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## Retooling Blue-Ribbon Advisory Committees for a Post-Fact World

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## RETOOLING BLUE-RIBBON ADVISORY COMMITTEES FOR A POST-FACT WORLD

*Will Rhee\* and Claire Flynn Sellers\*\**

*“No one wants advice, only corroboration.”*

—John Steinbeck, *The Winter of Our Discontent* (1961).<sup>1</sup>

*“The American people want a government that solves problems. This requires that decision makers have good information to guide their choices about how current programs and policies are working and how they can be improved.”*

—The U.S. Commission on Evidence-Based Policymaking, 2017.<sup>2</sup>

*“Disagreement and debate—including ferocious disagreement and exhausting debate—are hallmarks of American politics . . . . The art of politics lies in the manufacturing of a workable consensus for a given time—not unanimity.”*

—Jon Meacham, *The Soul of America* (2019).<sup>3</sup>

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<sup>1</sup> JOHN STEINBECK, *THE WINTER OF OUR DISCONTENT* 93 (1961).

<sup>2</sup> COMM’N ON EVIDENCE-BASED POLICYMAKING, *THE PROMISE OF EVIDENCE-BASED POLICYMAKING* 8 (2017).

<sup>3</sup> JON MEACHAM, *THE SOUL OF AMERICA: THE BATTLE FOR OUR BETTER ANGELS* 17 (2019).

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## INTRODUCTION

It is no surprise that over the last 40 years Americans have become increasingly polarized and divided.<sup>4</sup> Not coincidentally, over that same time, new technologies such as the internet, the now-ubiquitous smartphone, and social media have transformed how Americans communicate and receive information.<sup>5</sup> The future promises only more technological innovation and a concomitant change in popular communication.<sup>6</sup>

With political division increasing in popularity and intensity combined with more sophisticated technological means to attack and confuse opposing viewpoints,<sup>7</sup> the dearth of shared authoritative information sources will only get worse.<sup>8</sup> In 2016, political commentator Scottie Nell Hughes concluded that facts no longer existed.<sup>9</sup> That same year, the *Oxford English Dictionary* picked “post-truth,” “an adjective defined as ‘relating to or denoting circumstances in which

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<sup>4</sup> For further discussion of rising American political polarization, see *infra* Part II.A.

<sup>5</sup> For further discussion of how technology has transformed the way Americans communicate and receive information, see *infra* Part II.

<sup>6</sup> For further discussion of how further technological innovation will only increase post-factualism, see *infra* Part II.B.

<sup>7</sup> For further discussion of the interaction of technology and polarization in U.S. politics, see *infra* Parts II and III.

<sup>8</sup> Francis Fukuyama, *The Emergence of a Post-Fact World*, PROJECT SYNDICATE (Jan. 12, 2017), <https://www.project-syndicate.org/magazine/the-emergence-of-a-post-fact-world-by-francis-fukuyama-2017-01>.

<sup>9</sup> Hughes said, “Everybody has a way of interpreting [facts] to be the truth or not true. There’s no such thing, unfortunately anymore, of facts.” Diane Rehm, *How Journalists are Rethinking Their Role Under a Trump Presidency*, WAMU 88.5, at 15:30–15:40 (Nov. 30, 2016), <http://thedianerehmshow.org/audio/#/shows/2016-11-30/how-journalists-are-rethinking-their-role-under-a-trump-presidency/114095/@145:30> (Statement of Scottie Nell Hughes). A Twitter account later claimed to quote Hughes’ clarification of her earlier statement: “Of course I believe there are facts in this world; what I was referencing was . . . [f]acts to one side were seen as opinion or untrue to the other.” Brian Stelter (@brianstelter), *Following Up with Scottie Nell Hughes About Facts*, TWITTER (Dec. 4, 2016, 11:50 PM), <https://twitter.com/brianstelter/status/805635531250003968?lang=eu>. In a similar manner, Counselor to President Donald Trump, Kellyanne Conway, labeled partisan equivocation about so-called facts “alternative facts.” Alexandra Jaffe, *Kellyanne Conway: WH Spokesman Gave ‘Alternative Facts’ on Inauguration Crowd*, NBC NEWS (Jan. 22, 2017, 8:28 PM), <http://www.nbcnews.com/politics/news/wh-spokesman-gave-alternative-facts-inauguration-crowd-n710466>.

objective facts are less influential in shaping public opinion than appeals to emotion and personal belief” as its 2016 Word of the Year.<sup>10</sup>

Just as post-modernism has disputed the attainability and certainty of Enlightenment rationality in knowledge creation,<sup>11</sup> post-factualism disputes the attainability and certainty of factual evidence in policymaking.<sup>12</sup> By attacking previously shared authoritative information sources or even the theoretical possibility of indisputable or objective fact, post-factualism makes a nihilistic end run around conventional policy arguments.<sup>13</sup>

Regardless of whether post-factualism is something new or a reframing of something old,<sup>14</sup> it endangers deliberative democracy. To be effective, any exploration of post-factualism must remain as neutral and non-partisan as possible.<sup>15</sup> Otherwise, post-factualism’s distinctive danger can become lost in the perceived cacophony of typical partisan politics.<sup>16</sup>

In particular, post-factualism suffers from two dialectic defects, the “Thee-Not-Me” problem—where all sides are not subjected to the same rigorous criticism<sup>17</sup>—and the “What Would You Do?” problem—where a critical side refuses to offer any alternative solutions to undeniable policy challenges.<sup>18</sup>

Post-factualism exploits the unavoidable reality that we possess little actual first-hand (or specialized) knowledge of many facts essential for modern life. No one can know enough about everything necessary to function

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<sup>10</sup> *Word of the Year 2016*, OXFORD UNIV. PRESS: OXFORD LANGUAGES, <https://languages.oup.com/word-of-the-year/2016/> (last visited Nov. 29, 2022). According to the *Oxford English Dictionary*, the word “post-truth” appears to have been first coined in 1992. See also Megan Boler & Elizabeth Davis, *The Affective Politics of the “Post-Truth” Era: Feeling Rules and Networked Subjectivity*, 27 *EMOTION, SPACE, & SOC’Y* 75, 75 (2018); Stephan Lewandowsky, Ullrich K. H. Ecker & John Cook, *Beyond Misinformation: Understanding and Coping with the ‘Post-Truth’ Era*, 6 *J. OF APPLIED RSCH. MEMORY & COGNITION* 353 (2017).

<sup>11</sup> See generally *Postmodernism*, STANFORD ENCYCLOPEDIA OF PHIL. (Feb. 5, 2015), <https://plato.stanford.edu/entries/postmodernism/>; see also Andrew Calcutt, *The Truth about Post-Truth Politics*, NEWSWEEK (Nov. 21, 2016, 4:34 AM), <https://www.newsweek.com/truth-post-truth-politics-donald-trump-liberals-tony-blair-523198> (stating that “for as long as we have been postmodern, we have been setting the scene for a ‘post-truth’ era”).

<sup>12</sup> For further discussion of post-factualism, see *infra* Part I.B.3.

<sup>13</sup> For further discussion of how post-factualism bypasses conventional arguments over evidence and inferences, see *infra* Parts I.B, II, and III.

<sup>14</sup> See, e.g., KURT ANDERSEN, *FANTASYLAND: HOW AMERICA WENT HAYWIRE: A 500-YEAR HISTORY* (2017); Paul-Erik Korvela, *The Ancient Pedigree of Post-Factualism*, 19 *REDESCRIPTIONS* 121, 124 (2016).

<sup>15</sup> See *infra* note 378 and accompanying text.

<sup>16</sup> See *infra* note Part IV.D.2.

<sup>17</sup> TOM NICHOLS, *THE DEATH OF EXPERTISE: THE CAMPAIGN AGAINST ESTABLISHED KNOWLEDGE AND WHY IT MATTERS* 18 (2017) (quoting Richard Hofstadter).

<sup>18</sup> For further discussion of these two dialectic defects of post-factualism, see *infra* Part I.B.1.i–ii.

independently in our modern, complex world.<sup>19</sup> Whether a plumber or a phlebotomist, specialized professionals or experts are unavoidable in our modern service-dominated economy.<sup>20</sup>

Likewise, complex contemporary governance is impossible without trusting another person or institution.<sup>21</sup> We can only do or know so much ourselves. Because government leaders at all levels can only regularly supervise a limited number of direct reports under their optimal span of control,<sup>22</sup> they must unavoidably delegate important tasks and information gathering to trusted subordinates.<sup>23</sup>

If the purpose of government in a representative democracy is to create and implement policies that best address real problems, then government must root out misleading post-factualism.<sup>24</sup> As Francis Fukuyama opined, “there is no reason to think that good information will win out over bad.”<sup>25</sup> Even the best policy analysis is only as good as its underlying inputs and assumptions. Garbage in, garbage out.

Easier said than done. Given how evenly divided Americans remain—particularly at the national level—and the prevalence of our two-party political system,<sup>26</sup> direct government efforts to limit post-factualism like the doomed U.S. Department of Homeland Security Disinformation Governance Board<sup>27</sup> can be dismissed by the party out of power as at best disingenuous or at worst sinister.<sup>28</sup> Moreover, even the most vile post-factual lies—not published with malice or

<sup>19</sup> Accord Maria Paola Ferretti, *Post-Factualism, Political Communication and the Role of Citizens*, in VIRTUES, DEMOCRACY, AND ONLINE MEDIA: ETHICAL AND EPISTEMIC ISSUES 235 (Nancy E. Snow & Maria Silvia Vaccarezza eds., 2021) (discussing “knowledge by being told” and “testimonial agency”) (quoting Elizabeth Fricker, *Testimony: Knowing through Being Told*, in HANDBOOK OF EPISTEMOLOGY 109–30 (Ilkka Niiniloto, Matti Sinonen, Jan Woleński eds., 2004)).

<sup>20</sup> NICHOLS, *supra* note 17.

<sup>21</sup> For further discussion of how trust in public servants and public institutions is essential for rational governance in a democracy, *see infra* Part I.B.2.

<sup>22</sup> *See generally* TIFFANY MCDOWELL & DON MILLER, DELOITTE, SPANS AND LAYERS FOR THE MODERN ORGANIZATION (2019), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/human-capital/us-spans-and-layers-for-the-modern-organization-2020.pdf>.

<sup>23</sup> *See id.*

<sup>24</sup> For further discussion of how the purpose of government in a democracy is to attempt to solve real problems, *see infra* Part I.A.

<sup>25</sup> Fukuyama, *supra* note 8.

<sup>26</sup> For further discussion of how evenly Americans are politically divided predominantly among two political parties, *see infra* Part III.A.

<sup>27</sup> For further discussion of the Disinformation Governance Board’s failure, *see infra* Part IV.D.2.

<sup>28</sup> For further discussion of Republican criticism of the Biden Administration’s efforts against post-factualism, *see infra* Part IV.D.2.iv.

reckless disregard<sup>29</sup>—are political speech protected from government regulation by the First Amendment.<sup>30</sup>

Better, we submit, for private citizens to address the post-factualism of their fellow private citizens through so-called “blue-ribbon advisory committees” (“BRACs”).<sup>31</sup> Because they are only advisory, BRACs are more resistant to partisan “whataboutism” attacks<sup>32</sup> and not subject to the same First Amendment prohibitions.<sup>33</sup> Ultimately, the blue-ribbon purpose of these retooled BRACs would be to voluntarily promote increased civic competence in assessing, consuming, and using information in this post-fact age.<sup>34</sup>

Historically, BRACs have ironically fueled counterproductive conspiracy theories.<sup>35</sup> There remains a rising populist backlash against the “best and the brightest” that the blue-ribbon represents.<sup>36</sup> And past advisory

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<sup>29</sup> U.S. CONST., amend. I; *see also* Francis C. Amendola et al., *Political Speech*, 16B C.J.S. CONST. L. § 933 (Oct. 2022) (“Criticism of the official conduct of public officers is protected even though . . . it is untrue if it is not published with legal malice . . . or reckless disregard.”).

<sup>30</sup> *See* U.S. CONST., amend. I; *see also* *United States v. Alvarez*, 567 U.S. 709, 718, 723 (2012) (plurality opinion) (holding that the First Amendment prohibited the criminal prosecution of an individual falsely claiming he was a recipient of the Medal of Honor) (“[S]ome false statements are inevitable if there is to be an open and vigorous expression of views.”) (“Permitting the government to decree this speech to be a criminal offense, . . . would endorse government authority to compile a list of subjects about which false statements are punishable . . . [o]ur constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth.”).

<sup>31</sup> For further discussion of why in combatting post-factualism private citizen advisory groups are less legally suspect and more persuasive than government agencies, *see infra* Part III.C.

<sup>32</sup> For further discussion of a BRAC’s advisory status and diverse membership, *see infra* Part V.A.

<sup>33</sup> *See* *Marez v. Bassett*, 595 F.3d 1068, 1074–75 (9th Cir. 2020) (holding that speech of a member of municipal advisory committee was outside the scope of the First Amendment’s government prohibition because the city did not employ the advisory committee member); *see also* Megan Campbell, *Marez v. Barrett*, 42 URB. LAW. 631, 631 (2011) (stating “the court held that the First Amendment protects the expressive conduct of the Committee members because the members were not City employees since the City did not grant official powers to the committee members or pay them for their work”).

<sup>34</sup> For further discussion of civic competence, *see infra* Part I.B. *See also* Jordan Tama, *Crises, Committees, and Reform: The Impact of Blue-Ribbon Panels*, 67 POL. RSCH. Q. 1, 135 (2014) (“Commissions excel . . . because of their strong political credibility, which derives from their independence from permanent institutions of government, the stature of their members, and their bipartisan makeup.”).

<sup>35</sup> For further discussion of historical regulatory capture of government by powerful special interests, *see infra* Part IV.A.3. *See also* Tara Kibler, *Five U.S. Presidential Commissions that have Fueled Conspiracy Theorists*, HeinOnline Blog (Sep. 1, 2020), <https://home.heinonline.org/blog/2020/09/5-u-s-presidential-commissions-that-have-fueled-conspiracy-theorists/> (describing five Presidential Commissions and highlighting the conspiracy theories resulting from their findings).

<sup>36</sup> For further discussion of populist backlash against expertise, *see infra* Part III.B.

committees, which powerful special interests abused to secretly influence government policy, have epitomized the often vilified “swamp.”<sup>37</sup>

Although advisory committees remain one of the only formal public mechanisms for private citizens to participate in the policymaking process, BRACs at present are a jumbled mess.<sup>38</sup> The “blue-ribbon” designation appears to be devoid of standards or requirements.<sup>39</sup> Simply calling yourself the best does not make it so. Although local, state, and federal advisory committees often have similar functions, they lack uniformity.<sup>40</sup> Even at the federal level, there is too much inconsistency among legislative, executive, and judicial branch advisory committees.<sup>41</sup> Because governance ultimately involves checks and balances among these three branches,<sup>42</sup> advisory committees should not be limited to one branch or have different requirements for different branches. Such limitations also prevent advisory committees from providing needed advice to more than one branch or examining multiple branches’ interaction.<sup>43</sup>

In our proposed reformulation, a BRAC’s primary purpose would be to address post-factualism.<sup>44</sup> Although the “blue-ribbon” descriptor can mean many things, we would limit its use to private citizen advisory commissions seeking to avoid or debunk false facts among fellow citizens.<sup>45</sup> The problem of post-factualism is perilous enough to merit the descriptor’s exclusive use. A BRAC therefore would constitute a small subset of all advisory committees. After all, there are many other useful, uncontroversial advisory committees which do not share a BRACs’ mission.<sup>46</sup>

With the blue-ribbon designation, a BRAC would aspire to provide both the public and the government with a shared trustworthy information source.<sup>47</sup> In so doing, the BRAC would seek to fill a gap created by the proliferation of

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<sup>37</sup> For further discussion of the popular meme of “draining the swamp” in U.S. politics, see *infra* Part IV.B.

<sup>38</sup> For further discussion of the present confused state of U.S. BRACs, see *infra* Part IV.B.

<sup>39</sup> For further discussion of the current meaninglessness of the blue-ribbon designation, see *infra* Part IV.A.

<sup>40</sup> For further discussion of local, state, and federal advisory committees, see *infra* Part IV.C.

<sup>41</sup> For further discussion of federal advisory committees’ inconsistency, see *id.*

<sup>42</sup> For further discussion of the separation of powers among the three branches of government, see *infra* Part I.

<sup>43</sup> For further discussion of the necessary interaction among the three branches of government, see *infra* Part I.

<sup>44</sup> For further discussion of proposed BRAC best practices, see *infra* Part V.

<sup>45</sup> For further discussion of limiting the blue-ribbon designation, see *id.*

<sup>46</sup> For further discussion of uncontroversial federal advisory committees, see *infra* Part IV.C.

<sup>47</sup> For further discussion of a BRAC’s aspiration to serve as a trusted shared authoritative information source, see *infra* Part IV.A–B.



internet news “filter bubbles.”<sup>48</sup> Before opposing viewpoints can rationally debate policy, they must initially agree upon the undisputed facts and evidence.<sup>49</sup>

Specifically, BRACs across both different levels and branches of government would require (1) transparent selection, (2) a specific charge, and (3) a limited duration.

