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Climate Change and the Free Marketplace of Ideas?

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Abstract

Climate change poses a significant future danger that requires intervention today. Climate denial poses a key challenge to meaningful timely intervention. In this paper, we argue that current US free speech jurisprudence inadequately addresses the risk of climate change because it is overly permissive of 'professional' climate denial and underappreciates the need to address the future harm of climate change today. We begin by clarifying the risk posed by the Court's current approach to speech with respect to climate change and reviewing the philosophical foundations of the marketplace of ideas found in the work of John Stuart Mill. Following, we examine three potential ways in which Court jurisprudence could be used to limit what we term professional climate change denial while permitting 'private' skepticism. Setting aside, largely, the return to earlier free speech jurisprudence and the extension of libel law, we offer a novel solution to the problem that suggests that what we term professional climate denial could be treated as a categorical exception under free speech jurisprudence and thus afforded a lower level of constitutional protection than other expression.

Introduction

Browse the comments section of any article on climate change, turn on cable news at the end of the day, or follow the social media feeds of public officials and you are bound to encounter challenges to the science of climate change. Some efforts have been made independently by media companies to limit these encounters. The moderators of Reddit's

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science sub-reddit (a forum for users to discuss peer-reviewed science with over 21 million subscribers) began filtering comments that explicitly deny climate change on the grounds that allowing 'a handful of commentators to … purposefully mislead [their] audience was immoral' (Allen, 2013). Google recently began putting boxes akin to those found on cigarette packages in many countries below climate denial videos on YouTube linking to the Wikipedia entry for global warming to combat what it calls 'disinformation' – 'deliberate efforts to deceive and mislead using speed, scale, and technologies of the open web' (Google, 2019: 2). Efforts and proposals such as these that seek to limit the expression of climate change denial in some way understandably inflame the passions of those who practice or support it, as well as those who more broadly defend free speech for such actors and organizations. The standard response is something like 'there is an intense need for robust speech about these matters in the marketplace of ideas' (Shapiro, 2014: 4).

It is into this politically-charged debate that we wade, presenting a novel argument that considers the position of those who want to limit climate change denial in the name of scientific truth and the urgency of action versus those who advocate for no restrictions on speech as being healthy for and constitutionally required by American democracy and scientific inquiry. We argue that *professional* climate change denial might reasonably be limited while preserving the right to *privately* express skepticism in a way that maintains the core value and purpose of free expression.

In so doing, we present a novel solution to the problem of the public understanding of climate change and a reconsideration of how we think about the permissibility and value of climate change denial in democratic society. Though our explicit focus here is on American free speech jurisprudence and philosophy, we believe the argument to be applicable in principle to a discussion about climate denial and democratic societies in general. Indeed, given that the US is well known for its absolutist protections of speech, showing that some

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climate denial could be limited within the norms of its jurisprudence suggests that it can be limited elsewhere and thus presents a usefully hard theoretical case.

We begin by examining the nature of climate denial, distinguishing professional denial from private skepticism, and establish both the immediate and future harm posed by climate change. In Section II, we consider the status-quo of free speech jurisprudence, arguing that while some climate change denial could trigger the current test for immediately harmful speech, it is unlikely to do so. We then show how climate change denial exposes the flaws with the philosophical underpinnings of this jurisprudence. To consider possible ways to limit climate denial, we examine three possible approaches, beginning with application of war powers in Section III. Considering the pragmatic limitations of returning to an older jurisprudence, we suggest that two other approaches within current jurisprudence may be more illuminating. In Section IV we examine the way in which libel law offers a potential analogous solution and in Section V that, as the libel analogy seems too difficult in practice, then professional climate denial could be treated as a categorical exception to free speech rules.

I. Climate Change and Denial

Climate change poses an ever-increasing threat to current and future generations. An October 2018 report by the Intergovernmental Panel on Climate Change (IPCC) found that given limited international action to date we are in need of 'systems transitions … unprecedented in terms of scale, but not necessarily in terms of speed' in order to have any hope of limiting warming to the amount agreed to under the Paris Agreement (IPCC, 2018: 17). We may in fact be closer than previously thought to reaching the 'tipping point' at which changes begin to cascade beyond our ability to limit them (Steffan et al, 2018). A November 2018 report on the impact of climate change on the United States found evidence of everything from an increased number of temperature-related deaths, to an increase in the

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intensity and frequency of extreme weather events, to higher propagation rates of vector-borne diseases (U.S. Global Change Research Program [USGCRP], 2018). In short, the negative impacts of climate change are already upon us and we are fast approaching a point where if we have not acted, by century's end we will be living under extremely challenging conditions on a 'Hothouse Earth' (Steffan et al, 2018). It is thus the overwhelming consensus of the scientific community that we need to act now and act aggressively (e.g. Ripple et al, 2017).

