



Elections, Speech, and Political Disinformation

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[00:00:00] Tanaya Tauber: Welcome to Live, the National Constitution Center, the podcast sharing live constitutional conversations and debates hosted by the center in person and online. I'm Tanaya Tauber, senior director of Town Hall programs. Battling disinformation has become a huge obstacle in keeping elections in the United States free and fair. We've gathered a trio of experts to discuss proposals for limiting disinformation around elections and to analyze whether those strategies are consistent with the First Amendment's protection of free speech. Rick Hassen is a leading election law expert and author of *Cheap Speech: How Disinformation Poisons Our Politics—and How to Cure It*.

[00:00:41] Sarah Isgur is a staff writer at The Dispatch and co-host of the legal podcast *Advisory Opinions*. And Catherine Ross is a free speech expert and author of *A Right to Lie? Presidents, Other Liars, and the First Amendment*. Jeffrey Rosen, president and CEO of the National Constitution Center moderates. This conversation was stream live on March 10th, 2022. Here's Jeff, to get the conversation started.

[00:01:05] Jeffrey Rosen: Hello friends, I'm Jeffrey Rosen, and welcome to the National Constitution Center and to tonight's convening of America's Town Hall. Thank you so much for joining us, Rick, Sarah and Catherine. Rick let's begin with you, the subtitle of your new book is *How Disinformation Poisons Our Politics—and How to Cure It*. Defining disinformation can be tricky. It means different things to different people as you note in the book. So why don't I begin by asking you, uh, what is disinformation and how does it poison our politics?

[00:01:40] Rick Hassen: Well, thank you for the opportunity to be back at the National Constitution Center. So I go by what I think is a pretty standard definition of the difference between disinformation and misinformation. Misinformation is any false inform, something that's empirically falsifiable, right? Um, you know, the, the sun rises in the west type false statement, regardless of whether it is a deliberate or a non deliberate statement.

[00:02:07] Whereas disinformation is a deliberate attempt to spread false information. And it is in the context of my book, usually for either political or financial reasons, and those reasons can reinforce one another. I think a lot of people have actually gotten rich off the lie that the 2020 election was stolen. And, and my book starts out by showing the real kinds of danger that are new information environment. The environment that I call the cheap speech environment has created for American democracy. And one of the claims I make in the book is that we had the same polarized politics of today, but to the technology of the 1950s, we've, we very likely would

not have had the January 6th insurrection of the Capitol. And we likely would not have the situation where not only do millions of Republican voters who followed Donald Trump believe the false claim that the 2020 election was stolen, but also 59% of Republican voters say that a big part of what it means to be a Republican is to believe the claim that the 2020 election was stolen.

[00:03:12] And this has severe implications for our democracy because our democracy depends upon people being able to separate truth from falsy and be able to know whether or not we have a fair election. If millions of people believe we don't have a fair election, it's very hard to have fair elections in the future. I, I say a lot more in the book, but that's kind of the opening danger that I, uh, bring in there. And I believe it is caused by disinformation. That is the people who are claiming the 2020 election was stolen know that they're lying and are doing it anyway for both political and financial reasons.

[00:03:45] Jeffrey Rosen: Thank you so much for that. Sarah, what do you think of Rick's argument, which he just laid out very clearly that disinformation, which he defines as a deliberate attempt to spread false information for political financial reasons is a problem for democracy to the degree that it creates mistrust about the possibility of fair elections. Uh, do you agree or disagree with that? And if you disagree, are there any kinds of disinformation that you think might be a problem for democracy? And we're seeing some in Ukraine right now where we have a big lie being spread about the justification for the war. Would you distinguish what's going on there from what's going on in the U.S.?

[00:04:23] Sarah Isgur: So I wanna start by saying that I have dedicated innumerable podcasts and newsletters that I write about my experience. I've worked on three presidential campaigns, all overseeing legal, um, aspects of those campaigns. And, uh, as someone whose job it is to think through how one would steal a statewide election, I just wanna be very clear, uh, that it is impossible as far as I am concerned with our current system. And so I, in no way and what I'm about to say, do I want to confuse any fact that I think that it is okay to say that the 2020 election was stolen. I do not. I do not think it was, I think it is bad for our country, for our democracy, for the Republican Party. All of it. That being said, disinformation is not new to our politics. Uh, you know, going back to, uh, first of all the founding, but let's just go with Lincoln.

[00:05:15] There was a famous pamphlet spread, right? That, um, Lincoln was a, "Miscegenator" and, uh, you know, wanted to increase miscegenation in the country, things that were not misinformation, they were disinformation clearly knowingly done at the time. So, um, I do think it's important to dispel the notion that disinformation in our politics is new because it goes to what the solution is. Because I think the solutions, if you think disinformation is a new threat that we must somehow stamp out, you could have very illiberal solutions that affect our free speech rights.

