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The Press and the Expectation of Executive Counterspeech

RonNell Andersen Jones*

I. INTRODUCTION

Few catch phrases have burst onto the American political and journalistic scene with as much vigor as the term “fake news.” President Donald Trump first used the expression in a tweet as president-elect,¹ and it rapidly became his go-to response to a wide variety of news reports, ranging from allegations of his campaign’s ties to Russia,² to assertions of sexual assault³ or discussions of the significant turnover in White House staffing.⁴ President Trump and his advisors have never specifically defined what they mean when they label a story from the press “fake news,”⁵ but it has now been invoked as a retort on

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1. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 10, 2016, 9:11 AM EST), <https://twitter.com/realdonaldtrump/status/807588632877998081> (“Reports by @CNN that I will be working on The Apprentice during my Presidency, even part time, are ridiculous & untrue - FAKE NEWS!”).

2. *Donald Trump’s News Conference: Full Transcript and Video*, N.Y. TIMES (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/us/politics/trump-press-conference-transcript.html> [hereinafter *Trump’s News Conference*] (responding to questions about the Russian dossier and meddling in the election, then stating that the reports and articles are “fake news”).

3. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 20, 2018, 10:16 AM EST), <https://twitter.com/realdonaldtrump/status/965968309358333952> (responding to allegations from the “Fake News Washington Post”).

4. Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 7, 2017, 9:14 AM EST), <https://twitter.com/realdonaldtrump/status/839116941956640768> (“Don’t let the FAKE NEWS tell you that there is big infighting in the Trump Admin.”).

5. See Chris Cillizza, *Donald Trump Just Claimed He Invented ‘Fake News’*, CNN (Oct. 26, 2017), <https://www.cnn.com/2017/10/08/politics/trump-huckabee-fake/index.html> (discussing Trump’s interview where he claimed he invented the term, but did not define it); see also Lucia Graves, *How Trump Weaponized ‘Fake News’ for His Own Political Gain*, PAC. STANDARD (Feb. 26, 2018), <https://psmag.com/social-justice/how-trump-weaponized-fake-news-for-his-own-political-ends> (stating that dictionaries and scholars struggle to define it); Katy Steinmetz, *The Dictionary Is Adding an Entry for ‘Fake News’*, TIME (Sept. 27, 2017), <http://time.com/4959488/donald-trump-fake-news-meaning/> (discussing disagreement over the definition of “fake news” amongst dictionaries).

hundreds of occasions—in interviews, at public appearances, and on social media.⁶

The “fake news” retort is just one of a number of recent presidential responses to press coverage that have proven unsatisfying to critics because they are nonresponsive—that is, they lack clear, substantive content or verifiable facts that specifically counter the news story or otherwise clarify the truth.⁷ Other nonresponsive retorts, including bare labeling of coverage as “bad”⁸ or

6. Angie Drobnic Holan, *The Media’s Definition of Fake News vs. Donald Trump’s*, POLITIFACT (Oct. 18, 2017, 2:11 PM), <http://www.politifact.com/truth-o-meter/article/2017/oct/18/deciding-whats-fake-medias-definition-fake-news-vs/> (stating that between January 2017 and November 2017, Trump had used the term “fake news” at least 153 times); Brian Stelter, *Trump Averages a ‘Fake’ Insult Every Day. Really. We Counted.*, CNN (Jan. 17, 2018, 5:05 PM EST), <http://money.cnn.com/2018/01/17/media/president-trump-fake-news-count/index.html> (stating that between January 17, 2017, and January 20, 2018, Trump used the word “fake” 404 times in tweets or during public appearances). Trump has used the term in various formats. See, e.g., *President Trump Ranted for 77 Minutes in Phoenix. Here’s What He Said*, TIME (Aug. 23, 2017), <http://time.com/4912055/donald-trump-phoenix-arizona-transcript/> (using the term “fake news” twice and “fake media” once during the rally); Ian Schwartz, *Full Lou Dobbs Interview: Trump Asks What Could be More Fake Than CBS, NBC, ABC and CNN?*, REAL CLEAR POLITICS (Oct. 25, 2017), https://www.realclearpolitics.com/video/2017/10/25/full_lou_dobbs_interview_trump_asks_what_could_be_more_fake_than_cbs_nbc_abc_and_cnn.html (referencing fake news seven times in the interview with Lou Dobbs that aired on October 25, 2017); Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 11, 2017, 9:55 AM EST), <https://twitter.com/realdonaldtrump/status/918112884630093825> (“With all of the Fake News coming out of NBC and the Networks, at what point is it appropriate to challenge their License [sic]? Bad for our country!”); *Trump’s News Conference*, supra note 2 (calling Jim Acosta of CNN “fake news”); see also Sarah Sanders (@PressSec), TWITTER (Jan. 13, 2018, 6:37 PM EST), <https://twitter.com/PressSec/status/952323750401331202> (posting an image with the title “Fake News: The Wall Street Journal. Fake News Is at It Again!”).

7. Paul Waldman, Opinion, *Donald Trump Is Executing a Brilliant Media Strategy. If Only He Had a Strategy for Governing.*, WASH. POST (Dec. 23, 2016), https://www.washingtonpost.com/blogs/plum-line/wp/2016/12/23/donald-trump-is-executing-a-brilliant-media-strategy-if-only-he-had-a-strategy-for-governing/?utm_term=.da6ae143a52d (discussing the lack of news conferences and that “the media are starved for news” from this administration); see also Jason Schwartz, *Trump’s Press Strategy: A Few Questions, Then a Quick Escape*, POLITICO (Dec. 29, 2017, 5:04 AM EST), <https://www.politico.com/story/2017/12/29/trump-press-media-strategy-319617> (describing Trump’s strategy to “[k]eep[] exchanges with the media short and avoid situations where he could be pinned down with in-depth questions and follow-ups.”).

8. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 14, 2017, 6:29 PM EST), <https://twitter.com/realdonaldtrump/status/897223558073602049> (“Made additional remarks on Charlottesville and realized once again that the #Fake News Media will never be satisfied . . . truly bad people!”).

“wrong,”⁹ generic comments about what “people say,”¹⁰ vague threats that President Trump possesses contrary but unspecified evidence,¹¹ or ad hominem attacks on individual journalists,¹² share the same frustrating traits as the “fake news” rejoinder. These responses assert what is *not* but contribute little concrete, additional information about what *is*.

Commentators have noted—and complained about—the apparent trend,¹³ but most of their criticisms have been focused on the ways that the “fake news”

9. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 6, 2018, 7:55 AM EST), <https://twitter.com/realdonaldtrump/status/971006379375972354> (“The new Fake News narrative is that there is CHAOS in the White House. Wrong! People will always come & go, and I want strong dialogue before making a final decision. I still have some people that I want to change (always seeking perfection). There is no Chaos, only great Energy!”).

10. See, e.g., Rebecca Savransky, *Trump on Chinese President: ‘Some People Might Call Him the King of China’*, HILL (Oct. 26, 2017, 9:55 AM EST), <http://thehill.com/homenews/administration/357284-trump-on-chinese-president-some-people-might-call-him-the-king-of> (quoting a Trump interview with Lou Dobbs where the President said: “People say we have the best relationship of any president-president, because he’s called president also”); *Remarks by President Trump in Cabinet Meeting*, WHITE HOUSE (Jan. 10, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-cabinet-meeting-6/> (discussing the amount of people impacted by DACA, Trump stated: “A lot of people say 800,000; some people said — yesterday, first time I heard 650 [thousand]. I also heard 3 million. The fact is, our country was such a mess, nobody even knows what the numbers are. But we’ll know what the numbers are.”).

11. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 6:52 AM EST), <https://twitter.com/realdonaldtrump/status/837994257566863360> (“I’d bet a good lawyer could make a great case out of the fact that President Obama was tapping my phones in October, just prior to Election!”); Donald J. Trump (@realDonaldTrump), TWITTER (May 12, 2017, 8:26 AM EST), <https://twitter.com/realdonaldtrump/status/863007411132649473> (“James Comey better hope that there are no ‘tapes’ of our conversations before he starts leaking to the press!”).

12. RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. ST. L.J. 1301, 1318–20 (2017) (discussing the various targeted attacks on individual reporters, most notably his “vulgar attacks on the physical appearance, intelligence, and mental health of two news anchors . . .”).

13. See, e.g., Marisa Kellam & Elizabeth A. Stein, *Trump’s War on the News Media Is Serious. Just Look at Latin America*, WASH. POST (Feb. 16, 2017), https://wapo.st/2lijqCW?tid=ss_mail&utm_term=.2a7c8ba8e0c7; *Trump’s War on Journalism*, L.A. TIMES (Apr. 5, 2017), <http://www.latimes.com/projects/la-ed-trumps-war-on-journalism/> (“By branding reporters as liars, [Trump] apparently hopes to discredit, disrupt or bully into silence anyone who challenges his version of reality.”).

mantra evidences an unquestioning political base¹⁴ or demonstrates an unfortunate disrespect for the role of the press.¹⁵ In fact, however, much more is at stake when the president routinely offers nonresponsive retorts to press reporting. The greater, but mostly unrecognized, harm is that these retorts are being offered as a substitute for counter-assertions by—and engagement with—the executive. If a news report that is distributed to the public is erroneous, then democracy and First Amendment values are served by the president contributing *more* information with additional accuracy—not by the president shutting down dialogue with nonresponsive retorts or labeling the news coverage “fake” without revealing what the truth is. On many topics, the President of the United States is better positioned than anyone in the world to counter misinformation and to clarify and correct errors. A president’s unwillingness or inability to do so violates longstanding constitutional norms and upsets jurisprudential expectations about the role of the press, the role of government, and the flow of information in a democracy.

