

Alternative Facts, Political Lies and Freedom of Expression: A Paradigm of Trump's Administration

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Abstract: Fatti alternativi, bugie politiche e libertà di espressione: un paradigma dell'Amministrazione Trump – The article discusses the peculiar relationship between truthfulness and lies in politics, with a specific focus on the Trump administration and its unconventional use of social networks (mainly Twitter). A specific attention is devoted to the analysis of the several nuances of Trump's political speech and on the impact it has on the functioning of the US system of government. Finally, the relationship between political speech and freedom of expression is addressed, considering the existence of a sort of right to political truth.

Keywords: alternative facts; freedom of expression; social networks; political lies; Supreme Court

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*L'homme est de glace aux vérités;
Il est de feu pour les mensonges*

Jean de La Fontaine, *Le statuaire et la statue de Jupiter*, in *Fables*, Paris, 1991, 276-277

Ce n'était ni faux, ni vrai, mais vécu
André Malraux, *Antimémoires*, Paris, 1967, 414

1. Premise

Truthfulness has never been counted as a political virtue, points out Hanna Arendt when discussing the *Pentagon Papers*.¹ In another major essay, *Truth And Politics*,² Arendt follows up on the relationship between truth and politics, claiming that not only lies have always be inherent to the political discourse, but that they have been even regarded as necessary and justifiable tools to both the politician and the statesman.

¹ H. Arendt, *Lying in Politics. Reflections on the Pentagon Papers*, *The New Yorker Review*, 18 November 1971, 2, available at www.tramuntalegria.com/wp-content/uploads/2018/08/Lying-in-Politics-Reflections-on-The-Pentagon-Papers-by-Hannah-Arendt-The-New-York-Review-of-Books.pdf.

² H. Arendt, *Truth And Politics*, originally published in *The New Yorker*, 25 February 1967, and reprinted with minor changes in *Between Past and Future. Eight Exercises in Political Thought*, New York, 1968, 227-264. The page references are all to the Penguin edition.

The discussion on the relationship between truth and politics is as ancient as the world and surely does not start with Arendt. Nevertheless, Arendt was able to grasp in the progressive degradation of political speech glimpses of the future Trump's administration. Indeed, she identified in the transformation of political communication into advertisement and in the expansion of the media- in terms of accessibility and rapidity in the spreading of communication - the two major elements which were altering the traditional political speech.

The world has survived four years of Trump's administration, characterised by an obsessive, compulsive and narcissistic use of social networks (hereinafter SNs), Twitter in particular, and by unconventional political speech, generally - and improperly - labelled as fake news.

Indeed, the paper claims that to simply qualify Trump's speech as fake news is unfair with respect to the variety of nuances that Trump's speech acquires and this qualification seems to forget that the speaker is neither a private citizen nor a journalist; he is (was) the President of the United States. Because of his office, his speech is always political. This claim calls into question a series of critical issues with respect to the extent of the protection that should be granted to untrue political speech and to the system of remedies available against untrue political speech. The latter point introduces a further criticality, because it challenges the role of SNs and their economic model under Section 230 of the *Communication Decency Act*.

Hence, the paper aims at discussing Trump's political speech first within the framework of the relationship between truth and politics and second within the protection of speech under the First Amendment, in order to identify possible remedies against such untrue speech.

The paper is then structured in four parts. Par. 2 analyses the relationship between truth and politics, identifying the different typologies of political lies. Indeed, in the IT society, the concept of political lies has to be deconstructed into a variety of different concepts, spanning fake news, disinformation, misinformation, alternative facts, post-truth, bullshit; some of them may be partially overlapping, which strengthens the confusion on the issue. Par. 3 focuses on Trump's political speech, framing it according the different taxonomies drafted in par. 2 and tries to assess the impact of such a political speech on the functioning of the US system of government. Par. 4 discusses the remedies available against Trump's political speech and the rationale of the distinction between an untrue political speech and an untrue speech *tout court*. Hence, Par. 4 calls into question the role of courts and of SNs as well as the existence of a right to political truth and, more broadly of "alethic" rights as possible remedies. Finally, par. 5 draws some tentative conclusions.

2. The Relationship Between Truth and Lies in Politics: a Tentative Taxonomy

In the incipit of his *pamphlet On Bullshit*, Harry G. Frankfurt says that “One of the most salient features of our culture is that here is so much bullshit. Everyone knows this. ... In consequence, we have no clear understanding of what bullshit is, why there is so much of it, or what functions it serves.”³ However, the relationship between truth and politics has been addressed for many centuries by prominent authors (Plato,⁴ Augustine,⁵ Thomas Aquinas,⁶ Machiavelli,⁷ Hobbes,⁸ just to mention a few). Throughout the centuries, different aspects of the relationship have been stressed.

In Ancient Athens, the Socratic concept of *parresia* (παρρησία),⁹ analysed by Michel Foucault,¹⁰ opposes rhetoric; the former is the art to tell the truth, moving the individual closer to the real world and the latter distances the individual from the real world, concealing the truth. In his 1982-1983 course at the *Collège de France*, Foucault analyses the different typologies of *parresia* in Euripides’ tragedies: political *parresia*, moral *parresia* and judicial *parresia*. According to this distinction, the political *parresia* is the way to exercise power by telling the truth.¹¹ Foucault had already analysed the relationship between truth and government in a diachronic perspective in his 1979-1980 course at the *Collège de France*.¹² There, he identified five types of relationship between the art of government and truth corresponding to five ages. The first is the age of rationality (16th and 17th century), corresponding to the *raison d’Etat*. Therefore, the truth of the State leads the action of the government. The second is what he calls the *principe d’évidence* (18th century), where the government is dissolved in the empire of truths. The key idea here is that the foundation of the government are the numbers, that things are able to speak for themselves, therefore there is no need for a government. This principle is perfectly embodied by Quesnay’ physiocratic approach: if men were to govern following the rules of evidence, it were not them who ruled, rather, evidence itself. The third is the age of expertise (19th century), where a category of individuals specialised in the knowing of the truth, the experts, is developed. At the same time, Foucault observes, this age develops

³ H.G. Frankfurt, *On Bullshit*, Princeton, 2005, 1 (based on the essay *On Bullshit*, *Raritan Quarterly Review*, Vol. 6, No. 2, 1986, 81-100).

⁴ In *The Republic*, *The Laws* and *Gorgias* mainly.

⁵ See *On Lying* (*De mendacio*) and *To Consentius: Against Lying* (*Contra mendacium [ad Consentium]*).

⁶ In Part II, *Secunda secundae* of his *Summa Theologica*.

⁷ Mainly in *The Prince*.

⁸ In *The Leviathan*.

⁹ Word used for the first time by Euripides in the tragedy *Ion*, line 672.

¹⁰ Foucault devotes to the concept of *parresia* his inaugural lecture at the *Collège de France* and the course of the year 1982-1983, whose lectures have been published in *Le gouvernement de soi et des autres. Cours au Collège de France. 1982-1983*, Paris, 2008.

¹¹ *Id.*, 141-142.

¹² M. Foucault, *Du gouvernement des vivants. Cours au Collège de France. 1979-1980*, Paris, 2012, 14-18.

a mistrust, a suspicion towards the experts, as if they had something to hide. According to Foucault, the mistrust towards expertise is inherent to democracy. The fourth age corresponds to the so called Rosa Luxembourg principle (which may be updated into the Snowden principle) or *principe de la prise de conscience universelle*, according to which if everyone would know the truth, the regimes would collapse (she clearly referred to the capitalist regime). Foucault points out how Solženicyn challenged this principle, stating that in the socialist system everyone knew what was going on and that was precisely the reason the regime survived. Indeed, according to Solženicyn, to know the truth is the reason why nothing changes. The last age corresponds to the contemporary society, which Foucault qualifies as the age of terror, or *de la vérité qui glace*, where governments govern cynically and without decency. The final remark is that even though these ages are diachronically staged, they are not necessarily replaced by one another, meaning that the five principles founding the five ages may coexist.

Surely the issue of politics and truth has become of a particular interest with the progressive establishment of an accountable government. Up to that moment, the issue had raised mainly moral concerns. During the Renaissance¹³ and the absolutism, the art of dissimulation, for both the courtier and the sovereign, was the most prominent political virtue.¹⁴ However, political dissimulation is not necessarily overlapping with political lying. To be more precise, the absolute king does not lie, because he does not represent an accountable government and thus he does not have to explain his political action to anyone. Furthermore, none challenges him on that, because he reigns by a divine right. Consequently, the lie is a courtly matter, not a kingly one. To fake and to conceal emotions are the trump card of the prince, according to Machiavelli (chapter 18).¹⁵

The progressive building up of a more aware civil society and the establishment of a more accountable government and of a dialectic between the government and the opposition urge a new approach to the issue. Interesting insights are offered, in spite of the satirical point of view, in the *The Art of Political Lying* by Jonathan Swift.¹⁶ The *pamphlet* discusses

¹³ A master study has been recently published by J. Hankins, *Virtue Politics. Soulcraft and Statecraft in Renaissance Italy*, Cambridge MA, 2019.

¹⁴ As the literature of the 16th and 17th century tells us. See B. Castiglione, *The Book of the Courtier (Il cortegiano)*, 1520 and B. Gracián, *The Art of Worldly Wisdom (Oráculo Manual y Arte de Prudencia)*, 1647.

¹⁵ “But it is necessary to know how to hide this characteristic well and to be a great pretender. People are so simple, and so subject to present necessities, that anyone who seeks to deceive will always find someone who will allow himself to be deceived. ... Therefore it is unnecessary for a prince to have all the good qualities I have described, but it is very necessary to appear to have them.”