[00:05:53] And, uh, on the flip side, if you accept that, um, I think oddly, even though I like the way it sounds, the idea that our democracy is based on the, uh, concept that voters have to be able to tell the difference between fact and fiction, just historically is not particularly true. Um, you know, we have obviously increased the franchise over time in our country. And the idea that

if you pulled voters at any given moment, um, on any number of questions, a fact versus fiction that all of the voters would get that right. And suddenly in 2016 or 2020, they're starting to get it wrong. I don't particularly believe that.

[00:06:31] Um, and so then it's like, well, if this isn't a unique threat, is it nevertheless the size of the threat unique or, or something else? Um, I think that social media, uh, presents it, it does present a unique change in how people are getting their information. No question about it. And there are things we can do when it comes to algorithms anonymous, um, accounts, deep, fake videos, things like that, that these private companies could be incentivized to do more of. But what I see instead are, uh, the right, trying to pass laws that, uh, you know, force companies to carry speech that they don't wanna see, uh, carry.

[00:07:12] And I see on the left very illiberal solutions as well to taking down speech. And look the result, of course, I'd love to take down all the false speech. I'm not here to be a proponent for misinformation or disinformation. The problem is who gets to decide? And as we saw at the beginning of COVID, for instance, um, there was a lot of pressure to label any speech about the origin of COVID potentially coming from a lab for instance, as, um, misinformation and disinformation and over the course of the next year. And again, I wanna be very clear. It's not that those theories have been proven true. No, but they are not misinformation or disinformation. They're a valid part of our free speech conversation as we determine what's true because people don't actually know the answer.

[00:08:04] And if, instead you say, "Ah," um, whether it's Rick deciding what's misinformation or President Biden deciding, or Mitch McConnell, I don't want any of those people deciding what is truth? What is disinformation or misinformation because that to me is where you get into a very dangerous illiberal anti-free speech culture. Um, and so it's not that I disagree necessarily with the problem, but I certainly disagree with any of the solutions that would actually fix it.

[00:08:34] Jeffrey Rosen: Thank you so much for that. Catherine, focusing on the problem, please tell us, um, as you do, so, uh, powerfully in your book, what you think the problem is part three of your book is called lies affecting democracy, and you give, uh, examples, uh, ranging from the 2020 campaign to, uh, viral lies in the COVID era. And you also very helpfully distinguish among different kinds of lies, uh, ranging from, uh, intentionally dishonest ones to prevarication to other forms of lies. So, um, how would you sum up the problem? Uh, what, what, what is, uh, disinformation and in what ways does it poison American democracy, if at all?

[00:09:20] Catherine Ross: Thank you so much, Jeff. Um, disinformation, um, as, as you indicated, I, I acknowledge takes many forms and the ones that I think we can focus on as a matter of law and constitutional doctrine and or what I call bald faced lies. Those are verifiably, false assertions about facts that we can actually disprove. And, um, it turns out that it's not so easy to reach agreement about what is even a bald faced lie, because, uh, as opposed to, uh, insinuations, rhetorical questions that suggest a dishonest answer and many of these, uh, or even what scholars in fact, call bullshit where you don't really care if you wanna be, if you're going to be believed, you're just throwing it out there. But for, for the law, um, a, a bald faced lie, uh, is something that the liar knows is false, that he wants other people to believe.

[00:10:28] And, uh, one of the problems with regulating these things as we're seeing a lot of the cases coming out of January 6th is proving that somebody knew it was false. And what do you do with a liar who actually turns out to be misinformed, resistant or even delusional if that's an element? Um, but one of the things I'm aiming to do in this book is to respond to what appears to be a crisis about, uh, proliferating lies and misinformation as well, though I'm not dealing with the misinformation as much. And I really agree with what Sarah said, this is not a new problem. It goes back to the founding era. Um, but it is a unique problem in the United States because of our First Amendment. And while many of the people who are concerned about the state of our democracy, uh, all point to misinformation and repeated lies and attacks on the media as the weapons of authoritarians and how dangerous they are for democracy.

[00:11:41] And I absolutely agree with those concerns. And my level of concern has only risen in the last year, since I finished changing the manuscript, as we have learned more and more and has events have unfolded. Um, but most of these critics don't need to think about the First Amendment and the speech clause. Many of them are political scientists, it's not their zone of operation. And so one of the things I wanna do is to explain the illiberal from every part of the political spectrum, why we have to honor the First Amendment, why freedom of expression is so also essential to democracy, to preserving our constitution and to respond to the many people who are saying, "There ought to be a law. Why can't we do something about this?" And so I wanna explain, and I also wanted to explore, uh, what the actual First Amendment status of lies is because it has not received sufficient attention, even in, uh, a second impeachment trial of President Trump already by then former President Trump, um, where it was at, at the essence of the charges against him, didn't really receive careful analysis.

