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"O SAY CAN YOU SEE…": THE COURT OF APPEAL SINGS A DIFFERENT TUNE WITH THE FIRST AMENDMENT

The Online Citizen v Attorney-General

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Constitutional law scholars in Singapore often wait for years in eager anticipation of a landmark decision from the Court of Appeal concerning the ambit of fundamental rights guaranteed in the *Singapore Constitution*[1]. Unlike other areas of law, for instance tort law,[2] there have been few such iconic decisions over the last couple of decades.[3] On 8 October 2021, in *The Online Citizen v The Attorney-General*,[4] a five-member full bench of the Singapore Court of Appeal, handed down a joint unanimous decision on whether the correction directions issued by the Minister of Home Affairs against allegedly false statements of fact under the *Protection from Online Falsehoods and Manipulation Act 2019*[5] impermissibly restricted freedom of speech under Article 14 of the *Singapore Constitution* and were unconstitutional.

Since the 1990s, the Court of Appeal has steadfastly rejected any comparisons with or drawing guidance from the United States' ("US") First Amendment jurisprudence,[6] and it was surprising that the Court of Appeal in *The Online Citizen* devoted significant attention to the doctrine of compelled speech that features in First Amendment jurisprudence. This decision of 246 paragraphs has deservedly merited two case comments in this issue of the Singapore Journal of Legal Studies.

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1 *Constitution of the Republic of Singapore* (1999 Rev Ed) [*Singapore Constitution*].

2 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR (R) 100 (CA); *Hii Chi Kok* [2017] 2 SLR 492 (CA); *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918 (CA); *Ng Huat Seng v Munib Mohammad Madni* [2017] 2 SLR 1074 (CA). In contract law, there have been important decisions that show a divergence of Singapore law from its English roots, but perhaps none as groundbreaking. See Andrew Phang & Goh Yihan, "Contract Law in Commonwealth Countries: Uniformity or Divergence?" (2019) 31 Sing Ac LJ 170.

3 A number of recent landmark decisions in the public law field include: *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 (CA); *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 (CA); *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 (CA) [*Jolovan Wham*].

4 [2021] SGCA 96 [*The Online Citizen*].

5 (No 18 of 2019, Sing) [*POFMA*].

6 *Eg*, *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 1 SLR (R) 791 [*Jeyaretnam*]; *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 (CA) [*Review Publishing*].

I. Overview of the Two Case Comments

The following two case comments address different aspects of this landmark decision in their analyses.

Gary Chan's critique focuses on the Court of Appeal's approach to the constitutionality of the *POFMA* provisions covering issues pertaining to the constitutional status of subject statements, compelled speech in the US and United Kingdom ("UK") with reference to the *European Convention on Human Rights*[7], stop communication directions, the contexts in which subject statements are interpreted and their potential harms, and the proportionality analysis to assess the constitutionality of legislation. Chan devoted significant attention to the Court's engagement with US and *ECHR* jurisprudence on the doctrine of compelled speech as exemplified respectively in *Wooley v Maynard*[8] and *Lee v Ashers Baking Co Ltd*.[9] Indeed, based on the Court's interpretation of *Wooley* and *Lee*, The Online Citizen's arguments were rejected by the Court without the necessity to rule on whether the doctrine of compelled speech ought to be applicable to Singapore. Chan astutely comments:

> Any doctrine of compelled speech applicable to Singapore would have to be accommodated within Article 14—with respect to which the core premise should be the right not to speak or express an opinion as part of democratic discourse as opposed to purely freedom of conscience based on dignitarian interests. To that end, the judiciary might delineate the scope of compelled speech to be protected or not (eg, note that the US jurisprudence does not generally protect compelled disclosures of factual statements per se).[10]

Chan also notes that Singapore already embraces a form of proportionality analysis within Article 14 through the application of the three-step framework that requires the court to balance free speech against legislative restrictions based on the justifiability of restrictions and the rational nexus test; the proportionality analysis insofar as it is based on the requirement of "the least restrictive means" is not applicable presently in Singapore.

Marcus Teo observes that the Court of Appeal in *Wham Kwok Han Jolovan v Public Prosecutor* had established a seemingly-novel three-step analytical framework to evaluate Article 14 challenges to legislation, and *The Online Citizen* was the first opportunity for the Court to apply that test. However, Teo argues that "the manner in which the Court in *The Online Citizen* applied important aspects of the framework, involving the identification of restrictions on free speech under Article 14(1) and the justification of those restrictions under Article 14(2), appears to differ considerably from what the Court did in *Jolovan Wham* itself. *The Online Citizen*, then, is an important second chapter in the development of the applicable

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7 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) [*ECHR*].