This Article explores the wider constitutional and democratic consequences of a president’s refusal to engage in counterspeech on matters of public concern. It argues that both fundamental principles of First Amendment theory and watershed cases from the United States Supreme Court presuppose a constitutional system of dialogue between the press and the executive in which the president offers verifiable, supported, fact-based counterspeech to press coverage with which he disagrees. Part II of this Article describes how marketplace-of-ideas, self-governance, and checking-function principles—although more often invoked to protect private speech from governmental restriction—also manifest a longstanding assumption of executive counterspeech. It explores the clear expectation within First Amendment jurisprudence that presidents will dialogue with, rather than shut down, the press when the press’s reporting on matters of public concern is erroneous, misleading, or otherwise faulty. Part III of this Article describes the essential characteristics of this democracy-enhancing counterspeech and the ways in which nonresponsive retorts fall short of meeting the constitutional aims envisioned by the Court. Part IV details the harms that follow from these failings. I argue that, in addition to having the significant consequences of hampering government accountability and the public’s quest for truth, flouting the norm of executive counterspeech diminishes the wider tone of dialogue nationally and threatens the viability of the

14. See, e.g., Peter Apps, *Commentary: Trump’s Early War with the Media Will Damage Both*, REUTERS (Jan. 24, 2017), <https://www.reuters.com/article/us-trump-media-commentary/commentary-trumps-early-war-with-the-media-will-damage-both-idUSKBN1582HI> (“If you can’t trust anyone[, including the media,] . . . then it becomes more difficult to question those in authority.”).

15. See, e.g., Paul Farhi, *Press Advocates See Trump’s Words Behind Physical Attacks on Journalists*, WASH. POST (May 25, 2017), https://www.washingtonpost.com/lifestyle/style/press-advocates-see-trumps-words-behind-physical-attacks-on-journalists/2017/05/25/f8ced468-4162-11e7-9869-bac8b446820a_story.html?utm_term=.a3cca11d1999 (discussing the rise in disrespect of journalists and subsequent violent interactions).

larger marketplace of ideas. The abandonment of this norm creates a grave threat to the democracy-enhancing role of accurate press coverage. But it also disservices democratic and free-speech values when the press coverage is inaccurate. Indeed, despite the President's apparent goal of disparaging the press, his failure to engage in executive counterspeech may leave the press itself insufficiently checked by the executive.

II. THE EXPECTATIONS OF EXECUTIVE COUNTERSPEECH IN A SYSTEM OF FREE SPEECH AND PRESS

The theoretical and jurisprudential underpinnings of the American system of free speech and press understandably focus on the private speaker. Because the First Amendment erects a barrier to governmental regulation of speech,¹⁶ the justifications for our system of free speech center on private expression. Thus, when we consider the ways that free speech enhances our search for truth, our efforts for self-government, and our goal of governmental accountability, we ordinarily do so through the lens of the private speaker. But this analytical scaffolding is not sustainable by mere individual freedom to speak. Scholarship exploring these themes, and United States Supreme Court jurisprudence animated by these themes, evinces a wider expectation—indeed, a democratic imperative—that the executive will be a participant in meaningful conversations on matters of public concern and will respond with substantive counterspeech to erroneous assertions by the press on those issues.

A. The Expectation of Executive Counterspeech in Major Free Speech Theories

A set of oft-cited theories provide the foundation for a system of free speech and press in our democracy.¹⁷ Three of the primary theories justifying such a system—the marketplace-of-ideas theory, the Meiklejohnian self-governance theory, and the checking-function¹⁸ theory—all share a largely unrecognized central premise. All three analytical approaches implicitly assume that government officials in a democracy will engage in dialogue with the public and the press.¹⁹ The values of finding knowledge and truth in a marketplace of ideas, of facilitating representative democracy, and of checking abuses of

16. *Sorell v. IMS Health, Inc.*, 564 U.S. 552, 566 (2011) (“The First Amendment requires heightened scrutiny whenever the government creates ‘a regulation of speech’” (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989))).

17. See, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 47–51 (1989); Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521, 529–44 (1977), <http://www.jstor.org/stable/827945> (tracing the foundation for free speech theory).

18. Blasi, *supra* note 17, at 554–65, 565 n.146.

19. See *id.*

governmental power are all advanced by meaningful executive counterspeech. All are crippled by its absence.

1. The Marketplace of Ideas and Executive Counterspeech

At the very heart of modern First Amendment jurisprudence is a free-speech theory with a longstanding pedigree. The belief that “the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”²⁰—is both “the theory of our Constitution”²¹ and the structure on which all our important national conversations are built. The model is, at base, an adversarial one: if truth and falsehood battle, truth will emerge the victor.²² In the process, the public benefits. When the tested material proves false, correct information replaces incorrect information. When the tested material proves true, believers gain a “clearer perception and livelier impression of truth, produced by its collision with error.”²³

The marketplace theory tells us not only why free discussion matters—“for advancing knowledge and discovering truth”²⁴—but also how participants in free discussion ideally behave. “An individual who seeks knowledge and truth must hear all sides of the question, consider all alternatives, test his judgment by exposing it to opposition, and make full use of different minds.”²⁵ The theory thus envisions an active exchange, a vibrant give-and-take, and “participation in decision making by all members of society”²⁶ as they take “precautions against their own fallibility”²⁷ and offer additional information to others who are doing the same. The envisioned contributions to the marketplace are not merely subjective ideas or opinions that the speaker hopes she may be able to persuade others to adopt, but also objective, factual information that the

20. *Abrams v. United States*, 250 U.S. 616, 630 (1919).

21. *Id.*

22. See John Milton, *Areopagitica*, in *AREOPAGITICA AND OF EDUCATION* 50 (George H. Sabine ed., Harlan Davidson, Inc. 1951) (1644) (“Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?”).

23. JOHN STUART MILL, *ON LIBERTY* 53 (Stefan Collini, ed., Cambridge University Press 1989) (1859); see also, THOMAS I. EMERSON, *THE SYSTEM OF FREE EXPRESSION* 7 (1970) (“Discussion must be kept open no matter how certainly true and accepted opinion may seem to be; many of the most widely acknowledged truths have turned out to be erroneous. Conversely, the same principle applies no matter how false or pernicious the new opinion appears to be; for the unaccepted opinion may be true or partially true and, even if wholly false, its presentation and open discussion compel a rethinking and retesting of the accepted opinion.”).

24. See EMERSON, *supra* note 23, at 7–8.

25. *Id.*

26. *Id.*

27. See MILL, *supra* note 23, at 22.

speaker possesses that would inform others.²⁸ The theory thus anticipates that speakers who are invested in an outcome and know facts that would inform the discussion will provide them to the marketplace. Such a system “is an essential mechanism for maintaining the balance between stability and change” because it “provides a framework in which the conflict necessary to the progress of society can take place without destroying the society.”²⁹

The United States Supreme Court has embraced this marketplace notion, expressing a jurisprudential confidence that “the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.”³⁰ When speech in the public square is asserted to be offensive,³¹ dangerous,³² or false,³³ the Court consistently responds that “the remedy to be applied is more speech”³⁴ The Court frequently reminds us that the Founders valued liberty not merely as an end, but as a means to the discovery and spread of truth. We protect ourselves as a nation, the Court says, through discussion—with meaningful

28. See Blasi *supra* note 17, at 553 (“[S]omehow we have come to think of the passionate, often uninformed, soapbox orator as the class embodiment of our commitment to diversity. . . . Yet a marketplace can trade in information as well as ideas, and in fact most of us probably seek new information more assiduously than we seek new points of view.”).

29. MILL, *supra* note 23, at 22.

30. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 44 (1969).

31. *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (calling the speech at issue in the case “offensive,” “but the sort of expression involved in this case does not seem to us to be governed by any exception to the general First Amendment principles . . .”).

32. *Whitney*, 274 U.S. at 374 (suggesting we protect speech unless it “would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent”); *Brandenburg*, 395 U.S. at 449 (striking down an Ohio statute because it did not distinguish “from incitement to imminent lawless action”).

33. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344–46 (1974) (describing the high constitutional bar for libel against public officials and public figures, who have “significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy”).

34. *Whitney*, 274 U.S. at 377.

contributions to the marketplace of ideas designed to counter, refute, and clarify other contributions.³⁵ Making those contributions, then, is “a political duty” and “a fundamental principle of the American government.”³⁶

Although the marketplace-of-ideas analogy is most often invoked against government regulation of the marketplace in ways that would hamper discourse among private speakers,³⁷ the theory is plainly premised on the assumption that the executive also can, should, and will contribute to the marketplace of ideas. A quest for truth in the discussion of public matters is debilitated when information held primarily or exclusively by the president is withheld from the marketplace. The principle that false speech is remedied by more speech—and the concomitant principle that discussion offers clarification and improved understanding of even true speech—are no less true when the holder of the true information is a key government official. Indeed, while the marketplace theory has faced thoughtful criticism from those questioning both the likelihood of fair access to the market³⁸ and the likelihood that truth will emerge from it,³⁹ the theory’s core principles unquestionably support accurate executive counterspeech as a critical aspect of the search for truth on matters of public concern. Withholding clarification or correction in the face of erroneous or misleading news coverage violates the ideal and robs the market of its essential ingredients.