[00:13:05] And so, um, unfortunately the status of lies as a constitutional matter is quite a gray zone. Even since the Supreme Court first really addressed it head on in 2012 in a case called *United States v. Alvarez*. Um, they said it's not lies are not outside the protection of the First Amendment. They are protected to some extent, but that is not the same as saying there's a First Amendment right to lie. And what they said is you can't punish factual falsehoods just because they're false. You have to do something. Show, the government has to show something more than that. And it has to be part of the law. And the government has to show either harm to others or an, um, illegitimate benefit to the liar. And my focus was on the harm to others. And I'm arguing that it doesn't have to be, uh, harm to a specific individual, can be a harm to society and the body politic.

[00:14:17] And I use the two examples of Trump's lies about lies and misinformation, uh, about COVID causing absolutely unnecessary levels of death, long-term illness, economic devastation, um, and an undermining of the whole, um, approach to reality and science. And the second example is the effort to delegitimize the 2020 election, both leading up to that time after he was defeated, after the results were certified and the contribution that those lies made to the January 6th insurrection. And, uh, one of the things that has made me feel even more strongly is that as we are seeing the January 6th investigation, the surrounding, uh, litigation, both civil and criminal and learning more and more, I did not fully appreciate that more than a year, uh, after

the insurrection, nearly 70% of Republicans would still believe that the election was stolen. So this is a really important. And then how do we, how do we respond to it?

[00:15:35] Jeffrey Rosen: Thank you so much for all that. Thank you for so clearly introducing us to the Supreme Court's, uh, jurisprudence on this question. The Alvarez Congressional Medal of Honor case is crucial, as you said, and you just told us that the court has said you can't punish falsehood simply 'cause they're false. You have to show harm to others or other illegitimate benefits. We'll dig into that doctrine in a moment. But before we do that, I'd like to put on the table proposed reforms if any, that each of you have to regulate lies bald-face or not. Rick in chapter three of your book, you set out a series of important legal changes and the ones for regulating lies include your suggestion that Congress should make it a crime to lie when, where, and how people vote. Uh, they might, uh, require the labeling of deep fakes as altered to help voters separate fact from fiction. And it might be important to prevent people from targeting voters with false messages as, uh, happened in 2016. Please tell us about the proposals that you have in chapter three and elsewhere for how you think lies should be regulated.

[00:16:44] Rick Hassen: Sure. And I should say that the book doesn't, despite the subtitle, which was chosen by my publisher, the book doesn't just deal with disinformation, but other problems like a rise in corruption that occurs from the change in our information environment and lack of, of voter competence to be able to make informed voting decisions. So the book doesn't just deal with the problem of lies the way that Catherine's book does. So just to be clear. And so some of my proposals, for example, my proposals to improve disclosure laws. So we know if the person targeting us claiming to be a black activist is actually a Russian government agent or the person who is a, uh, Baptist [inaudible 00:17:23] turns out in Alabama, turns out to be a Democratic operative, trying to get Doug Jones elected over Roy Moore. That disclosure is a way of giving voters more information, and doesn't raise the same kinds of risks as laws that say that certain kinds of speech is prescribed.

[00:17:39] And I agree with both Catherine and Sarah, that those kinds of laws are dangerous. And so I would only have a, a ban on empirically falsifiable statements about when, where and how people vote. So for example, if someone being prosecuted now in 2016, who targeted messages at African American voters, he was a Trump supporter, targeted messages, African American voters telling them that they could vote by text or vote by social media hashtag. It seems that that kind of lie undermines very workings of our electoral process and the Supreme Court, uh, in a case called *Minsky* in 2018, indicated that such narrow laws would in fact be constitutional under the First Amendment because of the strong interest. Other than that, I don't think we can address the biggest lies. The lies, the Rich, Catherine was just talking about. The lies that the 2020 election was stolen.

[00:18:30] I think it'll be quite dangerous to have a government bureaucrat deciding when those things can be taken off. And the way I would deal with that is through treating the social media platforms and, and others. Um, Spotify, Google, Facebook, Twitter, TikTok as private companies entitled to have whatever speech they want on their platforms. But, uh, not subject to regulation as Justice Thomas seems to support, for example, that would allow states to require these private companies to carry the speech of politicians, even those who call for violence or

who consistently undermine elections. I had a piece in the Washington Post yesterday where I said that Facebook and Twitter should be able to make the decision about whether to keep Donald Trump de platformed and they should choose to keep him de platformed because his speech is so dangerous to our democracy, but I don't want that to be a government decision.

[00:19:27] I think that's a decision that we as private individuals can earn these private companies to do. I don't like from the left or the right a kind of fairness doctrine or a kind of even adness because I think that ends up leading to us down a very dangerous road.

[00:19:41] Jeffrey Rosen: Uh, Sarah, you just heard Rick's proposals a, a ban on empirically falsifiable statements about when, where and how people vote, but leaving it up to companies to decide to de platform or not. Do you agree or disagree and more broadly, uh, are there any other regulations that you would support that involve the regulation of lies?