8 430 US 705 (1977) [*Wooley*].

9 [2018] 3 WLR 1294 (SC) [*Lee*].

10 Gary Chan, "Online Falsehoods, Constitutional Free Speech and Its Limits" [2022] Sing JLS 166 at 173.

test for Article 14 challenges".[11] Teo's adroit commentary focuses on the difference between fundamental principles in constitutional law and administrative law, and notes that "the constitutionality of legislative provisions conferring discretionary powers must be assessed on the premise that the executive will only act intra vires (*ie* within the administrative law limits of legality, rationality and procedural propriety) thereunder".[12] He also poses the provocative question:

> Thus, on the Court of Appeal's own test for compelled speech, POFMA Part 3 should be characterised as a provision which compels (non-false) speech, because it requires the statement-maker to say something it disagrees with (that the subject statement was false) without the ability to qualify it (one cannot subsequently say that the subject statement is not-false or true, only that one believes that it is not-false or true). Why, then, did the Court hold otherwise?[13]

Last but not least, Teo notes that, hitherto, the *Jolovan Wham* framework was widely seen to herald a more intense standard of constitutional scrutiny, but *The Online Citizen* has given us reason to doubt that conclusion: "If *Jolovan Wham* was a "landmark' for constitutional adjudication in Singapore, *The Online Citizen* is a step backward: it seems that a factual nexus between the rights-restricting legislation and an Article 14(2) purpose may once again be all that is required for laws to be constitutional."[14]

II. The Singapore Court of Appeal and the First Amendment

I hope to supplement the case comments by providing an overview of how the Singapore Court of Appeal had been engaging with the First Amendment to the US Constitution, and then adding some thoughts on the extent to which the regulation of fake news would be permitted in the US.

In 1992, in the context of defamation law, the Court of Appeal in *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* rejected drawing relevant comparisons from US First Amendment jurisprudence, emphasising that: "The terms of art 14 of our Constitution differ materially from the First and Fourteenth Amendments of the Constitution of the United States and also from art 10 of the European Convention on Human Rights."[15] Almost two decades later, again in a decision involving the tort of defamation, the Court noted that: "In American jurisprudence on freedom of speech, one of the strongest arguments for tolerating defamation is the 'marketplace of ideas rationale'… This is a very powerful argument in favour of allowing a great degree of latitude *vis-à-vis* freedom of speech, but it has not been accepted in England, Australia, New Zealand or other Commonwealth jurisdictions as a

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11 Marcus Teo, "Constitutional Implications of the First POFMA Judgment" [2022] Sing JLS 177 at 178.
12 *Ibid* at 182.
13 *Ibid* at 185.
14 *Ibid* at 188.
15 *Jeyaretnam*, *supra* note 6 at 330.

sufficient legal basis for allowing the publication of defamatory views or opinions."[16] In particular, the High Court of Australia had rejected the applicability of the marketplace of ideas rationale to Australian free speech jurisprudence.[17] While the Court did not explicitly declare the inapplicability of First Amendment jurisprudence to Singapore law, Chief Justice Chan Sek Keong's judgment focused primarily on the consideration of English decisions in arriving at the conclusion that it was questionable whether the marketplace of ideas rationale was applicable to false statements. In summary, the Court of Appeal had not been hospitable to entertaining references to First Amendment jurisprudence until its recent mention of the marketplace of ideas rationale in *Attorney-General v Ting Choon Meng* in 2017.[18] While the Court reiterated its doubt about the applicability of such a rationale, it commented that "false speech, *which has been proven as a matter of fact to be false in a court of law*, can contribute little to the marketplace of *ideas* or to advances in knowledge for the benefit of society as a whole".[19]

The text of the First Amendment to the US Constitution starkly provides: "Congress shall make no law… abridging the freedom of speech, or of the press". The absolute language in which the US constitutional guarantee is phrased—as a limitation on legislative power as opposed to a grant of a positive right—is not found in either the constitutional documents of most democracies or their equivalent conventional instruments. For instance, Article 10 of the *European Convention on Human Rights* begins with "*[e]veryone* has the right to freedom of expression…",[20] and Article 14 of the *Singapore Constitution* is framed as "*every citizen* of Singapore has the right to freedom of speech and expression".[21] As a result of the apparent absolutist language of the First Amendment, the US Supreme Court had to construct a unique jurisprudence famously characterised by its content-neutrality doctrine with a tiered-scrutiny review of legislative action to give effect to the spirit of the First Amendment: 'no' cannot be absolutely 'no' as there ought to be some occasions on which the freedom of speech or the freedom of the press may permissibly be abridged.[22] It was perhaps a text in search of a theory, as the US Supreme

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16 *Review Publishing*, *supra* note 6 at para 280.