¹⁶ The first mention of the *pamphlet* appeared in Jonathan Swift's *Journal to Stella* in October 1712. Swift had received an outline for a book from his friend Dr Arbuthnot. Rather than write the projected book, Swift wisely chose to write a review of what it might have been. Therefore, the work is satirical review of a non-existent volume. C. Condren, *Satire, Lies and Politics. The Case of Dr Arbuthnot*, London, 1997.

political lying, analysing the role of truth and lie in politics and providing a taxonomy of political lies as well as a set of rules and advices to the politician. According to Swift, political lying is a very specific form of lying, clearly distinct from any other. Indeed, it is the art of convincing the people of salutary falsehoods for some end. The use of the term art is actually not anodyne; Swift employs this term to distinguish political lying from telling truth, which does not seem to require any art whatsoever. Nonetheless, the author recognises that there is indeed more art to convince the people of a salutary truth than of a salutary falsehood. Swift then proves that there are salutary falsehoods (as did before him, among others, Plato in *The Republic* and Machiavelli in *The Prince*). In spite of this, he advises carefulness to politicians - the government has not the monopoly of political lying -, in the sense that political lying has to respect a series of rules in order to achieve its target. Specific rules apply to specific typologies of political lying. Attention is also paid by the author to the celerity and the duration of a political lie. He identifies three sorts of lies: the detractor (defamatory), the additory, and the translatory. The detractory, or defamatory, is a lie which takes from a great man the reputation that belongs to him, for fear he should use it to the detriment of the public. The additory gives to a great man a larger share of reputation than belongs to him, to enable him to serve some good or purpose. Whilst the translatory is a lie that transfers the merit of a man's good action to another, who is in himself more deserving; or it transfers the demerit of a bad action from the true author to a person who is in himself less deserving. Some sort of rules are given with respect to the additory and to the defamatory: as to the former, when one ascribes to a person anything which does not belong to him, the lie ought to be calculated in order not to be contradictory to his known qualities, whilst as to the latter, the lie should not be quite opposite to the qualities the persons are supposed to have. Swift is thus establishing a connection between the political lie and some sort of plausibility. Political lying is the art of the middle ground; any lie has to be proportionate to the truth, the circumstances and the aim. Nevertheless, he considers that in certain circumstances, better, in proper occasions, it is useful that the political lie exceeds the common degree of probability, i.e. the miraculous. With respect to the people, the miraculous is divided into two sorts, the *το φοβερον* (terrifying lies) and the *τα θυμοειδες* (animating or encouraging lies). Again, the author sets some rules. Concerning the former, he argues that terrible objects should not be too frequently shown to the people lest they grow familiar and thus not frightened any more. As to the latter, he advises that they shall not exceed the common degrees of probability; that there should be a variety of them; and the same lie not obstinately insisted upon. Furthermore, when the encouraging lie is either a promissory or a prognosticating lie, it should not be upon short days, for fear the authors should have the shame and confusion to see themselves speedily contradicted. As to the *το τεραδωδες* (the

prodigious), he has little to advise, but that their comets, whales and dragons should be sizeable. When coming to the celerity of the spreading of a political lie, he says that it is almost incredible; lies travel at a prodigious rate (especially the terrifying ones). With respect to the duration, there are of all sorts. The author discusses two more points that are relevant to our times: how to fight a lie and what is the implication for the individuals of a political lie, namely, whether individuals are entitled to the right to political truth. When considering the former, the author phrases the issue quite plainly: is a lie best contradicted by truth, or by another lie? The answer is by another lie, considering the great propensity to believe lies in the generality of mankind. When coming to the latter point, the author argues that everyone lies, the politicians (government and the opposition) as well as people: the ministers deceive the people and the people slander the ministers to get rid of them. Political lying is democratic and a symbol of the English liberties. Furthermore, the author considers that there is no such a thing like the right to political truth. Different truths exist and he distinguishes the right to private truth, to economic truth and to political truth; people have a right to private truth from their neighbours, and economical truth from their own family; but that they have no right at all to political truth.

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The issue of political lying acquires a new relevance under the 20th century totalitarian regimes, whose combination of political lying and masses manipulation urged a different approach to the issue. Both George Orwell¹⁷ and Hannah Arendt¹⁸ have outlined the fact that the political speech is more and more disconnected from political facts and reality; truth, according to Arendt, can very well disappear from public life. When considering the approach to the fabrication of the lie, there does not seem to necessarily exist a substantive difference between the political lies under totalitarian and democratic regimes. However, what is different for sure is that in a democratic regime political lying is pluralistic, in the sense that a series of concurring political lies do exist. Democracy levels everything, including the political lying. This is not much different from Swift's discussion on who is entitled to lie, namely whether the government should be entrusted with the monopoly of political lying. Nonetheless, the totalitarian regimes have marked an upgrade in the scale of the fabrication of lies and in the extent of the manipulation of the truth. Sort of ministers of Truth had been created in Germany and Italy in the 1930s very alike to their Orwellian fictional counterpart. Democracies learnt the lesson. Indeed, as Arendt points out when discussing the *Pentagon Papers*, there is a commitment to non-

¹⁷ Orwell discusses the issue obviously in his masterpieces *Animal Farm* and *1948* and in a series of essays such as 'Politics & the English Language' (1946), in *Collected Essays, Journalism & Letters*, London, 1970.

¹⁸ Arendt discusses the issue in *Crises of the Republic* and in particular in the first of the four essays that compose the book, the already mentioned *Lying in Politics. Reflections on the Pentagon Papers* (note 1).

truthfulness in politics, which has proliferated throughout the ranks of all government officials. She argues that truthfulness has never been counted as a political virtue. However, things have evolved until a deliberate denial of a factual truth, which is coupled to the capacity to change facts. This depends on factual truths never being compellingly true; no factual statement - not even during a pandemic - can ever be beyond doubt. Arendt argues that up to a point the political lie never enters into conflict with neither reason nor reality; furthermore, lies are more plausible and appealing to reason than reality, until the liar gets to a point beyond which lying becomes counterproductive. What is particularly interesting in Arendt's reasoning is that she identifies a new variety of political lying in the public-relations managers in government. Politics is image-making, is the selling of a product that individuals will buy. The second new variety of political lying is identified in the so-called professional problem-solvers.

With her Platonic approach, Arendt follows on the analysis of the relationship between truth and politics in another major essay, *Truth And Politics*.¹⁹ Lies have always be inherent to the political discourse and have been regarded as necessary to both the politician and the statesman. Indeed, there is a preliminary question any politician/statesman has to address, namely whether it is always legitimate to tell the truth. Traditionally, political lies have been justified in the name of the survival of the state.²⁰ Besides, an interesting distinction that Arendt introduces is the one between rational truth (mathematical, scientific, and philosophical truths) and factual truth. The reason of the distinction, following Leibniz, comes from the belief of modern age that truth is neither given to nor disclosed to but produced by the human mind (very important distinction with respect to Trump's approach to the covid-19 pandemic). Furthermore, even though the most relevant truths in politics are factual, the conflict between truth and politics was first discovered and articulated with respect to rational truth. She continues "The opposite of a rationally true statement is either error and ignorance, as in the sciences, or illusion and opinion, as in philosophy."²¹ Arendt quotes James Madison "All governments rest on opinion". Spinoza proved right when stating that at "every man is by indefeasible natural right the master of his own thoughts." What is most stunning, according to Arendt, is that, although probably no former time tolerated so many diverse opinions on religious or philosophical matters, factual truth, if it happens to oppose a given group's profit or pleasure, is greeted today with greater hostility than ever before. The key point is not the existence of state secrets; every government must classify certain information, withhold it from public notice. Factual truth is progressively less and less tolerated and thus,

¹⁹ Arendt, *Truth And Politics*, note 2, 227-264.

²⁰ George W. Bush's claim of weapons of mass destructions by Saddam Hussein can be framed within this category.

²¹ Arendt, *Truth And Politics*, 232.

consciously or unconsciously, it ends up transformed into opinions. According to Arendt, factual truth is always related to other people, because it concerns events and circumstances in which many are involved; it is established by witnesses and depends upon testimony. Factual truth exists only to the extent that it is spoken about, even if it occurs in the domain of privacy. Hence, it is political by nature. Starting from here, she argues that seen from the viewpoint of politics, truth has a despotic character. It is therefore hated by tyrants, because they fear the competition of a coercive force they cannot monopolise. Unwelcome opinion can be argued with, rejected, or compromised upon, but unwelcome facts possess an infuriating stubbornness that nothing can move except plain lies. Arendt then provides an illustrative example of the dichotomy factual truth/opinion²² and the relationship with politics resorting to the *Declaration of Independence*. She recalls Jefferson's declaration that of certain "truths to be self-evident", arguing that he chose that wording, because he wished to put the basic consent among the men of the Revolution beyond dispute and argument. In other words, he conceded, probably unconsciously, that the statement "All men are created equal" is not self-evident but stands in need of agreement and consent. Indeed, equality is a matter of opinion, and not "the truth." What Arendt has discussed so far is that factual truth seems not to be a citizen anymore in contemporary democracy and that, therefore, is transformed into opinion. However, opinion is not the opposite of factual truth, nor it is neither error nor illusion. The opposite of factual truth is deliberate falsehood, or lie. And then she connects lie and opinion: "when the liar, lacking the power to make his falsehood stick, does not insist on the gospel truth of his statement but pretends that this is his "opinion," to which he claims his constitutional right."²³ This is frequently done by subversive groups, and in a politically immature public the resulting confusion can be considerable. In this framework, Arendt claims that organised lying is a marginal phenomenon;²⁴ unfortunately, this is not true anymore. Still, it remains particularly relevant the comparison between contemporary lies and traditional lies. The latter concerned only particulars and was never meant to deceive literally everybody; it was directed at the enemy and was meant to deceive only him (the injury inflicted upon truth is almost harmless) and those who are engaged in the business of deception belonged to the restricted circle of statesmen and diplomats (who knew the truth and could preserve it).