While there is no shortage of impediments to acting on climate change, one source of inaction is the concerted efforts of climate change deniers. What is climate change denial? At its most basic, it is the refusal to acknowledge that the planet is abnormally warming. A recent nationally representative survey found roughly 70 per cent of registered voters believe that we are experiencing global warming compared to 17 per cent who do not (Leiserowitz et al, 2019: 30). While statistically the same as 11 years ago, this represents a recovery from a low of 58 per cent at the start of 2010, the year following what one US Senator 'call[ed] "the year of the skeptic"', as Brigitte Nerlich (2010: 426) notes in her account of the November 2009 'climategate' email scandal, which saw the leaking of thousands of emails by climate scientists that subsequently became media fodder. Around this time, the climate denial industry was coming off a high period of activity during successful efforts to defeat then President Obama's national cap-and-trade scheme, the American Clean Energy and Security Act, which failed in summer 2010 (Frontline, 2013). Investigations by organizations like opensecrets.org found large amounts of spending on lobbying by the oil and gas industry and like-minded organizations during this period (Lizza, 2010; Hepler, 2010). It is not just lobbying of politicians that is at issue.

A concerted effort has been made to publically counter the overwhelming scientific evidence that not only is the world warming (a fact that climate deniers increasingly concede)

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but that humans are the primary cause (it is anthropogenic). The same survey found that a significantly smaller number of registered voters (55 per cent plus or minus three per cent) believed that global warming was caused mostly by human activities (Leiserowitz et al, 2019: 32). While this number has recovered from a similar ebb, it too is unchanged from 11 years ago. About three in ten registered voters (32 per cent) believe that global warming is due to natural changes or not happening. There is an extreme partisan split on this issue: 80 per cent of Democrats, 46 per cent of Independents, and only 30 per cent of Republicans believe it is primarily human-caused (Leiserowitz et al, 2019: 32-34; see also Dunlap, McCright, and Yarosh, 2016).

This is thanks in part to the concerted efforts of a small group of actors (for an overview, see Dunlap and McCright, 2011). The nature and tactics of these actors are by now well documented (Monbiot, 2007; Oreskes and Conway, 2010; Mann and Toles, 2018). As their reach demonstrates, denial covers a range of arguments and positions, is increasingly sophisticated, appears in a variety of formats and fora, and has consistently increased in output over the last two decades (Boussalis and Coan, 2015). Most critically, denial has been successful, with the above example of the defeat of a national cap-and-trade plan only one in a string of victories that have seriously limited federal (not to mention state and local) action on climate change over the past three decades (see Monbiot, 2007; Klein, 2014; McCright and Dunlap, 2010; Banerjee, Song, and Hasemyer, 2015; Frontline, 2013; Oreskes and Conway, 2010; Mann and Toles, 2018).

Given the severity and immediacy of the threat of climate change, these concerted efforts to oppose national political action by promoting knowingly-faulty scientific positions hearken back to the era of Big Tobacco, except with even more damaging consequences (Oreskes and Conway, 2010; Mann and Toles, 2018). Yet denial continues relatively unabated under claims of free expression and scientific inquiry, and efforts to restrict climate

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change denial have been met with objections of stifling free speech and skeptical inquiry (Shapiro, 2014; Hasemyer, 2016). We want to address these free speech claims by both challenging their philosophical underpinnings and by identifying a way in which *some* climate change denial could be filtered from the public without being overly restrictive on individual speech.

To do so, we must draw a distinction between two kinds of climate change denial: professional and private. The *private skeptic* is someone who, whatever their individual motivation, expresses skepticism about climate change in public in their capacity as a private citizen. The public place could be a town hall meeting, the green of a public university, or a busy sidewalk. The skeptic is at least capable of modifying their views based on new information, while the *professional* is incapable of doing so given their instrumental motivation, or as Trygve Lavik argues in drawing a similar typology, their 'not being in good faith' (Lavik 2016: 77). The *professional* is identified in the preceding paragraphs.[1] They are a scientist or pundit, typically facilitated by a think tank dedicated to this purpose and funded by industry or dark money sources, who purposefully propagates known falsehoods in order to sow doubt into public knowledge, manipulate public sentiments, and/or influence government policy. This is akin to what Catriona McKinnon (2016: 208) labels 'industrial denial' on account of its 'scale, systematicity, and its sources of funding'; these are the 'merchants of doubt' (Oreskes and Conway, 2010). While we recognize the lines between these two groups may not always be clear and that erring should be on the side of caution, we think that unobjectionable cases of each category are readily identifiable and in the case of *professional* denial, are well-documented.