35. *Id.* at 375 (“Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly[,] discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine . . .”).

36. *Id.*

37. *See, e.g.,* *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503–04 (1984)) (“[T]he freedom to speak one’s mind is not only an aspect of individual liberty . . . but also is essential to the common quest for truth . . . We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions.”).

38. *See* Jerome A. Barron, *Access to the Press – A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641, 1648 (1967) (arguing that “a self-operating marketplace of ideas . . . has long ceased to exist” and that “a right of expression is somewhat thin if it can be exercised only at the sufferance of the managers of mass communications”).

39. *See* Harry H. Wellington, *Our Freedom of Expression*, 88 YALE L.J. 1105, 1130 (1979) (“In the long run, true ideas do tend to drive out false ones. The problem is that the short run may be very long . . .”); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 974, 978 (1978) (calling “the hope that the marketplace leads to truth” an “implausible” notion given the ways the market is “biased in favor of presently dominant groups . . .”).

The marketplace theory does not call for a marketplace of ideas comprised of purely private competitors, with no contribution of facts or opinions from elected officials. Such a market would lack important information unavailable from any other source. Instead, the theory envisions that speakers—including the executive—will contribute ideas and demonstrate that those ideas can “survive and endure against hostile criticism.”⁴⁰ Moreover, counterspeech by a government official “can be especially important to an equality-based conception of free speech when its voice counters that of powerful, private speakers.”⁴¹ In cases focused on core political speech, the Court has “emphasized the value of the government’s voice” in fulfilling this marketplace role.⁴² Executive counterspeech can insert new data and new perspectives into narratives previously controlled in one-sided ways by private speakers.⁴³ Indeed, as First Amendment scholar Helen Norton has noted, private speech is often problematically nontransparent and unaccountable to the public.⁴⁴ Because even false political speech by private speakers can be constitutionally protected, executive counterspeech may be a crucial competitor to misleading or inaccurate speech in the marketplace of ideas.⁴⁵ “[G]overnment will not inevitably speak in opposition to powerful, private interests; indeed it is often aligned with them,”⁴⁶ but the marketplace theory suggests that the president’s contributions play a valuable part in the discussions. “[T]he point is not that the government’s views are necessarily correct, but instead that they may provide value by responding to speech from powerful, private parties that might otherwise not face effective rebuttal.”⁴⁷

40. Harry Kalven, Jr., *If This be Asymmetry, Make the Most of It!*, CENTER MAG., May/June 1973, at 36 (“It is an insufficiently noticed aspect of the First Amendment that it contemplates the vigorous use of self-help by the opponents of given doctrines, ideas, and political positions. It is not the theory that all ideas and positions are entitled to flourish under freedom of discussion. It is rather then that they must survive and endure against hostile criticism.”). Kalven’s article was written in response to an article by Antonin Scalia, arguing for the restoration of “adversary balance between the government and the press.” *Id.*

41. Helen Norton, *Campaign Speech Law with a Twist: When the Government is the Speaker, Not the Regulator*, 61 EMORY L.J. 209, 249 (2011).

42. *Id.* at 224–25 (discussing as an example an opinion that “emphasized the value of the government’s voice in informing the voters on contested ballot measures – especially in countering powerful private speech . . .”).

43. See, e.g., Helen Norton, *The Government’s Manufacture of Doubt*, 16 FIRST AMEND. L. REV. 342, 342 (footnote omitted) (“This strategy was perhaps most famously employed by the tobacco industry in its longstanding campaign to contest the mounting medical evidence that linked cigarettes to serious health conditions. At its best, the government’s speech can counter such efforts and protect the public interest, as exemplified by the Surgeon General’s groundbreaking 1964 report on the dangers of tobacco, a report that challenged the industry’s preferred narrative.”).

44. Norton, *supra* note 41, at 252.

45. *Id.* at 252–53.

46. *Id.* at 253.

47. *Id.* at 250.

Scholars have rarely explored the ramifications of presidential refusal to contribute to the marketplace of ideas. This is likely because the scholarship in the area has long been focused on the opposite concern—a concern about asymmetry of power and the ways that the government’s disproportionate resources unfairly give its contributions greater weight.⁴⁸ Recognizing those concerns, however, does not preclude a recognition of the possibility that the pendulum may swing in the other direction and the executive may refuse to contribute meaningful counterspeech. The marketplace theory envisions that our system of competing ideas and information, with a back-and-forth of speech and counterspeech, is the best mechanism for advancing knowledge and finding truth. The underlying norm that government leaders will contribute counterspeech is central to the theory’s structure and has proven critical to its practical operation in the real world of dialogue on matters of public concern.

2. Self-Government and Executive Counterspeech

The expectation that the executive will engage in counterspeech becomes even more apparent when the issue is considered through the lens of a second prominent theory animating our First Amendment landscape: the Meiklejohnian concept of free speech as a facilitator of democratic self-governance.

Alexander Meiklejohn postulated that “[t]he First Amendment does not protect ‘a freedom to speak.’ It protects the freedom of those activities of thought and communication by which we ‘govern.’ It is concerned, not with a private right, but with a public power, a governmental responsibility.”⁴⁹ Meiklejohn’s concept of an ideal democratic structure for “[p]ublic discussions of public issues, together with the spreading of information and opinion bearing on those issues,”⁵⁰ envisions public conversations between and among voters, but also envisions dialogue between voters and their current and would-be

48. See, e.g., *id.* at 253 (noting the argument that “the government’s inherent power, prestige, and especially resources tilt the playing field such that dissenting speakers cannot fairly compete”); Frederick Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373, 385 (1983) (reviewing MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW AND GOVERNMENT EXPRESSION IN AMERICA* (1983)) (recognizing the potential for abuse in government speech but unwilling to agree that all abuse is a First Amendment problem); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 592 (1980) (discussing government expenditures used to finance a campaign to pass a tax referendum); Edward H. Ziegler, Jr., *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C. L. REV. 578, 580 (1980) (“The government’s use of public resources to manufacture citizen support for a partisan viewpoint on political issues raises serious questions concerning the integrity of the democratic process.”).

49. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961).

50. *Id.* at 257.

representatives in government. The United States Supreme Court has recognized this driving force behind free speech protection, emphasizing that “speech concerning public affairs is more than self-expression; it is the essence of self-government”⁵¹ and that “speech on ‘matters of public concern’ . . . is ‘at the heart of the First Amendment’s protection.’”⁵² Although arguments that speech freedoms ought to be strictly limited to these narrowly defined “public” issues or governmental matters⁵³ have been rejected as overly restrictive,⁵⁴ the Court has repeatedly recognized that dialogue about—and with—government officials “occupies the ‘highest rung of the hierarchy of First Amendment values[.]’ and is entitled to special protection.”⁵⁵ The theoretical justifications for a system of free speech in a democracy are at their strongest when the conversations we are having are focused on public officials and their political deliberations.⁵⁶ Propelling this high-value status is an appreciation for both the historical origins of our First Amendment structure⁵⁷ and the democratic imperative for dialogue between the rulers and the ruled. The Founders believed “that in [our] government[,] the deliberative forces should prevail over the arbitrary[;] . . . that without free speech and assembly, discussion would be futile; . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.”⁵⁸ The entirety of American free speech doctrine is animated by an understanding that the people will speak to their government and that their government will speak back.⁵⁹ The right to

51. *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

52. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)).

53. See Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 27 (1971) (“[T]he protection of the [F]irst [A]mendment . . . must be cut off when it reaches the outer limits of political speech.”).

54. *Id.* at 34–35 (citing *Whitney v. California*, 274 U.S. 357, 377–78 (1927) (Brandeis, J. concurring), *overruled in part by Brandenburg v. Ohio*, 395 U.S. 44 (1969)).

55. *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1983)).

56. See Cass R. Sunstein, *Free Speech Now*, 59 *U. CHI. L. REV.* 255, 263 (1992) (“[T]he First Amendment is fundamentally aimed at protecting democratic self-government . . .”).

57. See *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”).

58. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring), *overruled in part by Brandenburg v. Ohio*, 274 U.S. 357 (1927).

59. See William V. Luneburg, *Civic Republicanism, the First Amendment, and Executive Branch Policymaking*, 43 *ADMIN. L. REV.* 367, 370–71 (1991) (“[T]he President is one of the most important participants in the deliberative process mandated by the Constitution . . . [and] the constitutional process of deliberation must be more than a monologue; it must be a dialogue involving many interested ‘parties,’ including the public at large.”).

discuss policy ideas with other people would be an empty promise if not coupled with the expectation of ongoing discussion about those ideas with the people in power.⁶⁰ Without some provision of information from the president to the people, the “important aspects of the freedom of speech and ‘of the press could be eviscerated.’”⁶¹ In analogous cases focused on the judiciary, the Court has found that citizens must have access to and active engagement with the work of that branch of government in order to “give meaning to those explicit [First Amendment] guarantees.”⁶² The citizens’ need to receive counterspeech from the president is equally important to the First Amendment’s fuller promise of engaged, democratic dialogue.

It is through the Meiklejohnian lens that we come to appreciate that free speech *about* the government must “carr[y] with it some freedom to listen”⁶³ to information *from* the government. Hearing the president’s corrections or clarifications is essential to the public’s First Amendment dialogue. Executive counterspeech presents the opportunity for the voter to hear the ways in which the president agrees or disagrees with her position and the factual premises on which the president intends to base his decisions, which advances Meiklejohnian goals of enhanced self-governance. Self-governance goals dictate that “the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”⁶⁴ The norm of presidential counterspeech emerged from this understanding.