A further step on deliberate falsehood is provided by Harry G. Frankfurt in his already mentioned *pamphlet On Bullshit*. Indeed, Frankfurt goes a bit further, in the sense that he introduces the concept of bullshit, which is a

²² Here she follows Plato who in the *Timaeus* distinguished man capable of perceiving the truth and man who happen to hold the right opinion. Arendt, *Truth And Politics*, note 2, 240.

²³ Arendt, *Truth And Politics*, note 2, 249-250.

²⁴ Arendt, *Truth And Politics*, note 2, 251.

short of lying, meaning that although they do share some common features, they are not overlapping concepts. He adds that those who perpetrate bullshit misrepresent themselves in a certain way.²⁵ Then Frankfurt introduces distinctions between lying, bluffing and bullshit. The latter is in-between the two former. Both lying and bluffing are modes of deception or misrepresentation. However, the distinctive nature of lying is falsity, whilst the one of bluffing is fakery. Hence, the essence of bullshit is not that it is false, but that it is phony. Then he argues that even though bullshit is produced without any concern for truth, it need not to be false; indeed, the bullshitter fakes things.²⁶ It may sound a bit like a paradox, but the liar is far more concerned with truth than the bullshitter. The former knows the truth, the latter is unconcerned of it. What comes from this distinction is that, according to Frankfurt, people tend to be more tolerant of bullshit than of lies. When trying to answer the question why there are so many bullshits, Frankfurt considers that there is more communication, although there is no evidence of a significant increase in the information society. What he underlines, is that bullshit is very common in public life, where people are required to talk without knowing what they are talking about.²⁷ This is particularly evident in democracies, where it is considered a citizen's responsibility to have an opinion on everything.²⁸

Frankfurt bullshit who does not care for the truth has certain similarities with the concept of post-truth (also called post-factual politics and post-reality politics). Post-truth is strictly connected to political speech and can be considered as a very peculiar form of political speech, which largely appeals to emotion disconnected from the details of policy, and by the repeated assertion of talking points to which factual rebuttals are ignored. Like bullshit, post-truth is neither a distinguishing phenomenon of the IT society nor a lie or a fabricated fact. Indeed, post-truth relegates facts and experts opinions to be of secondary importance, favouring appealing to emotion.

Quite similar to post-truth is alternative facts. They both have a contempt for truth, in the sense that their aim is not to lie about the truth, but to offer the people an alternative truth. Post-truth and alternative fact are similar, because in the recent years both concepts have been connected to Kellyanne Conway. The very same notion of alternative facts was brilliantly coined by Conway, when defending White House Press Secretary Sean Spicer's false statement about the attendance numbers of Trump's inauguration as President of the United States. She claimed that Spicer was giving "alternative facts".²⁹ To be more precise, alternative facts conceal the

²⁵ Frankfurt, *On Bullshit*, note 3, 19.

²⁶ Frankfurt, *On Bullshit*, note 3, 46-48.

²⁷ Frankfurt, *On Bullshit*, note 3, 61.

²⁸ Frankfurt, *On Bullshit*, note 3, 62.

²⁹ During an interview with *Meet the Press* on the 22 January 2017.

truth³⁰ and they call into question relativism, in the sense that no objective truth does exist, and thus anyone manipulates truth according to their advantage. Furthermore, and here again we have to resort to Conway, alternative facts are not lies, because if you do not know the truth you cannot actually lie. Hence, how can it be a lie if you don't know which facts are true?³¹

When discussing the limits to the power of the absolute king, Grotius insisted, as Arendt recalls, that “even God cannot cause two times two not to make four.” He was invoking the compelling force of truth against political power.³² Grotius definitely didn't know a thing about alternative facts!

When considering political lies, a relevant category is represented by electoral lies, another broad category.³³ Following Norton, in the *mare magnum* of political lies, it has to be properly assess the impact that derives from political lies of governmental speakers, whose impact is obviously far greater on voters. Leaving aside for the moment the bullshit category, which does not care neither for lie nor for truth, a political lie is perpetrated for a specific purpose, which may be: political gain; financial gain; to avoid legal accountability; to undermine the notion of truth itself (Trump as the champion of the fight against fake news).³⁴ If one tries to focus on Trump speech whose content is strictly political, in the sense that it is connected to electoral campaign (nothing is more political than this), we can distinguish: lies about the voting mechanisms (the alleged fraudulent character of postal voting); lies about a candidate credentials; lies about the source of speech (Trump's campaign against “mainstream” media³⁵). When examining the timing of the lie with respect to the election: preventative lies (mainly about voter fraud); post-election lies about the other side campaign (Trump claim that former President Obama had wiretapped his campaign); post-election lies about voter fraud. When coming to the means of transmissions, the main difference is between “traditional” media, both mainstream and partisan, and SNs. Finally, the audience is not a relevant parameter, because of the widespread penetration of the SNs.

³⁰ M. Revault d'Allonnes, *La Faiblesse du vrai, ce que la post-vérité fait à notre monde commun*, Paris, 2018.

³¹ See Conway comment on Trump's false claim about NBC's Lester Holt to be a democrat. J. Holmes, *Trump's Campaign Manager Offered Her Most Brilliant Defense Yet of Trump's Lies*, *Esquire*, 26 September 2016, available at www.esquire.com/news-politics/news/a48906/trump-campaign-manager-lester-holt/.

³² Arendt, *Truth And Politics*, note 2, 240.

³³ For a taxonomy, which is partly overlapping with the one provided above of fake news, see H. Norton, *(At least) Thirteen ways of looking at election lies*, *Oklahoma Law Review*, Vol. 71, No. 1, 2018, 117-139.

³⁴ In recent months, a number of politicians and public figures have repurposed the phrase “fake news” to describe reports from traditional news publishers that they dislike or find unflattering.

³⁵ An interesting approach to this is in S.R. West, *Suing the President for First Amendment Violations*, *Oklahoma Law Review*, Vol. 71, No. 1, 2018, 321-346.

And then comes the IT society and the phenomenon that goes very generally under the name of fake news, which has progressively become more and more critical in present-day society for two main reasons. First, because fake news has turned into a good which is produced, circulated and consumed. To put it straight: fake news make money. Second, the global reach; fake news spreads globally at an extraordinary pace thanks to the technical tools of the IT society (mainly SNS)³⁶. Therefore, the fact that fake news is information fabricated in order to manipulate and influence opinions and behaviours around the world is not critical per se. Indeed, fabricated information is not a distinctive trait of our society; it has always existed, in particular as a form of political speech, as it has already been discussed. However, fake news is something much broader than both political speech and political lying. Therefore, even though not all the nuances of fake news may be relevant with respect to the present analysis, it seems nonetheless convenient to discuss the issue of the definition of fake news, precisely in order to identify those nuances.

The concept of fake news is connected to a variety of definitions, all of which tend to be broad in their scope. As a result, no universal agreement exists on what is a fake news. This lack of agreement entails three other major disagreements: where actually the problem lies, how to frame it³⁷ and how to solve it. Almost all players involved in the IT society, institutions, traditional media and SNS, have their own definition of fake news, which reflects their perception of the problem.³⁸

The European Commission defines fake news as “intentional disinformation spread via online social platforms, broadcast news media or traditional print”,³⁹ whilst a report by Facebook defines it as “a catch-all phrase to refer to everything from news articles that are factually incorrect to opinion pieces, parodies and sarcasm, hoaxes, rumours, memes, online abuse, and factual misstatements by public figures that are reported in otherwise accurate news pieces.”⁴⁰ The BBC qualifies fake news as “false information deliberately circulated by hoax news sites to misinform, usually for political or commercial purposes”,⁴¹ thus distinguishing it from properly false news, whilst the Guardian favours the definition of “fictions deliberately fabricated

³⁶ H. Margetts & P. John, S. Hale & T. Yasseri, *Political Turbulence, How Social Media Shape Collective Action*, Princeton, 2016.

³⁷ E.C. Tandoc Jr & Z. Wei Lim & R. Ling, *Defining ‘Fake News’. A typology of scholarly definition*, *Digital Journalism*, Vol. 6, No. 2, 2018, 137-153.

³⁸ France has coined her own word to translate the English fake news: *infox*, i.e. an information which is toxic.

³⁹ Public consultation on fake news and online disinformation, 13 November 2017.

⁴⁰ J. Weedon & W. Nuland & A. Stamos, *Information Operations and Facebook*, available at fbnewsroom.us.files.wordpress.com/2017/04/facebook-and-information-operations-v1.pdf.

⁴¹ BBC, *Written evidence submitted by the BBC (FNW0114)*, available at data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/culture-media-and-sport-committee/fake-news/written/48758.html.

and presented as non-fiction with intent to mislead recipients into treating fiction as fact or into doubting verifiable fact.”⁴² The disagreement on the definition of fake news affects the academia too, where, as Alemanno suggests,⁴³ the most persuasive definition seems to be the one by Allcott and Gentzkow as “news articles that are intentionally and verifiably false, and could mislead readers.”⁴⁴

An interesting classification is offered in *The Conversation*,⁴⁵ which distinguishes: 1) Reports that are knowingly, and mischievously, false. 2) Reports in the mainstream media that are false. This category is different from the former because of the subject which is spreading the fake news, a mainstream media, which spreads a news that it believe to be true. 3) Manipulated news reports, stories twisted out of context, or phoney photos and videos posted online to create misleading impressions. 4) State propaganda inserted into the news cycle by foreign states. 5) Stories that are “spun” by PR firms and advertisers using pseudo news and events to attract publicity and advertising revenues. 6) Parody content.