17 *Eg*, *McCloy v New South Wales* (2015) 257 CLR 178 at 229 (HCA). But note that the High Court had in the 1990s drawn on First Amendment jurisprudence in articulating the implied constitutional freedom of political communication: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (HCA); *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 (HCA). More recently Justice Edelman had cautioned that "the adoption of a foreign concept that is ill-suited to resolving conflicting rights or freedoms will not benefit local jurisprudence". See *Clubb v Edwards*; *Preston v Avery* (2019) 267 CLR 171 at para 465 (HCA).

18 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 (CA) [*Ting Choon Meng*].

19 *Ibid* at para 115 [*emphasis in original*].

20 *ECHR*, *supra* note 7, art 10 [*emphasis added*].

21 Singapore *Constitution*, supra note 1, art 14 [emphasis added].

22 The Supreme Court has employed a 'heightened scrutiny methodology' drawn from the Fourteenth Amendment jurisprudence where governmental regulation has to satisfy the relevant strict, intermediate or rational scrutiny standards, depending on whether it was content-neutral or content-based. Content-neutral time, place and manner restrictions are usually permitted if they serve a substantial governmental interest, but content-based restriction of protectable speech will be subject to strict scrutiny, which is usually fatal to the challenged regulation. *Eg*, Susan Williams, "Content Discrimination and the First Amendment" (1991) 139 U Pa L Rev 615; Martin H Redish, "The Content Distinction in First Amendment Analysis" (1981) 34 Stan L Rev 113.

Court attempted over the decades to construct a theoretical framework to support the growing number of First Amendment doctrines that were articulated. These include 'time-place-manner (TPM) restrictions', 'secondary effects', 'categorical exceptions', 'prior restraint', 'compelled speech', 'actual malice', 'public figure' and 'commercial speech'.[23] In particular, the content neutrality doctrine is a hallmark of First Amendment jurisprudence that sets the US apart from its Western liberal democratic counterparts such as the UK and Australia which adopt some form of proportionality balancing when evaluating governmental regulation of speech.[24]

It has been noted by free speech scholar Rodney Smolla that "[c]ontemporary free speech is a befuddling array of theories, methods, formulas, tests, doctrines and subject areas".[25] More critically, he cynically wrote that:

> Modern First Amendment law abounds in three-part and four-part tests of various kinds, leaving the Supreme Court vulnerable to the accusation that First Amendment jurisprudence is highly contrived. No serious student of modern law believes that these doctrines have any *a priori* existence or validity. These doctrines, which have evolved through fits and starts over time through decisions of the Supreme Court, are expressions of social policy and philosophy. They will come and go with changes in the personnel of the Supreme Court and with the long march of cultural and intellectual history—of which the First Amendment is only one small part.[26]

Similarly, Lillian BeVier and Thomas McCarthy have expressed despair at how "First Amendment theories have multiplied, the case law has become ever more chaotic, and consensus on fundamental issues has remained elusive both on and off the Court"[27] and how the rules are "often maddeningly vague and unpredictable".[28]

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[23] *Eg*, *Chaplinsky v New Hampshire*, 315 US 568 (1942); *New York Times Co v Sullivan*, 376 US 254 (1964); *Gertz v Robert Welch, Inc*, 418 US 323 (1974) [*Gertz*]; *Central Hudson Gas & Electric Corp v Public Service Commission*, 447 US 557 (1980); *New York v Ferber*, 458 US 747 (1982); *Clark v Community for Creative Non-Violence*, 468 US 288 (1982); *Ward v Rock Against Racism*, 491 US 781 (1989); *Texas v Johnson*, 491 US 397 (1989); *RAV v City of St Paul*, 505 US 377 (1992) [*RAV*]; *Reed v Town of Gilbert*, 576 US 155 (2015).