Unless we are told what the president knows, why he has formed the views he has, and the factual information that he perceives as true, we cannot understand and accept the work he claims to do in our name.⁶⁵ Indeed, Meiklejohn analogized all public discourse to a town meeting at which all viewpoints must be presented, debated, and considered in order for participants to arrive at sound public policy.⁶⁶ It is unspoken, but obvious, that government officials are present at the meeting—hosting it, substantively responding within it, and informing and improving the public policymaking emerging from it.

Notably, an appreciation that free speech theory encompasses engagement with and response by public officials is highlighted in one of the Court’s

60. *See id.* at 370 (“[T]he President’s power as resulting in significant part from his ability to persuade – in the sense of communicating with and perhaps thereby winning over what otherwise would be administrative resistance to his policy initiatives – fits well with the notion of deliberative government as it was envisioned by the Framers.”).

61. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (citing *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

62. *Id.* at 575.

63. *See id.* at 576.

64. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

65. *See Richmond Newspapers, Inc.*, 448 U.S. at 572 (“People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”).

66. Meiklejohn, *supra* note 49, at 252, 260–61.

most recent discussions of speech in the public forum. In *Packingham v. North Carolina*,⁶⁷ the Court noted that a “fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.”⁶⁸ In suggesting that social media is the quintessential modern public forum,⁶⁹ the Court explored not only the ways citizens speak to each other and to their elected officials using Facebook, Twitter, and other social media, but also the ways elected officials speak back. Noting that “[g]overnors in all [fifty states] and almost all Members of Congress have set up accounts for this purpose,” the Court found that social media is not merely a mechanism for citizens to petition their elected representatives but that it is also a mechanism for citizens to “engage *with* them.”⁷⁰

All told, the core self-governance rationale holds that we need a system of free speech so that we can influence the executive’s decisions and “share in devising methods by which those decisions can be made wise and effective.”⁷¹ Executive counterspeech is an integral component of that system.

3. The Checking Function and Executive Counterspeech

Executive counterspeech responding to press coverage is important in a democratic system of free speech not only because of what we know about the role of government, but also because of what we know about the role of the press. The press’s work as a watchdog of government establishes an important trigger for expected counterspeech, and a third major theoretical justification for our system of free speech, championed by First Amendment scholar Vincent Blasi, focuses on this “checking value.”⁷²

The construct, which emerged in the aftermath of the Watergate scandal, is that freedom of speech and press have a critically important part to play in “checking the abuse of power by public officials” and “guarding against breaches of trust” by them.⁷³ “[T]he basic assumption of our political system [is] that the press will often serve as an important restraint on government.”⁷⁴ The right of the press “to praise or criticize governmental agents and to clamor and contend for or against change” is a matter that “the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep

67. 137 S. Ct. 1730 (2017).

68. *Id.* at 1735.

69. *Id.* at 1734 (citing *Reno v. ACLU*, 521 U. S. 844, 868 (1997)) (“While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace – the ‘vast democratic forums of the Internet’ in general, . . . and social media in particular.”).

70. *Id.* at 1735 (emphasis added).

71. Meiklejohn, *supra* note 49, at 255.

72. See Blasi, *supra* note 17, at *passim*.

73. *Id.* at 527.

74. *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983).

it free.”⁷⁵ In performing this role, the free press “guards against the miscarriage of justice”⁷⁶ and “has been a mighty catalyst in . . . exposing corruption among public officers and employees.”⁷⁷

In one sense, the checking-function theory of free speech differs radically from the marketplace-of-ideas and self-government theories in terms of its assumptions about executive counterspeech. The theory does not envision voluntary contributions of speech on certain matters by the president; indeed, its major assumption is that, on at least some issues, government officials will engage in secret wrongdoing and hide their misdeeds in ways that need to be exposed by private speakers—often members of the press. Despite the assumptions of government fallibility and citizen distrust of government that lie at the heart of the theory,⁷⁸ the theory also envisions that government officials will speak with substance to the people. The checking function sheds light on the fundamental nature of executive counterspeech in our society because its essential premise is that the private checking of government is part of a wider structural tension of speech and counterspeech—in the form of press coverage and meaningful response to that coverage.

That tension was the centerpiece of Justice Potter Stewart’s watershed article, “Or of the Press,” in which he asserted that a free press meant not merely “organized, expert scrutiny of government” and a “formidable check on official power,”⁷⁹ but an active exchange between the press and government leaders, through speech and counterspeech, baked into a larger structural plan. Stewart argued that “the Founders deliberately created an internally competitive system” between the press and the executive, just as they had done in devising the three competing branches of government.⁸⁰ Their “purpose was[] not to avoid friction,” but to combat autocracy “by means of the inevitable friction.”⁸¹ In this way, “the Free Press guarantee is, in essence, a structural provision of the Constitution”—one that only serves its higher public-serving goals if the other components of the structure, including thoughtful executive

75. *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (“The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs,” and that “[t]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials . . .”).

76. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 560 (1966) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)).

77. *Estes v. Texas*, 381 U.S. 532, 539 (1965).

78. *See, e.g.*, FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 86 (1982) (“Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a more general sense.”).

79. Potter Stewart, *Or of the Press*, 50 *HASTINGS L.J.* 705, 708 (1999).

80. *Id.*

81. *Id.*

counterspeech, are also observed.⁸² We “rely, as so often in our system we must, on the tug and pull of the political forces in American society.”⁸³ Blasi’s theory anticipates executive counterspeech as a norm.

The United States Supreme Court also maintains this presumption of executive counterspeech. The Justices consistently assume speech and action on the part of the elected official in response to the checking-function speech and behavior by the press. In key Court opinions, the press is not depicted merely as telling the public about officials’ misdeeds so that the public can decide what action to take.⁸⁴ Rather, the Court says, “the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.”⁸⁵ The expectation is that the important “role of the media” is to “be a powerful and constructive force, contributing to remedial action in the conduct of public business.”⁸⁶ More than this, the watchdog press is portrayed as serving an educative function, with at least some of the information it conveys to the people coming in the form of material provided to it by government officials.⁸⁷ Indeed, a fundamental norm underlying press freedom is a notion that the press is a proxy for the citizen, engaging in the sort of substantive exchanges with the government that the citizen is entitled to have herself but lacks the time or resources to perform on her own.⁸⁸ In all of these capacities, the press’s freedom is built on a concept of executive speech to and through the press and

82. *Id.* at 707, 710 (“The Constitution, in other words, establishes the contest, not its resolution.”).

83. *Id.*

84. *N.Y. Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) (“In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry – in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.”).

85. *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

86. *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978).

87. *See, e.g., Minneapolis Star & Tribune Co. v. Minn. Comm’n of Revenue*, 460 U.S. 575, 585 (1983) (alteration in original) (quoting *Grosjean v. Am. Press Corp.*, 297 U.S. 233, 250 (1936)) (“[A]n untrammelled press is a vital source of public information.”); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (quoting *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring)) (noting the press is central to “public understanding of the rule of law . . .”).

88. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (“[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.”). *See generally* RonNell Andersen Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 U. COLO. L. REV. (forthcoming 2019).

substantive responses to the concerns raised by the press on behalf of the public.

The Court's jurisprudential approach to a free press further signals an expectation of executive counterspeech when it protects the press even in the face of error or irresponsibility.⁸⁹ The Court openly concedes "that the press has, on occasion, grossly abused the freedom it is given by the Constitution."⁹⁰ While "deplor[ing] such excesses,"⁹¹ the Court flatly refuses to "saddl[e] the press"⁹² with the "impossible burden of verifying facts with certainty."⁹³ It protects the press even when the press makes mistakes because of the expectation that government officials will counter any false information with clear, truthful additional information. The idea is that the checking function will produce an ongoing pattern of revelations by the press followed by explanations, clarifications, or corrections by the president. The Court is comfortable accepting "some degree of abuse"⁹⁴ by the press because it believes the substantive story will begin, but not end, with press coverage. This premise centers on the norm of executive counterspeech.

B. The Expectation of Executive Counterspeech in the United States Supreme Court's Defamation Jurisprudence

Most specifically, the expectation of executive counterspeech is an undeniable theme in the Court's First Amendment approach to false and defamatory speech about public officials.⁹⁵ In *New York Times Co. v. Sullivan*,⁹⁶ the most

89. RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253, 259–60 (2014) (noting that the Court has historically protected the press "even when presented with strong counter-narratives—with press-freedom values pitted against 'other values society ordinarily wishes to see protected quite vigorously, like the rights of criminal defendants, reputational rights, and rights of privacy'—or when confronted with evidence of press behavior gone awry or concerns about inaccuracy, sensationalism, or unfairness . . .").

90. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 51 (1971), *abrogated by* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

91. *Id.*

92. RonNell Andersen Jones, *The Dangers of Press Clause Dicta*, 48 GA. L. REV. 705, 712 (2014) (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967)); *see also* *Shepard v. Maxwell*, 384 U.S. 333, 350 (1966) (concluding that the constitution "require[s] that the press have a free hand" even when it engages in "sensationalism").

93. Jones, *supra* note 92, at 712.

94. *Hill*, 385 U.S. at 388–89 (quoting 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876)) ("Some degree of abuse is inseparable from the proper use of every thing [sic], and in no instance is this more true than in that of the press.").