Another taxonomy provided by Claire Wardle on *First Draft*⁴⁶ suggests that, in order to identify the types of information and, more generally, of online content that could be considered as fake news, three elements have to be considered: first, the different types of content that are being created and shared; second, the motivations of those who create this content; and third, the ways this content is being disseminated. On the basis of these elements, seven types of online content can be identified: 1) Satire or parody. Although such content does not intend to cause harm, it may fool. 2) False connection. It is when headlines, visuals or captions don’t support the content. 3) Misleading content. This implies the misleading use of information to frame an issue or individual. 4) False context: when genuine content is shared with false contextual information. 5) Imposter content: when genuine sources are impersonated. 6) Manipulated content: when genuine information or imagery is manipulated to deceive. 7) Fabricated content: when content is false and designed to both deceive and do harm.

This last taxonomy is particularly helpful, because it puts forward two other terms, which are disinformation and misinformation. The former would be defined as false, inaccurate, or misleading information designed, presented

⁴² The Guardian, *Written evidence submitted by Guardian News & Media (FNW0096)*, available at data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/culture-media-and-sport-committee/fake-news/written/48259.html.

⁴³ A. Alemanno, *Editorial: How to Counter Fake News? A Taxonomy of Anti-fake News Approaches*, *European Journal of Risk Regulation*, Vol. 9, No. 1, 2018, 1-5, 2.

⁴⁴ H. Allcott & M. Gentzkow, *Social Media and Fake News in the 2016 Election*, *Journal of Economic Perspectives*, Vol. 31, No. 2, 2017, 211-236.

⁴⁵ ‘Debate: The legal fight against ‘fake news’ must not veer into censorship’, 11 June 2018, available at theconversation.com/debate-the-legal-fight-against-fake-news-must-not-veer-into-censorship-98049.

⁴⁶ ‘Fake news. It’s complicated’, 16 February 2017, available at firstdraftnews.org/latest/fake-news-complicated/

and promoted to intentionally cause public harm or for profit, whilst the latter as the inadvertent or unintentional spread of false or inaccurate information without malicious intent.⁴⁷ However, it is convenient to point out again that Trump's aim is neither to inform, nor to mis/disinform.

Damian Tambini of LSE proposes a similar taxonomy, considering that the concept of fake news is ill-defined.⁴⁸ He thus distinguishes: 1) Alleged foreign interference in domestic elections through fake news. 2) Ad-driven invention. 3) Parody and satire. 4) Bad journalism. 5) News that is ideologically opposed. 6) News that challenges orthodox authority.

Cook and Lewandowsky too, in their *Debunking Handbook 2020*,⁴⁹ distinguish misinformation, disinformation and fake news respectively as a false information that is disseminated, regardless of intent to mislead, a misinformation that is deliberately disseminated to mislead and a false information, often of a sensational nature, that mimics news media content. According to these definitions, misinformation turns into the founding ground of disinformation.

When examining the fake news taxonomies above, what emerges is the variety of definitions and nuances, which, nonetheless, share main common elements. Indeed, it is possible to argue that the very same label of fake news is quite improper, not all the online content that usually goes under this label is neither fake nor news. Hence, a certain caution is required, when applying the fake news narrative to political speech and to political lies. Political lies are, to a certain extent, inherent to political speech. Furthermore, it is convenient to point out that several taxonomies include parody and satire, which because of the strong connection with political speech they have, can be qualified as political speech themselves.

3. Trump and the Alternative Facts

The Trump administration represents the paroxysm of an already existing phenomenon, perfectly outlined by Arendt, i.e. the progressive detachment of politics from factual truth and the concurrent transformation of political communication into advertisement. The upgrade of the degradation of political speech is symbolised by post-truth and alternative facts. It is this new form of communication - which, as discussed above, considers truth irrelevant, because truth is relative, thus many truths do actually exist - that has put under strain the traditional relationship between truth and politics. The last decades have been punctuated by a series of political lies, which have grown bigger and bigger (such as Saddam Hussein's alleged weapons

⁴⁷ R. Wingfield, *A Human Rights-Based Approach to Disinformation*, 15 October 2019, available at www.gp-digital.org/a-human-rights-based-approach-to-disinformation/.

⁴⁸ D. Tambini, *Fake News: Public Policy Responses*, *LSE Media Policy Brief*, 20 March 2017, available at blogs.lse.ac.uk/medialse/.

⁴⁹ S. Lewandowsky & J. Cook & U.K. Ecker *et al.*, *The Debunking Handbook 2020*, 2020, available at sks.to/db2020.

of mass destruction); nonetheless, it was still possible to frame them within the traditional pattern of political lies or, better, in at least one of the five relationship between government and truth discussed by Foucault. When examining Trump's political speech, what strikes most is that political lying does not seem anymore to be a mere political tool, as it had been so far. On the contrary, it seems that lying is his fuel.

This part aims at framing Trump's political speech with respect to the taxonomies of political lies, alternative facts and fake news discussed in the previous part. Nonetheless, it is not the purpose of the paper to review all Trump's lies. The media have reviewed and counted the majority of them.⁵⁰ Clearly Trump hasn't followed any of Swift's rules for a plausible lie. His approach to political lying is the paroxysm of the age of terror described by Foucault, where political communication has lost any sense of decency. This can be perfectly explained by resorting to Arendt's approach, which, despite dating back to the 1970s, is very appropriate to 2020. Even though Arendt does not go so far as to depict alternative facts, three main points of her reasoning can be applicable to Trump. First, the disregard not only for factual truth, but also for rational truth, in particular the one deriving from science, i.e. scientific truth. Second, the despotic character of truth. Truth has a coercive force and people like Trump fear the competition of truth, because they have no control upon it. Hence, the disregard for it and the claim that truth is relative, which implies that it does not exist. Third, the transformation of political communication into advertisement. From the merge of the three Arendt's points you get alternative facts.

Every single political speech by Trump or by his advisers refers to alternative facts, which are conveyed by using a specific vocabulary.⁵¹ Alternative facts do share some common features with some of the nuances of fake news discussed above. None can doubt that alternative facts manipulate the audience, that the manipulation is intentional and aims at a personal gain, thus corresponding to the definition of disinformation provided by Wardle on *First Draft*. However, it does not seem convenient to

⁵⁰ An example on his speeches on covid-19, is CNN's D. Dale & T. Subramaniam, *Trump made 33 false claims about the coronavirus crisis in the first two weeks of March*, CNN, 22 March 2020, available at edition.cnn.com/2020/03/22/politics/fact-check-trump-coronavirus-false-claims-march/index.html and by T. McCarthy, *'It will disappear': the disinformation Trump spread about the coronavirus – timeline*, *The Guardian*, 14 April 2020, available at www.theguardian.com/us-news/2020/apr/14/trump-coronavirus-alerts-disinformation-timeline. Furthermore, CNN has launched Facts First (edition.cnn.com/factsfirst/politics), with a specific section devoted to Trump's speech (for the most recent on the campaign, see edition.cnn.com/specials/politics/fact-check-politics). The BBC has fact-checked all Trump's speech on the elections; see *Reality Check Team, US election 2020: Donald Trump's speech fact-checked*, BBC, 7 November 2020, available at www.bbc.com/news/election-us-2020-54837926.

⁵¹ On *USA Today*, William Cummings has made a review of the Trumpian glossary. See W. Cummings, *'Alternative facts' to 'witch hunt': A glossary of Trump terms*, *USA Today*, 16 January 2018, available at eu.usatoday.com/story/news/politics/onpolitics/2018/01/16/alternative-facts-witch-hunt-glossary-trump-terms/1029963001/.

qualify Trump's speech as disinformation, because the main aim of political speech is not to inform the audience. To inform is the media's job. Furthermore, the personal gain which Wardle connects to disinformation is inherent to any political speech, in the sense that personal gain corresponds to the success of the politician. However, when considering Trump, his personal gain is much broader than this. If we go back to Norton's proposed purposes of political lying - political gain; financial gain; to avoid legal accountability; to undermine the notion of truth itself - it is possible to argue that Trump embodies all of them.

Tambini's taxonomy is of particular interest when talking about Trump with reference to its n. 5 definition, which perfectly matches Trump's own definition of fake news: any news story he finds unflattering or that might hinder his agenda.⁵² In several occasions, Trump has lashed out against what he defines as mainstream media, qualifying them as a source of fake news and threatening them to intervene in order to stop them.⁵³ Sonia West examines Trump's approach against the mainstream media as a possible infringement of the First Amendment.⁵⁴ This definition by Tambini and shared also by West corresponds to Norton undermining the notion of truth itself considered as one of the purposes of political lying.

A relevant portion of Trump's alternative facts, especially in 2020, are connected to the covid-19 pandemic and the elections. The former, as already outlined when discussing Arendt, calls into question the relationship between rational truth, factual truth and politics as well as the role of scientists and experts with respect to government (see Foucault's age of expertise). Whilst the latter calls into question electoral lies and their impact on the electoral process.

When considering Trump's approach to the pandemic,⁵⁵ it could be defined as a combination between denial of the existence of an actual pandemic and downgrading covid-19 to a mere flu. Even though virologists still debate on covid-19 and propose different countermeasures, scientific evidences do exist, making possible to elaborate a rational truth. Following again Arendt, scientific truth, deriving from scientific analysis and experience, is one of the typologies of rational truth. As recalled above, although she considers that the main opposition is between factual truth and politics, rather than between rational truth and politics, she concedes that the conflict between truth and politics developed from the latter. However, when providing for the opponent of a rational (scientific) truth, she mentions either error or

⁵² The definition is also to be found in W. Cummings's glossary.