[00:20:04] Sarah Isgur: I agree with Rick, that more information is universally good and a very pro First Amendment approach. So for instance, um, more disclosure on platforms about who is speaking or who paid for that speech, I am wildly in favor of such things. And, um, perhaps would even go further in terms of creating incentives for social media companies, not to want to allow anonymous speech. And I think that, um, uh, yeah, I mean, what Rick said about banning the what, when, where of voting, I have relatively small concerns honestly, that that would be sort of a crack in the door that would open to more, um, to the extent I have concerns, that's where they are that like, "Well, if we start there, will it just incrementally, um, increase" for instance, to take some of what, what Catherine said?

[00:20:57] Um, I think it is very easy when you are someone who agrees with the left thinks Donald's Trump is a danger to democracy to know what the lies are. But as Catherine pointed out, some of the problem is what if they believe those lies? Like to Catherine's solution, I don't think she would capture the vast majority of people who believe the election was stolen. Even the Rudy Giuliani's, the Sydney Powells. It's hard to imagine people who could believe what they're saying more [laughs] than those. Um, and so part of the problem with, with Catherine's solution though, I, um, you know, it is attractive in so many ways is that I don't think it would capture any of the actual problem, unfortunately.

[00:21:43] Um, and so the, the issue is there are similar things on the left that I think if you happen to agree with the purpose behind them, it's hard to see them as, "Lies." But for instance, when Joe Biden says that, um, 19 states have passed voter suppression laws that are Jim Crow 2.0, is that misinformation? Is that disinformation? You know, if you go through, um, you know, what the Brennan Center has put out, which said for instance, that four states have, uh, limited or eliminated, um, absentee ballot applications being sent unsolicited.

[00:22:26] Well, it turns out that the four states, none of them eliminated unsolicited absentee ballot applications. So right off the bat is that misinformation or disinformation, the Brennan Center obviously read all those bills. Those states simply said that, "If you send an unsolicited ballot, you have to say that you're not sending it from a government organization." Well, so is that misinformation or disinformation? Is what Biden said, misinformation or disinformation his speech writer certainly knew a lot of this. And so that's where you get into very dangerous

questions about, well, if the speaker knew it was false in our political campaigns for better or worse, both sides say things that I think are disingenuous, if I'm being generous and misinformation or disinformation in seeking to win election. And to say that it is purely a problem on the right, um, I think ignores a lot of the problem on the left, including by the way.

[00:23:21] And I know this example is overused. So forgive me, but the Stacy Abrams, Georgia governor's election was stolen. There is simply no evidence to show, even in her theory of voter suppression to come anywhere close to the number of votes it would take for her to have won that election. But to this day, she continues to say that that election was stolen. I still actually don't think she's technically conceded. Um, she is a gubernatorial candidate who knows, who holds no elected office, in no way am I comparing that to what Donald Trump and his, um, advisors did. But if, again, if you're gonna make a law that gets to the Donald Trump problem, you're gonna hit Stacy Abrams on the way. And so anytime we're looking at that, um, you know, if you think that the New York Times should clearly win over Sarah Palin in that defamation case for instance, then you're gonna have to look carefully at whether Fox News should clearly win in the Dominion and Smartmatic lawsuit cases.

[00:24:20] And just, I should disclaimer, my husband represents Fox News in that, um, [laughs] we don't agree on everything. So don't assume that I'm on his team there, but, uh, it goes to a consistency that I think is, um, often missing from these conversations. But look, nothing that Rick said, uh, you know, scares me or I'm throwing tomatoes at Rick's idea or Catherine's idea. I'm just concerned that they don't actually get to the heart of the problem that we're dealing with, which is a fundamental disintegration of trust in self government and in free speech and what that does for our society. You don't get to that by legal changes unfortunately, that is a cultural rot that is happening. Uh, and so I think the problems are going to be, um, a cultural as well. Sorry, the solutions.

[00:25:10] Jeffrey Rosen: Thanks for that very interesting intervention and the significant, uh, areas of agreement between you and Rick, about the possibility of banning, uh, intentional election lies, uh, that are also targeted. Catherine, do, do you support Rick's proposal about the intentional election lies and tell us about proposals for regulating lies in your book in your last chapter lives matter. You describe how Congress could make clear that it views intentional presidential lies as impeachable. You talk about oversight hearings, uh, censure and other, uh, responses. Are, are there any statutes that you think Congress, uh, should pass and then please put on the table, your proposals for ways that Congress and the states could and should in your view regulate lies.

[00:26:02] Catherine Ross: I'm a little puzzled by some of Sarah's comments just to start off because I had not laid out my proposals and I'm not sure, um, if people listening understood what she was addressing and I'm not sure what she was addressing, but, uh, we, we need, uh, get into those wheat. Um, so, uh, I suggest that, uh, the president and other high officials may be treated differently in terms of supervision and regulation of their lies because the president works for us. And there is a small area of First Amendment law called the public employee speech doctrine. And when people are public employees, they give up a lot of their First Amendment rights because their employer can discipline them for what they say, even outside the office, if it is

within the, a topic that is related to the scope of their employment. And, uh, that has been interpreted very broadly. And there's some other, uh, details about that.