First, the BRAC must publicly invite nominations and fairly and transparently evaluate those nominations to select a final committee worthy of the blue-ribbon name.<sup>50</sup> To prevent unqualified committee members, any private citizen or organization with standing could file a motion with the federal or state trial court closest to the BRAC’s designated headquarters to remove a proposed committee member. The trial court judge would evaluate such a motion under the well-established lay and expert evidentiary standards of Federal Rules of Evidence 702 and 703<sup>51</sup> or their state equivalents.

Second, the sponsoring government organization or organizations would provide the BRAC with a specific written charge directly related to countering post-factualism.<sup>52</sup> A BRAC’s charge would vary according to its purpose. There would be at least four different types of BRACs, which form the tongue-in-cheek acronym “*BS TD*”<sup>53</sup>: (1) the *breakdown* BRAC, where the existing political process appears incapable of properly investigating a specific crisis or tragedy;<sup>54</sup> (2) the *special expertise/knowledge* BRAC, where private citizens possess special knowledge, skills, or experience beyond the government’s capabilities;<sup>55</sup> (3) the *targeted fact* BRAC, where the committee’s mission is to diagnose, understand, and, if possible, correct public misunderstanding of specific policy-essential facts;<sup>56</sup> and (4) the *dialogue facilitation* BRAC, where credible private citizens and/or government officials representing opposing sides of a divisive

<sup>48</sup> For further discussion of the loss of shared information courses, see *infra* Part II.A.

<sup>49</sup> See, e.g., FED. R. CIV. P. 16(2)(C) (listing as a matter for consideration at a pretrial conference “obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence”).

<sup>50</sup> For further discussion of a BRAC’s transparent selection, see *infra* Part V.A.

<sup>51</sup> See FED. R. EVID. 702, 703.

<sup>52</sup> For further discussion of a BRAC’s institutional charge, see *infra* Part V.B.

<sup>53</sup> “BS” stands for “bullshit,” “something . . . that . . . is nonsense or completely untrue.” *BS*, COLLINS ENGLISH DICTIONARY, <https://www.collinsdictionary.com/us/dictionary/english/bs#:~:text=If%20you%20describe%20something%20as,is%20an%20abbreviation%20for%20bullshit> (last visited Sept. 28, 2022). “TD” stands for a “touchdown” in the game of football. *TD*, COLLINS ENGLISH DICTIONARY, <https://www.collinsdictionary.com/us/dictionary/english/td> (last visited Oct. 22, 2022). For further discussion of rhetorical “bullshit,” see HARRY G. FRANKFURT, *ON BULLSHIT* (2005).

<sup>54</sup> For further discussion of the breakdown BRAC, see *infra* Part V.B.1.

<sup>55</sup> For further discussion of the special expertise/knowledge BRAC, see *infra* Part V.B.2.

<sup>56</sup> For further discussion of the targeted fact BRAC, see *infra* Part V.B.3.

policy issue agree to listen to each other to further public dialogue and compromise.<sup>57</sup>

Finally, to avoid a waste of public resources and bureaucratic proliferation,<sup>58</sup> the BRAC must have a limited duration.<sup>59</sup> Although a useful BRAC can continue to exist, its membership must have limited terms at the end of which a member must undergo the same transparent selection process as before.<sup>60</sup> Furthermore, the BRAC must continue to be guided by specific written charges.<sup>61</sup> A BRAC without a written charge must disband.<sup>62</sup>

While uniquely designed to combat post-factualism, a BRAC is just another institutional policy tool. A BRAC's ultimate success or failure depends on its members' individual efforts. It must unavoidably embrace the inherent tension between its elitist aspiration to include the most capable, most knowledgeable, most trustworthy, or most persuasive citizens and the populist nature of its representative, advisory role.

#### I. THE BETTER THE FACTS AND EVIDENCE, THE BETTER THE POLICY RESULT:

The fundamental assumption of evidence-based policymaking—and the essence of any critique of post-factualism, is that the better the facts and evidence, the better the policy result.<sup>63</sup> With good inputs come good outputs. Democratic policymaking can at least aspire to be something more than mere politics and power struggles.<sup>64</sup> Under this assumption, post-factualism results in bad policy because instead of using ostensibly objective facts and evidence, post-factualism uses subjective emotion and identity to select policy.<sup>65</sup> Bad or irrelevant inputs make bad outputs. Post-factualism seeks to discredit the institutional trust and diverse consensus critical to democracy<sup>66</sup> that enables

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<sup>57</sup> For further discussion of the dialogue facilitation BRAC, see *infra* Part V.B.4.

<sup>58</sup> For further discussion of previous BRAC waste, see *id.*

<sup>59</sup> For further discussion of a BRAC's limited duration, see *infra* Part V.C.

<sup>60</sup> For further discussion of a BRAC's selection process, see *infra* Part V.A.

<sup>61</sup> For further discussion of a BRAC's institutional charge, see *infra* Part V.B.

<sup>62</sup> For further discussion of disbanding a BRAC without a charge, see *infra* Part V.C.

<sup>63</sup> Will Rhee, *Evidence-Based Federal Civil Rulemaking: A New Contemporaneous Case Coding Rule*, 33 PACE L. REV. 60, 65–66 (2013).

<sup>64</sup> Brian W. Head, *Evidence-Based Policymaking—Speaking Truth to Power?*, 72 AUSTL. J. PUB. ADMIN. 397, 397 (2013).

<sup>65</sup> *Id.*

<sup>66</sup> Nancy E. Snow, *Democratic Truth-Seeking, Tribal Epistemologies, and Trust*, in VIRTUES, DEMOCRACY, AND ONLINE MEDIA: ETHICAL AND EPISTEMIC ISSUES 11 (Nancy E. Snow & Maria Silvia Vaccarezza eds., 2021).

democracy to select and implement more effective policies than its authoritarian counterparts.<sup>67</sup>

This Part examines how evidence-based policymaking in a democracy relies upon simplified foundational models like the evidence-fact relationship and how post-factualism seeks to undermine this foundational relationship. If evidence does not matter and anyone can pick their own “alternative facts,”<sup>68</sup> then evidence-based policymaking cannot work.<sup>69</sup> Part I.A breaks the fact-evidence relationship into the familiar categories of direct and circumstantial evidence<sup>70</sup> and adjudicative-versus-legislative facts.<sup>71</sup> Part I.B begins by explaining how the “Thee-Not-Me” and “What Would You Do?” Problems form a clear boundary between legitimate public debate and post-factualism. Part I.B further breaks down post-factualism into its unconscious, metaphysical, motivational, epistemic, and radical types.<sup>72</sup> Although theoretically post-factualism is limited to adjudicative facts, in practice it is unlikely that opposing sides will agree that a disputed fact is indeed adjudicative. While a democratic government can attempt direct measures to combat post-factualism, Part I.B concludes that the most effective way to combat post-factualism is indirectly through promoting civic competence among fellow citizens.

Perhaps the most distinctive characteristic of the American federal democratic system of government is its separation of powers into the legislative,

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<sup>67</sup> Bryan D. Jones, Derek A. Epp & Frank R. Baumgartner, *Democracy, Authoritarianism, and Policy Punctuations*, 1 INT’L REV. PUB. POL’Y 7, 8 (2019).

<sup>68</sup> S. I. Strong, *Alternative Facts and the Post-Truth Society: Meeting the Challenge*, 165 U. PENN. L. REV. ONLINE 137, 137 (2017) (“‘[A]lternative facts’ [is] a term that quickly became synonymous with a willingness to persevere with a particular belief either in complete ignorance of, or with total disregard for, reality.”).

<sup>69</sup> Geoff Whitty & Emma Wisby, *Evidence-Informed Policy and Practice in a ‘Post-Truth’ Society*, 1 HANDBOOK OF EDUC. POL’Y STUDS.: VALUES, GOVERNANCE, GLOBALIZATION, AND METHODOLOGY 399 (Guorui Fan & Thomas S. Popkewitz eds., 2020), [https://doi.org/10.1007/978-981-13-8347-2\\_19](https://doi.org/10.1007/978-981-13-8347-2_19).

<sup>70</sup> See *infra* Part I.A.1-2.

<sup>71</sup> See *infra* Part I.A.1.i-ii.

<sup>72</sup> See *infra* Part I.B.3.i-v.

executive, and judicial branches.<sup>73</sup> Most U.S. state<sup>74</sup> and local<sup>75</sup> governments are similarly divided into three functional branches. All three have separate and different bases of constitutional authority.<sup>76</sup>

*A. All Traditional Policymaking Models Rely on Evidence and Facts*

Regardless of level or constitutional branch, all individual government officials are limited by their span of control,<sup>77</sup> the number of their direct reports,<sup>78</sup> to interacting regularly with only a handful of subordinates. Given the massive scale of modern American government,<sup>79</sup> it is impossible for one government official to rely solely on their first-hand knowledge or to do everything that needs to be done by themselves.<sup>80</sup> In other words, modern American governance inescapably relies upon delegation and trust.<sup>81</sup>

In addition to relying upon others, government must employ policy models, “simplified representations of a problem situation.”<sup>82</sup> With policy

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<sup>73</sup> MATTHEW E. GLASSMAN, CONG. RSCH. SERV., R44334, SEPARATION OF POWERS: AN OVERVIEW 1 (2016). In contrast, most modern democracies are parliamentary systems where the legislature controls and the executive, appointed by the legislature, has no independent constitutional authority. *Id.*

<sup>74</sup> *Separation of Powers—An Overview*, NAT’L CONF. STATE LEG. (May 1, 2021), <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx> (stating that 40 U.S. state constitutions specify that state government be divided into these three branches and collecting state separation of powers law review articles, state court cases, and state legislative reports).

<sup>75</sup> See Alexander J. Kasner, *Local Government Design, Mayoral Leadership, and Law Enforcement Reform*, 69 STAN. L. REV. 549, 557–61 (2017); Bradley E. Morris, *Separation of Powers in Municipal Government: Division of Executive and Legislative Authority*, 1978 B.Y.U. L. REV. 961, 961, 963–66 (1978).

<sup>76</sup> GLASSMAN, *supra* note 73 at 12.

<sup>77</sup> See Doris R. Entwisle & John Walton, *Observations on the Span of Control*, 5 ADMIN. SCI. Q. 522, 523 (1961).

<sup>78</sup> See *id.*

<sup>79</sup> See Paul C. Light, *The True Size of Government is Nearing a Record High*, BROOKINGS INST.: FIXGOV BLOG (Oct. 7, 2020), <https://www.brookings.edu/blog/fixgov/2020/10/07/the-true-size-of-government-is-nearing-a-record-high/>.

<sup>80</sup> See *id.*

<sup>81</sup> *The Roles of State and Federal Governments*, NAT’L GEOGRAPHIC <https://education.nationalgeographic.org/resource/roles-state-and-federal-governments> (last visited Oct. 22, 2022).

<sup>82</sup> WILLIAM N. DUNN, PUBLIC POLICY ANALYSIS: AN INTEGRATED APPROACH 81 (Routledge eds., 6th ed. 2018) (first citing SAUL I. GASS & ROGER L. SISSON, U.S. EPA OFFICE OF RSCH. AND DEV., GUIDE TO MODELS IN GOVERNMENTAL PLANNING AND OPERATIONS (1974); and then citing MARTIN GREENBERGER, MATTHEW A. CRENSON & BRIAN L. CRISSEY, MODELS IN THE POLICY PROCESS (1976)).

models, the only question is which one to choose,<sup>83</sup> as every American government official must rely upon some abstracted policy model to determine what is essential or non-essential<sup>84</sup> and to delegate policy tasks among various government actors.<sup>85</sup>

Underlying every policy model is the fundamental relationship between evidence and facts. Based upon its relationship to facts, evidence can either be *direct* or *circumstantial*. Direct evidence “supports the truth of a fact without the need for additional evidence or inference,” while circumstantial evidence “relies on an inference to connect it to a conclusion of fact.”<sup>86</sup>

For example, if Wayne walks outside his house, sees rain falling, and gets wet, then his later sworn testimony about his personal knowledge is direct evidence of the factual finding that rain had been falling from the sky above his home. In contrast, if Wayne walks inside his house holding a dripping wet umbrella, the umbrella is circumstantial evidence that it is currently raining outside because the evidence relies upon the reasonable inference that Wayne would only bring a wet umbrella inside his house if he had previously been holding it over his head to keep his body dry.

The inference connecting the wet umbrella to the factual conclusion is reasonable but could be wrong. The current weather might be sunny and cloudless. Wayne might have wet his umbrella with an outdoor hose before coming inside the house because Wayne wanted to deceive someone inside the house into believing it was raining.

Although only binding upon the judiciary,<sup>87</sup> judicial rules of evidence provide useful explanations of this fundamental evidence-fact relationship. In short, relevant evidence proves or disproves facts that matter to solving the particular policy problem.

### 1. Evidence

Although the Federal Rules of Evidence fail to define “evidence,”<sup>88</sup> the California Rules of Evidence connect evidence directly to facts, defining “evidence” as “testimony, writings, material objects, or other things presented to

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<sup>83</sup> For an example of one categorization of different public policy models, see *id.* at 82.

<sup>84</sup> *Id.*

<sup>85</sup> The relationship between the policy model and the specific policy problem can be analogized to the relationship between a map and the actual territory or a menu and the actual meal. *Id.* at 89.

<sup>86</sup> STEPHEN E. ARTHUR & ROBERT S. HUNTER, *Admissibility of Circumstantial Evidence*, in FEDERAL TRIAL HANDBOOK: CIVIL § 30:1 (2022–2023).

<sup>87</sup> *See, e.g.*, FED. R. EVID. 101.

<sup>88</sup> DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM* 7 (5th ed. 2022).

the senses that are offered to prove the existence or nonexistence of a fact.”<sup>89</sup> The Federal Rules do connect “relevant” evidence to facts, stating that “[w]hen the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support the finding that the fact does exist.”<sup>90</sup> “Evidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence . . . and the fact is of consequence”<sup>91</sup> in resolving the legal problem. Although “of consequence” here refers specifically to a lawsuit,<sup>92</sup> the principle can be generalized to apply to any government policy problem.

## 2. Facts

Federal Rule of Evidence 201 distinguishes between two types of facts utilized by all three branches of government,<sup>93</sup> *adjudicative facts* and *legislative facts*.<sup>94</sup> They differ primarily in their scope, proof, and the amount of deference another branch will give the branch that first found them.<sup>95</sup> There can be overlap between adjudicative and legislative facts.

### *i. Adjudicative Facts*

Adjudicative facts concern a specific micro event or incident.<sup>96</sup> They are found in formally resolving a specific individual dispute through an adversarial

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<sup>89</sup> CAL. EVID. CODE ANN. § 140 (West 2022).

<sup>90</sup> FED. R. EVID. 104(b).

<sup>91</sup> *Id.* 401(a), (b).

<sup>92</sup> MERRITT & SIMMONS, *supra* note 88, at 56.

<sup>93</sup> *See* FED. R. EVID. 201.

<sup>94</sup> FED. R. EVID. 201(a) & Note of Advisory Committee, Subdiv. (a) (2011). Rule 201 only applies to adjudicative facts. *Id.* Courts can always take notice of legislative facts without having to follow a particular rule. Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 SAN DIEGO L. REV. 315, 320 (2005); *see also* Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 931 (1980) (explaining how the four types of U.S. lawmaking all rely upon facts).

<sup>95</sup> *See* FED. R. EVID. 201(a) & Note of Advisory Committee, Subdiv. (a) (2011); *see also* Christopher B. McNeil, *Critical Factors of Adjudication: Language and the Adjudication Process in Executive and Judicial Branch Decisions*, 23 J. NAT’L ASS’N ADMIN. L. JUDGES 411, 412–13 (2003).

<sup>96</sup> *Cf.* Will Rhee, *Law and Practice*, 9 LEGAL COMM’N & RHETORIC: JALWD 273, 283–88 (2012) (defining the micro-macro legal continuum).

process like a judicial trial or hearing.<sup>97</sup> They change from case to case.<sup>98</sup> They also tend to be more detailed and enjoy more technical evidentiary protections than legislative facts.<sup>99</sup> As Kenneth Culp Davis explained, adjudicative facts “usually answer the questions of who did what, where, when, how, why, with what motive or intent.”<sup>100</sup> They are “roughly the kind of facts that go to a jury in a jury case.”<sup>101</sup> The North Carolina Supreme Court helpfully defined adjudicative facts as “what occurred, when it occurred, where it occurred, who did what, the [party] relationships . . . or any other factual data that might identify the occasion or describe the circumstances . . . .”<sup>102</sup>

A “high degree of indisputability is the essential prerequisite”<sup>103</sup> for adjudicative facts. Government findings of adjudicative facts, therefore, “must be supported by evidence.”<sup>104</sup> Adjudicative facts must either be readily known or accurately verifiable.<sup>105</sup>

All three branches of American government use adjudicative facts when adjudicating disputes. *Black’s Law Dictionary* defines “adjudication” as the “legal process of resolving a dispute; the process of judicially deciding a case.”<sup>106</sup>

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<sup>97</sup> See FED. R. EVID. 201(a) & Note of Advisory Committee, Subdiv. (a) (2011); see also generally Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 354–55 (1978) (“[T]he term adjudication . . . is not restricted to tribunals functioning as part of the government. It includes adjudicative bodies which owe their powers to the consent of the litigants expressed in an agreement of submission.”).

<sup>98</sup> *United States v. Gould*, 536 F.2d 216, 219–220 (8th Cir. 1976) (quoting 2 KENNETH CULP DAVIS, ADMIN. L. TREATISE 15.03 (1958)).