95. *See* David Kohler, *Self Help, the Media and the First Amendment*, 35 HOFSTRA L. REV. 1263, 1272–73 (2007) ("[C]ounter-speech as an integral part of First Amendment theory has an unassailable pedigree, it has not often found its way in any explicit sense into actual constitutional doctrine. The one clear exception to this is the constitutionalization of defamation law.").

96. 376 U.S. 254 (1964).

classic of checking-function cases, an executive official sued the press over criticism of his official conduct, and the Court constitutionalized the law of libel, calling for a heightened showing of fault in such cases.⁹⁷ An executive official may not prevail in a libel action unless he is able to prove actual malice—that is, that the press organization acted with knowing falsity or reckless disregard for the truth.⁹⁸ While *Sullivan* and its progeny are almost always considered from the vantage point of the rights and protections of libel defendants, this jurisprudence also unmistakably sets forth a presupposition regarding the public official, as the Court describes how it envisions false statements about government officials will be countered. The cases in this area clearly anticipate an ongoing norm of executive counterspeech.

The Court's reasoning in *Sullivan* also has a deep Meiklejohnian thread, endorsing “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”⁹⁹ and openly analogizing to the nation's early rejection of seditious libel.¹⁰⁰ The Court reminds us that because the form of self-government the Founders devised was “altogether different from the British form, under which the Crown was sovereign and the people were subjects,”¹⁰¹ the Constitution embraced a new form of government-public dialogue.

The structure of *Sullivan* shows the Court's confidence that this robust, wide-open debate would sometimes—indeed, often—be in the form of dialogue that citizens would have with government officials themselves. Thus, the *Sullivan* line of cases warns that those who seek public office must enter that fray prepared to be spoken about¹⁰² and prepared to speak back. Officials should, the Court said, be treated as “men of fortitude, able to thrive in a hardy climate.”¹⁰³ This is a judicial recognition not only that criticism would be the cost of doing business as an elected official, but also that “public officials . . . are made to bear the burden of ensuring that the public hears speech about public matters.”¹⁰⁴

The confidence that the criticized government official will not merely sit idly by as the press fulfills its checking function, but instead will actively engage in First Amendment counterspeech, is woven throughout the *Sullivan* line

97. *Id.* at 291–92.

98. *Id.* at 279–80.

99. *Id.* at 270.

100. *Id.* at 273–74; *see also* *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967) (noting that *N.Y. Times Co. v. Sullivan* was “adjudicating in an area which lay close to seditious libel, and history dictated extreme caution in imposing liability.”).

101. *Sullivan*, 376 U.S. at 274.

102. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) (describing the “compelling normative consideration” that “[a]n individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case.”).

103. *Sullivan*, 376 U.S. at 273 (citing *Craig v. Harney*, 331 U.S. 367, 376 (1947)).

104. Tung Yin, *Independent Appellate Review of Knowledge of Falsity in Defamation and False Statements Cases*, 15 BERKELEY J. CRIM. L. 325, 371 (2010).

of cases. Endorsing a broad marketplace-of-ideas rationale, the Court echoed Learned Hand's maxim that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues"¹⁰⁵ The *Sullivan* Court spoke of the need for an "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."¹⁰⁶ It asserted that a "fundamental principle of our constitutional system" is the need to foster dialogue that spurs officials to "be responsive to the will of the people."¹⁰⁷ Indeed, the Court stressed that the *Sullivan* actual malice standard was both inspired by and modeled upon the privilege already enjoyed by government officials.¹⁰⁸ Executive branch officials enjoy such a privilege because of our expectation of "fearless, vigorous, and effective" speech on their part, the Court said, and "[a]nalogous considerations support the privilege for the citizen-critic of government."¹⁰⁹ The Court, in other words, views vibrant speech and vibrant counterspeech as "fair equivalent[s],"¹¹⁰ and its First Amendment framework is constructed on a belief that the marketplace of ideas will receive both.

The strongest signal of the Court's constitutional expectation of executive counterspeech in the *Sullivan* line of cases is the focus on "channels of effective communication" in responding to falsehood.¹¹¹ The *Sullivan* Court concluded that because "speech can rebut speech, propaganda will answer propaganda,

105. *Sullivan*, 376 U.S. at 270 (quoting *United States v. Assoc. Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

106. *Id.* at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

107. *Id.* (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)); *see also id.* at 301 (Goldberg, J., concurring) (alteration in original) (quoting *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937)) ("[I]mperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.").

108. *Id.* at 281–82 (italics added) ("In *Barr v. Matteo*, 360 U.S. 564, 575 [(1959)], . . . this Court held the utterance of a federal official to be absolutely privileged if made 'within the outer perimeter' of his duties.").

109. *Id.* at 282; *see also id.* at 304 (Goldberg, J., concurring) (quoting *Barr*, 360 U.S. at 571) ("If the government official should be immune from libel actions so that his ardor to serve the public will not be dampened and 'fearless, vigorous, and effective administration of policies of government' not be inhibited, then the citizen and the press should likewise be immune from libel actions for their criticism of official conduct."); Aaron Perzanowski, Comment, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CAL. L. REV. 833, 843 (2006) (footnotes omitted) ("[T]he Court demonstrated sensitivity to a plaintiff's ability to speak in determining appropriate liability standards. The Court reasoned that because public officials enjoyed unlimited immunity from defamation claims, the right of the public to criticize such officials must be similarly unrestrained.").

110. *See Sullivan*, 376 U.S. at 282–83.

111. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

[and] free debate of ideas will result in the wisest governmental policies,”¹¹² the stricter actual malice standard was fair to impose upon public officials. The marketplace of ideas will sort truth from falsehood when the topic is the behavior of a prominent executive branch official because that official, who “certainly has equal if not greater access than most private citizens to media of communication,”¹¹³ will offer the clarifications and corrections necessary to the endeavor.

This theme, which animates every post-*Sullivan* case on libel standards, centers on the influence the public official has had—and the future influence he or she can be expected to have—on meaningful public conversations. The president’s ability to contribute to the dialogue and “significantly to influence the resolution of those issues”¹¹⁴ is the chief characteristic that justifies more stringent restraints on his libel recovery. In later cases, the Court extended this same reasoning to public figures who were not elected officials, but instead had achieved other prominence or fame.¹¹⁵ In applying the theme to public-figure plaintiffs,¹¹⁶ the Court offered an analogy to the public official’s capacity to engage in counterspeech as a primary justification.¹¹⁷ The “first remedy of any victim of defamation is self-help—using available opportunities to contradict

112. *Curtis Publ’g. Co. v. Butts*, 388 U.S. 130, 153 (1967) (quoting *Dennis v. United States*, 341 U.S. 494, 503 (1951)) (summarizing *Sullivan*).

113. *Sullivan*, 376 U.S. at 305 (Goldberg, J., concurring).

114. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (“There is, first, a strong interest in debate on public issues, and second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues.”).

115. *See, e.g., Curtis Publ’g. Co.*, 388 U.S. at 136, 140, 155 (holding that Butts, a university football coach, and Walker, who led a protest at a university, both had “political prominence” in the community, were public figures); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48, 49 (1988) (agreeing that Falwell, as a “nationally known minister who has been active as a public commentator on politics and public affairs,” is a public figure).

116. *Curtis Publ’g. Co.*, 388 U.S. at 154–55 (“[B]oth Butts and Walker commanded a substantial amount of independent public interest . . . and had sufficient access to the means of counterargument to be able to expose through discussion the falsehood and fallacies of the defamatory statements.”); *see also id.* at 164 (Warren, C.J., concurring) (emphasis added) (“And surely as a class these ‘public figures’ have as ready access as ‘public officials’ to mass media of communication, both to influence policy and to counter criticism of their views and activities.”).

117. *See* Ashley Messenger & Kevin Delaney, *In the Future, Will We All be Limited-Purpose Public Figures?*, COMM. LAW., Mar. 2014, at 4, 4–6 (analyzing cases and arguing that a “realistic opportunity to counteract false statements” and “continuous access” to the communication channels” are key); Nat Stern, *Unresolved Antitheses of the Limited Public Figure Doctrine*, 33 HOUS. L. REV. 1027, 1041 n.113 (1996) (noting that, since *Gertz*, courts have routinely cited access to the media, or lack of access, as ground for classifying or refusing to classify the plaintiffs as public figures and citing cases to support the proposition); Perzanowski, *supra* note 109, at 836–37, 842–43 (arguing that “the ability to respond to defamatory speech served as a central consideration in the creation of the public figure test” and that “access to self-help through corrective speech provides the primary justification for the current framework”).

the lie or correct the error”—and both public officials and public figures thus could be expected “to counteract false statements” and “influence the resolution of the issues involved.”¹¹⁸

In cases finding that a series of plaintiffs fell short of public-figure status, the Court repeatedly hinged its determination on the absence of “the regular and continuing access to the media that is one of the accouterments of having become a public figure.”¹¹⁹ Libel plaintiffs who do not discuss matters with the press,¹²⁰ make themselves central to a public conversation,¹²¹ or “engage[] the attention of the public in an attempt to influence the resolution of the issues involved”¹²² are not similarly situated enough to public officials to be treated as constitutional equivalents. Only those who “thrust themselves into the vortex of [a] public issue”¹²³ and use their situation “as a fulcrum to create public discussion”¹²⁴ are engaged in the sort of speech-and-counterspeech behavior that the Court envisions.