[00:27:12] But unless the employee can show that he or she was speaking as a private citizen and that their communication had nothing to do with their job, then they can be disciplined or fired by their government employer. And how do, how would that apply to a president? What a president says is almost always related to their job and they very rarely speak, um, as someone who is not seen as the president and they often speak not as but government, which can say whatever it wants about anything and express viewpoints, uh, but speaking as me, the president, and so our whole constitutional scheme relies on a separation of powers, which includes congressional oversight.

[00:28:06] Now I have to say that, uh, given the conduct of one party during the last two impeachments and the voting along partisan lines, I am not optimistic that this is the time to make major changes. But I begin by suggestion that Congress can clarify it has, it is the only, uh, group that can clarify the meaning of high crimes and misdemeanors, which is the standard for impeachment and removal from office.

[00:28:38] And Congress could, uh, in a number of ways, whether through a statute or a resolution, uh, indicate their very clearly that if the president or other high government officials subject to removal, um, engages in material lies that adversely affect the body politic or harm the American people like the COVID lies, um, that would be regarded as a ground for impeachment moving forward. They could do that without limiting their discretion on a case by case basis to decide what an impeachable offense consists of. This would give the president notice. You make repeated statements, you don't retract them when you are confronted with factual evidence. And, uh, this is going to seriously harm our republic or our population. You will be subject to congressional discipline, which can range from fairly meaningless slaps on the wrist, like censure, through impeachment, conviction and disqualification for future office. So that is the main proposal in my book.

[00:29:51] I also, uh, note the very powerful use of defamation cases like the ones brought by Dominion and, and others against, uh, some of the people who falsely and without any evidence accused the voting machine operators of subverting the election. Um, and other civil suits, uh, like some of the ones that were filed by Congressman Swalwell and others, uh, against the, uh, people whose lies, uh, led to the January 6th insurrection. Uh, since then, I've also, uh, been working with the governor of the State of Washington on a, uh, proposed statute that was reported out of committee, but did not get a vote in the Legislature before they adjourned actually today. Um, that would require as a condition of a place on the ballot for any office in the State of Washington. Um, and I think this is very, very narrowly crafted to meet the concerns, um, of the court to hold an office or to run for office in that state.

[00:31:04] The proposal was, uh, you would have to sign an oath basically to say, "I will uphold the laws and the constitution of the state, as well as the United States" and specifically referencing this new provision, which makes it illegal for candidates and office holders to, um, deny the proven results of a previous election. And that leaves candidates free to bring every,

um, legal challenge that is permissible under or law. Um, but after the results have been certified, they cannot continue to say the election was stolen. And by taking that oath as a condition of getting on the ballot, they're basically saying, "If I wanna be in the Super Bowl, I understand that the unbiased final call is the final call. And I am going to accept the results of the game." And if you wanna play the game and run for office and have our trust, then you have to play by the rules.

[00:32:18] Will that eliminate every conversation about stolen elections? Obviously not. Everyone else in the state remains free to make any false claims they want, but we, when we look at the oversized impact of the candidate themselves, or the president himself who incidentally wouldn't be on the ballot, but electors are on the ballot. And if a condition of being an elector is that you say the last election was stolen, it would apply to the electors. Then I think it would severely diminish the risks. And, um, it was written very carefully, uh, to address all kinds of First Amendment concerns, whether the court would ultimately uphold such a law is an open question, uh, because it's full of approaches that have never been tried before. But the court and even the current justices are all on record as saying, "The government may never be the arbiter of truth." And that is really the overarching issue in attempts to regulate both lies about elections and other falsehoods that affect democracy.

[00:33:37] So I think it's worth trying some of these approaches because the dangers today are so great. And I'm not looking specifically at whether we can regulate social media. I think it's a more problematic thing to try because these are private companies that have their own First Amendment rights to edit their content. So I'm very much in favor of consumer pressure and public pressure to get these companies to try to do the right thing, but their profit is largely in stoking fires. So I'm not very optimistic about that.

[00:34:20] Jeffrey Rosen: Thank you so much, uh, for that very concrete proposal of a law that would say you, uh, can't deny the result of a previous election after it's certified. Rick in this round, I'd really like to dig into what the court would allow under the First Amendment, and why. You note that the court has currently embraced the marketplace of ideas, um, vision of the First Amendment it was articulated so inspiringly in justice home's, uh, soaring dissenting opinion in the Abrams case, I have to read the famous sentence 'cause I get chills every time I do, "When men have realized that time has upset many fighting faiths, they've come to believe even more than they believe the very foundations of their own conduct, that the ultimate good desired is better reached by free trade and ideas that the best test of truth is the power of the thought to get accept-, self accepted in the competition of the market. And the truth is the only ground upon which their wishes safely could be carried out." Is just amazing pros.