⁵³ The chant "CNN sucks" has become a classic moment at any Trumpian rally.

⁵⁴ S.R. West, *Suing the President for First Amendment Violations*, note 35.

⁵⁵ A detailed account of Trump's (non)strategy against the pandemic is in S.L. Greer, 'Debate: Trump's Response to the Covid-19 Emergency', in M. Del Pero & P. Magri (Eds.), *Four Years of Trump. The US and the World*, Milan, 2020, 88-111, available at www.ispionline.it/sites/default/files/pubblicazioni/ispireport_four_years_trump_2020_0.pdf#page=88.

ignorance; whilst opinion is considered opposite to the rational (philosophical) truth. None would argue with Arendt, when she opposes rational (scientific) truth and ignorance. None would argue either with the fact that politicians are not scientist, therefore it is not their ignorance to be a problem per se. The government can resort to experts in order to scientifically found its decision. Again, Trump takes to paroxysm what Foucault had identified as one of the main features of democracy, i.e. the mistrust towards experts. The cause of this mistrust can be traced back to what Arendt calls the despotic character of truth. Rational (scientific) truth is in Trump's mind much more despotic than factual truth. There is not trace in Trump's approach to the pandemic of a serious reasoning upon the role of experts in democracy. Furthermore, experts should act with the interests of the general public in mind,⁵⁶ something that is in conflict with one of Trump's speech key traits, i.e. personal interest. Again, even in such a sensitive domain as public health, Trump abides by post-truth, appealing to the emotions and to the worst instincts of the people, as all the other populist leaders of the globe have done. Besides, again and again his political speech on the pandemic presents alternative facts; he doesn't even bother to refute any single rational (scientific) truth on the pandemic, he simply dismisses rational truth altogether, because it doesn't serve its personal interests. One of the ways used to downgrade the seriousness of the virus has been to continuously delegitimise his experts in person of dr Anthony Fauci. In his relationship with dr Fauci and in the overall handling of the pandemic Trump's alternative reality pops up again. When realising that the pandemic was seriously threatening his re-election, Trump's campaign felt the need to get dr Fauci's endorsement and to have him praising the president's handling of the pandemic. In an advert boastings Trump's response to the pandemic released on 10 October 2020, dr Fauci can be heard saying "I can't imagine that ... anyone could be doing more". Dr Fauci himself had to step in, claiming that the comments attributed to him without his permission were out of context.⁵⁷

Electoral lies have been Trump's main occupation in the last months. Going back to Norton's classification of electoral lies, it turns out that Trump fits all of them. We had lies about the voting mechanisms (the alleged fraudulent character of postal voting), both previous to the election day and afterwards; lies about a candidate credentials, together with post-election lies about the other side campaign (Trump claim that former President Obama had

⁵⁶ Dewey argues that in the end experts are inevitably removed from common interests and become a class with private interests. As he pointed out in a much quoted claim in his 1927 *The Public and Its Problems*: "No government by experts in which the masses do not have the chance to inform the experts as to their needs can be anything but an oligarchy managed in the interests of the few." Dewey was thus opposing the technocratic government advocated by Walter Lippmann in *Public Opinion*, 1922.

⁵⁷ L. Aratni, *Anthony Fauci criticises Donald Trump for using his words out of context*, *The Guardian*, 11 October 2020, available at www.theguardian.com/us-news/2020/oct/11/anthony-fauci-criticises-donald-trump-for-using-his-words-out-of-context.

wiretapped his campaign); lies about the source of speech (Trump's campaign against mainstream media, as already outlined).

4. Alternative Facts and the Law: Tentative Remedies

The paper so far has discussed the fact that the conflict between truth (either factual or rational, to follow Arendt again) and politics is as ancient as the world. The totalitarian regimes of the 20th century further called into question the role of truth in politics. The massive development of the media together with the progressive transformation of political speech into advertisement had degraded even more the relationship between politics and truth. SNs and the post-truth completed the picture. Clearly Trump and Trumpism are also the product of specific crisis, which started with September 11 and culminated in the economic crisis of 2007-2008. Since then, a series of populist/sovracist leaders have popped up throughout the globe, even in democratic regimes. However, none of them has been like Trump; none of them has reached the peak of alternative facts of Trump presidency.

Hence, the question arises: is there a place for the law in the picture? Has the law ever addressed the issue of political lies? Should new remedies be made available in the IT society, dominated by the pervasive role of SNs? Furthermore, can actually Trump's political speech deconstruct the checks and balances of US democracy? Are the checks and balances alternative facts-proof? Electoral integrity (more generally, the integrity of the whole electoral process) and freedom of speech (First Amendment) are at stake. More precisely: does the integrity of the electoral process require political/electoral speech to be truthful? Does the First Amendment protect political lies? Furthermore, Trump's campaign against the mainstream media can be interpreted as an infringement of the media's First Amendment? Should power be checked with respect to truth? And to what extent?

This part will try to answer these questions. The discussion can be structured following four main lines: the model of protection of freedom of speech under the First Amendment, in order to assess the viability of legislation limiting untrue (political/electoral) speech, calling into question the balance between different rights and freedoms; the role of the checks and balances of the US government; the role of the media and, in particular, of SNs; the viability of the strengthening of specific set of rights - such as the right to education and rights connected to the information - as the most suited countermeasures against Trumpian alternative facts, but, more generally against fake news and post-truth.

The key issue is that misinformation, disinformation, fake news, bullshit, post-truth, alternative fact all call into question the existence of a right to the political truth. Swift had strongly denied the existence of such a right.

Hence, if we follow up on Swift, nothing should be done to redress the political truth. That would be too simplistic.

John S. Mill in the incipit of *On Liberty's* chapter 3 concedes that, even though “human beings should be free to form opinions, and to express their opinions without reserve,” their “actions should [not] be as free as opinions. ... On the contrary, even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act.”⁵⁸ Interestingly enough that the need for some limit to freedom of speech comes from Mill. However, it is difficult to understand Mill’s definition of a mischievous act; few lines later, he mentions the example of the corn-dealer and of certain speech that can excite the mob against him. The question remains unanswered: what about political speech endangering the integrity of the electoral process or the health of the individuals? Is not the result of such a speech a mischievous act?

In the US, political speech is granted the greatest protection of all.⁵⁹ According to the Supreme Court, the right “to inquire, to hear, to speak, and to use information is a precondition to enlightened self-government and a necessary means to protect it.”⁶⁰ The First Amendment doctrine relies on an inherent mistrust of government power. Hence courts tend to strike down restrictions on speech, subjecting those laws to strict scrutiny, thus placing on the government the burden to prove that the restriction “furthers a compelling interest and is narrowly tailored to achieve that interest.”⁶¹

However, when considering legal remedies against government lies, the First Amendment does not expressly protect government’s speech (opposite to non-government speech), thus government speech may, under specific

⁵⁸ J.S. Mill, *On Liberty*, 1859, Ch. 3: “Such being the reasons which make it imperative that human beings should be free to form opinions, and to express their opinions without reserve; and such the baneful consequences to the intellectual, and through that to the moral nature of man, unless this liberty is either conceded, or asserted in spite of prohibition; let us next examine whether the same reasons do not require that men should be free to act upon their opinions—to carry these out in their lives, without hindrance, either physical or moral, from their fellow-men, so long as it is at their own risk and peril. This last proviso is of course indispensable. No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.”

⁵⁹ Among others, see *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (“Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (“The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions.”).

⁶⁰ *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

⁶¹ *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007).

circumstances, be constrained by the constitution itself.⁶² More precisely, some government lies about voting matters can violate the Due Process Clause; more generally, a violation of the Clause happens when the government lies directly deprive individuals of life, liberty, or property or when they are sufficiently coercive of their targets to constitute the functional equivalent of such deprivations.⁶³ Furthermore, it cannot be disregarded the fact that when the speaker is a government official, his speech would strengthen the threat that his election lies pose to key constitutional values. It is then of paramount importance to distinguish who is lying in politics: a private citizen, a candidate, an incumbent or an incumbent who is also a candidate.

The potentially disruptive effect of government, not even saying presidential, lies (in all the varieties discussed above) is not properly assessed, in particular with respect to certain audience, which may be more inclined to believe it and more resistant to rebuttal by counter speech. As John Mearsheimer put it, the costs of government lies include thwarting the public's ability to hold government accountable for misconduct, frustrating citizens' ability to make informed voting choices, undermining the policy-making process when participants cannot rely on others' assertions, and alienating the public's faith in democratic governance.⁶⁴ Nevertheless, to limit governmental lies is not costless, in particular with respect to the risks of undermining the separation of powers and to the chilling effect on governmental speech. If one would rely on constitutional adjudication, the separation of powers could make judges reluctant to enforce constitutional limitations on the government's lies, because that would require courts to evaluate the policy choices of the politically accountable branches. However, the Supreme Court⁶⁵ has clearly stated the courts' competence to check upon the government action (speech included) possibly undermining constitutional values or when manipulating the electoral process.⁶⁶ When considering the potential chilling effect of speech regulation, such regulation would be a threat to valuable private speech as well as to valuable governmental speech.⁶⁷ However, not all speech is equally relevant (such as

⁶² H. Norton, *The Government's Lies and the Constitution*, *Indiana Law Journal*, Vol. 91, No. 1, 2015, 73-120. See also *Lies and the Constitution*, *The Supreme Court Review*, Vol. 2012, No. 1, 2013 161-201.

⁶³ See *Caruso v. Yamhill Cnty.*, 422 F.3d 848, 863-64 (9th Cir. 2005) (raising the possibility that false ballot speech could violate the Due Process Clause, while finding that the contested ballot speech was not misleading); *McLaughlin v. North Carolina Bd. of Elections*, 65 F.3d 1215, 1227 (4th Cir. 1995).