Importantly, this jurisprudential focus on the corrective speech capacity of the executive is not just a discussion of remedy for harm, but rather an exposition of First Amendment values and of the wider counterspeech norms within those values.¹²⁵ Counterspeech by the president is expected not because the Court is convinced that self-help will work,¹²⁶ but instead because we are committed to more rather than fewer contributions to the marketplace of ideas when government leaders and their work are the topic at hand. When the president faces “unsubstantiated opinions or deliberate misstatements,” the Court has concluded as a structural, constitutional matter that “counterargument

118. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344, 345 (1974).

119. *See, e.g., Hutchinson v. Proxmire*, 443 U.S. 111, 136 (1979).

120. *See, e.g., Wolston v. Reader’s Digest Ass’n, Inc.*, 443 U.S. 157, 167 (1979) (“[P]etitioner never discussed this matter with the press . . .”); *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976) (“Nor did respondent freely choose to publicize issues . . .”); *Gertz*, 418 U.S. at 352 (noting the plaintiff did not “discuss[] either the criminal or civil litigation with the press and was never quoted as having done so”).

121. *Hutchinson*, 443 U.S. at 135 (“Hutchinson at no time assumed any role of public prominence in the broad question . . .”); *Gertz*, 418 U.S. at 352 (noting that plaintiff “did not engage the public’s attention . . .”).

122. *Wolston*, 443 U.S. at 168.

123. *Gertz*, 418 U.S. at 352; *see also Wolston*, 443 U.S. at 166 (“[T]he undisputed facts do not justify the conclusion of the District Court and Court of Appeals that petitioner ‘voluntarily thrust’ or ‘injected’ himself into the forefront of the public controversy . . .”).

124. *Wolston*, 443 U.S. at 168.

125. *See Perzanowski, supra* note 109 at 841, 845 (suggesting “media access militates against the public figure’s interest in protection from defamation while simultaneously advancing independent First Amendment principles” and that “the democratic necessity of open discourse provided the primary thrust for developing such a balance”).

126. *Gertz*, 418 U.S. at 344 n.9 (“[A]n opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie.”).

and education are the weapons available to expose these matters.”¹²⁷ As one scholar noted, “the First Amendment does not guarantee effective remedies for defamation – it guarantees free speech and a free press,”¹²⁸ and counterspeech is a vital component of those freedoms. The interests at stake are not merely the interests of the would-be plaintiff, who is getting relief for a damaged reputation, but the wider interests of third parties in the public, who are getting both sets of information.¹²⁹ Counterspeech “does more than simply reduce the vulnerability of public figures to libel and slander: it furthers the values espoused by the First Amendment. Corrective speech contributes to robust public debate.”¹³⁰

Of course, we cannot force the president to engage. There is no obvious constitutional *mandate* to respond to allegations, to offer corrections, or to provide substantive clarifications.¹³¹ But the jurisprudence plainly envisions these communications as the norm. The whole of First Amendment theory and the core of the most important developments in modern media law are premised on the notion that the president will counterspeak rather than nonresponsively retort.

III. THE CHARACTERISTICS OF EXECUTIVE COUNTERSPEECH

The theoretical frameworks discussed above not only establish a constitutional expectation of executive counterspeech, but also help to demarcate the line between what might fairly be classified as executive counterspeech and what is mere nonresponsive retort. To contribute meaningfully to the marketplace of ideas, advance self-government, and enable the checking function, counterspeech would necessarily have a few essential characteristics.

This Part explores those characteristics and contrasts them with the traits of some of the nonresponsive retorts commonly employed by President Trump. The issue of executive counterspeech is timely and urgent because there is reason to believe that President Trump “is different in kind and not just in degree” from his modern predecessors in his hostility against and nonresponsiveness

127. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 304 (1964) (Goldberg, J., concurring) (quoting *Wood v. Georgia*, 370 U.S. 375, 389 (1962)).

128. Bruce J. Borrus, Comment, *Defamation and the First Amendment: Protecting Speech on Public Issues*, 56 WASH. L. REV. 75, 92 (1980).

129. See Yin, *supra* note 104, at 369 (“In a public official defamation case, we can visualize three distinct entities affected by the lawsuit: the plaintiff, the defendant, and the public. The plaintiff’s interest is in vindicating her reputation from the defamation and obtaining compensation (and perhaps special damages) from the defendant. The defendant’s interest stands in direct opposition to the plaintiff’s, which is to prove the truth of the defaming statement. The public’s interest is in receiving information relevant to the public official.”).

130. Perzanowski, *supra* note 109, at 845.

131. See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (“Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control.”).

toward the press.¹³² But all presidents have engaged to one degree or another in evasion, spin, or other nonresponsive reactions to the press,¹³³ and the principles discussed below apply to all executives. The modern, Trump-focused examples serve the wider function of exploring the quality and quantity of exchange between the press and the president that best serves democracy and comports with constitutional expectations.

Given the marketplace, Meiklejohnian, and checking-function goals for dialogue on matters of public concern, the ideal executive counterspeech would be responsive, would be based on facts and evidence, and would meaningfully advance public conversations. It would go beyond mere contradiction to offer counterargument—backed with reasoning and supporting evidence—and would provide clear, specific refutation, identifying a mistake and explaining to the reader why it is mistaken.¹³⁴ Counterspeech to objectionable news reporting, in particular, would squarely address what was said in the report and meet it directly on its terms to offer a different perspective, more information on the specific topic, additional unreported facts, or clarification and explanation of the facts reported.

Although it would be ideal to the citizenry if the provided facts were *true*, the marketplace-of-ideas theory does not mandate this as a characteristic of useful counterspeech. The theory assumes some falsehood will be contributed to the market, but at its most basic level, it at least requires that there actually be market contributions.¹³⁵ Competing, verifiable facts can be sorted, challenged, investigated, and tested, and the theory assumes that citizens will do this testing and that from this competition of facts, truth will prevail. But this sort of fact-challenging requires counterspeech that is on point and at least purportedly fact-based.

In contrast, executive reactions to objectionable press coverage are mere nonresponsive retorts when they lack these characteristics. Bare labels—“sad!” “wrong!” “lies!”—are too generic to meet the counterspeech criteria or to serve any of the Meiklejohnian, checking-function, or marketplace goals. Likewise, sweeping statements that purport to counter press coverage but are in fact sourceless generalities, like the assertion that “many people say”¹³⁶

132. *Id.* at 1327–28.

133. See Jones & Sun, *supra* note 12, at 1328–31 (describing and comparing modern president-press tensions).

134. See *How to Disagree*, PAUL GRAHAM (Mar. 2008), <http://www.paulgraham.com/disagree.html> (“[R]efuting the central point” is the most responsive and powerful form of disagreement in the hierarchy of disagreements).

135. See Milton, *supra* note 22, at 50 (“Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?”).

136. See Jenna Johnson, ‘A Lot of People Are Saying...’: How Trump Spreads Conspiracies and Innuendoes, WASH. POST. (June 13, 2016), https://www.washingtonpost.com/politics/a-lot-of-people-are-saying-how-trump-spreads-conspiracies-and-innuendo/2016/06/13/b21e59de-317e-11e6-8ff7-7b6c1998b7a0_story.html?utm_term=.ebd06f7d83ec (analyzing Trumps approach to assert controversial statements by utilizing third person attribution).

something is true, are not true executive counterspeech because they provide no verifiable, specific additional facts. Plainly, ad hominem attacks on the authors or publishers of press reports, such as engaging in simple name-calling or belittling the authority of the writer without addressing the substance of the press report,¹³⁷ are not mechanisms for addressing the substance of an argument and thus are nonresponsive retorts rather than counterspeech.

The assertion that a particular news report is “fake news,” without more, is a nonresponsive retort rather than constitutionally valuable executive counterspeech. This is true for a number of reasons. First, “fake news” is nonresponsive because it gives no additional factual information. The phrase addresses no specific aspect of a given report, offers no clarification, and gives no useful new material to contrast with the material of the press report. It contains no reasoning or refutation. It has none of the important features of democracy-serving, marketplace-of-ideas-enhancing, executive counterspeech.

Additionally, “fake news” is a nonresponsive retort because the term itself has no clear meaning. Given the wide variety of contexts in which it has been used, including its use as a reaction to press reports that very quickly proved factually accurate,¹³⁸ the phrase as used by President Trump falls short of a clear, evidence-based denial. It is ambiguous because the hearer does not know if she is being told that the particular news story is biased, that it is politically motivated, that it is factually erroneous in all of its facets, that it is factually erroneous in some of its details, or that it is merely something that President Trump wishes was not being covered. Executive counterspeech of the sort envisioned by our longstanding constitutional theory would not leave a listener guessing about something so simple as the nature of thing being countered.

Perhaps most significantly, the “fake news” response is not constitutionally valuable executive counterspeech because it is potentially deceptive terminology. This is because the words within the phrase have a pre-existing primary linguistic meaning, and the phrase—although apparently repurposed to mean something else—retains the residual effect of those more obvious connotations. “Fake” is a word with a longstanding definition—false, inaccurate, fabricated, a hoax or fraud. In the run-up to President Trump’s election, the term “fake news” was used widely to refer to the rising problem of actually

137. See Jones & Sun, *supra* note 12, at 1310–11 (detailing “name calling and competency-questioning” by Trump).

138. Margaret Sullivan, *Trump Cries “Fake!” About Media Reports of White House Chaos. But They Keep Getting Proven Right*, WASH. POST (Jan. 2, 2019), https://www.washingtonpost.com/lifestyle/style/trump-cries-fake-about-media-reports-of-white-house-chaos-but-they-keep-getting-proven-right/2019/01/02/5af4db60-0e8a-11e9-831f-3aa2c2be4cbd_story.html?noredirect=on&utm_term=.abcc989c40db; Eugene Kiely, *Trump’s Phony ‘Fake News’ Claims*, FACTCHECK.ORG (Jan. 16, 2018), <https://www.factcheck.org/2018/01/trumps-phony-fake-news-claims/> (detailing occasions when Trump has “labeled accurate news reporting as ‘fake news’”).

fabricated news stories, and some dictionaries embraced the term as referencing this phenomenon.¹³⁹ At a time when there have been concerted efforts to disseminate actual fabrications on Facebook and elsewhere, and when the nation already faces a crisis in media literacy and reader discernment,¹⁴⁰ it is damaging to self-governance and the marketplace of ideas to be further confusing information consumers with this coopted term.