[1] Matt Ferkany (2015: 707; 714) in answering the question of whether it is arrogant to deny climate change draws a distinction between 'lay' and 'expert denial of mainstream science' and of the 'mitigation imperative'. Our concern here is with the former. Ferkany (2015: 710) then draws another distinction between the 'extremes of *naïve* and *motivated denial*' which 'cut[s] across the distinctions between lay and expert denial'. While the question of arrogance and Ferkany's answer are important, our purposes here are different and thus so are our categories.

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II. The Permissive Position: An Untenable Status Quo

To address professional climate denial, we shift to a discussion of free speech jurisprudence in the US. Our purpose in doing so is to illuminate how, even within the context of a highly permissive speech regime, professional climate denial might justifiably be limited. This section reviews the philosophical underpinnings of the Supreme Court's broadly permissive thinking about free speech, namely the concept of the marketplace of ideas and the thought of John Stuart Mill. We show how climate change denial seriously challenges the functioning of this marketplace. We also examine the Court's current means of restricting harmful speech within the marketplace – when there is threat of imminent harm. While we believe that climate change denial poses an imminent threat and for some Americans it might warrant restriction, it seems a threat that would be best covered by a prior era of Court thinking, one that we discuss in Section III.

The Supreme Court currently protects nearly all speech, remaining neutral between competing viewpoints, regardless of value, in an effort to foster a 'free trade in ideas' (250 U.S. 616 at 630, Holmes, J. *dissenting*). Such an absolutist approach has its philosophical roots in the work of Mill, who has also been the starting point for other work on the tolerability of climate denial (Lavik 2016: 82-85; McKinnon 2016: 206-207). In *On Liberty*, Mill advocates for a permissive approach to free speech grounded in a consequentialist end: arriving at the truth. Truth is a good with such value that it is worth the pain necessary to arrive at it.

Mill's classic argument offers four reasons for his permissive approach. First, an argument may be true and thus should not be censored because truth is the ultimate value of deliberation (Mill, 1991: 22). Second, even an argument that is largely false may contain a kernel of truth (Mill, 1991: 40). Third, Mill (1991: 59) suggests that even once we have

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arrived at the truth we must continue to debate it lest 'most of those who receive it' will have 'little comprehension or feeling of its rational grounds.' Fourth and related, Mill (1991: 59) worries that a truth not well-contested is 'in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct.' The argument is that even were every citizen to understand the anthropogenic basis of climate change and accept the urgency of action, they will fail to act with the required passion if their beliefs are not constantly challenged. While Mill's argument has been critiqued since publication on the grounds that there might be many reasons to restrict speech even in the face of Mill's arguments (Fitzjames Stephen 1837: 37-39), Mill's justification is picked up on routinely by the Court beginning with Justice Holmes' famous dissent in *Abrams v. United States* where he notes 'that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market…' (250 U.S. 616 at 630, Holmes, J. *dissenting*).

For Mill and for the Court today, the only time free discussion should be inhibited is in the case of the threat of immediate and physical harm. Though Holmes previewed the jurisprudential move towards this position in *Abrams*, the Court continued in that period to use an older standard known as the clear and present danger test. As we explain in detail in Section III, this approach was less concerned about immediate harm, allowing for permissible restriction of future harm to protect national interests (see: *Schenck v. United States* 249 U.S. 47 (1919); *Dennis v. United States* 341 U.S. 494 (1951)).

The shift towards the current status quo that prohibits regulation of speech based on potential future harm and inaugurates a highly permissive, absolutist, approach to free speech began nearly fifty years ago with *Brandenburg v. Ohio*. Here the Court began to distinguish between what it viewed as 'mere advocacy' and more immediate 'incitement to imminent lawless action' (395 U.S. 444, 449) (1969)). Whereas in earlier cases such as *Dennis* and *Schenck*, advocacy of threatening viewpoints could be deemed to present enough danger to

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warrant regulation that did not run afoul of the First Amendment, under *Brandenburg* an actual imminent threat expressed by the speech was required. Prior to *Brandenburg*, the Court, wrongly in the eyes of most, deemed future harm to the republic from anti-governmental speech to be criminally punishable without violating a commitment to free speech.

One way to think about this shift in reasoning is through the lens of Holmes' dissent in *Abrams*. So long as the truth is *eventually* reached, we must run the experiment of free debate if no one is immediately harmed. Indeed, as Lavik (2016: 83) suggests, Mill may not even be committed to the idea that truth must win out in *every* case. Rather his defense is 'rule-utilitarian in spirit', meaning that even some though some individual protections of speech might cause harm, if, in general, a permissible speech regime is valuable then individual harmful cases do not suggest reason to change the overall framework, a point we address and attempt to overcome in Section V.