[24] *Eg*, *Garrison v Louisiana*, 379 US 64 at 75 (1964) ("[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *United States v Playboy Entertainment Group, Inc* (2000) 529 US 803 at 818 ("It is rare that a regulation restricting speech because of its content will ever be permissible."); *RAV*, *ibid* at 387 (content discrimination "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace"). See also David Tan, "Walking the Tightrope Between Legality and Legitimacy: Taking Rights Balancing Seriously" (2017) 29 Sing Ac LJ 743.

[25] Rodney A Smolla, *Smolla and Nimmer on Freedom of Speech: A Treatise on the First Amendment*, 3d ed (New York: Clark Boardman Callaghan, 1996) (October 2021 Update) at § 2:2. See also Elena Kagan, "Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine" (1996) 63 U Chicago L Rev 413 at 515 ("increasingly technical, complex classificatory schemes").

[26] Smolla, *ibid* at § 2:13. See also Robert C Post, "Reconciling Theory and Doctrine in First Amendment Jurisprudence" (2000) 88 Cal L Rev 2353 at 2355 [Robert C Post, "Reconciling Theory and Doctrine"].

[27] Lillian R BeVier, "The First Amendment on the Tracks: Should Justice Breyer Be at the Switch?" (2005) 89 Minn L Rev 1280 at 1280.

[28] J Thomas McCarthy & Roger E Schechter, *The Rights of Publicity and Privacy*, 2d ed (United States: Thomson Reuters, 2021) at § 8:9.

Mutually supportive theories for the First Amendment have been said to rest on the tripartite goals of the Framers of the US Constitution that comprise sponsoring enlightenment or the discovery of truth, self-fulfillment and citizen participation in a deliberative democracy.[29] In its earlier conceptions, the First Amendment goal of enlightenment or the discovery of truth is represented most prominently by Oliver Wendell Holmes' theory of a 'marketplace of ideas' expressed most forcefully in *Abrams v United States*:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[30]

The marketplace of ideas rationale is perhaps "the most famous and rhetorically resonant of all free speech theories",[31] but it also exhibits a strong underlying democratic theory, evident in the oft-quoted phrase from *New York Times v Sullivan* that there is a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open".[32] However, the First Amendment case law offers an important lesson: the US Supreme Court's discussion of the relationship between truth, knowledge, and the First Amendment has been inconsistent. The Court sometimes posits that the discovery of truth within the marketplace of ideas is a vital justification for the First Amendment. At other times, however, it subordinates that rationale to other concerns, such as democratic legitimacy. It is worth noting that the truth-seeking justification, and its accompanying marketplace of ideas metaphor, have become far less influential in contemporary free speech scholarship, and "the free speech literature appears increasingly to have detached itself from the empirical and instrumental epistemic arguments made by Mill and others, focusing instead on the other justifications… such as arguments from democracy or autonomy".[33] This marketplace rationale mandates that speakers should be free from government control or censorship, so that truth and falsehood may battle it out in public discourse. In *Texas v Johnson*, the Supreme Court in the plurality opinion reiterated that "[i]f there is a bedrock principle underlying

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[29] Rodney Smolla argues that all three theories should be understood "not as *mutually exclusive* defenses of freedom of speech, but rather as *mutually supportive* rationales that combine to make an overwhelming case for the elevation of freedom of speech as a transcendent value in an open society" [emphasis added]. Smolla, *supra* note 25 at § 2:7.

[30] *Abrams v United States*, 250 US 616 at 630 (1919) [*Abrams*]. See also *Whitney v California*, 274 US 357 at 375 (1927).

[31] Smolla, *supra* note 25 at § 2:4.

[32] *New York Times Co v Sullivan*, *supra* note 23 at 270 as quoted in *NAACP v Claiborne Hardware Co*, 458 US 886 at 913 (1982); *Boos v Barry*, 485 US 312 at 318 (1988). The democratic variant of the marketplace of ideas theory was first discussed in *Thornhill v Alabama*, 310 US 88 at 96, 101-2 (1940).

[33] Paul Horwitz, "The First Amendment's Epistemological Problem" (2012) 87 Wash L Rev 445 at 453 (referring to Frederick Schauer, "Facts and the First Amendment" (2010) 57 UCLA L Rev 897 at 909-910).

the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable".[34] However, it is less clear in its application to deliberate falsehoods.

