator-resources> (last visited Apr. 12, 2018).

319. See *Universities with Courses in News or Media Literacy*, CTR. FOR NEWS EXCELLENCE & ENGAGEMENT, <http://www.news-excellence.org/universities-with-courses-in-news-or-media-literacy/> (last visited June 1, 2018).

320. See generally Foley, *supra* note 293; Nichols, *supra* note 293.

321. See, e.g., Jason Horowitz, *In Italian Schools, Reading, Writing and Recognizing Fake News*, N.Y. TIMES (Oct. 18, 2017), <https://www.nytimes.com/2017/10/18/world/europe/italy-fake-news.html>.

322. See Nina Jankowicz, *The Only Way to Defend Against Russia's Information War*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/opinion/the-only-way-to-defend-against-russias-information-war.html?action=click&pgtype=Homepage&clickSource=story-heading&module=opinion-c-col-left-region&region=opinion-c-col-left-region&WT.nav=opinion-c-col-left-region>.

right now likely ensures uninhibited marketplace access to speech regardless of the foreign identity or location of the speaker and likely also extends to false political speech from abroad. As fate would have it, this right to receive information and ideas peaked at the same moment when massive social media networks such as Facebook offered the means for disseminating falsehoods far and wide, and a foreign adversary had the motive and sophistication to do so covertly during a closely contested presidential election.

In the aftermath of this perfect free speech storm, it is an urgent, existential question whether our *de facto* free speech infrastructure should remain widely open to speech from abroad, particularly from foreign adversaries intent on weaponizing speech to sway electoral outcomes or sow social discord. This Article concludes that it is generally consistent with First Amendment precedents and functions to leave the electorate free to receive foreign information and ideas, and indeed essential to enjoy that exposure in matters of foreign policy and other issues of global concern. Further study is required, however, on the electoral and social effects of large-scale disinformation campaigns—such as Russia’s during the 2016 election—before any firm conclusions can be drawn as to the desirability, efficacy, and constitutionality of restrictions on access to fake news and other falsehoods by foreign speakers.

For the time being, without restricting the public’s access to foreign information and ideas, it is advisable at least to work toward technological and policy solutions for identifying and disclosing speech affiliated with foreign states. Furthermore, in addition to any other responses that might merit consideration against what are certain to be continually evolving operations to disrupt our domestic marketplace of ideas, teaching media literacy from grade school onward might yield an effective and durable long-term solution. It is also a solution that supports the truth-seeking, democracy-facilitating, and self-realizing functions of the First Amendment that underlay the right to receive information and ideas.