[00:35:22] But you say that the marketplace of idea of metaphor is, uh, has limits, uh, in an age when we can't always have confidence in age of cheap speech, that truth will win in a fair battle of error. So tell us what kind of regulations the court would allow under this marketplace vision. Would it even allow the law Catherine proposes and also tell us about the debate among the justices, including Justice Thomas's and Justice Gorsuch just efforts to open up New York Times versus Sullivan and allow even more, uh, suits for lies that harm individuals.

[00:35:54] Rick Hassen: Sure. Well, so the first thing I'd say is that if the marketplace have ideas approach that the truth will rise up from counter speech, right? The idea is, you know, if somebody lies the way to respond to it is to tell the truth and that the truth will emerge victorious. Uh, if that was ever true, it's likely not true today. Uh, if you look at social science evidence it's as though people will believe the truth and just take, you know, the, the, the 800 pound gorilla was the 2020 election stolen? This is what I do for a living. I study elections. There is no credible evidence that in any state in the country, the election results for president were not accurately reported and counted by their states. And yet here we are, with millions and millions of people believing the lie. And so it, to the extent that First Amendment doctrine is going to be driven by the marketplace of ideas approach, it's, it's based on a false, uh, assumption about how truth works today, and the idea that counter truth is always going to lead to the best solution.

[00:36:56] Now that doesn't mean, because at the same concerns that, that Catherine and Sarah do about a government bureaucrat deciding what's true and false, uh, or, um, a government law telling a private company, you a pri-, a company like Facebook should know more be able to be told, "You need to allow this person to speak as Fox News or The Atlantic or, or any other media outlet" of social media companies current content all the time. So I don't think the solution is censorship, but I don't think that our laws should flow from the marketplace of ideas approach. Let me talk about some, with some specifics of how this might make a difference. So for example, one of the concerns I have are deep fakes. These are, uh, using artificial intelligence to create manipulated video or audio to make it appear as though someone could be a presidential candidate, uh, has done something they haven't said or done like in a sexually compromised position or uttering a racial epithet or having a health crisis.

[00:37:55] And so one of the things that I propose in the book is that all altered and I have a kind of technical definition of all, all videos, an, an audio that is altered through, um, a certain kind of process that would count as a deep fake, needs to be labeled as altered. So that way, and it doesn't matter if it's satire, it doesn't matter what the person's purpose is. If it's an altered video, then altered appears, uh, on the video. And I think that that kind of law would help voters make more competent determinations as to the veracity of what they're seeing. And yet such a law would potentially fall into a problem under the Supreme Court's First Amendment doctrine, both in terms of a court that is increasingly showing itself unwilling to uphold disclosure laws. And I point to last term Supreme Court decision in *Americans for Prosperity Foundation v. Bonta*, as well as the compelled speech doctrine, which says in certain circumstances, "You can't make a private person say something," right?

[00:38:54] And here you'd be making someone who makes these, uh, uh, the speech for a social media company that carries a speech, include the word altered. So I, I have a, you know, kind of technical explanation for how I think we should address those questions and requiring the word altered. I think gives more information to voters. It's not censorship. It's not saying you can't put up that fake. It's saying we need to provide more information. So I give lots of examples in the book of that. And what I think is perhaps the most interesting, and I just wrote about this, not only in the book, but in a piece that I had at slate earlier this week is that we've seen a weird shift on the Supreme Court where justices who are seen as conserving the batarians like Justices

Gorsuch and Thomas who have at least Thomas taken the view that even disclosure laws violate the First Amendment and people should have a right to speak anonymously and, you know, hands, the government should have no business regulating campaign spending or anything like that.

[00:39:50] Here's Justice Thomas saying that you can require private companies to include Donald's Trump's speech if a state passes a law that does so. Analogizing these, uh, social media companies to telephone companies, to common carriers, rather than to say Fox News or, or The Atlantic. And Justice Thomas and, and Catherine could probably address as much better than I can. And Justice Gorsuch both suggested an agreement with Do-, Donald Trump to open up the libel laws to get rid of the actual malice standard, to make it easier to sue for defamation.

[00:40:21] I think that's really dangerous because we rely on the breathing space that the actual malice standard from the 1964 New York Times v. Sullivan gives. That's the one that says you, to, if you're a public official or public figure, if you have to speak with reckless district or knowledge of falsely in order to be, uh, liable for defamation. Lowering that standard is going to make things worse in our society, because people are not gonna be able to criticize the government, which is something I think is so important these days.

[00:40:52] Jeffrey Rosen: Thank you very much for all that. Sarah, um, what do you think of, uh, Justice Thomas and Gorsuch proposals to open up the libel laws? This is a vigorous debate among conservatives, so, uh, would love your thoughts and more broadly. What about Rick's claim that the marketplace of ideas metaphor is inspiring as it is doesn't descriptively apply in the age of cheap speech and just 'cause these quotations are so, uh, meaningful to read. I'm gonna put another one on the table that's so inspiring. This is Thomas Jefferson in a letter to William Roscoe. He says, "We have to have faith in the imitable freedom of the human mind. For here we are not afraid to follow truth wherever it may lead nor to tolerate any error. so long as reason is free to combat it, that inspiring faith, that reason will triumph when, uh, it's an battle with error." It, what, what do you make of those who say that, you know, is it's a great idea, but it's just not true descriptively, uh, in the age of the internet.