The least generous description of what is happening here is that President Trump is purposefully and falsely accusing legitimate, mainstream news organizations of being engaged in the deliberate wholesale fabrication of stories. Under this version of the events, in an effort to discredit all public discussion unfavorable to him,¹⁴¹ President Trump is deliberately undermining trust in those who are working according to high journalistic standards and producing carefully sourced stories about major public issues by wrongly accusing them of inaccuracies or fraudulent reporting. This represents a severe threat to press freedom, a deliberate undercutting of a critically important civic institution, and an undermining of the free flow of information in a democracy. It does not represent constitutionally valuable executive counterspeech.

But even the most generous description of what is happening here amounts to a troubling lack of meaningful executive counterspeech. Under this version of the events, President Trump and others in his administration are merely being hyperbolic when they use this nonresponsive retort against the press. They could, for example, be using the phrase “fake news” to apply to something that might better be termed “fake newsworthiness.” This would be a use of the term to indicate that President Trump takes issue, not with the facts as reported, but with the priorities, editorial discretion, perceived bias, or angle taken by the particular news outlet or story. Through this lens, when President Trump retorts that something is “fake news,” he does not mean that the reporter wholly fabricated the story or that she literally did not have sources who told her the information that she reported; instead, he means that he wishes the sources had said something different, that he wishes that the sources had not talked to the press at all,¹⁴² that he thinks other sources might have countered

139. Lili Levi, *Real “Fake News” and Fake “Fake News”*, 16 FIRST AMEND. L. REV. 232, 233–235, 233 n.1 (2017).

140. See, e.g., *Stanford Study Shows Most Students Vulnerable to Fake News*, NPR (Nov. 22, 2016), <https://www.npr.org/2016/11/22/503052574/stanford-study-finds-most-students-vulnerable-to-fake-news> (reporting that a study from Stanford University found “large portions of the students [surveyed] . . . had trouble judging the credibility of the news they read”).

141. *Leslie Stahl: Trump Admitted Mission to Discredit the Press*, CBS NEWS, <https://www.cbsnews.com/news/lesley-stahl-donald-trump-said-attacking-press-to-discredit-negative-stories/> (last updated May 23, 2018) (quoting Trump as saying, “I do it to discredit you all and demean you all so when you write negative stories about me, no one will believe you.”).

142. See, e.g., Rebecca Morin, *Trump Says Leaks Exaggerated but Vows to Track Down ‘Traitors’*, POLITICO (May 14, 2018), <https://www.politico.com/story/2018/05/14/trump-leaks-traitors-white-house-586041>.

that source, or that he wishes the news outlet would focus on other subjects more favorable to him. That is, perhaps when President Trump says, “This is fake news,” he is saying, “This is not *news*” rather than “This is not *true*.”

This explanation might place President Trump in a somewhat more favorable light, but it does not make this “fake news” retort appropriate executive counterspeech. Having failed to specify what he means by the term, he leaves open the very real possibility that citizens will wrongly assume its meaning. When a president says, “This is not what I would call newsworthy,” but does so using a label that can also mean “This is not factually true,” there is a very real risk of deceiving listeners and mischaracterizing the work of journalists. The phrase cannot carry both meanings without imposing chaos in the marketplace of ideas and the realm of public affairs reporting. Thus, under both scenarios, the “fake news” phrase represents an abandonment of the norm of executive counterspeech and the embrace of unhelpful nonresponsive retort.

Two important practical realities seem to be animating the rise of nonresponsive retorts and the declining norm of substantive executive counterspeech. Although a deep investigation is beyond the scope of this Article, both are worth noting for their important interrelationships with the problem addressed here. The first is a changing communications and media landscape. The waning legacy media¹⁴³ and the emerging ability of presidents to engage directly with the people through social media¹⁴⁴ change the calculus on executive counterspeech. While the velocity and volume of social media communications could conceivably support more and better counterspeech from the executive to the people in response to press coverage, some aspects of this new media technology seem to instead embolden nonresponsive retorts. Character limits in some social media communications, for example, may push a president to respond in less fulsome and more hyperbolic or reactionary ways than he might have in the past. The directness of social media communications make it possible for a president to cut out the press as an intermediary and thus ignore the previous, longstanding norms of being interviewed by members of the press and responding substantively to their reports.¹⁴⁵ Ironically, while Twitter and other social media tools have the capacity to be significantly more interactive than older forms of media, they also eliminate the direct journalistic-interview feature of legacy press coverage that so often made presidents feel obligated to offer substantive counterspeech. Thus, in this new media era, the president engages less, rather than more, with the facts reported by others.

143. See generally RonNeil Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV 557 (2011) (detailing the decline of legacy media).

144. Jones & Sun, *supra* note 12, at 1342–43 (describing the shift to direct presidential communication by Twitter).

145. *Id.* at 1343 (“[F]or the first time in press-President relations, the press has gone from being a necessary evil to merely being an evil,” and that because of social media, “[w]hat to say to the press, whether to engage with them, and even how to depict them to the wider public audience all become questions that can be answered unencumbered by the structural realities of the past”).

A second compounding factor in the uptick of nonresponsive retorts is the epistemological tribalism that increasingly pervades American politics and communications. Voters are increasingly entrenched in their own echo chambers, and this might suggest that those who support a particular president may no longer demand any counterspeech at all but instead be satisfied with—or even celebrate—nonresponsive retorts. This phenomenon, sometimes referred to as “post-truthism,”¹⁴⁶ in which “objective facts are less influential in shaping public opinion than appeals to emotion and personal belief,”¹⁴⁷ has created a political culture in which either “truth matters less than it used to”¹⁴⁸ or “some people ‘find’ truth through the use of post-truth reasoning: they discount empirical data and rely instead upon emotional inputs, personal belief, deference to authority, and trust—even to determine truths that are empirically testable [.]”¹⁴⁹ Research suggests that individuals are deeply influenced by their cognitive biases and, in particular, that they select interpretations of data that conform with their political priors.¹⁵⁰ Thus, nonresponsive retorts seem increasingly acceptable to at least a portion of the population. If one’s political base has no appetite for executive counterspeech and one’s political opposition has no mechanism for forcing it, it should be no surprise that nonresponsive retorts are the new go-to reply for a president facing objectionable press coverage.

Whatever the complex set of factors causing the apparent shift from a background expectation of executive counterspeech to a field predominated by nonresponsive retorts, the counterspeech norm that undergirds both First Amendment theory and free speech jurisprudence is now routinely spurned.

146. See Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L.J. (forthcoming 2018) (“Essentially, post-truthism teaches that people should not use evidence-based reasoning to make decisions, but should rely instead on emotion, intuition, and belief.”).

147. *Word of the Year 2016 Is . . .*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016> (last visited Oct. 3, 2018) (announcing “post-truth” as word of the year for 2016).

148. Haan, *supra* note 146.

149. *Id.*

150. See, e.g., Dan M. Kahan et al., *Motivated Numeracy and Enlightened Self-Government*, 1 BEHAV. PUB. POL’Y 54, 74 (2017) (“[W]hen policy-relevant facts become identified as symbols of membership in and loyalty to affinity groups that figure in important ways in individuals’ lives, they will be motivated to engage empirical evidence and other information in a manner that more reliably connects their beliefs to the positions the predominate in their particular groups than to the positions that are best supported by the evidence.”).

IV. THE CONSEQUENCES OF ABANDONING EXECUTIVE COUNTERSPEECH

Violating democratic norms comes with costs.¹⁵¹ A refusal to engage in executive counterspeech harms the nation, its people, and its press in specific and easily identifiable ways. When a president replaces meaningful, substantive counterspeech with nonresponsive retorts to press coverage, there are at least three sets of real-world consequences. These might be labeled “Accountability Consequences,” “Marketplace-of-Ideas Consequences,” and “Press Consequences.” Combined, these effects threaten to create an unprecedented impairment to our national conversations.

A. Accountability Consequences

The first set of harms of a president’s refusal to engage in executive counterspeech centers on the self-governance and checking functions that counterspeech would otherwise promote. If executive counterspeech offers citizens the information they need to properly participate in their democracy, the withholding of it robs them of that opportunity. Thus, a major harm of the failure to engage in executive counterspeech—and, perhaps, a major motivation for that failure—is the lack of presidential accountability that attends it. When no counterspeech is offered, the citizen loses her ability to make decisions about actions taken and policies embraced by the president. The voter is left without knowledge on which to base support or opposition to a given policy and without information on which to make a decision at the ballot box.¹⁵² The citizen cannot know what the executive knows, what the executive believes, what the executive stands for, or what the executive has done if she is fed a steady diet of nonresponsive retorts. Even the most participatory, earnest citizens cannot engage in the basics of self-governance if they are given only a set of press reports that the president demands not be believed, while he provides no counter-information about what they should instead know or understand. Taken to its extreme, the abandonment of the norm of executive counterspeech leads to an utter failure of both governmental accountability and self-government itself.