Climate change denial poses a dilemma to what counts as threatening imminent harm. For a growing number of Americans, the threat posed by climate change is acute, causes measurable harm, and demands immediate action (USGCRP, 2018). It is the nature of this action and how climate change denial impedes it where the difficulty arises. The US is the second largest national emitter of greenhouse gases (Boden, Marland, and Andres, 2017) and thus is critical to any international effort to mitigate emissions and limit the damage of climate change, not to mention is increasingly having to adapt to costly domestic events. As discussed above, climate change denial has clearly impeded aggressive US action on climate change, thereby continuing to worsen the situation for Americans and the rest of the world. But public policy decision-making is not linear (Anderson, 2015), and the harm is not clearly the right kind of imminent to trigger restrictions.

This dilemma is illuminated by *Virginia v. Black* wherein the Court parsed two instances of cross-burning in relationship to a Virginia statute prohibiting cross-burning. The

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Court noted a difference between the burning of a cross at a Ku Klux Klan rally and the burning of a cross near the home of an African-American family (583 U.S. 343 (2003)).[2] The Court held that while the burning of a cross could be banned if done with the aim to intimidate, it was not generally able to be prohibited; burning a cross near the home of a family might be able to be prohibited, however, because it constituted such a threat. For some, climate change represents the latter kind of threat – it is immediate and poses a serious risk to life and property, and denial's ability to influence policy-making hampers our response. But for most climate change denial, in the same way as burning a cross at a rally expresses a hateful viewpoint that detracts from the equality of all citizens, represents a too future and abstract kind of harm, we suspect, for the Court. Indeed, this distinction highlights a key interaction between the Court's current approach, Mill's arguments, and the problem of climate change: immediacy.

On the marketplace of ideas approach, the proper response to speech that causes non-immediate harm is to run the 'experiment' that Holmes reads into Mill. As long as a harm is not posing a significant and sufficiently immediate threat, we should allow discussion to run its course for the reasons Mill highlights. According to this logic, it would be better if climate denial, like racist speech, is discussed and rejected as false on a continual basis because such rejection would ensure that the truth is accepted and valued over time. Indeed, as McKinnon points out, contestation is often central both to public debate and to scientific inquiry (McKinnon 2016: 207). Importantly, neither Mill nor the Court put a time limit on deliberation. Their view holds that so long as the truth is found, at some future point, all speech that does not result in imminent harm should be protected. Climate change denial, while harmful, would seem to fall squarely in this category.

[2] The Court agreed to vacate the Klan rally conviction and remanded the home conviction so that actual evidence of intimidation could be presented.

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On our view, climate change poses a unique problem with respect to this argument. While one might dispute the immediacy of the threat of instances of climate change denial, there is absolutely no doubt that the timeframe for solving the problem of climate change is immediately pressing (IPCC, 2018). While climate change for most Americans is not yet an immediate harm in the legal sense emphasized in *Virginia v. Black*, the need to combat the future danger is immediate for everyone. We simply lack the ability to run the experiment because our timetable to prevent future harm is pressingly immediate and grows more so the longer the delay (see also Lavik 2016: 83). While the policy process (Anderson, 2015) makes it difficult to quantify the harm caused by specific acts of denial, the policies sought by and partially attributable to that denial are a different story.[3] Such an argument might be compelling to Mill as a consequentialist but seems less likely to provide an answer to the Court which has deepened rather than enervated its commitment to neutrality and absolutism.[4]

It is not clear that even if we let the experiment run the truth would eventually win out. As we noted in the previous section and as McKinnon (2016: 208-210) argues, the sophisticated mechanisms of denial are deliberately crafted to ensure this does not happen and have been successful thus far. Those engaged in climate denial frequently use the language of free speech and rely (sometimes unstated) on the idea of the marketplace of ideas. Thus, while we might grant, *ad arguendo,* the value of a perfectly functioning marketplace of ideas on climate change, the pressing nature of the problem and the practical concern over the functioning of such a marketplace weighs against maintaining the status quo

[3] An objection here could be if the harm is so immediate, why not just ban the burning of fossil fuels? Our response is that finding ways to curb speech that impedes action on climate change is critical in crafting policy that addresses the underlying actions needed to reduce the burning of fossil fuels. It is additionally impractical to immediately ban burning fossil fuels. See also Lavik 2016: 86-87. We thank an anonymous reviewer for raising this challenge.

[4] It is possible that for Mill climate change would introduce a harm warranting regulation. Because the Court has largely moved away from thinking through future harm as an application of Mill we do not treat that argument in detail. See Mill,1991: Chapter 1.

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approach. In short, the overly permissive marketplace of ideas approach is unattractive because it is easily manipulated and can result in significant negative externalities.