[00:41:53] Sarah Isgur: Okay. There's a lot here. I wanna try to get to it all as fast as I can. So I wanna address a couple things that Catherine, um, said, uh, and I just thought her book, by the way, was it just, it made my brain tingle in all the good ways. Um, I think I disagreed with large chunks of it and yet I loved reading it. So thank you and, and plugged for Catherine's book. Um, okay. So for instance, I am concerned about the law that Catherine proposes, uh, because of Bush v. Gore, right? Now, uh, Al Gore conceded and so I, again, I, I'm not trying to compare the two or say that there's this both sides is I'm going on, but rather I am concerned that a candidate who wants to run on the fact that Bush V Gore was a dangerous Supreme Court decision that handed the election to George Bush instead of Al Gore could potentially run a foul of Catherine's law.

[00:42:43] I, I'm calling it Catherine's law. Just forgive me. It's a fun shorthand for right now. And I'm also concerned on the impeachment standard, that she poses. Now, look, I'm not sure the impeachment standards that different than that. I don't have a problem telling Congress they can impeach a president if they don't like the way he sliced the, you know, crossed off his sandwich.

Um, high crime and misdemeanor to me fine. But you know, President Obama saying, you can, uh, "If you like your plan, you can keep your plan." Was labeled the lie of the year by politic fact checkers, whatever it was. And he kept repeating it.

[00:43:20] Is that then an impeachable offense under Catherine's law? Um, I hope not. Right? Like, uh, I obviously, um, you know, worked from at Romney's campaign in 2012. No, one's confused about where I come on the political spectrum, but I think impeachment are for, uh, something that cannot wait until the people of the United States can go back to the ballot box.

[00:43:42] And so that's where, again, it, it's not that I think Catherine and I necessarily disagree on the problems, but at least my job on this panel, um, is to point out my concerns with, again, a book that made my brain tingle and I really enjoyed it. Um, so, okay. Check, check on that. Now, let me get to some things that Rick said. So on the social media front and free expression, look, there's just some things that I think are, you know, if you believe in the free expression for social media companies, there's this case then called 303 creative for instance, about an individual who runs a website who doesn't want to, um, create a wedding website for a same sex couple, again, for me, this is more about consistency across the free speech spectrum.

[00:44:29] And that if you think social media company should have the right to, uh, to choose what speech they put on their website, surely then an individual website creator does as well. And I'm concerned sometimes about those cases not getting lumped together in some respects. And I think what he was saying about Justice Thomas and Justice Gorsuch, isn't quite how I interpret what they were saying. So, first of all, most recently Justice Thomas just this week was talking about Facebook and human trafficking and treating that as a, um, an act or omission by Facebook itself. And that, that shouldn't be covered by what Rick is describing, which is Section 230 of the Communications Act.

[00:45:13] Um, now Justice Thomas has also written about the liable defamation laws. I think it's fascinating that we're having a conversation about how dangerous, um, misinformation is, but then saying that we should keep a very high standard for being able to sue civilly, someone who does, um, promote misinformation because they're a news organization. And look that the, what Justice Thomas and Justice Gorsuch are pointing out is that there is nothing textual or originalist about why, for instance, um, a public figure gets a higher, uh, or a lower level of protection from defamation than someone who's private and the mess that the courts have made over who a public figure is.

[00:45:56] There's nothing about, uh, reckless disregard for the truth anywhere. If you publish something that's wrong about someone and it hurts them, then you pay damages and it's okay. It's not the end of the world. Uh, and so they're making a point about where the law is, not, I think a point as Rick is, um, correctly and smartly making about sort of what the law should be or about how to prevent misinformation or disinformation in our culture, in our society. And last thing I'll say is I do disagree with Rick, just fundamentally, the idea that the marketplace of ideas somehow doesn't work uniquely in 2022, but it used to work in, um, you know, 1795 or 1820 or 1865. The marketplace of ideas has never been about 100% of people, um, believing only the true things and not the false things. I don't think social media is unique in that regard.

[00:46:54] Um, you know, in 1820, it was very hard to get the truth out to people. You get one pamphlet and you're like, "I guess that's true." That's as much a deep fake as anything else. And yet over time, the marketplace of ideas works. And again, this goes to a fundamental belief in self-government and what the purpose of free speech is. Unfortunately it does result in voters believing things that are just false, but I think voters in 1820 believe probably the same percentage of false things that voters in 2022 did. The only difference now is voters have a lot more ability to find true things. And so in that sense, I'm totally on team Rick for again, um, more information on social media, putting the word altered on videos that are deep fakes. Although I think we have problems knowing what are deep fake videos. Uh, and I agree with him that they may run into some legal problems, but again, I'm, I'm from more information, more marketplace of ideas working, and I think it does still work.