III. Fake News and the First Amendment

Falsehoods is a category of speech that had not been clearly addressed by the US Supreme Court. In defamation law, when a public figure is the plaintiff, a defendant is not liable for publishing or disseminating falsehoods unless the actual malice test (*ie*, there is actual knowledge of the falsity of the statement or a reckless disregard as to the truth or falsity)[35] is satisfied. This high threshold implicitly shows an early tolerance in First Amendment jurisprudence for fake news. The term 'fake news' has been used by politicians, journalists and ordinary citizens all around the world, but each of whom has his or her own interpretation of what 'fake news' really means. Generally, there seems to be a consensus that it "ultimately refers to deliberately false or misleading information, disguised as legitimate news, meant solely to deceive the public".[36] Parody or satire, albeit clearly conveying false information but in an intentionally humorous and critical manner, would not be defined as 'fake news'. It is not surprising that many who decry fake news as having no value in the marketplace of ideas or perceiving it as 'anti-speech' because it undermines public discourse by perpetuating false statements of fact, advocate its regulation because fake news can cause, or potentially cause, tangible social harm.[37]

Immanuel Kant argues that all lies or deliberate false speech are harmful because they undermine the dignity of other individuals by preventing them from acting freely and rationally.[38] When speakers lie, they can interfere with their listeners' right to receive true information and manipulate their ability to make informed decisions based on fact.[39] In her reading of Kant, Daniela Manzi contends that "[u]nder a listener-based approach, listeners' interests in receiving accurate information are placed above speakers' interests in speaking freely when there is a power imbalance or unequal access to information".[40]

Fake news is often argued to distort the truth in the marketplace of ideas or to be antithetical to the concept of rational deliberation. Fake news may also cause harm—including physical injury—to both listeners and the public at large. Fake news stories

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[34] *Texas v Johnson*, 491 US 397 at 414 (1989). It is noted that "[e]very idea, no matter how misguided, and every speaker, no matter how ill-equipped, stands on equal footing". Horwitz, *ibid* at 471.

[35] *New York Times Co v Sullivan*, *supra* note 23; *St Amant v Thompson*, 390 US 727 (1968); *Bose Corporation v Consumers Union of United States*, 466 US 485 (1984); *Masson v New Yorker Magazine Inc*, 501 US 496 (1991).

[36] Jessica Stone-Erdman, "Just the (Alternative) Facts, Ma'am: The Status of Fake News under the First Amendment" (2017) 16 First Amendment Rev 410 at 440.

[37] Alan K Chen, "Free Speech, Rational Deliberation, and Some Truths About Lies" (2020) 62 Wm & Mary L Rev 357 at 388-389.

[38] Immanuel Kant, *On a Supposed Right to Lie Because of Philanthropic Concerns*, translated by James W Ellington in *Ethical Philosophy*, 2d ed (Indianapolis: Hackett Publishing, 1994) at 163-165.

[39] Daniela C Manzi, "Managing the Misinformation Marketplace: The First Amendment and the Right Against Fake News" (2019) 87 Fordham L Rev 2623 at 2626.

[40] *Ibid* at 2640.

may be created and disseminated with the purpose of affecting the public's views on a political candidate or matters of public interest. It can be intentionally propagated with the primary objective of spreading particular falsehoods, or it may be unintentionally shared or reposted on social media by individuals who do not know that such information is false. During election time, it has been commented, in the context of the First Amendment, that giving the government the authority to determine "what is true or false in campaign speech opens the door to partisan abuse".[41]

The US Supreme Court "often makes a point to say that it affords political speech the highest level of Constitutional protection".[42] In fact, the "discussion of political affairs lies at the heart of the First Amendment"[43] and there is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs including discussions of political candidates.[44] Indeed this protection can even extend to false speech, or information that is untrue. In the iconic US Supreme Court decision of *New York Times v Sullivan*, the court famously uttered that "erroneous statement is inevitable in free debate, and… it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need… to survive.'"[45]

Prior to 2012, it would seem that the question of whether fake news deserves any protection under the First Amendment would be answered with a clear 'no'. However, it would appear that today, the position is that "falsity alone may not suffice to bring the speech outside the First Amendment".[46] In 2012, the US Supreme Court handed down a judgment in *United States v Alvarez* that may be its strongest statement yet on the necessity and value of protecting false speech generally, not just in the political context. It has been said that "[a]ny consideration of laws regulating false campaign speech and fake news must consider carefully the recent case *United States v Alvarez*".[47] Xavier Alvarez was found guilty of violating the *Stolen Valor Act of 2005* for falsely claiming he had been awarded the Congressional Medal of Honor; he contended that the *Act*, which also made it a crime to falsely claim receipt of military decorations or medals, violated his First Amendment rights. The government in *Alvarez* cited a number of precedential cases that suggested that false statements have no value in the marketplace of ideas, and hence should receive no protection under the First Amendment. They include:

> False statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas.[48]

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41 William P Marshall, "False Campaign Speech and the First Amendment" (2004) 153 U Pa L Rev 285 at 299.