It is true that the pursuit of truth is not the only possible justification of free speech. Indeed, the pursuit of democratic debate that introduces all possible viewpoints for democratic consideration is also often grounds for speech protection (Meiklejohn, 1948). If the ultimate justification of free speech is that citizens have a right to hear and consider all viewpoints to become better educated decision-makers, then climate denial might be considered worth hearing even if ultimately discarded. However, even if the ultimate goal of democratic debate is that 'voters…be made as wise as possible', the argument rests on the requirement that 'all facts and interests relevant to the problem...be fully and fairly presented…in such a way that all the alternative lines of action can be wisely measured in relation to one another' (Meiklejohn 1948: 25). Given the intentional distortion by *professional* climate denial, there might be democratically-grounded reasons based on the need for an informed citizenry that warrant its restriction.

Even if such an argument is satisfying one might still press that regardless of the outcomes of deliberation, citizens may have 'autonomy-related interest in being able to say whatever they want in public spaces, when what they say is nonsense and has no social utility…' (McKinnon 2016: 208). We agree with this point, and as we highlight, such an argument is behind our reasoning to protect the *private* skeptic. But, we suggest, *professional* climate denial is distinct because if there is an intrinsic interest in speaking, it is an individual one and thus is satisfied by allowing individuals *qua* privately-expressed skepticism to speak, leaving open restrictions on the professional denialism we address here.

III. Declaring War on Climate Change

Having highlighted the foundation of the problems with the status quo, we turn in this section and the two that follow to mechanisms by which *professional* denial could be limited.

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One possible approach would be to return to the jurisprudence of the pre-*Brandenburg* Court and its capacity to address future harm. To do so we could, as prominent environmentalist Bill McKibben (2016) has argued, declare war on climate change. To be clear, his argument for doing so is not to trigger speech restrictions, but rather to allow for a return to a more command-style national economy as was present in World War II, thereby allowing the repurposing and development of heavy manufacturing capacity to produce wind and solar renewables at the scale necessary to rapidly decarbonize the US, a proposal familiar to those following debates surrounding a Green New Deal. Feasibility aside, the proposal is illuminating for our purposes.

Practically speaking, there are potential limitations to the literal interpretation of this proposal. Congress has not formally declared war since 1942, instead operating via authorizing resolutions under the War Powers Resolution of 1973 (50 U.S.C. 1541-1548). Relying on Congress to authorize war-like mobilization under the current political climate seems an impractical place to rest an argument. The President's powers (setting aside willingness) to direct a command-style economy in a war-like situation without Congressional authorization are murky at best, falling perhaps in what Justice Jackson famously called the 'zone of twilight' in *Youngstown Sheet & Tube Co. v. Sawyer* (343 U.S. 579 at 637, Jackson, J. *concurring* (1952)). There is also the issue that wars are fought against *foreign actors* and identifying who such actors might be when it comes to climate change seems unlikely to be productive, especially when as noted in Section I, the US and American actors, given their current and historical responsibilities for emissions, are their own enemies. In literal terms, it is not clear how this war happens and against whom we would fight it.

Setting aside these practical difficulties, an interesting speech question emerges from McKibben's (2016) proposal 'to adopt a wartime mentality … to overcome concerted opposition.' As we noted, the Court was once more willing to consider the impact of future harm when contemplating limits on free speech, limiting communist speech on the grounds

that such speech might, at some indefinite future point, cause harm. As the Court explained in its strongest formulation of the clear and present danger test in *Dennis*, the test 'cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited' (341 US 494, 509 (1951)). Rather, quoting Judge Hand, the Court held that it must balance 'the gravity of the 'evil', discounted by its improbability [to see whether it] justifies such an invasion of free speech as is necessary to avoid the danger' ((341 US 494, 510 (1951)). Could climate change denial be treated as seditious speech that impedes the ability of the United States to conduct itself during times of war?

We are ultimately hesitant about this course of action not because we disagree that the threat is immediate, but rather with the jurisprudential tools available to this course of action. While we suspect some would not object, it would be difficult, if not impossible, to distinguish between the actions of the *private skeptic* and *professional denial* in this regard. Charles Schenck was distributing anti-conscription pamphlets on a relatively small-scale during World War I and in a war-time speech case during Vietnam, David O'Brien publically burned his draft card (*United States v. O'Brien* (391 U.S. 367 (1968)). These seem to align with the actions of the private skeptic, individual or non-coordinated actions of dissent, and not with those of the professional denial industry.[5]

It is both unlikely and problematic for the Court to return to a bygone era of free speech jurisprudence. Unlikely, because the Court has moved to become less and not more restrictive of speech generally. Problematic, because such an approach would represent a kind

[5] This argument also responds to the challenge that our argument licenses banning any speech that we do not like, particularly speech that misleadingly labels genuine facts as being 'false news.' While the recent advent of such discourse merits discussion, we agree with Lavik (2016: 83-84) that the unique nature of the climate problem, namely the extent and immediacy of the threat, allows the argument to be limited to just climate denial. The exception approach in Section V allows for this narrow limiting. We thank Matthew Lyddon and an anonymous reviewer for raising this concern.