⁶⁴ See J.J. Mearsheimer, *Why Leaders Lie. The Truth About Lying in International Politics*, Oxford, 2011, 5.

⁶⁵ See, *ex multis*, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

⁶⁶ See *Reynolds v. Sims*, 377 U.S. 533 (1964) (striking down state legislatures' refusal to reapportion state legislative districts to reflect major demographic changes as violation of Equal Protection Clause requirement of "one person, one vote").

⁶⁷ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable

commercial speech⁶⁸); deliberately false speech should not be awarded any protection. Nevertheless, as recalled above, there are certain circumstances when political lies are valuable, because motivated by specific public purposes. This is surely not the case of Trumpian alternative facts.

Rather than a constitutional approach (violation of the Due Process Clause), tailored statutory alternatives could be more suitable in order to contrast specific government lies that may seriously affect the integrity of the legal system.

In the US, legislation regulating political speech does exist at state level.⁶⁹ Indeed, false campaign speech and election speech may be regulated under state law. However, even though regulations were to be implemented, a distinction has to be made between campaign speech and the broader political speech. Indeed, state legislations limiting political speech circumscribe these limits to the period of the electoral campaign. The reason is the protection of the integrity of the electoral process.⁷⁰ However, even when such a legislation does exist, the focus is to regulate lies told by private speakers (and then whether the government is permitted to intervene under the First Amendment). All legislation restricting public discourse, when challenged before courts, is subject to the strict scrutiny.

The approach of the Supreme Court to deliberate falsehood has recently departed from earlier rulings, stating that false speech was valueless. As stated in *Gertz v. Robert Welch, Inc.*, “there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”⁷¹ Nonetheless, in *Alvarez*,⁷² six Justices supported the conclusion that intentional lies are protected under the First

in free debate. ... And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.”); *New York Times Co. v. Sullivan*, 376 U.S. 254, 282–83 (1964) (concluding that the imposition of damages liability for merely negligent false statements about public officials threatens to chill valuable political criticism).

⁶⁸ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n. 24 (1976) (“[C]ommercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely. Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.”).

⁶⁹ J.S. Sellers, *Legislating Against Lying in Campaigns and Elections*, *Oklahoma Law Review*, Vol. 71, No. 1, 2018, 141-165.

⁷⁰ In 2018 France passed a legislation to prevent news manipulation during the electoral campaign, Loi n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information. The text is available in French at www.legifrance.gouv.fr/jorf/id/JORFTEXT000037847559/.

⁷¹ 418 U.S. 323, 340 (1974); see also *Time, Inc. v. Hill*, 385 U.S. 374, 389-90 (1967) (“[T]he constitutional guarantees can tolerate sanctions against calculated falsehood without significant impairment of their essential function. We held in *New York Times* that calculated falsehood enjoyed no immunity in the case of alleged defamation of a public official concerning his official conduct.”).

⁷² *United States v. Alvarez*, 567 U.S. 709 (2012).

Amendment. The plurality decision, authored by Justice Kennedy and joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor, found the Stolen Valour Act (SVA) to give the government a broad censorship power. Justice Alito, dissenting together with Justices Thomas and Scalia, considered the SVA as “a narrow statute that presents no threat to the freedom of speech”⁷³ as far as it sanctioned “only knowingly false statements about hard facts directly within a speaker’s personal knowledge.”⁷⁴ Justice Alito stated that “[t]ime and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value.”⁷⁵ Hence, false speech can be granted protection under the First Amendment only when necessary to preventing the chilling effect on speech.⁷⁶

Again, the problem with respect to Trump alternative facts is the relationship they have with truth and falsehood, because they are drafted not as blatantly false/fabricated speech, rather as a concurring (alternative) interpretation of a fact.

Indeed, in the wake of Alvarez, a surprising number of states had laws - very rarely enforced - prohibiting false campaign speech, election speech, or both,⁷⁷ that, when challenged, were struck down.⁷⁸

However, considering that the Supreme Court itself has stated that not all speech is equally relevant, a political lie, aiming at personal gain (Eugene Volokh talks of paying job in a comment to *Alvarez*), should be considered as a financial fraud, thus not falling under the First Amendment protection.⁷⁹ An interesting approach to the viable limits to electoral lies is by James Weinstein.⁸⁰ He argues that so far, most courts, when scrutinising laws prohibiting lies in political campaigns, approached them as if they were content-based restriction on public discourse, thus subjecting them to strict scrutiny, which almost always leads to the law’s invalidation. Weinstein suggests not to consider those laws as regulations within the domain of public discourse (where actually the government action is strictly limited), rather, to consider them as regulations of speech in the election domain,

⁷³ *Id.*, 739 (Alito J., dissenting).

⁷⁴ *Id.*

⁷⁵ *Id.*, 746.

⁷⁶ *Id.*, 750.

⁷⁷ *E.g.* Alaska Stat. § 15.13.095(A) (2010); Colo. Rev. Stat. § 1-13-109 (2012); Fla. Stat. Ann. § 104.271 (West 2008); La. Rev. Stat. Ann. § 18:1463(C) (2011); Miss. Code Ann. § 23-15-875 (2007); N.C. Gen. Stat. § 163-274(A)(8) (2011); N.D. Cent. Code § 16.1-10-04 (2007); Or. Rev. Stat. Ann. § 260.532 (West 2009); S.D. Codified Laws § 12-13-16 (Supp. 2012); Tenn. Code Ann. § 2-19-142 (2003); Utah Code Ann. § 20a-11-1103 (West 2010); Wash. Rev. Code Ann. § 42.17a.335 (West 2012); W. Va. Code Ann. § 3-8-11 (West 1995); Wis. Stat. Ann. § 12.05 (West 2004).

⁷⁸ Sellers, *Legislating Against Lying in Campaigns and Elections*, note 69, 150 *et seq.*

⁷⁹ E. Volokh, *Freedom of Speech and Knowing Falsehoods*, 28 June 2012, available at volokh.com/2012/06/28/freedom-of-speech-and-knowing-falsehoods/.

⁸⁰ J. Weinstein, *Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibition of Lies*, Vol. 71, No. 1, 2018, 167-236.

where the government can actively intervene to ensure the integrity of the electoral process. Nonetheless, when considering Trump's electoral alternative facts, it would be very difficult to narrowly frame the case without risking to violate the First Amendment.

A collateral issue related to the First Amendment and Trump's political speech is when the President poses as the champion of truth against fabricated, partisan and distorted content spread by mainstream media, threatening to close them down. Hence, the relevant issue in this case is not really Trump's verbal attack against the media, rather the threat to close them down. Indeed, to close them down would be a major harm to the freedom of the media. Moreover, it has to be stressed the fact that the threat does not come from a mere politician, but from the highest government official, someone enjoying significant power. Sonja West discusses in a paper the viability of a claim by the mainstream media against the President for violating their First Amendment rights.⁸¹ Interestingly enough, in 2017 lawsuits have been filed against Trump by the Knight First Amendment Institute and several users, who claimed that the President had violated their free speech when he blocked their accounts (in doing so Trump prevented them from both reading his tweets and comment them).⁸² The DoJ responded the lawsuit arguing the President had personally blocked certain users, because they criticised his policies.⁸³ Two interesting profiles emerge here: the first is whether citizens can hold the POTUS responsible for violating their First Amendments rights; and second whether the POTUS can block users' accounts, because they criticise him, as if he were an ordinary user. With respect to the former profile, the Supreme Court had never ruled on the issue. However, as West argues, because the Court makes exceptions for the President that it does not make for other federal officer, the Court might rule that the President should have similar protections from First Amendment liability.⁸⁴ Furthermore, in the *Nixon v. Fitzgerald*,⁸⁵ the Court stated that it had exercise its jurisdiction over the President only in situations concerning broad public interests⁸⁶ or criminal prosecutions.⁸⁷ In 2018, a New York federal judge (District Judge Naomi Reice Buchwald) ruled in favour of the plaintiffs, ruling that Trump can't block Twitter users

⁸¹ S.R. West, *Suing the President for First Amendment Violations*, note 35.

⁸² T. McCarthy, *Blocked by Trump on Twitter – Now Crusaders Take Their Case to Court*, *The Guardian*, 7 March 2018, available at www.theguardian.com/us-news/2018/mar/07/trump-twitter-first-amendment-legal-case.

⁸³ See *Joint Stipulation of Facts, Knight First Amendment Inst. v. Trump*, No. 17-cv-5205 (S.D.N.Y. Sept. 25, 2017), available at knightcolumbia.org/documents/4f28c8c211/2017.09.25_ECF-28-1_Stipulation.pdf.

⁸⁴ S.R. West, *Suing the President for First Amendment Violations*, note 35, 330 *et seq.*

⁸⁵ 457 U.S. 731, 734 (1982).