This reality illustrates that an abandonment of the norm of executive counterspeech is not merely an executive failing—although it certainly is that. It is also a public failing. Elected officials cannot reasonably be expected to

151. See, e.g., Ronnell Andersen Jones & Sonja R. West, Opinion, *Don’t Expect the First Amendment to Protect the Media*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/opinion/dont-expect-the-first-amendment-to-protect-the-media.html>.

152. Of course, a citizen could determine that the lack of factual information provided by an incumbent was grounds for refusing to re-elect, and Americans may yet make that determination in response to the current administration. But the more fundamental principle remains that nonresponsive retorts leave most citizens in the dark about many aspects of government decision-making.

hold themselves fully accountable, and their self-interests may often push against the public interest.¹⁵³ Current trends strongly suggest not only that President Trump is ignoring the norm of engaging in counterspeech, but also that the public is ignoring the norm of demanding it. The consequence is a dearth of the sort of informed, critical, and factual exchanges on which democracy ordinarily rests.

B. Marketplace-of-Ideas Consequences

A second, related set of harms from a president's refusal to engage in counterspeech focuses on the ways that this refusal impacts the marketplace of ideas. Nonresponsive retorts—especially from speakers like the president, who is a unique keeper of information that is either held exclusively by him or best distributed broadly by him—deserve the search for truth.

So, for example, if every time President Trump has responded with “fake news” he had instead responded with either “This is not true and here is the evidence” or “This is accurate but has been misinterpreted and here are the details to help you better understand,” the caliber of contribution to the marketplace would be exponentially higher. Observers in the marketplace would have had real tools with which to decide the truth of the matter and counterfactuals would have advanced the dialogue about the propriety of the decisions that had been made. The “fake news” retort harms the marketplace whether the press report is false or true. If these counterfactuals do not exist, President Trump is harming the marketplace with deceptive signals. His cry of “fake news” is itself fake. If the counterfactuals do exist, he is also harming the marketplace by withholding them and thereby robbing the marketplace of the competition between the challenged report and the new facts. In nearly every instance, it is easy to see how counterspeech would have advanced dialogue and how nonresponsive retorts shut it down. Speech and counterspeech can be complicated partners in the marketplace, and issues of politics, national security, or personal preference might understandably keep a president from squarely answering every challenge raised in a media report or candidly providing all of the facts in his possession. But, in some instances, no response at all would be less damaging to the marketplace of ideas than the potentially deceptive nonresponsive retort.

More fundamentally, the disappearing norm of executive counterspeech harms the wider viability of the marketplace of ideas as an enduring American construct. When the executive, who sets the tone for the nation and models the climate for the nation's major collective conversations, sends the signal that factual, responsive contributions to the marketplace of ideas are no longer required, expected, or valued, it imposes a larger national loss. Lowering these expectations in our public discourse makes it less likely that others will use

153. See Blasi, *supra* note 17, at 529 (“The tendency of officials to abuse their public trust is a theme that has permeated political thought from classical times to the present.”).

competing empirical claims to engage substantively with their intellectual opponents. Other searches for truth will be less fruitful. The patterns that we embrace as acceptable at the highest level of national discourse reflect our commitment to truthseeking in the marketplace. The post-truthism that seemingly emboldens President Trump to flout the norm of executive counterspeech becomes more entrenched as a substitute framework for national dialogue when his nonresponsive retorts go unchallenged or, worse yet, are accepted as the new normal.

C. Press Consequences

A third set of harms resulting from a president's refusal to engage in counterspeech centers on the press and its role in a democratic society. Importantly, these harms do not rise and fall on the question of whether the press is performing its functions well or poorly—the absence of executive counterspeech works harms on the public in either event.

The United States Supreme Court routinely assumes that the press is performing valuable, democracy-enhancing work.¹⁵⁴ If that is the case, President Trump's decision to employ nonresponsive retorts can be dangerous to the continued legitimacy of an important institution.¹⁵⁵ This is most obviously true when his chosen nonresponsive retort is a direct, ad hominem attack on a specific journalist or on the institutional press as a whole,¹⁵⁶ but it is also true when he makes more a generic allegation that an issue or coverage area is “fake news.” These labels construct the press as an enemy and impede it in its ability to communicate with the public and to do work on behalf of the public. The watchdog and proxy functions of the press rely on a foundation of respect for the institution, even when there is serious disagreement about the particulars of its work.¹⁵⁷ Nonresponsive retorts that attack rather than enlighten pose serious threats to that valuable informational structure. If the president unfairly maligns the press with labels that suggest its reporting is inaccurate when that reporting is in fact just disfavored by the executive, there are grave consequences to our ability to have meaningful national conversations, to be educated about public matters,¹⁵⁸ and to be represented by the press as it attends public functions and asks questions of the government.¹⁵⁹

But even if we assume the converse—that the press is doing its job poorly and its coverage is inaccurate, biased, or otherwise flawed—the failure of the president to engage in meaningful counterspeech continues to work harm on

154. Jones, *supra* note 89, at 254.

155. See Jones & Sun, *supra* note 12, at 1347–67 (describing the risks of the president undercutting the press).

156. See *id.* at 1346.

157. See *id.* at 1333–34 (describing the ways that President Nixon, despite serious tensions with the press, continued to convey that it was institutionally legitimate and constitutionally important).

158. See *id.* at 1361–63 (discussing the educational function of the press).

159. *Id.* at 1364.

the nation and its people. Indeed, the instances in which the press makes errors or otherwise falls short of the ideal of delivering comprehensive, truthful, and unbiased information are the instances when executive counterspeech—rather than bare nonresponsive retort—may be most important. The checking function performed by speech on matters of public concern runs in two directions, and a president who fails to offer any counterspeech to press coverage that he perceives as inaccurate is failing to check the press. The press might, of course, be countered by other speakers—and even by other press speakers—but to the extent the president is the individual possessing the crucial countering information, his response that the report is “fake news” falls short of being counterspeech. Repetition of a “fake news” trope leaves the public nearly as uninformed as it was by the problematic reporting. It does not adequately show where the error lies, provide any replacement information, or give the reading or viewing public any tools for selecting more accurate media sources.

The “internally competitive system” of speech and counterspeech that the Founders “deliberately created”¹⁶⁰ needs the “friction”¹⁶¹ of substantive, specific, factual pushback from the president. Like the checks and balances that preserve the distribution of power among the branches of government,¹⁶² the checks and balances between the executive and the press only meet the interests of the people if each party is actively guarding against the excesses of the other. Either party’s failure to engage in that “tug and pull”¹⁶³ leaves the public at best underserved and at worst affirmatively misled and imperiled.

Indeed, each additional use of nonresponsive retorts may further compromise the president’s ability to check the press when it does commit reporting error. If a retort like “fake news” is used with enough regularity and consistently invoked in situations where there has not been actual falsehood, the reading public will be unable to distinguish when the label is accurate in its descriptive sense—that is, when it is being told that the news item has been fabricated and is factually false. One journalist has already noted this concern in relation to a particularly lurid tale that President Trump has denounced as “fake news.”¹⁶⁴ “[President] Trump has cried ‘fake news’ so frequently that his angry

160. Stewart, *supra* note 79, at 708.

161. *Id.* (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)).

162. *Id.* at 707 (“[T]he Free Press guarantee is, in essence, a structural provision of the Constitution.”).

163. *Id.*

164. Ashley Parker, *Real or ‘Fake News’? Either Way, Allegations of Lewd Tape Pose Challenge for Trump*, WASH. POST (Apr. 13, 2018), https://www.washingtonpost.com/politics/real-or-fake-news-either-way-lewd-tape-allegations-pose-a-challenge-for-trump/2018/04/13/098cdedc-3f2b-11e8-8d53-eba0ed2371cc_story.html?utm_term=.69155d588306.

denials have lost their wallop, part of a routine call-and-response with the media rather than evidence of legitimate inaccuracy.”¹⁶⁵ Thus, despite its apparent goal of disparaging and discrediting the press,¹⁶⁶ a nonresponsive retort used in place of executive counterspeech may leave the press insufficiently critiqued by the president. A president who attacks the press as biased or incompetent, and who has the capacity to prove it by presenting superior or corrective facts, would better advance his agenda by presenting those facts.

V. CONCLUSION

There is a widening disconnect between the presidential communications anticipated by the marketplace-of-ideas, self-governance, and checking-function theories and the actual responses offered by President Trump to press coverage that he finds objectionable. While these foundational principles call for responsive, factual, evidence-based counterspeech that aids the search for truth, advances public conversations, and enables accountability, the nonresponsive retorts employed by President Trump—including his iconic “fake news” mantra—serve none of those aims. They at best offer bare contradiction and at worst constitute deliberate deception. Democracy relies upon executive counterspeech that contains factual evidence and supporting reasoning and that engages in specific refutation rather than generalized critique or ad hominem attack. An executive’s refusal to engage in counterspeech on matters of public concern not only is inconsistent with fundamental principles of First Amendment theory, but also is harmful in concrete ways to the goal of governmental accountability, to the society’s ongoing search for truth, to the wider tone of national conversation, and to the democracy-enhancing role of the press.

165. *Id.*

166. *Leslie Stahl: Trump Admitted Mission to Discredit the Press*, *supra* note 141.