42 See Leigh Ellen Gray, "Thumb War: The Facebook 'Like' Button and Free Speech in the Era of Social Networking" (2013) 7 Charleston L Rev 447 at 475 (citing *Citizens United v FEC*, 558 US 310 at 329 (2010)) (striking down certain campaign finance laws as impermissibly chilling to political speech "central to the meaning and purpose of the First Amendment".)

43 William P Marshall, *supra* note 41 at 298.

44 *Buckley v Valeo*, 424 US 1 at 14-15 (1976).

45 *New York Times v Sullivan*, *supra* note 22 at 271 (citing *NAACP v Button*, 371 US 415 at 433 (1963)).

46 *United States v Alvarez*, 567 US 709 at 719 (2012) [*Alvarez*].

47 Alvin I Goldman & Daniel Baker, "Free Speech, Fake News, and Democracy" (2019) 18 First Amendment Rev 66 at 113.

48 *Alvarez*, *supra* note 46 at 717 (quoting *Hustler Magazine, Inc v Falwell*, 485 US 46 at 52 (1988)).

> Spreading false information in and of itself carries no First Amendment credentials[49] [and] there is no constitutional value in false statements of fact.[50]

Justice Kennedy, in the plurality opinion, commented that the quotations cited by the government in support of its position "all derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement".[51] While the Court conceded that "there are instances in which the falsity of speech bears upon whether it is protected", but even then, the falsity of the speech at issue is only a relevant factor, not a determinative one.[52]

Justice Kennedy identified three features that militate against falsehood as a category of proscribable speech. First, each precedent case advanced by the government featured a legally cognizable harm associated with the false statement. Falsity per se did not support a categorical rule that false statements receive no First Amendment protection. Second, following *New York Times Co v Sullivan*, the Supreme Court "has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood".[53] Third, the statute that abridges the freedom of speech must be narrowly tailored to a legitimate government interest; and the *Stolen Valor Act* was not sufficiently narrowly tailored to meet this standard. These restrictions reflect Justice Kennedy's application of a strict scrutiny standard to a statute that is characterised as content-based discrimination. It should be noted that while Justice Breyer joined in the plurality's invalidation of the *Act*, he applied a lower standard of intermediate scrutiny. However, these differences have no relevance to Singapore's constitutional jurisprudence.

Justice Breyer, with whom Justice Kagan joined, commented:

> The dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts that do not concern such subject matter. Such false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas. And the government often has good reasons to prohibit such false speech. … But its regulation can nonetheless threaten speech-related harms.[54]

In summary, a majority of the Supreme Court rejected the position that false statements are not protected by the First Amendment or that "false speech should be in a general category that is presumptively unprotected".[55] Accordingly, the Court refused to create any general exception to the First Amendment for false statements.

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49 *Herbert v Lando*, 441 US 153 at 171 (1979).

50 *Gertz*, *supra* note 23 at 340.

51 *Alvarez*, *supra* note 46 at 719.

52 *Ibid*.

53 *Ibid* (citing *New York Times Co v Sullivan*, *supra* note 23 at 280) (a high mens rea standard of "actual malice", entailing knowledge or reckless disregard, must accompany a false statement).

54 *Ibid* at 732.

55 *Ibid* at 722. Other scholars have also disputed the premise that fake news has no intrinsic value. *Eg*, Alan K Chen, *supra* note 37.