<sup>99</sup> See *id.* at 219.

<sup>100</sup> 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW AND GOVERNMENT 149 (1960).

<sup>101</sup> *Id.*

<sup>102</sup> See *Gillispie v. Goodyear Serv. Stores*, 128 S.E.2d 762, 766 (N.C. 1963).

<sup>103</sup> FED. R. EVID. 201(a) & Note of Advisory Committee, Subdiv. (a) (2011).

<sup>104</sup> Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952–53 (1955).

<sup>105</sup> See FED. R. EVID. 201(b); see also Harry P. Carroll & William C. Flanagan, *Indisputability; Adjudicative and Legislative Facts; Administrative Notice*, in 43A MASSACHUSETTS PRACTICE TRIAL PRACTICE § 12:5 (5th ed. 2021).

<sup>106</sup> *Adjudication*, BLACK’S LAW DICTIONARY (11th ed. 2019).

At the federal level, there are judges in all three branches of government<sup>107</sup> who adjudicate disputes more or less formally using evidence and facts.<sup>108</sup>

*ii. Legislative Facts*

In contrast, legislative facts address more macro social or societal concerns beyond the scope of a single micro event or incident.<sup>109</sup> As Davis explained, legislative facts are “general facts” that help government “decide questions of law and policy and discretion.”<sup>110</sup> They are the “factual foundations of rules of decision including social, scientific, economic and often political factors whether or not generally known or readily determinable.”<sup>111</sup> Legislative facts are “established truths, facts, or pronouncements that do not change from case to case but apply universally.”<sup>112</sup> Given their broad scope, legislative facts are not only open to dispute<sup>113</sup> but also “need not, frequently are not, and sometimes cannot be supported by evidence.”<sup>114</sup>

*iii. Not a Bright-Line Distinction*

In theory, adjudicative facts can focus efforts against post-factualism. Post-factualism theoretically is limited to disputes over adjudicative facts. While a post-factualist might reject indisputable adjudicative facts, the evidence

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<sup>107</sup> See generally David J. Bederman, *Article II Courts*, 44 MERCER L. REV. 825, 825 (1993); see also U.S. CONST., art. I, § 8 (“To constitute Tribunals inferior to the supreme Court”), art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish”); FED. BAR ASS’N, CURRENT NON-ARTICLE III/ARTICLE I (ALSO KNOWN AS “LEGISLATIVE”) COURTS, Oct. 2019, <https://www.fedbar.org/wp-content/uploads/2019/10/Current-non-Article-III-or-Article-I-Courts-pdf-1.pdf> (listing Article I courts); *Federal Administrative Adjudication*, STAN. L.S.: ADJUDICATION RSCH., <https://acus.law.stanford.edu/> (mapping “the wide variety of agency adjudicatory schemes across the federal government”); BEN HARRINGTON & DANIEL J. SHEFFNER, CONG. RESEARCH SERV., R46930, INFORMAL ADMINISTRATIVE ADJUDICATION: AN OVERVIEW 1-3 (2021).

<sup>108</sup> See *Federal Administrative Adjudication*, *supra* note 107; HARRINGTON, *supra* note 107.

<sup>109</sup> Cf. Rhee, *supra* note 96, at 283–88.

<sup>110</sup> 1 KENNETH CULP DAVIS, ADMIN. L. & GOV’T 149 (1960).

<sup>111</sup> MICHAEL H. GRAHAM, HANDBOOK OF FED. EVID. § 201:1 (9th ed. 2021).

<sup>112</sup> *Robinson v. Liberty Mut. Ins. Co.*, 958 F.3d 1137, 1142 (11th Cir. 2020) (internal citations omitted).

<sup>113</sup> FED. R. EVID. 201(a) Advisory Committee Note (quoting Kenneth Culp Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW: ESSAYS FOR AUSTIN WAKEMAN SCOTT 82 (Roscoe Pound, Erwin N. Griswold & Arthur E. Sutherland eds., 1964)).

<sup>114</sup> Davis, *supra* note 104, at 952.



underlying provable adjudicative facts provides the best counterargument.<sup>115</sup> Although a post-factualist might also claim that a legislative fact cannot be proven or has been proven conclusively, because, by definition, reasonable minds can disagree over legislative facts,<sup>116</sup> post-factualism should not implicate legislative facts. In reality, however, it is unlikely that opposing sides will agree over any initial fact categorization—whether a disputed fact is properly adjudicative or legislative. More likely, the fact’s proponent will claim that it is adjudicative whereas the fact’s detractor will claim it is at best an unprovable legislative fact.

Like other similar micro-macro distinctions,<sup>117</sup> adjudicative and legislative facts overlap. Adjudicative facts can provide specific examples of legislative facts in action. People might also disagree over whether a particular fact is adjudicative or legislative.

For instance, the fact that at the time of writing hundreds of millions of people have safely received a COVID-19 (hereinafter “COVID”) vaccine<sup>118</sup> could be considered an adjudicative fact. The fact is supported by evidence and can be accurately verified. An anti-vaxxer, Sarah, however, disputes the presented evidence, a U.S. Centers for Disease Control and Prevention (“CDC”)

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<sup>115</sup> If a post-factualist rejects a conclusive adjudicative fact, then the onus is on them to provide an alternate explanation for the evidence, reasonable inferences from it, and the resulting syllogistic premises that lead to the adjudicative fact. This “What Else Could It Be?” Problem is the logical corollary of the “What Would You Do?” Problem. See *infra* Part I.B.1.ii.

<sup>116</sup> See Davis, *supra* note 104, at 952.

<sup>117</sup> See, e.g., Rhee, *supra* note 96, at 283–88.

<sup>118</sup> See *Safety of COVID-19 Vaccines*, CTR. FOR DISEASE CONTROL (Sept. 19, 2022), [https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/safety-of-vaccines.html?s\\_cid=10507:covid%20vaccine%20safety;sem.ga:p:RG:GM:gen:PTN:FY2](https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/safety-of-vaccines.html?s_cid=10507:covid%20vaccine%20safety;sem.ga:p:RG:GM:gen:PTN:FY2).

The experience of fictional characters Wayne, Sarah, and Dr. Kate with COVID is used as a running example throughout this Article because COVID remains a current experience unfortunately shared by everyone and dominated by post-factualism. See generally Paul A.M. Van Lange & David G. Rand, *Human Cooperation and the Crises of Climate Change, COVID-19, and Misinformation*, 73 ANN. REV. PSYCH. 379, 391–97 (2021). As Dr. Anthony Fauci wrote in a farewell message,

We also must acknowledge that our fight against Covid-19 has been hindered by the profound political divisiveness in our society. In a way that we have never seen before, decisions about public health measures such as wearing masks and being vaccinated with highly effective and safe vaccines have been influenced by disinformation and political ideology.

Anthony Fauci, Opinion, *Anthony Fauci: A Message to the Next Generation of Scientists*, N.Y. TIMES (Dec. 10, 2022), <https://www.nytimes.com/2022/12/10/opinion/anthony-fauci-retirement.html>.

The authors admittedly are neither medical nor public health experts. Regarding COVID, we are merely private citizens. If any of the medical assertions in this Article turn out to be “junk science,” such inadvertent misinformation only further demonstrates post-factualism’s peril. For further discussion of misinformation, see *infra* III.A.

website,<sup>119</sup> as self-serving and unconvincing. “Why take the CDC’s own word for it?” asks Sarah. “Have you personally verified each case? How do we know that the number is not much smaller?”

“I disagree with you,” responds a physician named Kate, because Kate trusts the CDC to have personally verified each case. To Kate, the CDC’s official website is reliable. The CDC, Kate adds, has individually followed up with her and her patients after vaccination through its V-Safe after vaccination health checker phone text survey.<sup>120</sup> The mere fact that the CDC has sent individual text messages after vaccination asking about the recipient’s health does not, of course, establish that the CDC used that information. But the fact that the CDC asked for such information at all makes it more likely that the CDC verified vaccine safety than if the CDC had failed to ask for such information.

Anti-vaxxer Sarah, as doctor Kate’s trusted childhood friend, concedes that the CDC following up with Kate is an adjudicative fact. “Don’t get me wrong, Kate,” says Sarah. “You’ve been a lifelong good friend. I don’t doubt that the CDC followed up with you.” Sarah however disputes anyone else’s account. “Even assuming the CDC asked, and other people answered, how do we know if the other respondents were truthful? They could have lied to the CDC.” There apparently was no independent verification of the survey responses.

Because of Sarah’s mistrust of the CDC, Sarah is only willing to concede to Kate that belief in the COVID vaccine’s safety *could* be a legislative fact incapable of independent verification.<sup>121</sup> Dr. Kate again disagrees, explaining that there are trusted professionals whose job is to verify such information. Given the existence of reliable documentation of all vaccines, the doctor asserts that ensuring the safety of the millions of COVID vaccination shots already administered is an adjudicative fact just like ensuring the safety of her single vaccination. The only difference is in scope.

Although both Dr. Kate and Sarah agree that Sarah’s belief in only allowing natural products in her body<sup>122</sup> is a legislative fact, they disagree over its veracity. Anti-vaxxer Sarah believes that there is sufficient evidence to support the legislative fact; doctor Kate believes that there is sufficient evidence to refute it. Despite identical evidence, the way they view the same evidence and

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<sup>119</sup> See *id.*

<sup>120</sup> See generally *V-Safe after Vaccination Health Checker*, CTR. FOR DISEASE CONTROL (July 18, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/vsafe.html>.

<sup>121</sup> See *supra* Part I.A.2.ii; see also Davis, *supra* note 104, at 952.

<sup>122</sup> See, e.g., Craig Idlebrook, *First Opinion: I Was Once a Hardcore Anti-Vaxxer. Now I Try to Nudge People to Get the COVID-19 Vaccine*, STAT (Aug. 29, 2021), <https://www.statnews.com/2021/08/29/former-anti-vaxxer-now-nudge-people-to-get-covid-19-vaccine/> (explaining that the author’s anti-vaccination beliefs originated from his desire to use or consume only natural products). The “natural living” and “natural lifer” community example used in this Article is fictitious and is not intended to resemble any real-life group.

their resulting inferences are diametrically opposed. Ultimately, while as childhood friends they trust each other as people, neither trusts the other's facts or evidence.

*B. Post-Factualism and Civic Competence*

Although the adjudicative-versus-legislative fact distinction provides a useful logical distinction, post-factualism is fundamentally about a lack of trust. As Sophia Rosenfeld observed, “a basic commitment to truth-telling or veracity as a moral position is central to maintaining the interpersonal trust that democracy, in its modern incarnation, needs to be effective.”<sup>123</sup> Where post-factualism nihilistically seeks to destroy this essential interpersonal trust, civic competence seeks to revitalize it by emphasizing the fundamental importance of truth seeking and inculcating in citizens information literacy and the ability to identify and resist post-factualist tactics. Where post-factualism disdains public reason,<sup>124</sup> civic competency seeks to improve it.<sup>125</sup>

1. Unlike healthy public debate, post-factualism suffers from the “Thee-Not-Me” and “What Would You Do?” Problems

Post-factualism has been defined as a “prevailing attitude among citizens to disregard objective empirical conditions when forming their political beliefs.”<sup>126</sup> In contrast, factualism is where ordinary citizens in a democracy at least aspire to use epistemologically reliable empirical beliefs to make their political decisions.<sup>127</sup> It would however be unrealistic to expect the political decisions of citizens in a democracy to always be guided by accurate empiricism.<sup>128</sup>

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<sup>123</sup> SOPHIA ROSENFELD, *DEMOCRACY AND TRUTH: A SHORT HISTORY* 173 (2019).

<sup>124</sup> See John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 8 (1987) (discussing public reason).

<sup>125</sup> For further discussion of civic competency, see *infra* Part I.B.4.

<sup>126</sup> Ferretti, *supra* note 19, at 227. While “post-truth” and “alternative facts” evoke similar concepts, post-factualism is a more accurate term because “post-truth” and “post-reality” imply that there was a prior time where citizens were somehow more truthful or realistic. Accord Natascha Rietsijk & Alfred Archer, *Post-Truth, False Balance and Virtuous Gatekeeping*, in *VIRTUES, DEMOCRACY, AND ONLINE MEDIA: ETHICAL AND EPISTEMIC ISSUES* 69 (Nancy E. Snow & Maria Silvia Vaccarezza, eds. 2021) (stating that “post-truth” is often used “pejoratively, and it problematically suggests there used to be a ‘truth’ time that was somehow better”). “Alternative facts” are just a symptom of post-factualism. For further discussion of “post-truth” and “alternative facts,” see Strong, *supra* note 68.

<sup>127</sup> Ian MacMullen, *What Is “Post-Factual” Politics?*, 28 J. POL. PHIL. 97, 98 (2020).

<sup>128</sup> *Id.*

Intellectual humility and skepticism are necessary and healthy in a democracy.<sup>129</sup> What is the difference between legitimate, healthy skepticism and self-defeating post-factualism in public policy? We submit that there are at least two ways to distinguish between healthy public debate and nihilistic post-factualism.

*i. The Criticism for “Thee Not Me” Problem*

First, post-factualism refuses to subject all adjudicative facts, evidence, and beliefs to the same rigorous criticism.<sup>130</sup> Although post-factualists are happy to criticize opposing beliefs, they cannot accept or allow similar criticism of their own beliefs. They can dish it out but can’t take it. Typically, the post-factualist only cherry picks empirical evidence or alleged adjudicative facts consistent with their own self-fulfilling prophecies.<sup>131</sup>

For example, post-factualist anti-vaxxer Wayne refuses to apply the same scientific skepticism and rigor to ivermectin<sup>132</sup> that he applies to the mRNA COVID vaccines.<sup>133</sup> Although Wayne will readily accept any alleged adjudicative facts criticizing the mRNA vaccines, he conveniently ignores all adjudicative facts—regardless of supporting evidence—criticizing ivermectin. In contrast, anti-vaxxer Sarah chooses to take ivermectin for COVID because ivermectin is derived from the natural product avermectin B<sub>1</sub><sup>134</sup> and refuses to

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<sup>129</sup> As Martin Redish and Abby Marie Mollen observed:

Democratic theories . . . must respect the principle of epistemological humility—they must assume that no determinate “right” or “good” exists, apart from what the electorate, or those responsive to it, determine. Democratic theories must therefore commit such substantive valuations to the people to decide through democratic procedures. Epistemological humility is a direct outgrowth of the principle of self-rule: the people cannot be self-governing if some external concept of rightness or goodness coercively determines their decisions.

Martin H. Redish & Amy Marie Mollen, *Understanding Post’s and Meiklejohn’s Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1305 (2009) (internal citations omitted).

<sup>130</sup> Post-factualism, by definition, “disregards objective empirical conditions.” Ferretti, *supra* note 19, at 227.

<sup>131</sup> For a discussion of how post-factualists suffer from both confirmation and disconfirmation bias, see *infra* Part III.A.2.

<sup>132</sup> For a general discussion about ivermectin misinformation, see Amicus Curiae Brief of the Ass’n of Am. Phys. & Surgeons Supporting the Plaintiff at 6–12, *Apter et al. v. Dep’t Health & Hum. Servs.*, No.3:22-cv-184, (S.D. Tex. Sept. 29, 2022).

<sup>133</sup> See, e.g., Joseph Fraiman, Juan Erviti, Mark Jones, Sander Greenland et al., *Serious Adverse Events of Special Interest Following mRNA COVID-19 Vaccination in Randomized Trials in Adults*, 40 VACCINE 40 (2022).

<sup>134</sup> See Werner Sieghart, *Avermectin B1 A*, in *ADVANCES IN PHARMACOLOGY* (2015), <https://www.sciencedirect.com/topics/pharmacology-toxicology-and-pharmaceutical-science/avermectin-b1-a>.

receive the mRNA COVID vaccines because she believes they are not derived from nature.<sup>135</sup> Unlike Wayne, Sarah would not ban the mRNA COVID vaccines or make ivermectin the only available COVID treatment. Because Sarah applies the same critical standard consistently, unlike Wayne, Sarah is not a post-factualist whereas Wayne is.

ii. *The “What Would You Do?” Problem*

Second, post-factualists fail to offer constructive alternatives to address pressing policy problems. Although post-factualist Wayne was quick to criticize COVID public health measures like required masking indoors, social distancing, and vaccination,<sup>136</sup> he failed to offer any constructive, viable solutions to the COVID pandemic other than “open everything up and let the chips fall where they may.”<sup>137</sup> In contrast, Sarah resists such mandatory public health measures not out of nihilism but rather because she worries about the limits of emergency executive government power.<sup>138</sup> Because Sarah’s resistance is based upon a legitimate policy concern—that unelected public health officials should not have unaccountable, unlimited power during a pandemic regardless of public health effectiveness, she is not a post-factualist. In fact, public debate over such policy concerns is critical to a healthy, functioning democracy.

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<sup>135</sup> See Archa Fox & Charles Bond, *You Don’t Need to Worry About COVID Vaccines Being ‘Unnatural’ or ‘Synthetic,’* THE CONVERSATION (Sept. 1, 2021, 4:10 PM), <https://theconversation.com/you-dont-need-to-worry-about-covid-vaccines-being-unnatural-or-synthetic-166268>.