⁸⁶ *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

⁸⁷ *Id.* (citing *United States v. Nixon*, 418 U.S. 683 (1974)).

because of their political opinions without violating the First Amendment.⁸⁸ The judge argued that the @realDonaldTrump account meets the Supreme Court's standards for a designated public forum. Hence, preventing users from viewing his tweets based on political speech is discriminatory. Trump appealed the decision, but lost in the 2nd Circuit.⁸⁹ In July 2019, the federal appellate panel⁹⁰ affirmed that blocking critics from seeing his tweets amounts to a constitutional violation: "The First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise open online dialogue because they expressed views with which the official disagrees."⁹¹ It is important to point out that the ruling of the 2nd Circuit Court of Appeal does not prevent the government to block users *tout court*, it prevents only politically biased blocking. In August 2020, the President submitted a petition⁹² to the Supreme Court asking to examine "whether the First Amendment deprives a government official of his right to control his personal Twitter account by blocking third-party accounts if he uses that personal account in part to announce official actions and policies."⁹³ The President's petition is founded upon the fact that Trump had created his account back in 2009, thus prior to his election as President. However, he concedes that once become President, he has used the account also to communicate political speech and to inform the public of his policies.⁹⁴ Basically Trump's legal team argues that his personal account has turned into an official presidential account by chance, simply because he sometimes uses it to make official statements. Indeed, "[T]he President uses his account to speak to the public, not to give members of the public a forum to speak to him and among themselves."⁹⁵ Furthermore, "in contrast to the @WhiteHouse and @POTUS accounts, over which he may exercise control only by virtue of his office, he will continue to have control over the @realDonaldTrump account after his term of office has completed."⁹⁶ Therefore, Trump, when blocking people, would be exercising his "prerogative not to listen."⁹⁷ According to the petition, "Denying him the power to exclude third parties' accounts from his personal account - a power that every other owner of a Twitter account possesses - would deter holders

⁸⁸ *Knight First Amendment Institute at Columbia University v. Trump* (1:17-cv-05205). All the documents are available at www.courtlistener.com/docket/6087955/knight-first-amendment-institute-at-columbia-university-v-trump/.

⁸⁹ In March 2020. The court refused to rehear the 2019 ruling.

⁹⁰ *Knight First Amendment Institute, et al v. Donald J. Trump, et al* (18-1691-cv). The ruling is available at cdn.cnn.com/cnn/2019/images/07/09/twitter.ruling.pdf.

⁹¹ *Knight First Amendment Institute, et al v. Donald J. Trump, et al*, at 4.

⁹² *Trump v Knight SCOTUS Petition*, 21 August 2020, available at it.scribd.com/document/473127192/Trump-v-Knight-SCOTUS-Petition#download.

⁹³ *Trump v Knight SCOTUS Petition*, I.

⁹⁴ *Trump v Knight SCOTUS Petition*, 13.

⁹⁵ *Trump v Knight SCOTUS Petition*, 17.

⁹⁶ *Trump v Knight SCOTUS Petition*, 13.

⁹⁷ *Trump v Knight SCOTUS Petition*, 26.

of his Office from using new technology to efficiently communicate to a broad public audience.”⁹⁸

The US Constitution is praised for its effective system of checks and balances, which, although put under considerable stress by the Trump administration, managed to survive. Being focused on the realm of political speech, that - as argued so far - has a usual disregard for truth, the key point would be whether the system of checks and balances which was created and works in the realm of political power is a proper instrument to limit untrue political speech, such as Trumpian alternative facts. The question is particularly relevant when alternative facts insist upon a delicate matter such as health, as it has happened recently with respect to the pandemic, because of the impact on individual life. Within the system of checks and balances and considering that federal courts cannot enjoin the POTUS to act, the Supreme Court, in *Nixon v. Fitzgerald*, suggested that the people through their elected representatives can impeach the President.⁹⁹ However, as the recent impeachment trial on Trump revealed, the threat of impeachment is not only extreme, but seems unlikely to be employed by Congress or to work as an effective deterrent to the President, especially a President like Trump. The Court, and this is connected to what will be discussed *infra*, proposed that more informal checks offer sufficient protection, such as the “constant scrutiny” of the press together with “vigilant oversight” by Congress. The Court also considers a proper deterrent the presidential desire to maintain the prestige of the institution as well as his desire to win the re-election.¹⁰⁰ Trump’s recent re-election campaign has proved exactly the opposite. Indeed, such deterrents and protections against presidential misconduct are founded on the assumption that the President will follow constitutional and political norms, whilst Trump presidency has been punctuated by the highest disregard towards those norms.

This unusual approach by Trump leads to question the media role. Traditionally, the media are considered as the watch-dogs of any democratic society, because they are “independent of the wishes and desires of the citizens as is the will of the worst tyrant.”¹⁰¹ However, the degradation that has characterised political speech in the past decades has affected the media too, some of which have become more and more partisan and polarised. Arendt advocated for the media to become the fourth branch of government, despite recognising that because they are in a competition with new media and they need to keep up with their speed of information, they do not double check anymore the information.¹⁰² Incidentally, it is convenient to underline that even foreign politics. i.e. foreign leaders, could act as a sort of system of

⁹⁸ *Trump v Knight SCOTUS Petition*, 29.

⁹⁹ *Fitzgerald*, 457 U.S. 757.

¹⁰⁰ *Id.*

¹⁰¹ Words by Arendt, *Truth And Politics*, note 2, 240.

¹⁰² Arendt, *Truth And Politics*, note 2, 261.

control on domestic policy. The mainstream media have all put in place serious fact-checking on political speech. However, without diminishing its importance, fact-checking doesn't seem a proper countermeasure against alternative facts. Firstly, because alternative facts spread quicker; a serious fact-checking requires some time and when it has been accomplished misinformation and disinformation have already caused damages. Secondly, fact-checking and alternative facts reach different audiences; the audience sensible to the latter will not bother to look for a fact-check of Trump's speech, whilst the audience concerned with fact-checking was already suspicious with respect to Trump's speech. Beside fact-checking, debunking can play an even more significant role. Debunking, i.e. deconstructing alternative facts *et similia*, can be performed by both the media and the more media-literate users. However, debunking is subject to the same criticalities as fact-checking: the more one tries to debunk alternative facts, the more they get strong, because their audience is impenetrable to facts. Indeed, there is a risk of the so-called backfire effect, because of the crisis of the sources of the information, which makes facts to be questioned preventatively. Hence, alternative facts are sticky, they continue to influence people, even when it seems they have been proved to be fraud.

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Immediately in the aftermath of the election, the mainstream media tested a new typology of countermeasure once Trump's electoral lies reached the paroxysm with respect to both electoral fraud and false claim of victory. Indeed, MSNBC, ABC, CBS, CNBC and NBC interrupted Trump's White House address on Thursday 5 November 2020 after he called the entire race into question, claiming it was rigged against him from start to finish by a vast conspiracy (whilst Fox News and CNN were among the few channels to air the full speech).¹⁰³ Even Fox News on 9 November 2020 cut away from a briefing held by the White House press secretary, Kayleigh McEnany, during which she repeated the allegations of electoral fraud without providing any evidence.¹⁰⁴ The progressive distancing of Fox News from Trump has caused the channel rating to drop significantly after the elections.¹⁰⁵

However, the role of the media and of journalism may be scrutinised by a more critical point of view, such as Walter Lippmann did. Lippmann had already perceived in the 1920s the dark side of journalism. Being a critic of democracy, Lippmann considered that journalism, i.e. the media, is an ineffective method of educating the people, regardless of the quality of

¹⁰³ D. Bauder, *Networks cut away from Trump's White House address*, ABC News, 6 November 2020, available at abcnews.go.com/Entertainment/wireStory/networks-cut-trumps-white-house-address-74051403.

¹⁰⁴ H. Sullivan, *'Whoa' – Fox News cuts off Kayleigh McEnany for 'illegal votes' spiel*, The Guardian, 10 November 2020, available at www.theguardian.com/us-news/2020/nov/10/whoa-fox-news-cuts-off-kayleigh-mcenany-for-votes-spiel.

¹⁰⁵ D. Bauder, *Fox News Ratings Plummet After Election. Is President Trump's Criticism the Cause?*, Time, 24 November 2020, available at time.com/5915461/fox-news-ratings-plummet/.

journalists. According to his reasoning, there is a progressive deterioration of democracy due to the degradation of the public opinion (more precisely, of the voters), “the mass of the reading public is not interested in learning and assimilating the results of accurate investigation.” Nevertheless, he believed the journalist to be a link between policymakers and the public; he seeks facts from policymakers and then he transmits to citizens who will form a public opinion. In this model, the information may be used to hold policymakers accountable to citizens, in spite of the awareness that news and truth are not synonymous. This explains the constructive part of Lippmann argument in favour of a technocratic government, where a specialised class of social scientific experts operating beyond the voters and the politicians. In theory, there would be a crop of experts for each area of government, and these experts would competently examine the facts and then advise government officials.

Lippmann approach is not free of concerns, mainly because it seems that his technocratic government is anything but democratic. Nonetheless, it calls into question the relationship between politics and experts, a major debate during the pandemic. As previously outlined, when the political pole of the relationship is embodied by an adept of alternative facts such as Trump, the contribution of experts is anything like the one advocated by Lippmann. Hence, it doesn't seem a viable solution to endorse the support of experts besides politicians in order to vouch their speeches.

To follow up on the role of media, a specific attention has to be paid to SNs, because they are the main source of information and because they are Trump's favourite way to communicate with the American people. Despite Trump being a compulsive Twitter user, he is far from having a good relationship with SNs. Their conflictual relationship, following the growing of fact-checking upon his tweets,¹⁰⁶ has called again into question their economic model and the irresponsibility they enjoy under Section 230 CDA.¹⁰⁷ Twitter has specific rules for world leaders,¹⁰⁸ which can be qualified as a privilege, because the firm will not ordinarily ban them for the same offences for which it would ban ordinary users. Twitter explains this decision arguing that such posts - even when violating its rules - are sufficiently newsworthy to stay up, with a handful of exceptions. Instead, the steps Twitter can take with respect to world leaders is to label posts, hiding them from view, but leaving it viewable to anyone who clicks through a warning message about the content.

¹⁰⁶ Trump is not the only world leader under Twitter's scrutiny. On 30 September 2020, Twitter, without giving explanations, shut down the official account of the Hungarian government. The account was temporarily removed and then reinstated. I. Frodsham & S. Petrequin, *Twitter suspends government-run account for the first time*, *The Independent*, 30 September 2020, available at www.independent.co.uk/news/world/europe/twitter-suspends-about-hungary-account-b719598.html.