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of revolution in speech jurisprudence that might be too widely applied to problems that are less pressing or of a different kind than that posed by climate change (see Note 5).

IV. False Speech and *New York Times v. Sullivan*

Setting aside past jurisprudence, we look in this section and the next at two ways that current jurisprudence could be used to limit climate change denial. Here we examine the argument of whether professional denial can be limited on the grounds of it being false speech. How do you go about limiting the propagation of speech that is knowingly false and designed to mislead and obstruct actions contrary to the interests of those who fund and disseminate it? While you could leave this in the hands of the market to self-regulate (as the editors of the science sub-reddit and Google have done as we noted in the introduction), we rejected the status-quo approach in Section II as being overly permissive. In this section, we take inspiration from libel law, specifically whether the principle of actual malice espoused in *New York Times v. Sullivan* (376 U.S. 254 (1964)) could be analogously used to cover professional denial.[6] Noting that there are difficulties with pursuing this approach, not the least of which is the absence of jurisprudence in the area of restricting false speech, not to mention the contentious politics of 'fake news' and the difficulties of proving intent to manipulate, we still think it is an intriguingly analogous situation: knowingly false information is being distributed with harmful intent.

The principle of 'actual malice' was developed over five decades ago in a case involving print advertising in the New York Times. It specifically involved an advertisement that in the process of raising money for a defense fund for Martin Luther King, Jr. published

[6] We recognize standard libel law is already being used (and challenged as the appropriate venue) in disputes between climate scientists and denial groups, the case of Michael Mann being the most notable. See *Competitive Enterprise Institute, et al. v. Mann, National Review, Inc. v. Mann, Nos. 14-CV-101 & 14-CV-126 (consolidated).*

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clearly false claims about the police force of Montgomery, Alabama, whose Public Safety Coordinator, L. B. Sullivan, sued. The Court ultimately sided with the paper and in the process developed an exacting standard for libel – in the case of public officials, libel could only be found in cases where statements are made 'with "actual malice," that is, with knowledge that it was false or with reckless disregard of whether it was false or not' (376 US 254, 280 (1964)). The standard was set this high in order that 'debate on public issues should be uninhibited, robust, and wide-open' (376 US 254, 270 (1964)).

Propagating knowingly false information with malicious intent could be a description of the climate denial actions of oil and gas companies over the past several decades, as exposed by InsideClimate News and others. At least as early as 1977, internal research by Exxon confirmed fossil fuel emissions were the primary cause of observed abnormal global warming. Instead of disseminating this information and supporting decisive action, Exxon reacted to early US actions to address emissions in the late 1980s by co-founding industry denial group the Global Climate Coalition, spending tens of millions of dollars funding climate change denial, and actively lobbying against policies like ratifying the Kyoto Accord (see Rich, 2018; Banerjee, Song, and Hasemyer, 2015).

While not libel, limiting actions such as these seems ideally suited for something analogous to the actual malice test, as this may constitute the harmful promotion of knowingly false information. A ready comparison can be made to the Tobacco Master Settlement Agreement of 1998, which involved large corporations deliberately misleading the public for generations at great public cost, and ultimately involved reparations payments, restrictions on sales of certain products, and the dissolving of entities responsible for distributing the factually untrue information (see, e.g., Frontline, 2013; Oreskes and Conway, 2010). This has clearly been on the minds of the various thus far unsuccessful lawsuits for

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damages by cities and states against companies including Exxon since the news broke.[7] Exxon has opposed all such actions, including fraud investigations by the Attorneys General (AGs) of New York and Massachusetts, making the argument that these investigations violate their First Amendment rights and are 'impermissible viewpoint-based restriction[s] on speech' (Hasemyer 2016).[8] These lawsuits may ultimately prove to be one fruitful legal avenue to address some *historical* sources of professional denial funding, but they do not seem to address current acts of denial.

If we look to address current efforts at *professional* denial, the extension of the actual malice standard we suggested here runs into some difficulties in the US. Libel is after all about the target and while legal personhood for the non-human world is an emerging practice (Tanasescu, 2017), thorny questions in the US remain as to whether nature can be a victim and who has standing to represent it.[9] This analogy though may prove more attractive outside of the US context, where content restrictions are more acceptable and there may be more straightforward pathways to limiting *professional* denial, such as by analogy to Holocaust denial as Lavik suggests (2016: 86). In the US, however, *Sullivan* is a case remembered and venerated by the Court and legal scholars for protecting speech. Thus, asking the Court to use such a standard to limit speech would be problematic. While the actual malice principle seems to capture the nature of professional denial, the jurisprudential tools offered by the actual malice test seem difficult to apply in practice. Thus, we suggest this offers an interesting way to think analogously about the problem, but one unlikely to work on its own.