<sup>136</sup> See Andrea Gurkamin Levy, Alistair Thorpe, Laura D. Scherer & Aaron M. Scherer et al., *Misrepresentation and Nonadherence Regarding COVID-19 Public Health Measures*, 5 JAMA NETWORK OPEN, at 7 (2022) (reporting “wanting life to feel normal, wanting to exercise personal freedom, feeling that it is no one else’s business, . . . not feeling very sick[,]” and “endorsing statements about COVID-19 not being real or a big deal as reasons for “misrepresentation and/or nonadherence regarding public health measures against COVID-19 during the pandemic”).

<sup>137</sup> Although often invoked to justify “doing nothing,” the Swedish COVID strategy was more nuanced than simply “open up and do nothing.” See generally Arash Heydarian Pashakhaniou, *Sweden’s Coronavirus Strategy: The Public Health Agency and the Sites of Controversy*, 14 WORLD MED. & HEALTH POL’Y 507, 508 (2022) (stating that “Sweden had the most lenient COVID-19 policy possible” until March 8, 2020).

<sup>138</sup> See SUPREME COURT AND APPELLATE ALERT: COVID-19: EMERGENCY POWERS AND CONSTITUTIONAL LIMITS, AKIN GUMP STRAUSS HAUER & FELD, L.L.P. 1 (Mar. 23, 2020), <https://www.akingump.com/a/web/pJrEkNCsXgYkf36Wjh8h1r/bvvdS/supreme-court-and-appellate-alert-covid-19-emergency-powers-and-constitutional-limits.pdf> (“An emergency does not allow either the federal government or state governments to grant themselves any new powers. The federal government is still one of enumerated powers, and states cannot act arbitrarily.”).

2. Large, complex democracies cannot function without certain trustworthy institutions

In a large, complex democracy, ordinary citizens often have no other choice than to identify certain organizations or institutions which they believe are trustworthy sources of information.<sup>139</sup> Factual politics therefore “depends heavily on experts and on a media system that accurately transmits to each of us the judgments of those experts as well as the perspectives and insights of ordinary people whose experiences differ greatly from our own.”<sup>140</sup> In addition, a factualist society must maintain certain professions and institutions as apolitical and nonpartisan.<sup>141</sup> Ideally, those nonpartisan professions and institutions would serve as democratic gatekeepers and maximize popular trust in the democracy through public promise keeping.<sup>142</sup>

To be clear, targeted criticism of particular experts or particular media is not post-factualist. Such criticism is obviously necessary to deliberative democracy. To be post-factualist, such criticism would have to suffer from either the “Thee-Not-Me” or “What Would You Do?” problems. For instance, if Wayne refuses to subject his own favored medical expert<sup>143</sup> to the same level of scrutiny and criticism as the Director of the National Institute of Allergy and Infectious Diseases (“NIAID”), then he is being post-factualist.<sup>144</sup> If Wayne insists that a media source he dislikes issue a public retraction for a reporting error, but refuses to insist that his preferred media source issue a public retraction when it has clearly made a similar reporting error, then Wayne is being post-factualist. Post-factualism can vary in degree and self-awareness.

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<sup>139</sup> MacMullen, *supra* note 127, at 97, 98.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 98 n.3 (2020) (citing WILLIAM DAVIES, *NERVOUS STATES: DEMOCRACY AND THE DECLINE OF REASON*, at xiv (2019)).

<sup>142</sup> WILLIAM DAVIES, *NERVOUS STATES: DEMOCRACY AND THE DECLINE OF REASON*, at x (2019).

<sup>143</sup> Wayne happens to favor Dr. Pierre Kory, President and Chief Medical Officer, Front Line COVID-19 Critical Care Alliance (“FLCCC”). See *Our Physicians*, FRONT LINE COVID-19 CRITICAL CARE ALL., <https://covid19criticalcare.com/about-the-flccc/our-physicians/> (last visited Nov 24, 2022). Dr. Kory is considered a vaccine skeptic, a critic of Big Pharma and conventional medicine, and an advocate of ivermectin as a COVID treatment. See Olivia Goldhill, *Encouraged by Right-Wing Doctor Groups, Desperate Patients Turn to Ivermectin for Long COVID*, STATNEWS (July 25, 2022) <https://www.statnews.com/2022/07/26/ivermectin-has-become-a-popular-treatment-for-long-covid-with-a-push-from-doctors-with-ties-to-right-wing-political-groups/>.

<sup>144</sup> At time of writing, the (in)famous Dr. Anthony S. Fauci is the Director of the National Institute of Allergy and Infectious Diseases (“NIAID”). *About NIAID: Anthony S. Fauci, M.D., NIAID Director*, NAT’L INST. HEALTH: NAT’L INST. ALLERGY AND INFECTIOUS DISEASES, <https://www.niaid.nih.gov/about/director> (last visited Nov. 24, 2022).

### 3. Five Types of Post-Factualism

Understanding post-factualism is necessary to investigate it empirically and to equip citizens to resist it.<sup>145</sup> Although at the root of every form is a legitimate criticism of democracy, post-factualism not only takes the criticism too far but also fails to offer any solutions or alternatives.<sup>146</sup> Post-factualism can be divided into five different types in order of most open to least open to correction. These five types are summarized in Figure 1 below.

| <b>FIVE TYPES OF POST-FACTUALISM</b>           |  |  |  |
|--|--|--|--|
| <i>Name</i>                                    | <i>Open to Correction?</i>   | <i>Accuracy Goal?</i> <sup>147</sup>   | <i>Directional Goal?</i> <sup>148</sup>  |
| <b>Unconscious</b><br>( <i>Ignorant</i> )      | Most open. Self-deluded. Lacks information literacy skills.  | <i>Yes</i> , believes in universal truth and objective facts but unaware of own cognitive biases and fallacious reasoning.   | Not explicitly but implicitly <i>yes</i> .   |
| <b>Metaphysical</b><br>( <i>Intellectual</i> ) | More intellectual than emotional. Still cares about objective facts.   | <i>No</i> , truth must be coherent with their identity or worldview. Objective facts may exist but can only be understood through idiosyncratic identity or worldview. | <i>Yes</i> , truth can only be defined through their identity or worldview.  |
| <b>Motivational</b><br>( <i>Emotional</i> )    | More emotional than intellectual. Does not care about objective facts.   | <i>Yes</i> , there is universal truth and objective facts but they do not care about them.   | <i>Yes</i> , personal values or feelings are more important, even if opposing view is actually more objective and factually supported. |
| <b>Epistemic</b><br>( <i>Intellectual</i> )    | More extreme intellectual version of metaphysical. Still cares about objective facts. A discouraged factualist can | <i>No</i> , factual politics unattainable (but theoretically possible). Objective facts may exist. Paralysis through over analysis.                                    | <i>Yes</i> , no one really knows so no choice but to act selfishly.  |

<sup>145</sup> MacMullen, *supra* note 127, at 97, 100.

<sup>146</sup> For discussion of the “What Would You Do?” Problem, see *supra* Part I.B.1.ii.

<sup>147</sup> As explained *infra* in Part III.A.1, when people evaluate information, they are motivated by either accuracy (truth) or directional (consistent with your pre-existing biases and beliefs) goals. Likewise, post-factualism can be justified by misguided accuracy and directional goals.

<sup>148</sup> *See id.*

|  |  |   |   |
|--|--|---|---|
|  | become epistemic when they believe everyone around them is post-factualist.                      |   |   |
| <b>Radical</b><br>( <i>Emotional</i> ) | Least open. More extreme emotional version of motivational. Does not care about objective facts. | <i>No</i> , uncontested truth does not exist and seeking it is futile. There is only power. | <i>Yes</i> , explicitly. All about their team winning and the opposing team losing. |

Figure 1. Types of Post-Factualism

Like all policymaking tools, these categories are of course oversimplified.<sup>149</sup> Real people might demonstrate more than one type at different (or even the same) time or for different issues. They also might exhibit a particular type to varying degrees. From least dangerous to most dangerous (and from most to least reversible), post-factualism can be: unconscious; metaphysical; motivational; epistemic; and radical.<sup>150</sup> Unconscious post-factualism is motivated by ignorance. Metaphysical and epistemic post-factualism are more intellectual and still care about objective adjudicative or legislative facts and factual accuracy.<sup>151</sup> Motivational and radical post-factualism are more emotional, do not care about any objective facts, and seek to achieve directional goals consistent with their identity and worldview.<sup>152</sup> While defining each type of post-factualism, the analysis below identifies each type's legitimate critique of and danger to democracy and provides related examples.

*i. Unconscious Post-Factualism*

At one extreme is *unconscious post-factualism* by people who lack self-awareness<sup>153</sup> and may even deny being post-factual. Considering the universal voting assumptions of modern democracy,<sup>154</sup> most citizens are probably unconscious post-factualists on at least some issues.<sup>155</sup> Majority rule risks mob

<sup>149</sup> For a discussion of how all policymaking models are unavoidably oversimplified, see *supra* Part I.A.

<sup>150</sup> MacMullen, *supra* note 127, at 100.

<sup>151</sup> For further discussion of accuracy goals, see *infra* Part III.A.1.

<sup>152</sup> For further discussion of directional goals, see *infra* Part III.A.1.

<sup>153</sup> MacMullen, *supra* note 127, at 101.

<sup>154</sup> For example, the obligation to ensure universal suffrage is in the International Covenant on Civil and Political Rights. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

<sup>155</sup> Existing research demonstrates that popular belief in misinformation appears widespread. See D.J. Flynn, Brendan Nyhan & Jason Reifler, *The Nature and Origins of Misperceptions:*



rule. Because unconscious post-factualists are primarily motivated by ignorance, if they can be carefully influenced to become conscious of their post-factualism, they are the most open to correction.<sup>156</sup> Once aware of their ignorance, they also are the most teachable of information literacy skills.

When faced with competing factual claims, the unconscious post-factualist gives undue weight to some or all of these adjudicative facts: (1) how often they hear the claim; (2) how much they like or identify with the claim's source; (3) how well the claim fits with their prior beliefs; (4) whether the claim is consistent with their values and prior beliefs; and (5) whether the claim is consonant with their prior experience, observations, perceptions or those of their social network.<sup>157</sup> Although unconscious post-factualists may find such adjudicative facts more persuasive or even dispositive, in reality such subjective facts are poor criteria for rigorous policy analysis. Because unconscious post-factualists would probably reject opposing views formed through the different application of the same subjective factors, they suffer from the "Thee-Not-Me" problem.<sup>158</sup>

Unconscious post-factualism can be considered a broader form of implicit bias. Whether or not implicit bias exists in U.S. democracy remains disputed.<sup>159</sup> Implicit bias is when we possess unconscious, unintentional, and unfair negative stereotypes towards other people.<sup>160</sup> As made famous by Alcoholics Anonymous, the first step is admitting you have a problem.<sup>161</sup> If unconscious post-factualism is allowed to flourish unchallenged in a democracy, it can lead rational, factualist citizens to (1) give up trying to find the best evidence and facts, (2) conclude that creating the best policy is futile, and (3) become epistemic post-factualists.<sup>162</sup>

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*Understanding False and Unsupported Beliefs about Politics*, 38 ADVANCES POL. PSYCH. 127, 129 (2017).

<sup>156</sup> For further discussion of correcting misinformation, see *infra* Part III.A.2.

<sup>157</sup> MacMullen, *supra* note 127, at 97, 101 (citations omitted).

<sup>158</sup> See *supra* Part I.B.1.i.

<sup>159</sup> Compare, e.g., *What Is Implicit Bias?*, PROJECTIMPLICIT, <https://www.projectimplicit.net/> (last visited Oct. 5, 2022) (providing Implicit Association Tests) with Heather MacDonald, *The False 'Science' of Implicit Bias: A Test Purports to Reveal Hidden Prejudice, But There's Little Evidence Its Findings are Meaningful*, WALL ST. J. (Oct. 9, 2017, 7:15 PM), <https://www.wsj.com/articles/the-false-science-of-implicit-bias-1507590908> (criticizing Implicit Association Tests).

<sup>160</sup> See *id.*

<sup>161</sup> See *A Deeper Look at Alcoholics Anonymous Step One*, FREEDOM CTR. (Oct. 20, 2020) <https://www.thefreedomcenter.com/a-deeper-look-at-alcoholics-anonymous-step-one/> ("Admitting you have a problem is always said to be the first step of recovery.").

<sup>162</sup> MacMullen, *supra* note 127, at 110–11. For further discussion of epistemic post-factualism, see *infra* Part I.B.3.v.

At the beginning of the COVID pandemic in March 2020,<sup>163</sup> Wayne obediently followed CDC and U.S. government guidance. Lacking the scientific expertise as well as the patience to sift through all the competing claims he saw on his social media feeds, he initially defaulted to doing what he was told. But now, almost three years later, he has lost patience with the so-called authorities.<sup>164</sup> Although he eagerly received the initial Pfizer-BioNTech COVID vaccine<sup>165</sup> in 2021 as soon as it was available, he has not since received any booster shots.<sup>166</sup> Everyone in his immediate circle of young adult friends and family has been infected with COVID. None of them suffered from serious symptoms. Neither did he when he supposedly contracted the highly contagious Omicron variant<sup>167</sup> last February.

The CDC and the U.S. government, in Wayne's view, keep on moving the goalposts. He remembers spending hours disinfecting surfaces and groceries at the beginning of the pandemic.<sup>168</sup> Now they say it is not necessary.<sup>169</sup> The vaccine was supposed to end the pandemic.<sup>170</sup> Now they keep on talking about new so-called variants<sup>171</sup> and wanting to put more and more junk into our bodies.<sup>172</sup>

Wayne's new girlfriend Sarah believes in only eating and ingesting natural substances. He still cannot believe that Sarah wants to be with him. To Wayne, Sarah is by far the most physically attractive girlfriend he has ever known. With her guidance, Wayne has eliminated all processed foods from his

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<sup>163</sup> *COVID-19 Timeline*, CTR. DISEASE CONTROL: DAVID J. SENCER CDC MUSEUM, <https://www.cdc.gov/museum/timeline/covid19.html> (last visited Oct. 22, 2022).

<sup>164</sup> *See Isolation and Precautions for People with COVID-19*, CTR. FOR DISEASE CONTROL (Aug. 11, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/your-health/isolation.html>.

<sup>165</sup> *See Pfizer-BioNTech COVID-19 Vaccines*, CTR. FOR DISEASE CONTROL (Sept. 28, 2022), <https://www.cdc.gov/vaccines/covid-19/info-by-product/pfizer/index.html>.

<sup>166</sup> *Stay Up to Date with COVID-19 Vaccines Including Boosters*, CTR. FOR DISEASE CONTROL (Oct. 4, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html> [hereinafter *Stay Up to Date*].

<sup>167</sup> *Variants of the Virus*, CTR. FOR DISEASE CONTROL (Aug. 11, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/variants/index.html> [hereinafter *Variants*].

<sup>168</sup> *Grocery Shopping and COVID-19: What You Need to Know*, AM. HEART ASS'N (Apr. 8, 2020), <https://westchicago.org/wp-content/uploads/2020/05/Shopping-and-COVID-19-FINAL-4-8-2020.pdf>.

<sup>169</sup> Marcia Greenwood, *Still Wiping Down Your Grocery Store Purchases? Coronavirus Risk is 'Exceedingly Small,' Experts Say*, USA TODAY (Sept. 8, 2020), <https://www.usatoday.com/story/news/nation/2020/09/08/do-you-still-need-wipe-down-grocery-store-takeout-boxes/5743240002/>.

<sup>170</sup> Alvin Powell, *Fauci Says Herd Immunity Possible by Fall, 'Normality' by End of 2021*, HARV. GAZETTE (Dec. 10, 2020), <https://news.harvard.edu/gazette/story/2020/12/anthony-fauci-offers-a-timeline-for-ending-covid-19-pandemic/>.

<sup>171</sup> *Variants*, *supra* note 167.

<sup>172</sup> *Stay Up to Date*, *supra* note 166.

diet. He looks and feels better than ever. He also has abandoned his old unhealthy friend group for Sarah's natural, holistic living peer group. Although they have all gotten COVID, steam inhalation,<sup>173</sup> mega dosing vitamins C and E,<sup>174</sup> and ingesting a lemon-baking soda mix<sup>175</sup> or special herbs<sup>176</sup> appear—at least to Wayne—to have worked for them.

Although Wayne had never been against vaccinations in the past, he shall refuse to receive them from now on, preferring to use only natural remedies “as Nature intended.” Wayne is an unconscious post-factualist. He has become an anti-vaxxer because everyone in his new peer group constantly repeats and reinforces false facts. He obviously likes his new peer group and, in particular, his new girlfriend Sarah.

Wayne believes in the past he was a mindless sheep who simply did what the government told him to do. Now that he does his own research (albeit from online sources of questionable credibility), Wayne actually feels more empowered than ever before. He would pushback that he is for the first time being an engaged citizen. His post-factual beliefs are based upon evidence. Although they may not provide an appropriate sample of the general population, his immediate peer group and anecdotal experience confirm his post-factual anti-vaxxer beliefs. In principle, avoiding ingesting processed and human-made products as much as possible is a laudable goal.<sup>177</sup> Finally, eating cleanly has helped Wayne look and feel the best he has ever felt. Although he and his new peer group have contracted COVID, their youth and lack of co-morbidities<sup>178</sup> so far have helped them avoid COVID's worst effects.<sup>179</sup>

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<sup>173</sup> *Fact Check: Inhaling Steam Is Not Proven to Prevent COVID-19*, REUTERS (Feb. 12, 2021), <https://www.reuters.com/article/uk-factcheck-steam/fact-check-inhaling-steam-is-not-proven-to-prevent-covid-19-idUSKBN2AC2FV>.