¹⁰⁷ 47 U.S.C. § 230(c) (2012).

¹⁰⁸ See the firm specific page at blog.twitter.com/en_us/topics/company/2019/worldleaders2019.html.

The rationale of Section 230 is clear; the irresponsibility SNs enjoy aims at preventing any chilling effect that a regulation may have on Internet speech. Hence, the liability regime of SNs, although they operate almost worldwide, endorses the American approach to freedom of speech enshrined in the First Amendment. It may seem a paradox, SNs are criticised because they are irresponsible, thus allowing any content on their platform from the one hand, but they are also criticised when they decide to progressively take on more responsibility, by resorting to external fact-checkers or by banning misinformation (mainly about covid-19) or by labelling unverified posts from the other hand. The US electoral campaign has entailed a major involvement of SNs in fact-checking or at least more attention with respect to the online content published by Trump personally, by his campaign and by other public figures supporting him. Facebook has shut down a large group which alleged fraud (The Stop the Steal Facebook group, which counted up to 350,000 members), and announced new measures to amplify genuine results (according to a FB statement, “These include demotions for content on Facebook and Instagram that our systems predict may be misinformation, including debunked claims about voting. We are also limiting the distribution of live videos that may relate to the election on Facebook”). Twitter has permanently suspended Bannon’s account (and not banned for a limited amount of time¹⁰⁹); however, Bannon’s tweet was not providing for an alternative fact on the elections, rather, inciting hate and this explains Twitter’s hard response.¹¹⁰ Furthermore, Twitter decided to remove Trump’s privilege as a world leader in the event of Joe Biden winning the presidency;¹¹¹ besides, after having lost the election, Trump had been downgraded to the status of a regular user. Considering that it is almost impossible to legally found any possible preventative censorship, SNs intervene by tackling down all the typologies of improper content *ex post* with targeted sanctions.

However, the permanent suspension of Trump’s accounts by ten SNs¹¹² following the assault on the Capitol in January 2021 opens a new scenario in the relationship between them and world leaders.

¹⁰⁹ On 15 October 2020 Twitter temporarily locked Trump’s campaign account over a dubious story about Biden’s son Hunter. See Q. Forgey & N. Scola, *Trump threatens ‘big lawsuit’ after Twitter briefly locks campaign account*, *Politico*, 15 October 2020, available at www.politico.com/news/2020/10/15/trump-campaign-twitter-suspended-429579.

Twitter policy is to suspend accounts for posting an individual’s leaked private information without their consent. See help.twitter.com/en/rules-and-policies/personal-information.

¹¹⁰ P. Beaumont, *Steve Bannon banned by Twitter for calling for Fauci beheading*, *The Guardian*, 6 November 2020, available at www.theguardian.com/us-news/2020/nov/06/steve-bannon-banned-by-twitter-for-calling-for-fauci-beheading.

¹¹¹ K. Wagner, *Trump’s Special Twitter Treatment Would End With Biden Win*, in *Bloomberg*, 5 November 2020, available at www.bloomberg.com/news/articles/2020-11-05/trump-s-special-treatment-on-twitter-would-end-with-biden-win.

¹¹² Twitter, Facebook, Instagram, YouTube, Amazon Web Services, Snapchat, Reddit, Twitch, LiquidWeb and Shopify. See Twitter’s official statement of 8 January 2021 at

Interestingly enough, the feud between Trump and his followers from the one hand and Twitter from the other hand (#Twexit) has significantly increased the user base of Parler,¹¹³ a microblogging and social networking service launched in August 2018, which is a sort of Twitter without “censorship”, i.e. fact-checking and warning system.¹¹⁴

This new commitment of SNs - even more after Trump’s permanent suspension - urges to reconsider upon which legal basis they strike down online content, as if they were censors. The issue of the (ir)responsibility of SNs seems almost impossible to solve: either they implement private censorship without any legal check or they allow content that can put in jeopardy the integrity of the electoral process or of the health of individuals. One could argue that it should be public authorities to police the media. However, this solution too is highly controversial, because it may entail the creation of an Orwellian minister of truth, risking to have all content disliked by the authorities to be removed. Another solution, adopted by some SNs,¹¹⁵ is to provide the user additional information on the same story, allowing him to hear different bells on the same topic. This solution has the same criticalities already outlined with respect to fact-checking. The majority of users will never bother with reading the additional information, because post-truth and alternative facts both appeal to the emotions of the audience, not to their intellect. Therefore, it is doubtful that additional information can redress the audience perception of a fact. Furthermore, the selection of the additional information would rely upon the algorithm, which raises concerns with respect to the problem of algorithmic accountability.

Surely, when alternative facts insist on health-related issues, the media, SNs included, should abide by the highest professional and ethical standards, giving priority to authoritative messages regarding the crisis, and refraining from publishing, and thus amplifying, unverified stories.¹¹⁶

Despite the criticalities inherent to the lability regime of SNs, the role that can be played by the media in contrasting misinformation, disinformation, fake news, alternative facts, post-truth is of paramount importance. The

blog.twitter.com/en_us/topics/company/2020/suspension.html.

¹¹³ Following the election, Parler number of users had nearly doubled, from 4.5 million to 8 million, with a number of active users grown from 500,000 to more than 4 million. See D. Ingram, *A Twitter for conservatives? Parler surges amid election misinformation crackdown*, *NBC News*, 10 November 2020, November 10, 2020, available at www.nbcnews.com/tech/tech-news/twitter-conservatives-parler-surges-amid-election-misinformation-crackdown-n1247333. Following the events of 6 January 2021, both Apple and Google have removed Parler from their respective stores.

¹¹⁴ Actually, it is not quite so. A ban of left-wing content has been reported. See D. Covucci, *Free speech app Parler is already banning leftists*, *The Daily Dot*, 30 June 2020, available at www.dailydot.com/debug/parler-banning-leftist/.

¹¹⁵ Facebook with the related articles or YouTube infoboxes placed under videos on controversial topics.

¹¹⁶ As suggested by the Council of Europe in his guidance on covid-19 and media freedom, see www.coe.int/en/web/skopje/-/covid-19-and-media-freedom-guidance-based-on-the-council-of-europe-standards.

reason is that one viable countermeasure is to strengthen the awareness of the audience, implementing the right to education - in order for the people to exercise more properly their right to criticise and to scrutinise public authorities and the media -, the right to information, as well as their capability to handle SNs properly. Two Italian scholars, Franca D'Agostini and Maurizio Ferrera, have theorised a new set of rights, called *diritti aletici* (the made-up Italian word *aletici* comes from the Greek word for truth, *aletheia-ἀλήθεια*), corresponding to: the right to be truthfully informed; the right to receive a proper education in order to be able to distinguish truth from false; the right to be recognised as reliable sources of information; the right to have a reliable scientific system; the right to live in a cultural environment favouring and protecting the pursuit of truth; the right to live in a society which has a high regard for truth in both private and public life.¹¹⁷ These rights are particularly interesting. However, their implementation would prove to be very challenging for the system, in particular because it seems quite difficult that they could be enforced by courts.

5. Conclusion

The Trump presidency has concluded its run, at least until 2024. It is more and more difficult, and certainly shallow, to consider Trump as a simple anomaly of the system. He is the result of a long process of progressive degradation of political speech and of deepening of the cleavage between politics and reality. To regard Trump as an anomaly would have the merit to absolve the system and thus to avoid to consider that the legal system has to finally start dealing with the problem of online speech, in particular of political speech. The conundrum is how to act. The issue so far seems almost impossible to be dealt with. The First Amendment doctrine protects at most political speech and Trump's alternative facts challenge the capability of realise a tailored intervention without infringing the First Amendment. However, a possibility would be to introduce something analogous to the fairness doctrine for broadcaster that was eliminated by the FCC in 1987, whose aim was to ensure that viewers were exposed to a diversity of viewpoints.¹¹⁸

With respect to the side of SNs, economic interests seem to prevent, at least for the moment, a significant intervention on their economic model. Top-down approaches risk being abused and turning into censorship. Nevertheless, we have to concede that moderation, something that SNs could implement more significantly, does not mean censorship; specific restrictions are legitimate. The path being designed by the European Union with the *Digital Service Act* is surely an interesting attempt to regulate the

¹¹⁷ F. D'Agostini & M. Ferrera, *La verità al potere. Sei diritti aletici*, Torino, 2019.

¹¹⁸ The doctrine has already been scrutinised by the SCOTUS, which ruled that it did not infringe the First Amendment in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

digital world, fostering transparency (of the algorithm) and at the same time reducing the control of the media platforms on content. However, this does not seem to be a model solution for the US. Instead, the best way to tackle untrue content, whatever its form, is to teach netizens to identify and reject it. Critical thinking and stronger media literacy have to be encouraged. The aim should be the bursting of the informational bubble created by SNs. They generate sorts of tunnels or bubbles, where circulate the same information, without any dialectic debate, radicalising the users in their opinions. Debunking can be very helpful, because any “literate” user can debunk alternative facts shared by a contact and so on, thus creating some sort of debunking chain.

It seems convenient to recall the approach - and the respect - that Condorcet, Mirabeau and their fellow revolutionary had for education. The aim of education is to regenerate the people, to replace the individual with the citizen. And, according to Condorcet, only an enlightened citizen can reach truth. Moreover, it seems that educational and informational rights could be significantly strengthened through a positive intervention of both the state and the federal governments, even though in the US the support against the so-called big government is growing bigger and bigger. The alternative would be to continue to do nothing. However, presidencies like Trump’s may become more frequent in the near future, as well as the contempt of constitutional and legal norms, and the system of checks and balances that supports the US Executive may be put under such a strain as to prevent it to function properly.