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[7] See, e.g., City of Oakland v. BP p.l.c. N.D. Cal. 3:17-cv-06011; City of New York v. BP p.l.c. S.D.N.Y. 1:18-cv-00182.

[8] Charges were laid in October 2018 in the New York investigation. See People of the State of New York v. Exxon Mobile Corporation, New York State Supreme Court (Manhattan). The complaint against the Massachusetts AG was dismissed. See Exxon Mobil Corporation v. Attorney General SJC-12376.

[9] Residents of the City of Toledo, Ohio, passed the Lake Erie Bill of Rights in February 2019 to try to address chronic issues with water quality. It recognizes the lake's right to 'exist, flourish, and naturally evolve.' It was immediately challenged and is currently under preliminary injunction. *Drewes Farm Partnership v. City of Toledo, Ohio,* 3:19-cv-00343 (N.D. Ohio).

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V. Categorical Exception

This section suggests that professional climate denial could be treated as a categorical exception within a generally permissive free speech regime. The idea of a categorical exception is while there is general value in protecting speech expansively, some kinds of speech are so harmful that they should be subject to a separate set of rules. Indeed, as Fredrick Schauer usefully suggests, free speech is always a kind of 'nonideal approach' in that it seeks to create rules that are generally valuable but may not precisely track our interests in free speech in every case (Schauer 1989: 14). Our aim in this section is to suggest that categorical exceptions function as a practical way to have our First Amendment cake and eat it too. Permissive rules on free speech might be generally valuable but that the gravity of the harm in professional climate denial suggests that the Court should not apply its traditional approach to the right to free speech but instead should be far more permissive of restrictions. The advantage of this view is that we can maintain the current permissive stance towards free speech and thus not be overly disruptive to current jurisprudence. It allows maintaining the purported benefits of debate while cordoning off the instances of speech that we have identified as undermining of the marketplace of ideas. We argue treating climate denial as an exception to general free speech norms and doctrine represents the most coherent and plausible means to addressing its potential limitation.

The categorical approach to free speech has its roots in *Chaplinsky v. New Hampshire* (315 U.S. 568 (1942)). The case considered whether a state law banning the use of words that were deemed to be 'offensive' or 'derisive' ran afoul of the First Amendment. The Court there suggested that several kinds of speech fell outside of traditional First Amendment rules, including obscenity, profanity, libel, and 'fighting words' (315 U.S. at 572). The Court has expanded and deepened this idea over time in cases such as *Miller v. California* (413 U.S. 15,

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24 (1973)), which outlines a more specific approach to determining what counts, in that case, as obscenity and is thus not subject to standard free speech rules.

An instructive category receiving this treatment is child pornography. The Court outlined its approach to child pornography in *New York v. Ferber* in which the Court upheld a New York statute that banned its production and distribution (458 U.S. 747 (1982)). Building from *Miller's* obscenity standard, the Court held that 'the States are entitled to greater leeway in the regulation of pornographic depictions of children' than they might otherwise be with respect to other speech (458 U.S. at 756). Child pornography, it notes, can be classified 'as a category of material outside the protection of the First Amendment' (458 U.S. at 756). Unlike pornography more generally, 'a sexually explicit depiction need not be "patently offensive" in order to have required the sexual exploitation of a child for its production' (458 U.S. at 761). In *Ferber*, the Court not only carves out an exception to speech for child pornography but one more stringent than required by *Miller*. As the Court explains such an approach is justified to 'protect the physical and emotional well-being of youth' (458 U.S. at 757). Child pornography not only harms the child in the moment but constitutes 'a permanent record of the children's participation and the harm to the child is exacerbated by their circulation' (458 U.S. at 759).

While the analogy to climate change denial may seem offensive, it is, in our view, instructive. Like child pornography, climate change denial creates a harm that multiplies over time for the youth who are unable to sufficiently combat the problem today. In other words, when a child is victimized through the distribution of their images, as the Court explains in *Ferber*, that initial harm continues because distribution is likely to continue once an image is released thereby continuing and multiplying that initial harm over time. Similarly, when greenhouse gases are released into the atmosphere, youth are both harmed by conditions today and will experience increased harm in the future as the overall atmospheric concentration rises, or as youth climate activist Greta Thunberg puts it, the future 'was stolen

from us every time you said the sky was the limit … [a]nd the saddest thing is that most children are not even aware of the fate that awaits us' (Thunberg, 2019). As a result, the same concern for the future well-being of children in a democratic society that animates giving states wide-latitude to restrict child pornography also holds for climate denial. If those affected by speech's harm cannot combat it in the necessary time-frame to ameliorate the problem, then the state ought to have the power to act in their interest.