<sup>174</sup> *False Claim: Say Goodbye to Coronavirus with a Daily Regimen of Vitamins C and E, Sunlight, Resting, Drinking Water, an Egg, and an Alkaline Diet*, REUTERS (Apr. 16, 2020), <https://www.reuters.com/article/uk-factcheck-goodbye-coronavirus-idUSKBN21Y2IQ>.

<sup>175</sup> *False Claim: Baking Soda and Lemon Juice Can Help Prevent Coronavirus Infection*, REUTERS (Mar. 10, 2020), <https://www.reuters.com/article/uk-factcheck-coronavirus-alkaline-idUSKBN20X2BV>.

<sup>176</sup> *False Claim: 12 Herbs and Spices Can Prevent or Treat Different Viruses*, REUTERS (Apr. 27, 2020), <https://www.reuters.com/article/uk-factcheck-herbs-and-spices-treat-virus-idUSKCN229214>.

<sup>177</sup> Katherine Marengo, *21 Reasons to Eat Real Food*, HEALTHLINE: NUTRITION (May 19, 2021), <https://www.healthline.com/nutrition/21-reasons-to-eat-real-food>.

<sup>178</sup> *People with Certain Medical Conditions*, CTR. FOR DISEASE CONTROL (Sept. 2, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

<sup>179</sup> *Id.*

Moreover, the so-called experts have undeniably publicly contradicted themselves with the need to disinfect fomites<sup>180</sup> and the original vaccine's ability to neutralize COVID.<sup>181</sup> Because Wayne does not understand that such contradictions are part of science's trial-and-error process,<sup>182</sup> he no longer trusts what the CDC and the official government tell him to do.

Like many unconscious post-factualists, Wayne is now more likely to believe anti-vaxxers' empirically flawed claims because he now trusts them as ostensibly more objective sources of information<sup>183</sup> and hears them much more frequently than opposing claims.<sup>184</sup> Although Wayne might vehemently insist that he remains open-minded and objective, in reality he has self-selected himself into a "filter bubble" or "echo chamber."<sup>185</sup>

## ii. Radical Post-Factualism

At the other extreme is *radical post-factualism*, where people believe that uncontested truth does not exist.<sup>186</sup> To them, adjudicative and legislative facts are always in the eye of the beholder. As the name suggests, it is the form of post-factualism least open to correction. It also is the most emotional, least intellectual, and potentially most dangerous. Because to radical post-factualists there is no truth, only power, intentionally lying to further partisan objectives is not only justifiable but also laudable. Although truth claims can and should be continually tested in a democracy, to deny truth's very possibility undermines the rule of law and institutional trust essential to a thriving democracy. Needless

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<sup>180</sup> Dyani Lewis, *COVID-19 Rarely Spreads Through Surfaces. So Why Are We Still Deep Cleaning?*, NATURE (Jan. 29, 2021), <https://www.nature.com/articles/d41586-021-00251-4>.

<sup>181</sup> See Greg Curtis, *The Problem with Overselling the Vaccines*, PITTSBURGH Q. (Oct. 11, 2022), <https://pittsburghquarterly.com/articles/the-problem-with-overselling-the-vaccines/>; see also Helen Branswell, *COVID-19 Vaccines Never Promised Perfection. Experts Say It's Time to Curb Our Highest Expectations*, PBS NEWSHOUR (Sept. 3, 2021, 12:35 PM), <https://www.pbs.org/newshour/health/covid-19-vaccines-never-promised-perfection-experts-say-its-time-to-curb-our-highest-expectations> ("Now, however, our soaring expectations for COVID-19 vaccines are in the process of sinking back to earth.").

<sup>182</sup> See Ivry Zagury-Orly & Richard M. Schwartzstein, *COVID-19—A Reminder to Reason*, 383 N. ENGL. J. MED. 3, July 16, 2020, at e12(1) (cautioning against seeing false patterns in uncertainty); see also *The Scientific Method*, KHAN ACAD. (last visited Oct. 12, 2022), <https://www.khanacademy.org/science/biology/intro-to-biology/science-of-biology/a/the-science-of-biology>.

<sup>183</sup> MacMullen, *supra* note 127, at 102.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 103. See also Jason Baehr, *Democracy, Information Technology, and Virtue Epistemology*, in VIRTUES, DEMOCRACY, AND ONLINE MEDIA: ETHICAL AND EPISTEMIC ISSUES 36 (Nancy E. Snow & Maria Silvia Vaccarezza, eds. 2021) (citations omitted).

<sup>186</sup> MacMullen, *supra* note 127, at 113–14.

to say, such belief suffers from both the “Thee-Not-Me”<sup>187</sup> and “What Would You Do?” problems.<sup>188</sup>

If everything is power and politics, then why compromise and build consensus? Why not simply rely upon might makes right? When taken to its logical extreme, such post-factualism can result into the “will to power”<sup>189</sup> and civil war.

For example, a foreign clickbait factory that manufactures vile inflammatory racist lies solely for advertising profit,<sup>190</sup> fully aware (but not caring) that their lies might contribute to genocide in another country,<sup>191</sup> would be a radical post-factualist.

Wayne would be a radical post-factualist if all he cared about was “owning” the Republicans.<sup>192</sup> Tribalism is all that matters. Instead of examining evidence and considering adjudicative facts, discrediting the former Republican President at the beginning of COVID and bolstering the current Democrat President now would be his sole decision-making criterion.

Because anti-vaxxers can be Republican or Democrat,<sup>193</sup> radical post-factualist Wayne might not be an anti-vaxxer. Wayne might have wanted the

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<sup>187</sup> See *supra* Part I.B.1.i.

<sup>188</sup> See *supra* Part I.B.1.ii.

<sup>189</sup> Although debated by many scholars, Frederick Nietzsche’s “will to power” has become known in political discussions as Nietzsche’s belief that “the really fundamental instinct of life . . . aims at *the expansion of power*.” FREDERICK APPEL, NIETZSCHE CONTRA DEMOCRACY 30 (1999) (internal citations omitted) (emphasis in original). Nietzsche “derided ‘political leaders’ of modern democracies” with “an essentially dishonest worldview that denies the fact that the will to power drives everything.” *Id.* at 32.

<sup>190</sup> The clickbait factories in Veles, Macedonia might be the most infamous worldwide. See Heather C. Hughes & Israel Waismel-Manor, *The Macedonian Fake News Industry and the 2016 U.S. Election*, 54 PS: POL. SCI. & POL. 1, 19 (2020).

<sup>191</sup> In sub-Saharan Africa, the misinformation that albino body parts bring good luck and wealth have resulted in an estimated 75 deaths in Tanzania alone between 2000–2016. Briony Swire-Thompson & David Lazer, *Public Health and Online Misinformation: Challenges and Recommendations*, 41 ANN. REV. PUB. HEALTH 433, 435 (2020) (first citing Andrei Engstrand-Neacsu & Alex Wynter, THROUGH ALBINO EYES: THE PLIGHT OF ALBINO PEOPLE IN AFRICA’S GREAT LAKES REGION AND A RED CROSS RESPONSE, INT’L FED’N RED. CROSS AND RED CRESCENT SOC. (2009), and then citing P. Rao, *Ending Albino Persecution in Africa*, 31 AFR. REV. 36 (2018)).

<sup>192</sup> Derek Robertson, *How ‘Owning the Libs’ Became the GOP’s Core Belief*, POLITICO (Mar. 21, 2021), <https://www.politico.com/news/magazine/2021/03/21/owning-the-libs-history-trump-politics-pop-culture-477203> (a partisan history of the development of the phrase “owning the libs”).

<sup>193</sup> For example, see Sheera Frenkel, *How Some Parents Changed Their Politics in the Pandemic*, N.Y. TIMES (Aug. 3, 2022), <https://www.nytimes.com/2022/08/01/technology/anti-vax-parents-political-party.html> (explaining how COVID anti-vaxxers may be becoming single-issue voters). There is ample evidence, however, that Republicans are less likely to be vaccinated against COVID. See generally David R. Jones & Monika L. McDermott, *Partisanship and the Politics of COVID Vaccine Hesitancy*, 54 POLITY 408 (2022).

maximum reported COVID cases and deaths during a Republican U.S. Presidential Administration to discredit the Administration before an election.<sup>194</sup> Conversely, once a Democrat became President, Wayne might want the minimum reported COVID cases and deaths to provide the Democratic Administration with more credibility.<sup>195</sup> By so believing, Wayne clearly elevated political partisanship over his care and concern for his fellow Americans. Instead of focusing on addressing the underlying, nonpartisan policy challenge, the COVID pandemic, Wayne demonstrated “Thee-Not-Me” reasoning.<sup>196</sup> If Wayne did not care at all about reducing COVID deaths and his only concern with COVID was abusing it to discredit Republicans, then Wayne would exhibit the “What Would You Do?” Problem.<sup>197</sup>

To be clear, someone who preferred one political party’s substantive policy approach to COVID over another political party’s approach would not be post-factualist. Such belief is fundamental to deliberative democracy.<sup>198</sup> If Wayne preferred Republican voluntary COVID measures over Democratic mandatory COVID measures,<sup>199</sup> he would not be a post-factualist.

In between these radical and unconscious extremes are *metaphysical*, *motivational*, and *epistemic post-factualism*.

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<sup>194</sup> As former President Donald Trump said before losing his reelection bid, “Now the Democrats are politicizing the coronavirus. We did one of the great jobs. You say, ‘How’s President Trump doing?’ They go, ‘Oh, not good, not good.’ They have no clue.” Peter Baker & Annie Karni, *Trump Accuses Media and Democrats of Exaggerating Coronavirus Threat*, N.Y. TIMES (Feb. 28, 2020), <https://www.nytimes.com/2020/02/28/us/politics/trump-accuses-media-democrats-coronavirus.html>.

<sup>195</sup> Former President Trump agreed with the cynical belief that news about the COVID pandemic was solely motivated by political partisanship as opposed to other goals, like a desire to report accurate information about a once-in-a-millennia pandemic to the public. See Tommy Beer, *Trump Predicted ‘Covid, Covid, Covid’ Would End After the Election. It’s Worse Than Ever*, FORBES (Nov. 11, 2020), <https://www.forbes.com/sites/tommybeer/2020/11/11/trump-predicted-covid-covid-covid-would-end-after-the-election-its-worse-than-ever/?sh=703b95b86512> (stating that President Trump claimed that the “fake news media” chose to focus on COVID to damage his re-election campaign and predicted that after the election, the media would stop reporting about COVID).

<sup>196</sup> See *supra* Part I.B.1.i.

<sup>197</sup> See *supra* Part I.B.1.ii.

<sup>198</sup> See, e.g., Fabio Wolkenstein, *A Deliberative Model of Intra-Party Democracy*, in RETHINKING PARTY REFORM 35–65 (2019) (explaining how deliberative democracy can work with political parties).

<sup>199</sup> See generally Katrin Schmelz & Samuel Bowles, *Opposition to Voluntary and Mandated COVID-19 Vaccination as a Dynamic Process: Evidence and Policy Implications of Changing Beliefs*, 119 PNAS, Mar. 2022, at 1, <https://www.pnas.org/doi/pdf/10.1073/pnas.2118721119>.

*iii. Metaphysical Post-Factualism*

Unlike an unconscious post-factualist, a *metaphysical post-factualist* is self-aware that objective empirical facts do not influence their political judgments and decisions.<sup>200</sup> They still care about objective facts but from a philosophical perspective believe that truth is relative to a person's identity and worldview. They prioritize intellectualism over emotion. Their focus is more on the perceived limits of language and truth-seeking than on their own tribalism.

Such increased self-awareness, however, is not admirable. On the contrary, it is intellectual cowardice. Smug metaphysical post-factualists throw the baby out with the bathwater. While they may be able to shroud their might-makes-right beliefs behind more sophisticated sophistry, they reach the same nihilistic, selfish conclusion as radical post-factualists.

Echoing Scottie Nell Hughes,<sup>201</sup> they would assert, "There are no objective facts here."<sup>202</sup> Metaphysical post-factualism assumes not only that there are no objective truths but also that all truth claims are about increasing or maintaining the claimant's power.<sup>203</sup> Overall, it rejects the traditional correspondence view of truth, which measures a proposition's truth by its accuracy in reporting "the state of some language-independent objective reality."<sup>204</sup>

Instead, it assumes a coherence view of truth where facts can only be true if they are consistent with the person's own subjective identity or group beliefs.<sup>205</sup> To the metaphysical post-factualist, their identity or beliefs are the starting point of what they consider to be true. They might believe that their identity or beliefs are relatively true or universally true.<sup>206</sup>

On the one hand, a "*relativ[e]* coherence view" is where "the truth of a proposition *for me* (or us) consists in its fit with other propositions that are accepted by *some particular subgroup of people to which I belong*."<sup>207</sup> They might also deny their post-factualism by asserting that there are no possible objective facts in the current situation.<sup>208</sup>

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<sup>200</sup> MacMullen, *supra* note 127, at 97, 100.

<sup>201</sup> Accord Hughes, *supra* note 9, and accompanying text.

<sup>202</sup> MacMullen, *supra* note 127, at 100.

<sup>203</sup> See *id.* (citing political science theorists who explain metaphysical post-factualism).

<sup>204</sup> *Id.* at 103 n.21 (citing Marian David, *The Correspondence Theory of Truth*, in OXFORD HANDBOOK OF TRUTH 238–58 (Michael Glanzberg ed., 2018)).

<sup>205</sup> *Id.* at 104.

<sup>206</sup> *Id.*

<sup>207</sup> MacMullen, *supra* note 127, at 97, 104.

<sup>208</sup> *Id.* at 104.

On the other hand, a *universal* coherence view is where I believe that my own subjective conception of the “Truth” is the only legitimate truth.<sup>209</sup> All other contrary conceptions are lies. Although both relative and universal coherence views demonstrate the “Thee-Not-Me”<sup>210</sup> and “What Would You Do?”<sup>211</sup> problems, the relative coherence view at least offers a *lassiez-faire* coexistence whereas the universal coherence view ultimately leads to civil war or fascist oppression.<sup>212</sup>

Although metaphysical post-factualism can explain what is really going on in an unconscious post-factualist’s mind,<sup>213</sup> a metaphysical post-factualist takes healthy skepticism too far and turns it into unhelpful nihilism. To them, there are no objectively better policies, only biased policies that empower one interest group more than another.

For example, an evangelical Christian might believe that only propositions consistent with the Bible are true.<sup>214</sup> That same Christian might also concede that Jews and Muslims, “People of the Book”<sup>215</sup> who follow the other

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<sup>209</sup> See Donald Williams, *True Truth: Francis Schaeffer’s Enduring Legacy*, CALVINIST INT’L (Sept 24, 2014), <https://calvinistinternational.com/2014/09/24/true-truth-francis-schaeffers-enduring-legacy/> (“conveying the idea of a truth that was absolute and not relativistic, that acknowledged the presupposition that ‘if anything was true, the opposite was false’”) (quoting FRANCIS SHAEFFER, *THE GOD WHO IS THERE* 14 (1968)).

<sup>210</sup> See *supra* Part I.B.1.i.

<sup>211</sup> See *supra* Part I.B.1.ii.

<sup>212</sup> As Robert Paxton commented, fascism “does not rest on formal philosophical positions with claims to universal validity.” Robert Paxton, *The Five Stages of Fascism*, 70 J. MOD. HIST. 4, 4–5 (1998). Fascist movements are unique to each nation and lack common universal principles. What all fascist movements have universally in common, however, is that they “claim legitimacy by no universal standard except a Darwinian triumph of the strongest community.” *Id.*

<sup>213</sup> MacMullen, *supra* note 127, at 105.

<sup>214</sup> The Bible has numerous verses declaring it to be God’s true and perfect word. See, e.g., John 1:1 (Eng. Std. Ver.) (“In the beginning, was the Word, and the Word was with God, and the Word was God.”); John 17:17 (Eng. Std. Ver.) (“Sanctify them in the truth; your word is truth.”); 1 Kings 2:3 (Eng. Std. Ver.) (“And keep the charge of the LORD your God, walking in his ways and keeping his statutes, his commandments, his rules, and his testimonies, as it is written in the Law of Moses, that you may prosper in all that you do and where you turn.”).

<sup>215</sup> See Rabbi Marc Gellman, Monsignor Thomas Hartman, & Tribune Media Services, *Abrahamic Faiths All Worship the Same God*, CHI. TRIB. (June 26, 2003), <https://www.chicagotribune.com/news/ct-xpm-2003-06-26-0306260340-story.html>. See also John M. Cunningham, *Ahl al-Kitab*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Ahl-al-Kitab> (alternate title: “People of the Book”).



Abrahamic religions,<sup>216</sup> believe that only propositions consistent with their own holy book, the Torah<sup>217</sup> or the Quran,<sup>218</sup> are true.

Whether or not that evangelical Christian is a metaphysical post-factualist would depend on their willingness to impose their truth claims upon others who disagree with them. If they were simply practicing the broader belief that everyone can only vote as their individual conscience dictates and accepted that non-Christians who reject Christian truth claims can vote differently, then they would not be post-factualist. In other words, even though the evangelical Christian sincerely believes that their biblical beliefs are universally true, provided the evangelical accepts that adherents of other religions (or no religion at all) can relatively believe in their own contrary conceptions of universal truth, then the evangelical is not a metaphysical post-factualist. If, on the contrary, the evangelical rejected relative conceptions of universal truth, then they would be post-factualist.