IV. Concluding Remarks

It has been argued by American scholars that "[d]emocracy loses in the presence of fake news".[56] But the marketplace of ideas rationale appears to intimate that certain types of fake news may nonetheless have protectable value; the US Supreme Court noted that "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee".[57] In *The Online Citizen*, the Court of Appeal's reference to First Amendment jurisprudence unfortunately has omitted a more textured and nuanced discussion of the position of false statements, and in particular, the seminal decision of *Alvarez*. Under *Alvarez*, fake news could still be regulated so long as the regulation of speech is "actually necessary" to achieve a compelling government interest: (i) there must be a direct causal link between the restriction on speech and the harm to be prevented; (ii) the government must show that counter-speech would not suffice to achieve the interest; and (iii) the least restrictive means must be used to prevent harm to the compelling interest. But it is highly unlikely that legislation similar to Singapore's *POFMA* could survive judicial scrutiny by the US Supreme Court based on current First Amendment principles.[58] Ultimately, the narrower theory of participatory or deliberative democracy[59]—which appears to be more relevant to the High Court of Australia in their continued articulation of implied constitutional freedom of political communication—may be better aligned with Singapore's historical, political, cultural and social circumstances. I am heartened by the discussion of First Amendment jurisprudence in *The Online Citizen*, but one must certainly proceed with caution in future cases involving Article 14 of the *Singapore Constitution* as the fundamental textual and philosophical differences may stand in the way of apropos comparisons.

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[56] Alvin I Goldman & Daniel Baker, *supra* note 47 at 141. See also Daniela C Manzi, *supra* note 39 at 2651.

[57] *Alvarez*, *supra* note 46 at 718.

[58] *Eg*, Jessica Stone-Erdman, *supra* note 36; Joel Timmer, "Fighting Falsity: Fake News, Facebook and the First Amendment" (2017) 35 Cardozo Arts & Ent LJ 669 at 679-683; Daniela C Manzi, *supra* note 39 at 2645-2648. Richard Hasen commented that "[a]lthough the Court's decision in Alvarez is badly fractured, there seems unanimous skepticism of laws targeting false speech about issues of public concern and through which the state potentially could use its sanctioning power for political ends": Richard L Hasen, "A Constitutional Right to Lie in Campaigns and Elections?" (2013) 74 Mont L Rev 53 at 69.

[59] Often known in the US as the Madisonian ideal of deliberative democracy, different but related versions of this theory have been prominently championed by constitutional scholars like Robert Post, Cass Sunstein and Jack Balkin. *Eg*, Robert C Post, "Reconciling Theory and Doctrine", *supra* note 26; Robert C Post, "Participatory Democracy and Free Speech" (2011) 97 Va L Rev 477; Cass R Sunstein, *Designing Democracy: What Constitutions Do* (2001) at 6-9, 96-101, 239-43; Jack M Balkin, "Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society" (2004) 79 NYUL Rev 1. See also David Tan, "The *Reynolds* Privilege in a Neo-Confucianist Communitarian Democracy: Reinvigorating Freedom of Political Communication in Singapore" [2011] Sing JLS 456 at 468-474.

V. Postscript

On 28 February 2022, the Singapore Court of Appeal handed down a decision totalling 331 paragraphs in *Tan Seng Kee v Attorney-General* regarding the constitutionality of section 377A of the Penal Code.[60] The five-member Court held that the entirety of section 377A was unenforceable as a result of the political compromise struck by the government in 2007 and subsequent representations by the Attorney-General which have engendered substantive legitimate expectations in these exceptional circumstances that no prosecutions will be brought in respect of specific conduct.[61] In *obiter*, the Court noted that "Art 14(1)(a) protects the right to freedom of speech—that is to say, any form of communication that is *expressed in words*, *whether spoken or written*—that conveys meaning, opinions, beliefs or ideas. Since acts of sexual intimacy are not 'speech' to begin with, the Art 14 constitutional challenge to s 377A is without merit".[62] Unlike in *The Online Citizen*, where the Court of Appeal had engaged in a discussion of First Amendment jurisprudence, here the Court eschewed any reference to symbolic speech or expressive conduct which fall under the aegis of 'freedom of speech' protection in the US.[63]

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60 *Tan Seng Kee v Attorney-General* [2022] SGCA 16.

61 *Ibid* at paras 149-154.

62 *Ibid* at para 284.

63 *Eg*, *United States v O'Brien*, 391 US 367 (1968); *Tinker v Des Moines Independent Community School District*, 393 US 503 (1969); *Clark v Community for Creative Non-Violence*, *supra* note 23; *Texas v Johnson*, *supra* note 23; *United States v Eichman*, 496 US 310 (1990); *RAV v City of St Paul*, *supra* note 23; *Virginia v Black*, 583 US 343 (2003). The cases demonstrate that although symbolic speech and expressive conduct receive First Amendment protection, they can nonetheless be regulated by the government, subject to the content-neutrality doctrine and time-place-manner restrictions.