[00:47:51] Jeffrey Rosen: Thank you so much for answering. So, uh, well, so many different, uh, strands. Catherine, I'm gonna ask you, this is the time to sum up the state of the debate on the Supreme Court about what kind of lies can be punished. What should our viewers know about the debate between justices Gorsuch and Thomas and the, and the rest of the court. And you believe that the marketplace of ideas, uh, metaphor, I think is outmoded and you would allow the punishing of lies that cause harm to democracy. Any would, is there anyone on the court who would agree with that and give us a sense of the future of the debate over the regulation of lies on the Supreme Court?

[00:48:32] Catherine Ross: Uh, there may be someone on the court for the next few months, Justice Breyer, um, who wrote separately in Alvarez. I, I am not confident, um, of even the, the liberal justices, uh, where they stand on that. One of the additional problems I didn't mention with the court's jurisprudence in this area is they signaled that lies may have some protection, but they're not like other kinds of protected speech because they couldn't tell us what level of scrutiny should be applied to lies. They could not agree on a standard. And for those who follow the court and jurisprudence, will understand that the level of scrutiny in a First Amendment case will almost always tell you what the outcome is going to be. And most speeches analyzed under the most demanding level of scrutiny, strict scrutiny. Uh, but these court stopped short of being able to tell us, and in fact, dropped a footnote saying, "We're not telling you what standard is going to apply to lies under the Alvarez. You need something more test."

[00:49:46] Uh, so that leaves the status of lies themselves very, um, in, in a very gray zone. Um, so in terms of defamation, I agree that to weaken the, uh, protection for the press and for people to criticize the government, which you included in your, in your opening remarks about defamation, uh, Jeff, long before there was social media, the court, they had said two things that really bear on this. In Sullivan they said, "This is all about speaking truth to power. It's an essential part of our system that we must be able to criticize the powerful." And if we, um, give up the constitutional protections that the court grafted onto common law, defamation doctrine, I think that is incredibly dangerous for democracy.

[00:50:45] That said, I also agree with Sarah that one of the main points that justices Thomas and Gorsuch are making is that the elevated standard for public figures has been applied increasingly broadly. And that the definition of public figures under Sullivan perhaps was not

intended to embrace Kim Kardashian, because now if you're any sort of no name, regardless of what you do, or even if you're in a small fishbowl, but the jury's gonna be drawn from your county and they all know who you are, um, then you qualify as a public figure and it's very hard for a public figure to win a defamation suit intentionally, to protect that ability to criticize the powerful.

[00:51:40] And that's something that not only newspapers need, but I think we all need it because if you wanna stand up on the conventional soapbox or on Twitter or wherever you go, and you're just a person who feels strongly about the way the government is being misrun, you should have that ability to be protected from not only a serious defamation suit, but from a weaponized demonstra-, uh, defamation suit, where a lot of powerful are going out and suing people who do not have deep pockets to give a message that you should just shut up and censor your own speech. And I think that would be an incredibly dangerous road to go down, but we could still narrow perhaps the application of the public figure doctrine. I'm probably gonna get pillaring tomorrow for even saying that.

[00:52:36] Jeffrey Rosen: Thank you so much for that. Thanks for so powerfully putting the point of Sullivan as you gotta be able to speak truth to power. Each of the panelists have so much to say about non-legal solutions to the deep democratic challenges that we're talking about today, but we will reconvene, um, to launch our guardrails reports, which our panelists are so centrally involved in and to learn more from them. 'Cause it is always a privilege to do that. In the meantime, friends, thank you for taking an hour out of your evenings to learn and grow and dig in deep with our scholars, uh, of such broad learning and, and different perspectives and read the books, uh, Cheap Speech: How Disinformation Poisons Our Politics—and How to Cure It, A Right to Lie? Presidents, Other Liars, and the First Amendment. And Sarah's wonderful pieces in The Dispatch and elsewhere. Sarah, Catherine, and Rick on behalf of all your friends at the National Constitution Center. Thank you for teaching us and learning with us. Thank you, friends for watching and look forward to seeing everyone again, soon. Goodnight.

[00:53:45] Tanaya Tauber: This episode was produced by Melody Raul, Lana Alrich, John Guerra, and me, Tanaya Tauber. It was engineered by Dave Stats. Visit constitutioncenter.org/debate, to see a list of resources mentioned throughout this episode, find the full lineup of our upcoming shows and for register to join us virtually. You can join us via Zoom, watch our live YouTube stream or watch our recorded videos after the fact in our media library at constitutioncenter.org/constitution. We're taking a little break, but we'll be back with more conversations soon. Be sure to subscribe so you'll never miss an episode. And if you like the show, please help us out by rating and reviewing us on Apple Podcasts or by following us on Spotify. On behalf of the National Constitution Center, I'm Tanaya Tauber.