In our current scenario, Wayne would exhibit metaphysical post-factualism if he argues tautologically that because Nature is sovereign, only natural remedies created solely from unadulterated natural ingredients really work. Because mRNA vaccines like the Pfizer-BioNTech and Moderna ones use human-created mRNA manufactured in a laboratory,<sup>219</sup> Wayne refuses to receive them. Although still unvaccinated, he is open to being vaccinated with the Novavax or Johnson & Johnson's Janssen vaccine<sup>220</sup> if and only if he can be persuaded that they accurately replicate only natural processes. While Wayne says that the Pfizer and Moderna vaccines "don't work" because they are not natural, as a metaphysical post-factualist his sole decision-making criterion is whether or not the vaccine accurately replicates purely natural processes as opposed to the more rational criterion of the vaccine's overall effectiveness in preventing the COVID virus's infection, spread, and hospitalization.

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<sup>216</sup> See *id.* See also Anna Sapir Abulafia, *Discovering Sacred Texts: The Abrahamic Religions*, BRIT. LIBR. (Sept. 23, 2019), <https://www.bl.uk/sacred-texts/articles/the-abrahamic-religions#:~:text=When%20people%20refer%20to%20the,of%20Judaism%2C%20Christianity%20and%20Islam>.

<sup>217</sup> Maryanne Saunders, *Discovering Sacred Texts: The Torah*, BRIT. LIBR. (Sept. 23, 2019) <https://www.bl.uk/sacred-texts/articles/the-torah>.

<sup>218</sup> See Mustafa Shah, *Discovering Sacred Texts: The Qur'an*, BRIT. LIBR. (Sept 23, 2019), <https://www.bl.uk/sacred-texts/articles/the-quran>.

<sup>219</sup> *Understanding How COVID-19 Vaccines Work*, CTR. FOR DISEASE CONTROL (Sept. 16, 2022) [https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/how-they-work.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fvaccines%2Fdifferent-vaccines%2Fmrna.html](https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/how-they-work.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fvaccines%2Fdifferent-vaccines%2Fmrna.html) ("mRNA vaccines (Pfizer-BioNTech or Moderna").

<sup>220</sup> See *id.* ("Protein subunit vaccines (Novavax)," "Viral vector vaccines (Johnson & Johnson's Janssen)").

iv. *Motivational Post-Factualism*

While *motivational post-factualism* accepts the existence of universal truth and objective facts, it prioritizes directional goals over factual accuracy.<sup>221</sup> Unlike metaphysical post-factualism, motivational post-factualism prioritizes emotion over intellectualism. A motivational post-factualist would say, “There are facts here, but I don’t really care about them.”<sup>222</sup> Alternatively, a motivational post-factualist might conclude that although there are adjudicative facts, the amount of work required to obtain and understand them exceeds what the post-factualist is willing to do.<sup>223</sup> More important than facts is whether their beliefs are consistent with their values or make them feel good—to include affirmation; a sense of community or identity; or even amusement or entertainment.<sup>224</sup> If self-reflective and intellectually honest, they might admit, “Who cares about the facts? Politics (for me) is a matter of what feels good and right and rooting for one’s team.”<sup>225</sup>

Although more honest and less nihilistic than metaphysical post-factualism, motivational post-factualism is also more disappointing. If you believe that the best evidence and facts could create the best policy,<sup>226</sup> then why give up on it? If you know you could (and perhaps should) act better, then why not at least try? Radical post-factualism is a more extreme version of motivational post-factualism.

When confronted with the expert<sup>227</sup> and popular consensus<sup>228</sup> in favor of COVID vaccinations, Wayne would be a motivated post-factualist if he admits

<sup>221</sup> See *supra* note 147 and *infra* Part III.A.1.

<sup>222</sup> MacMullen, *supra* note 127, at 100.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 105.

<sup>225</sup> *Id.* at 106.

<sup>226</sup> For a discussion of the evidence-based policy assumption that the best evidence and facts shall result in the best policy, see *supra* Part I.A.

<sup>227</sup> See Vojtěch Bartoš, Michal Bauer, Jana Cahliková & Juli Chytilová, *Communicating Doctors’ Consensus Persistently Increases COVID-19 Vaccinations*, 606 NATURE 542 (2022).

<sup>228</sup> At the time of writing, 79% of Americans have received at least one dose of the COVID vaccine and 68% are considered fully vaccinated. *What’s the Nation’s Progress on Vaccinations*, USA FACTS (Aug. 31, 2022), <https://usafacts.org/visualizations/covid-vaccine-tracker-states>. At the time of writing, 68% of the world’s population has received at least one COVID vaccination dose. *Coronavirus (COVID-19) Vaccinations*, OUR WORLD IN DATA (last visited Oct. 12, 2022), [https://ourworldindata.org/covid-vaccinations?country=OWID\\_WRL](https://ourworldindata.org/covid-vaccinations?country=OWID_WRL). China claims that 90% of its population is fully vaccinated. *Id.* The European Union claims that 75.4% of their total population have been vaccinated with at least one dose. European Centre for Disease Prevention and Control, *COVID-19 Vaccine Tracker* (Sept. 9, 2022), <https://vaccinetracker.ecdc.europa.eu/public/extensions/COVID-19/vaccine-tracker.html#uptake-tab>.

that even though the majority might be correct, he is choosing otherwise for his own subjective reasons. Wayne responds,

I admit you might be right. The so-called experts might be right. But I don't care. I love Sarah and her friends. I'm the healthiest and happiest I've ever been. I trust them and the Earth. The animals seem to be okay without a vaccine. After all, viruses are simply another natural creation. If I'm wrong, I'm wrong. It's a risk I'm willing to take. I don't hide that I'm unvaccinated because I don't want anyone else to suffer from my personal decision. If another person is immunocompromised or otherwise high-risk health wise, they can avoid me. I've got no problem with that. My own mother will only meet with me at least six feet away outdoors.

v. *Epistemic Post-Factualism*

Because “epistemology” is “the investigation of what distinguishes justified belief from opinion,”<sup>229</sup> all factualists and post-factualists engage in some form of epistemic reasoning. An “*epistemic post-factualist*” however is skeptical of the ability to ascertain definitively evidence, facts, or truth.<sup>230</sup> Unlike unconscious, metaphysical, and motivational post-factualists who prioritize their own beliefs over facts, an epistemic post-factualist over prioritizes epistemology leading to paralysis through over analysis. Like metaphysical post-factualism, epistemic post-factualism prioritizes intellectualism over emotion. In fact, an epistemic post-factualist is a more extreme form of metaphysical post-factualism.

While a motivational post-factualist and an epistemic post-factualist may end up at the same destination, supporting their political leader of choice out of identity not evidence, they view factualism quite differently.<sup>231</sup> A motivational post-factualist views factual politics as an available option which they reject for identity reasons.<sup>232</sup> In contrast, an epistemic post-factualist believes that factual politics is not only usually unattainable as an option but also not a worthy aspirational goal.<sup>233</sup> This distinction matters for correction because irrefutable evidence might convince a motivational post-factualist but probably would not work with an epistemic post-factualist.

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<sup>229</sup> *Epistemology*, in OXFORD ENG. DICTIONARY (3d ed. 2013), <http://www.oed.com>.

<sup>230</sup> MacMullen, *supra* note 127, at 107–113.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

Like all forms of post-factualism, epistemic post-factualism varies in degree.<sup>234</sup> In its strongest and least constructive form, it pessimistically believes, “There are facts here, but I have no way of knowing them.”<sup>235</sup> In its weaker forms, epistemic post-factualism discounts personal beliefs when making policy judgments because of a lack of confidence in such beliefs’ veracity.<sup>236</sup> “Who knows? No source can really be trusted, not even the ones that we like.”<sup>237</sup>

Epistemic post-factualism ironically demonstrates the collective harm the other forms of post-factualism can cause to a democracy.<sup>238</sup> By assuming that everyone else is biased, lying, or—in Harry Frankfurt’s infamous words—bullshitting,<sup>239</sup> the epistemic post-factualist helplessly feels like they have no other choice but to act selfishly.<sup>240</sup> Moderate epistemic post-factualism and motivational post-factualism can work together to create a strongly, consciously post-factual attitude that because determining the facts would take more time and effort than I am willing to commit, I choose instead to make my political judgments in conscious ignorance of the facts.<sup>241</sup>

In its most virulent forms, epistemic post-factualism’s cynicism can transform democracies into fascist dictatorships.<sup>242</sup> As Rosenfeld ominously observed, “More and more citizens are . . . convinced that there are no legitimate, trustworthy sources of disinterested information, only partisan propaganda machines spinning out obfuscation, lies, and biased claims to advance hidden causes.”<sup>243</sup> If no one is trustworthy and democratic processes are thereby ineffective, then why not default to following the leader you personally find most charismatic or appealing?<sup>244</sup> Why only do what is best for you, even if you know that what is best for you is not the best for the rest of your community or nation? What good is sincere patriotism, courage, virtue, or honor? And if a would-be

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> See FRANKFURT, *supra* note 53.

<sup>240</sup> Accord MacMullen, *supra* note 127, at 109.

<sup>241</sup> *Id.* at 110.

<sup>242</sup> For example, while a motivational post-factualist might accept an overwhelming expert consensus (unfortunately rare in our post-fact times), a “thoroughgoing epistemic post-factualist will dismiss even such a consensus as unreliable.” *Id.* at 112. Because extreme epistemic post-factualists will reject or ignore even the best evidence or most persuasive arguments right in front of them, their irrational, fervent belief can be ideal for fascist dictatorships.

<sup>243</sup> SOPHIA ROSENFELD, *DEMOCRACY AND TRUTH: A SHORT HISTORY* 9 (2019).

<sup>244</sup> MacMullen, *supra* note 127, at 109–110 (explaining how a charismatic leader may purposefully encourage their followers to become epistemic post-factualists so they consciously ignore fact claims and choose to support the leader who is most entertaining or best demonstrating their preferred identity or ideology).

dictator knows that their audience is post-factual, then they need not even attempt to be a reliable source.<sup>245</sup>

Wayne would be an epistemic post-factualist if he argues that everyone—including himself—is doing the best they can with limited, flawed, and contradictory information about the COVID pandemic. To each their own conscience and beliefs.<sup>246</sup> “By scientists’ own admission,” says Wayne, “it’s too soon to know what might happen next with COVID. We’ll only know the answers well after this mess is hopefully over. Isn’t that how scientific research works?”<sup>247</sup> According to Wayne, it is presently premature to identify objective facts. “Sticking only to what nature intended has worked better for me and my friends than ingesting Big Pharma or other man-made processed crap.” Wayne continues, “Given no one really knows what’s happening, I’ll stick with my gut and Nature.”

#### 4. Civic Competency Seeks to Empower Citizens to Resist Post-Factualism

Radical post-factualism may be the most dangerous for democracy because it rejects compromise and co-existence for might-makes-right power. What we call “civic competency” is the ethical duty of all citizens in a deliberative democracy not only to maintain the technical information literacy skills required to be a discerning consumer of modern media<sup>248</sup> but also to seek “well-formed beliefs” to promote a democratic “society of free and equal citizens.”<sup>249</sup> As Greg Forster observed, 17th century English liberal philosopher John Locke viewed “[w]ars over beliefs” to be “wars over how and why people believe what they believe and how and why they should believe what they believe.”<sup>250</sup>

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<sup>245</sup> *Id.* at 109.

<sup>246</sup> *Id.* at 104. (explaining relativistic coherence truth view). The difference between Wayne’s epistemic post-factualism and the earlier evangelist’s metaphysical post-factualism is their respective belief in universal truth. Whereas the religious metaphysical post-factualist believes not only in universal truth but also that their religious belief is universally true, the epistemic post-factualist believes not only that universal truth is not a possible alternative but also that even manipulatively claiming universal truth is foolish and unpersuasive.

<sup>247</sup> Accord Krista Conger, *Two Years into the Pandemic, Medical Scientists Consider What the Future May Hold*, STAN. MED. NEWS CTR. (Mar. 11, 2022), <https://med.stanford.edu/news/all-news/2022/03/scientists-pandemic-future.html> (“Two years is not long enough to know how this [COVID] story ends.”).

<sup>248</sup> The American Library Association maintains a list of recommended information literacy resources. *Information Literacy*, AM. LIBR. ASS’N, <https://literacy.ala.org/information-literacy/> (last visited Nov. 30, 2022).

<sup>249</sup> Ferretti, *supra* note 19, at 230.

<sup>250</sup> GREG FORSTER, JOHN LOCKE’S POLITICS OF MORAL CONSENSUS 51 (2005).

Civic competence, therefore, is rooted in Locke's belief governance<sup>251</sup> and 20th century American liberal philosopher John Rawls' overlapping consensus.<sup>252</sup> In sum, civic competence recognizes that reason and evidence, as opposed to identity or power, should be the primary criteria for public policymaking because only the former allows for reasonable yet conflicting moral, religious, or philosophical doctrines to coexist peacefully and productively.<sup>253</sup> The latter, on the contrary, leads to democracy's subversion or breakdown.<sup>254</sup> Because a post-factualist believes that anyone with whom they disagree is neither truthful nor deserving of power, post-factualists ultimately seek to control their opposition as inferior to them.

Interpreting Locke, Maria Paola Ferretti explains why civic competence should resist the first three forms of post-factualism, which while choosing not to pursue objective truth do not altogether attack objective truth's very possibility or existence.<sup>255</sup> All three are wrong because they either do not respect fellow citizens as reasonable beings or they harbor manipulative intent.<sup>256</sup> Post-factualists unscrupulously exploit the "tacit assumption" in democratic public discourse that participants who claim to assert facts intend to be truthful—not manipulative—and that such facts should be believed because they are in fact truthful—not deliberate lies.<sup>257</sup>

First, unconscious post-factualism, even without "manipulative intent," ignores the civic obligation to apply "truth-conducive methods in the formation of beliefs" acquired as a citizen in a free and equal society.<sup>258</sup>

Second, to Locke, metaphysical post-factualism rejects the common gift of reason to humanity.<sup>259</sup> Because reason is "undogmatic" and facts, at least in principle, are equally accessible to all humanity, "we should follow truth, trying

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<sup>251</sup> Locke defined "belief governance" as "the practice of keeping one's beliefs in good order and trying to believe what is true rather than what is false." Ferretti, *supra* note 19, at 229 (citing JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 687 (Peter H. Nidditch ed., 1975)).

<sup>252</sup> See generally Rawls, *supra* note 124, at 1 (an "overlapping consensus" is "a consensus in which it is affirmed by the opposing religious, philosophical and moral doctrines likely to thrive over generations in a more or less just constitutional democracy").

<sup>253</sup> *Id.* at 10–11 (1987).

<sup>254</sup> Although a focus upon identity or power can result in a temporary cease-fire or stalemate, what Rawls calls a *modus vivendi*, its continued stability "depend[s] on happenstance and a balance of relative forces." *Id.* Like the views of 16th century English Catholics or Protestants during the English Reformation, such a *modus vivendi* often degenerates into civil war. See *id.*

<sup>255</sup> See generally Ferretti, *supra* note 19.

<sup>256</sup> See *id.* at 232.

<sup>257</sup> See *id.*

<sup>258</sup> *Id.* at 231.

<sup>259</sup> *Id.*

to learn from experience and reasoning without being held hostage” by our own subjective beliefs.<sup>260</sup>

Third, Locke believes in the civic duty to resist motivational post-factualism because it fails to treat fellow citizens as rational and autonomous moral agents.<sup>261</sup>

Finally, Locke would reject epistemic and radical post-factualism because they nihilistically deny even the possibility of objective truth. In so doing, these last two most dangerous forms of post-factualism are the polar opposites of Locke’s “alethic obligation,” a democratic citizen’s fundamental “duty to strive to believe what is most probably true and disbelieve what is most probably false.”<sup>262</sup>

Although disdain for the *demos*, the voters, as overly emotional and irrational is a tale as old as time,<sup>263</sup> recent technological changes and shifts in how the U.S. populace communicate may have exacerbated these ancient concerns.

## II. MEDIA DECENTRALIZATION AND NEW TECHNOLOGY RENDER A POST-FACT WORLD UNAVOIDABLE:

At least among the American commentariat, there is an emerging consensus that our currently unprecedented political division, only made worse by modern communication technology, is making post-factualism in U.S. political and cultural discourse a foregone conclusion. As the Vanderbilt Project on Unity and American Democracy, which attempts to measure U.S. national “unity” quantitatively,<sup>264</sup> has hypothesized, “the American experiment as a diverse, multiethnic democratic republic is undergoing one of its most difficult tests in its 244-year history.”<sup>265</sup>

The Project posits the potential cause of this unprecedented test: “Total partisan warfare has replaced evidence-based problem-solving as the controlling

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<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 230.

<sup>263</sup> See, e.g., KURT ANDERSEN, FANTASYLAND: HOW AMERICA WENT HAYWIRE: A 500-YEAR HISTORY (2017); Paul-Erik Korvela, *The Ancient Pedigree of Post-Factualism*, 19 REDESCRIPTIONS 121, 124 (2016).