One challenge is that the categorical exception in *Ferber* targeted conduct rather than the mere transmission of ideas. Indeed, as the Court clarified in *Ashcroft v. Free Speech Coalition* (535 U.S. 234 (2002)), virtual child pornography is protected and not an exception to general free speech rules because it does not involve actual harm to children. Revisiting the analogy, one could argue climate denial is akin to virtual child pornography in that it merely advances harmful ideas (and thus back to the *Virginia* problem identified in Section II) whereas the correct analogy to child pornography as seen in *Ferber* would be to the climate harming actions of excess carbon emissions.

In our view, however, denying that professional denial involves actions that causes harm is mistaken. Importantly, such denial is likely to involve action because it is done by agents whose purpose is to distort the marketplace of ideas. Here Justice Stevens' dissent in *Citizens United*, a landmark case that lifted some funding restrictions on speech near elections, is instructive. Though the marketplace of ideas is valuable, he argues, it often needs regulation to function freely: '[i]n a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules' (130 S.Ct. 876, 979 (2010)) Stevens, J., *concurring in part, dissenting in part*). Sometimes, he notes, 'the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding' is critical (130 S.Ct. at 979). Part of what Stevens highlights draws comparison to Lavik (2016: 83) and Schauer (1989) in the importance of the need to distinguish between rules that are

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generally valuable regarding free speech and the potential practical necessity to treat individual cases differently based on the effects in that case. Even if we grant that the pursuit of truth is *often* best advanced through open debate, professionalized engagement often precludes timely pursuit of truth and thus adherence to rules at the expense of pragmatism is problematic.

To return the argument on categorical exceptions, the *Ferber* focus on harm-inducing action helps to limit the exception we propose, creating a limited space of application. Our exception-based view suggests that climate denial should only be considered outside of general free speech norms and doctrine when it involves concerted actions likely to cause harm that may only be combatted today rather than in the future. Of course, the analogy only goes so far, as it would not be appropriate to suggest that the analogue to the private skeptic in the pornography case is acceptable and warrants protection. But we believe the analogy remains instructive in suggesting that our aim should be to consider harm and the timeliness of combatting it. Thus, individuals like our private skeptic remain able to speak freely because the lack of concerted effort makes them less able to distort the marketplace of ideas in harmful ways. But our view does create grounds to limit active and coordinated approaches to denial that are purposefully trying to distort the marketplace of ideas in ways that cause harm. This suggests that professional climate denial is harmful enough that it needs its own set of rules.

VI. Conclusion

It has now been three decades since James Hansen's ground-breaking testimony on climate change to Congress and more than a quarter-century since the United States ratified the United Nations Framework Convention on Climate Change, committing to act to prevent dangerous anthropogenic climate change. Yet we are worse off now than we were then, when scientists already well understood the urgency of action (Rich, 2018; IPCC, 2018). While

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belief in anthropogenic climate change has rebounded in the US over the last decade, still roughly three in ten Americas reject the argument that human activity is primarily to blame (Leiserowitz et al., 2019). The position of those who deny climate change to oppose aggressive (or any) US action have been bolstered by the current US administration's clear public support for the views of professional denial, reversal of Obama (and older)-era regulations, and announced intent to withdraw from the Paris Agreement (Holden, 2018; Popovitch, Albeck-Ripka, and Pierre-Louis, 2018). While these political battles play out in Washington, state capitals, and town planning meetings across the country, extreme weather events wrack the landscape and the economy, Americans are suffering a range of negative health effects, and delays in acting lead us closer to the dangers of passing the tipping point.

What could be done to counter the influence of climate change denial? One answer, and the one that both deniers and some free speech advocates argue is required, is to do nothing. If they are wrong, so it goes, the truth will eventually win out, and even untruths are valuable in a society to prevent dogmatism. A difficulty with this argument is that it depends on the contention that the truth will win out, rooted in the philosophy of Mill. The marketplace of ideas, the contemporary instantiation of Mill's thought, however does not clearly function as intended and a very real question must be asked: is there any value to the patently false claims of climate change deniers being expressed publicly? In this era of fake news and the sophisticated manipulation of information by vested interests (of all sorts), it is far from clear that there is.

In important ways, our aim with respect to constitutional jurisprudence is to suggest that there is an important principle in the pre-*Brandenburg* cases. When a threat is pragmatically great and pressing, it demands a different set of governing principles. Indeed, even those who value the pursuit of truth through deliberation must recognize that our society's continued existence is required for such debate to occur. The proper response to limits on climate change debate demands that we both defend the value of truly free

deliberation and guard its continued existence through targeted attention to threats to it. We have argued through attention to First Amendment exceptions that if a democratic society wishes to limit professional climate denial, there are ways to do so while at the same time supporting the core values of free expression instantiated by free speech theory and jurisprudence. The lesson here is that you cannot be so weak in your defense that you lose the values you are defending. We have attempted to provide here a middle way which targets impediments to continued democratic and societal flourishing from climate change while recognizing the overall value of free debate.

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