<sup>264</sup> The quarterly hybrid polling measure is called the Vanderbilt Unity Index (“VUI”). THE VANDERBILT PROJECT ON UNITY & AMERICAN DEMOCRACY, VAND. UNIV. 1 (Dec. 2020), <https://www.vanderbilt.edu/unity/wp-content/uploads/sites/380/2022/06/Final-Unity-Project-Concept-Paper.pdf> (citations omitted) [hereinafter PROJECT ON UNITY]. Unsurprisingly, as measured by the VUI, our national division is only getting worse. See Blake Hounshell, *Measuring America’s Divide: ‘It’s Gotten Worse’*, N.Y. TIMES (July 27, 2022), <https://www.nytimes.com/2022/07/27/us/politics/vanderbilt-unity-index.html>.

<sup>265</sup> PROJECT ON UNITY, *supra* note 264.

force in our public life; the engines of perpetual conflict are overwhelming the classic work of politics: the mediation of differences.”<sup>266</sup> In particular, “Rhetorical jousting matches, whether in 280-character tweets or split-screen soundbites, elicit emotional outrage, reinforce ideological intransigence and elevate platitudes of polarization above informed discourse.”<sup>267</sup>

While the Project’s hypothesis requires additional research, there is an emerging consensus over two possible explanations for partisanship’s apparent ascendancy over evidence in the modern American republic: (A) the contemporary loss of shared trustworthy information sources; and (B) increasingly sophisticated “fake news” technology which can make the post-factualist manipulation of truth claims easier and more convincing.

*A. Our Polarized World Lacks Shared Trustworthy Information Sources*

Increasingly, even our sources of information are polarized. The news sources used and relied upon by voters of one political party are considered “fake news” by voters of the opposing political party.<sup>268</sup> Celebrated *CBS Evening News* anchor Walter Cronkite, Jr., who ended his nightly broadcasts with, “And that’s the way it is,” is often lauded as the archetypical shared authoritative information source before the advent of the internet.<sup>269</sup>

Many today agree with Jamal Greene that “[t]rusted intermediaries, the Walter Cronkites of old, are increasingly hard to come by, leaving us with personalized Facebook and Twitter feeds and citizenship in either a Fox News America or an MSNBC America. They are easy to mistake for two different countries.”<sup>270</sup>

Former President Barack Obama recently told Stanford University graduates that the previously limited sources of news “did fortify a sense of shared culture” and when “it came to the news, at least, citizens across the

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<sup>266</sup> *Id.* at 1.

<sup>267</sup> *Id.*

<sup>268</sup> See generally PEW RSCH. CTR., U.S. MEDIA POLARIZATION AND THE 2020 ELECTION: A NATION DIVIDED (2020).

<sup>269</sup> See, e.g., Braden R. Allenby, *The Age of Weaponized Narrative or, Where Have You Gone, Walter Cronkite?*, 33 ISSUES SCI. & TECH. 65, 66 (2017), <https://issues.org/the-age-of-weaponized-narrative-or-where-have-you-gone-walter-cronkite/>; Lesley Martinez, *Walter Cronkite: The Most Trusted Man in America*, ST. MARY’S RSCH. SCHOLARS (Apr. 7, 2020), <https://stmuscholars.org/walter-cronkite-the-most-trusted-man-in-america/#marker-106605-4> (summarizing laudatory references of Cronkite).

<sup>270</sup> JAMAL GREENE, HOW RIGHTS WENT WRONG 143 (2021).



political spectrum tended to operate using a shared set of facts, what they saw, what they heard from Walter Cronkite or David Brinkley or others.”<sup>271</sup>

Cronkite’s lionization, however, occurred after the ostensible loss of shared information sources and the proliferation of internet misinformation.<sup>272</sup> Ironically, much folklore about Walter Cronkite, the so-called “most trusted man in America,” may have actually been “fake news.”<sup>273</sup>

*B. Increasingly Sophisticated Deep Fake Technology and the Monetized Internet Encourage Post-Factualism*

As the Pew Research Center observed, the “internet represents a fundamental shift in how Americans connect with one another, gather information and conduct their day-to-day lives.”<sup>274</sup> The percentage of Americans who use the internet has increased from about 50% in the early 2000s to 93% in 2021.<sup>275</sup> There is ample evidence that more than any other technological innovation the internet not only nearly singlehandedly undid newspapers and nightly TV news shows’ monopoly on information dissemination<sup>276</sup> but also remains the primary source of misinformation today.<sup>277</sup>

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<sup>271</sup> Barack Obama, U.S. President, Graduation Address at Stanford University: Disinformation Is a Threat to Our Democracy (Apr. 21, 2022), <https://barackobama.medium.com/my-remarks-on-disinformation-at-stanford-7d7af7ba28af>.

<sup>272</sup> Cronkite retired as the CBS Evening News Anchor in 1981. See Martinez, *supra* note 269.

<sup>273</sup> See *Too Good to Check*, NPR: ON THE MEDIA (July 31, 2009), <https://web.archive.org/web/20090804011021/http://www.onthemedial.org/transcripts/2009/07/31/07> (interview transcript of Ben Zimmer by Bob Garfield claiming to debunk several alleged myths about Cronkite).

<sup>274</sup> *Internet/Broadband Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/>.

<sup>275</sup> *Id.*

<sup>276</sup> Jie Ren, Hang Dong, Ales Popovic & Gaurav Sabnis et al., *Digital Platforms in the News Industry: How Social Media Platforms Impact Traditional News Media Viewership*, EUR. J. INFO. SYS., July 27, 2022, at 3–4, <https://www.tandfonline.com/doi/full/10.1080/0960085X.2022.2103046> (collecting prior studies).

<sup>277</sup> According to a Pew survey, 86% of Americans get their news “often” or “sometimes” from a digital device. Elisa Shearer, *More Than Eight-in-Ten Americans Get News from Digital Devices*, PEW RSCH. (Jan. 12, 2021), <https://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices/>. “Technology can all too easily weaponize false speech for maximum believability and impact. This is not only because the architecture of social media enables viral spreading of [mis]information, but because [artificial intelligence (“AI”)] can increase the efficiency and effectiveness of distributed content through targeting and automation.” Lili Levi, *Real “Fake News” and Fake “Fake News,”* 16 FIRST AMEND. L. REV. 232, 248 (2017).

Two other technological innovations frequently blamed for the loss of shared information sources are mobile phones,<sup>278</sup> with which Americans can access the internet everywhere,<sup>279</sup> and private social media platforms where Americans can access third-party information (of varying credibility) through the internet.<sup>280</sup> As of 2021, 97% of Americans own a mobile phone.<sup>281</sup> From 2011-2021, the percentage of Americans who own a smartphone<sup>282</sup> increased 50%, from 35% to 85%.<sup>283</sup> American social media use has increased from just 5% of Americans in 2005 to 72% in 2021.<sup>284</sup>

One particular challenge with the veracity of social media information is the way that social media is monetized.<sup>285</sup> Social media creators are financially rewarded for the popularity—the number of “clicks”—of their internet posts, not their accuracy or credibility.<sup>286</sup> While it would be preferable if the most accurate or credible information media posts were also the most popular, in reality, post-factualist information media posts are also extremely popular and profitable.<sup>287</sup>

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<sup>278</sup> See Tommy Walker, *How Your Cell Phone Is Ripping Traditional Media Apart*, SOCIALMEDIATODAY.COM (June 14, 2011), <https://www.socialmediatoday.com/content/how-your-cell-phone-ripping-traditional-media-apart> (declaring in 2011 that “your cell phone murdered the Newsroom”).

<sup>279</sup> *Id.*

<sup>280</sup> Ren et al., *supra* note 276, at 3–4 (collecting prior studies). The U.S. Court of Appeals for the Eleventh Circuit has defined “social media platforms” as private companies that use technology to

collect speech created by third parties—typically in the form of written text, photos, and videos, which we’ll collectively call “posts”—and then make that speech available to others, who might be either individuals who have chosen to “follow” the “post”-er or members of the general public.

NetChoice, L.L.C. v. Fla. Att’y Gen., 34 F.4th 1196, 1203–04 (11th Cir. 2022).

<sup>281</sup> See *Mobile Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/mobile/> [hereinafter *Mobile Fact Sheet*].

<sup>282</sup> A “smartphone” is a mobile phone “that performs many of the functions of a computer, typically having a touchscreen interface, internet access, and an operating system capable of running downloaded applications.” *Smartphone*, in OXFORD ENGLISH DICTIONARY (3d ed. 2013).

<sup>283</sup> See *Mobile Fact Sheet*, *supra* note 281.

<sup>284</sup> *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/>.

<sup>285</sup> Levi, *supra* note 277, at 248.

<sup>286</sup> *Id.*

<sup>287</sup> As Facebook advisor Noah Feldman recognized, “It’s inexpensive—and in fact cheaper—to produce lies rather than truth, which creates conditions for a lot of false information in the marketplace.” Elaine McArdle, *Oh, What a Tangled Web We Weave: Deception Spreads Faster than Truth on Social Media. Who—If Anyone—Should Stop It?*, HARV. L. BULL., Summer 2021, at 20, <https://hls.harvard.edu/today/oh-what-a-tangled-web-we-weave/>.

Although an examination of future information technology is beyond the scope of this Article, here are two examples that will only make determining real from fake information more difficult. First, the (in)famous Facebook Company, whose social media website <https://www.facebook.com/> remained the third most visited website in the world,<sup>288</sup> on October 28, 2021, announced that it had rebranded into “Meta” to focus on creating a new technological informational space called the “metaverse,” “a hybrid of today’s online social experiences, sometimes expanded into three dimensions or projected into the physical world.”<sup>289</sup> By blurring the distinction between what is real and what is online, the metaverse and other virtual reality environments promise to make discerning truth more difficult.<sup>290</sup>

Second, the 2022 popular NBC *America’s Got Talent* (“AGT”) reality-TV series<sup>291</sup> introduced everyday Americans to deep-fake video technology through the fourth-place winning artificial intelligence group MetaPhysic’s amazing real-time physical transformation of live human video.<sup>292</sup> Needless to say, the ability to manufacture seemingly authentic video, which traditionally has been considered indisputable evidence of adjudicative factual events,<sup>293</sup> can empower post-factualists to manipulate truth claims further. Although there are attempts to use technology to prevent post-factualism,<sup>294</sup> most future

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<sup>288</sup> See *Top Websites Ranking*, SIMILARWEB.COM, <https://www.similarweb.com/top-websites/> (last visited Dec. 2, 2022).

<sup>289</sup> *Introducing Meta: A Social Technology Company*, FACEBOOK.COM (Oct. 28, 2021), <https://about.fb.com/news/2021/10/facebook-company-is-now-meta/>; see generally Eric Ravenscraft, *What Is the Metaverse, Exactly?*, WIRED (Apr. 25, 2022, 7:00 AM), <https://www.wired.com/story/what-is-the-metaverse/>.

<sup>290</sup> Levi, *supra* note 277, at 252–53.

<sup>291</sup> See *America’s Got Talent: Season 17 Ratings*, TVSERIESFINALE.COM (Sept. 15, 2022), <https://tvseriesfinale.com/tv-show/americas-got-talent-season-17-ratings/> (stating that AGT is “one of NBC’s top-rated summer series year after year”).

<sup>292</sup> See McKenzie Jean Philippe, *The AGT Season 17 Winner Has Been Revealed*, NBC.COM (Sept. 14, 2022, 11:23 PM), <https://www.nbc.com/nbc-insider/who-won-agt-2022-season-17-results#:~:text=During%20September%2014's%20Live%20Final,Hart%20for%20the%20top%20spot> (listing Metaphysic as the fourth-place winner). On its website, Metaphysic claims to be “world leaders in creating AI generated content that looks real.” See *Building the Hyperreal Metaverse*, METAPHYSIC.AI, <https://metaphysic.ai/> (last visited Oct. 28, 2022).

<sup>293</sup> See *Scott v. Harris*, 550 U.S. 372, 395–96 (2007) (Stevens, J., dissenting) (explaining that the U.S. Supreme Court majority opinion instructed the lower court to “vie[w] the facts in the light depicted by the [authenticated] videotape” and “imply[d] that no reasonable person could view the videotape” and come to a different conclusion about an adjudicative fact).

<sup>294</sup> *dis.info.dex*, CARNEGIE ENDOWMENT FOR INT’L PEACE, <https://disinfodex.org/> (“Disinfodex is a database of publicly available information about disinformation campaigns. It currently includes disclosures issued by major online platforms and accompanying reports from independent open source investigators.”); see also Briony Swire-Thompson & David Lazer, *Public Health and Online Misinformation: Challenges and Recommendations*, 41 ANN. REV. PUB. HEALTH 433, 445 (2020) (mentioning online/smartphone applications like NewsGuard and GiftedMom which

technological innovations will probably intentionally or inadvertently make post-factualism easier.<sup>295</sup>

### III. MISINFORMED; SUSPICIOUS OF EXPERTS; AND DISDAINFUL OF THE “DEEP STATE”:

In particular, BRACs are uniquely suited to combat three populist post-factual beliefs that are pernicious to effective policy: (A) faith in misinformation; (B) rejection of expert opinion; and (C) mistrust of career civil servants.

#### A. Misinformation

“Misinformation” is simply an incorrect statement of adjudicative fact that is verifiably false.<sup>296</sup> As opposed to being simply “uninformed,” or listening to “rumors” or “conspiracy theories,”<sup>297</sup> people are misinformed when they “hold incorrect factual beliefs and do so confidently.”<sup>298</sup> In legal terms, when presented with sufficient verification,<sup>299</sup> a reasonable fact-finder would reject that

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indicate “whether a website adheres to basic standards of credibility and transparency” and a Danish public health Facebook page which would timely answer citizen questions).

<sup>295</sup> As Levi predicted, technological innovation has allowed “the generation and proliferation of increasingly seamless and practically undetectable fabricated events and statements.” Lili Levi, *supra* note 277, at 253.

<sup>296</sup> Charles R. Corbett, *Chemtrails and Solar Geoengineers: Governing Online Conspiracy Theory Misinformation*, 85 MO. L. REV. 633, 652 (2020). “Fake news” is news that deliberately spreads misinformation. *See id.*; Eric Emanuelson, Jr., *Fake Left, Fake Right: Promoting an Informed Public in the Era of Alternative Facts*, 70 ADMIN. L. REV. 209, 218–19 (2018); Levi, *supra* note 277, 245–46.

<sup>297</sup> Being “uninformed” is having “no factual beliefs about the topic under inquiry.” Jennifer Jerit & Yangzi Zhao, *Political Misinformation*, 23 ANN. REV. POL. SCI. 77, 78 (2020). “Rumors” are statements believed by others not because of any evidence but rather because of their widespread social transmission. *See id.* (first citing Adam J. Berinsky, *Rumors and Health Care Reform: Experiments in Political Misinformation*, 47 BRIT. J. POL. SCI. 241, 242–43 (2017), and then citing Cass R. Sunstein & Adrian Vermeule, *Conspiracy Theories: Causes & Cures*, 17 J. POL. PHIL. 202, 202–27 (2009)). What distinguishes a “conspiracy theory” from rumors or misinformation is a conspiracy theory’s emphasis on using “the machinations of powerful people” to explain current or past events. *Id.* (citing Sunstein, *supra* at 205); RUSSELL MUIRHEAD & NANCY L. ROSENBLUM, A LOT OF PEOPLE ARE SAYING: THE NEW CONSPIRACISM AND THE ASSAULT ON DEMOCRACY (2019)). The same false belief of course can be labeled misinformation, a rumor, or a conspiracy theory for different reasons.

<sup>298</sup> *Id.* (citing James H. Kuklinski, Paul J. Quirk, Jennifer Jerit & David Schwieder et al., *Misinformation and the Currency of Democratic Citizenship*, 62 J. POL. 790, 792 (2000)).

<sup>299</sup> Such evidence would, of course, have to be admissible for jury deliberations. *See* FED. R. EVID. 104(a), (c).

particular adjudicative fact.<sup>300</sup> Unlike others,<sup>301</sup> we believe using different terms to divine the supposed intent behind misinformation is unnecessarily complicated.<sup>302</sup> In our view, the focus should be on the factualism of the information. Although there is a big difference between people who share misinformation and people who believe misinformation,<sup>303</sup> all that ultimately matters from a policy perspective is whether or not the information is false.<sup>304</sup>

For instance, the Kaiser Family Foundation (“KFF”) has labeled the statement “[p]regnant women should not get the COVID-19 vaccine” as misinformation.<sup>305</sup> What makes it misinformation is the fact that there is

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<sup>300</sup> For example, under Federal Rule of Civil Procedure 50, a court should render judgment as a matter of law “when a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury [or factfinder] to find for that party on that issue.” Charlie Gibbons, *Judgment as a Matter of Law—Motion*, FED. TRIAL OBJECTIONS § J20 (7th ed. Oct. 2020). See also FED. R. CIV. P. 50.

<sup>301</sup> As defined by some critics, “disinformation” is misinformation where the author possesses an improper motive and actual knowledge of the statement’s falsity. See Corbett, *supra* note 296. Federal national security agencies recognize misinformation, disinformation, and malinformation. “Malinformation” is the intentionally harmful spreading of genuine information (i.e., confidential private information). U.S. DEP’T. HOMELAND SEC., DISINFORMATION BEST PRACTICES AND SAFEGUARDS SUBCOMMITTEE, FINAL REPORT 6 (2022), <https://www.hsdl.org/c/abstract/?docid=870913>; see also *Mis, Dis, Malinformation*, CYBERSECURITY AND INFRASTRUCTURE SEC. AGENCY, <https://www.cisa.gov/mdm> (last visited Sept. 28, 2022).

<sup>302</sup> See *Mis, Dis, Malinformation*, *supra* note 301.

<sup>303</sup> While there is of course cross-over when disseminating disinformation to others, the potential spreader uses more analytic reasoning, “‘deliberative reasoning processes’ that approach ‘epistemically suspect beliefs’ with ‘skepticism’ and discernment.” Audrey C. Normandin, *Redefining “Misinformation,” “Disinformation,” and “Fake News”: Using Social Science Research to Form an Interdisciplinary Model of Online Limited Forums on Social Media Platforms*, 44 CAMPBELL L. REV. 289, 296–97 (2022) (quoting Gordon Pennycook & David G. Rand, *Lazy, Not Biased: Susceptibility to Partisan Fake News Is Better Explained by Lack of Reasoning Than by Motivated Reasoning*, 188 COGNITION 39, 40 (2019)). When deciding to accept misinformation, a believer uses more “motivated reasoning,” where “they ‘process information in a way that protects or enhances their current belief system,’ judging information about their ingroup more positively and information about their outgroup more negatively.” *Id.* (quoting Angela Anthony & Richard Moulding, *Breaking the News: Belief in Fake News and Conspiracist Beliefs*, 71 AUSTL. J. PSYCH. 154, 159 (2018)).

<sup>304</sup> Accord Swire-Thompson, *supra* note 191, at 435.

<sup>305</sup> Liz Hamel, Lunna Lopes, Ashley Kirzinger & Grace Sparks et al., *KFF COVID-19 Vaccine Monitor: Media and Misinformation*, KAISER FAM. FOUND. (Nov. 8, 2021), [https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-media-and-misinformation/?utm\\_campaign=KFF-2021-polling-surveys&utm\\_medium=email&\\_hsmi=2&\\_hscnc=p2ANqtz—7HAth55beXaSKlmm7btc5QZ1pHSFI0ap0wFheyi2eFURmEaipPkOFnR8QuIXFh3eylEnaY9hvMiN0YiGs3vQ8H-mWA&utm\\_content=2&utm\\_source=hs\\_email](https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-media-and-misinformation/?utm_campaign=KFF-2021-polling-surveys&utm_medium=email&_hsmi=2&_hscnc=p2ANqtz—7HAth55beXaSKlmm7btc5QZ1pHSFI0ap0wFheyi2eFURmEaipPkOFnR8QuIXFh3eylEnaY9hvMiN0YiGs3vQ8H-mWA&utm_content=2&utm_source=hs_email).

convincing evidence demonstrating that the statement is false.<sup>306</sup> The same statement could be considered rumor<sup>307</sup> if Wayne believed it without any supporting evidence solely because of the statement's popularity (measured by repostings and positive reactions) within his favorite closed "Natural Lifer 4 Ever" Facebook group.<sup>308</sup> If Wayne believed the statement solely because he believed that the rich, powerful, and evil co-conspirators exposed in the *Plandemic* movie<sup>309</sup> (whose own pregnant women apparently already knew to avoid the vaccine) wanted to murder the babies of the poor and other people they consider undesirable, then Wayne's belief would be a conspiracy theory.<sup>310</sup> If Wayne rejected convincing evidence presented to him<sup>311</sup> and instead believed the statement because of its popularity on Facebook and its consistency with the *Plandemic* movie,<sup>312</sup> then Wayne would believe misinformation because of rumor and a conspiracy theory.

Misinformation research is only about 22 years old.<sup>313</sup> In addition, real-life policy interactions between fellow citizens or citizens and their political leaders are far less sanitized or controlled than research surveys and experiments. Nevertheless, because misinformation is otherwise so difficult to comprehend,<sup>314</sup> even limited research findings can help frame how misinformation spreads and how to combat it.

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<sup>306</sup> Sascha Ellington & Christine K. Olson, *Safety of mRNA COVID-19 Vaccines During Pregnancy*, 22 LANCET INFECTIOUS DISEASES 1514, 1514 (2022) (comparing adverse events the week after mRNA COVID vaccination among pregnant people with unvaccinated pregnant people and vaccinated non-pregnant females).

<sup>307</sup> *Rumor*, in OXFORD ENGLISH DICTIONARY (3d ed. 2013).

<sup>308</sup> A closed Facebook group is a group on the Facebook social media platform, where anyone can see the group's name, description, and member list but new members must ask to join or be invited by an existing member, only current members can see the content of the group posts, and only current members can see the group in their Facebook News Feed. See Gennie Gebhart, *Understanding Public, Closed, and Secret Facebook Groups*, ELECTRONIC FRONTIER FOUND. (June 13, 2017), <https://www.eff.org/deeplinks/2017/06/understanding-public-closed-and-secret-facebook-groups>.

<sup>309</sup> See John Cook, Sander van der Linden, Stephan Lewandowsky & Ullrich Ecker, *Coronavirus, 'Plandemic' and the Seven Traits of Conspiratorial Thinking*, THE CONVERSATION (May 15, 2020 2:40 PM), <https://theconversation.com/coronavirus-plandemic-and-the-seven-traits-of-conspiratorial-thinking-138483>. *Plandemic* is a popular conspiracy theory video interviewing a disgraced former virology researcher who argues that the COVID pandemic is a sham to make money off selling vaccinations. *Id.*

<sup>310</sup> See *supra* note 297 and accompanying text.

<sup>311</sup> See Ellington, *supra* note 306, at 1514.

<sup>312</sup> See Matthew D. Kearney, Shawn C. Chiang & Phillip M. Massey, *The Twitter Origins and Evolution of the COVID-19 "Plandemic" Conspiracy Theory*, HARV. KENNEDY SCH. MISINFORMATION REV., October 2020, at 1.

<sup>313</sup> See Jerit, *supra* note 297, at 77 (stating that misinformation research began in 2000).

<sup>314</sup> Misinformation, by its very definition, is irrational.

### 1. How Misinformation Metastasizes in the Body Politic as Motivated Cognition

While misinformation—like any lie—is inherently flawed, the policy problem is when misinformation multiplies like a counterinsurgency within a democracy. There is a general human tendency to be motivated to achieve certain goals or end states.<sup>315</sup> This human tendency influences our entire reasoning process<sup>316</sup> in what is often called “motivated cognition”<sup>317</sup> or “motivated reasoning.”<sup>318</sup> Our motivations “manifest in strategies that individuals—consciously or unconsciously—employ in an effort to obtain the desired” goal or end state.<sup>319</sup>

When evaluating information, we can be motivated by the desire to be accurate (*i.e.*, truthful) or directional (*i.e.*, the desire to arrive at a particular conclusion consistent with your pre-existing biases and beliefs).<sup>320</sup> From a policy perspective, we obviously would prefer that citizens and their leaders be motivated by the former, which would be factualism,<sup>321</sup> than the latter, which would be post-factualism.<sup>322</sup>

Unsurprisingly, while there is a “competitive tension” within each person between accuracy and directional goals, directional goals often win out.<sup>323</sup> Not only because whenever we encounter an object as part of our daily lives (*e.g.*, candidates, issues, and groups) we unconsciously experience “hot cognitions,” directional positive or negative feelings based upon our preconceived bias<sup>324</sup> but

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<sup>315</sup> Jerit, *supra* note 297, at 79 (citing Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480 (1990)).

<sup>316</sup> *See id.*

<sup>317</sup> *See id.*

<sup>318</sup> Dan M. Kahan, Ellen Peters, Erica Cantrell Dawson & Paul Slovic, *Motivated Numeracy and Enlightened Self-Government*, 1 BEHAV. PUB. POL’Y 54 (2017); Erik C. Nisbet, Kathryn E. Cooper & R. Kelly Garrett, *The Partisan Brain: How Dissonant Science Messages Lead Conservatives and Liberals to (Dis)trust Science*, 658 ANNALS AM. ACAD. POL. & SOC. SCI. 36 (2015); Briony Swire, Adam J. Berinsky, Stepan Lewandowsky & Ullrich K. H. Ecker, *Processing Political Misinformation: Comprehending the Trump Phenomenon*, 4 R. SOC. OPEN SCI., October 10, 2016, at 1.

<sup>319</sup> Thomas J. Leeper & Rune Slothuus, *Political Parties, Motivated Reasoning, and Public Opinion Formation*, 35 ADVANCES IN POL. PSYCH. 129, 139 (2014).

<sup>320</sup> Jerit, *supra* note 297, at 78 (citing Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480 (1990)); *see also* MILTON LODGE & CHARLES S. TABER, *THE RATIONALIZING VOTER* (2013).

<sup>321</sup> For further discussion of factualism, see *supra* Part I.B.3.

<sup>322</sup> For further discussion of post-factualism, see *supra* Part I.B.3.

<sup>323</sup> *See* LODGE, *supra* note 320.

<sup>324</sup> *Id.* at 19; Sheila T. Murphy & R.B. Zajonc, *Affect, Cognition, and Awareness: Affective Priming with Optimal and Suboptimal Stimulus Exposures*, 64 J. PER. SOC. PSYCH. 723 (1993).

also because such frequent directional motives can bias “subsequent conscious reasoning through selective exposure, attention, and judgment processes.”<sup>325</sup>

People with such directional cognition suffer from confirmation bias, where they accept evidence that supports their directional bias uncritically,<sup>326</sup> and disconfirmation bias, when they overreact against evidence counter to their directional bias.<sup>327</sup> Although there is no consensus on how to measure directional or accuracy cognition,<sup>328</sup> post-factualist directional cognition is presumed to be the default when people process political information.<sup>329</sup>

The five types of post-factualism in Part I.B.3 demonstrated that post-factualists are primarily motivated by directional cognition.<sup>330</sup> When post-factualism—as with unconscious and motivational post-factualism—recognizes accuracy cognition, it is merely to acknowledge the possibility of objective fact and truth, even though factualism, implicitly or explicitly, ultimately fails to influence post-factualism.<sup>331</sup>

## 2. How to Combat Misinformation

As many Americans have personally experienced,<sup>332</sup> once people firmly believe misinformation is true, they resist attempts at correction.<sup>333</sup> While there continue to be individual success stories of correction,<sup>334</sup> it is still uncertain why or how such corrections succeed or fail.<sup>335</sup> There are however at least three ways that the existing research can help frame our inquiry into how to convince people

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<sup>325</sup> Jerit, *supra* note 297, at 80 (citing LODGE, *supra* note 320, at 150).

<sup>326</sup> LODGE, *supra* note 320, at 151; Peter H. Ditto & David F. Lopez, *Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Non-preferred Conclusions*, 73 J. PER. SOC. PSYCH. 568 (1992).

<sup>327</sup> LODGE, *supra* note 320, at 151; Ditto, *supra* note 326, at 568.

<sup>328</sup> Jerit, *supra* note 297, at 81.

<sup>329</sup> Flynn, *supra* note 155, at 145.

<sup>330</sup> For a summary of post-factualist accuracy and directional goals, see *supra* Table 1 in Part I.B.3.

<sup>331</sup> *See id.*

<sup>332</sup> *See* Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, Neil Malhotra et al., *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POL. SCI. 129, 130 (2019).

<sup>333</sup> James H. Kuklinski et al., *Misinformation and the Currency of democratic Citizenship*, 62 J. Pol. 790, 792 (2000).

<sup>334</sup> Jerit, *supra* note 297, at 81; *see also* Nathan Walker & Shelia T. Murphy, *How to Unring the Bell: A Meta-Analytic Approach to Correction of Misinformation*, 85 COMM. MONOGRAPHS 423 (2018).

<sup>335</sup> Jerit, *supra* note 297, at 81 (quoting Brian E. Weeks & R. Kelly Garrett, *Electoral Consequences of Political Rumors: Motivated Reasoning, Candidate Rumors, and Vote Choice During the 2008 U.S. Presidential Election*, 26 INT’L J. PUB. OP. RSCH. 148, 148 (2018)).



to discount or reject firmly held misinformation: (i) the more they are motivated by misguided accuracy as opposed to directional cheerleading, the more amenable they are to correction;<sup>336</sup> (ii) the less they perceive the misinformation to be critical to their identity or worldview, the less resistance they will have to correction (and vice-versa);<sup>337</sup> and (iii) when determining the credibility of the correcting source(s), they value perceived trustworthiness and nonpartisanship more than knowledge or expertise.<sup>338</sup>

As non-governmental organizations, all blue-ribbon advisory committees (“BRACs”) have the ability to correct citizen misinformation in a more direct, individualized manner than indirect government efforts. As merely advisory organizations, BRACs are not subject to as stringent First Amendment restrictions on their conduct as actual government organizations. Unless it is violent or defamatory,<sup>339</sup> most misinformation is protected political speech under the First Amendment.<sup>340</sup> American government at all levels therefore can only regulate misinformation indirectly through efforts to include bringing back the Fairness Doctrine;<sup>341</sup> removing social media platform immunity under the Communications Decency Act;<sup>342</sup> requiring social media companies to adopt, adhere to, and report on their own content moderation rules; strengthening and enforcing consumer protection rules limiting access to consumer data; and taxing large media platforms or providing tax credits or breaks to strengthen local news.<sup>343</sup>

In contrast, a BRAC can interact with misinformed people directly and individually and can be staffed and structured so that post-factualists perceive the BRAC as more credible and nonpartisan than the government. A BRAC can tailor its approach to frame misinformation as a question of inaccuracy and

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<sup>336</sup> Jerit, *supra* note 297, at 83 (collecting authorities).

<sup>337</sup> *See id.* at 83–84 (collecting authorities).

<sup>338</sup> *See id.* at 84–85 (collecting authorities).

<sup>339</sup> *See* Francis C. Amendola et al., *Political Speech*, 16B C.J.S. CONST. L. § 933 (Oct. 2022).

<sup>340</sup> *Id.* *See also* U.S. CONST. amend. I.

<sup>341</sup> Created in 1949, the Fairness Doctrine required broadcast media to present opposing viewpoints to “protect the rights of audiences to diverse sources of information” and was repealed in 1987. Gail Ehrlich, *Fighting Misinformation: How New Laws Might Help*, 93 N.Y. STATE B.J. 16, 18 (2021). *See also* Syracuse Peace Council v. FCC, 867 F.2d 654, 656 (D.C. Cir. 1989) (upholding FCC determination that the Fairness Doctrine “did not serve the public interest and was unconstitutional”).

<sup>342</sup> 47 U.S.C.A. § 230 (West 2022).

<sup>343</sup> *See* Christina Pazzanese, *How the Government Can Support a Free Press and Cut Disinformation*, HARV. GAZETTE, Aug. 11, 2021, <https://news.harvard.edu/gazette/story/2021/08/martha-minow-looks-at-ways-government-can-stop-disinformation/> (citing MARTHA MINOW, SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR DEMOCRATIC ACTION TO PRESERVE FREEDOM OF SPEECH (2021)) (interview with Martha Minow).

prioritize addressing misinformation that a post-factualist does not perceive as critical to their identity or worldview.

### B. Popular Rejection of Expertise

As Tom Nichols wrote in *The Death of Expertise*, “the traditional American distaste for intellectuals and know-it-alls” is not the problem.<sup>344</sup> On the contrary, skepticism of expert claims is healthy for a democracy.<sup>345</sup> After all, as George Bernard Shaw famously commented, “All professions are conspiracies against the laity.”<sup>346</sup> Although they can be conspiracies for good or evil,<sup>347</sup> by their very existence, experts assert that their knowledge, training, or experience makes them superior to the mere lay person.<sup>348</sup> Expert jargon and knowledge may seem an inscrutable foreign language and culture to the average American. Common sense, sayeth the expert, can only get you so far.

Experts are often wrong. Experts can be abused or manipulated for political or personal gain.<sup>349</sup> As trial lawyer Richard Stillwell quipped, “A witness must tell the truth, the whole truth, and nothing but the truth—unless the witness is an ‘expert.’”<sup>350</sup> Carefully vetting expert claims will only improve their policy recommendations.

The problem here is the nihilistic resistance against learning and the unhealthy embrace of deliberate ignorance.<sup>351</sup> It is the angry, deliberate rejection of the value of expertise at all.<sup>352</sup> The ready availability of information from the internet has undoubtedly contributed to this popular disdain for expertise. With a quick web search, everyone now thinks they are an expert.

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<sup>344</sup> TOM NICHOLS, *THE DEATH OF EXPERTISE: THE CAMPAIGN AGAINST ESTABLISHED KNOWLEDGE AND WHY IT MATTERS*, at x (2017)

<sup>345</sup> *Id.*

<sup>346</sup> GEORGE BERNARD SHAW, *THE DOCTOR’S DILEMMA* act I (Project Gutenberg 1906), <https://www.gutenberg.org/files/5070/5070-h/5070-h.htm> (Sir Patrick Cullen speaking).

<sup>347</sup> Curtis Cole, “*A Conspiracy Against the Laity*”, 21 *CAN. REV. AM. STUDS.* 85, 85 (1990).

<sup>348</sup> Compare *FED. R. EVID.* 701 and *FED. R. EVID.* 702.

<sup>349</sup> The so-called “battle of the experts” cynically demonstrates how any expert can be found to support practically any position if the price is right. See Jennifer L. Mnookin, *Expert Evidence, Partisanship, and Epistemic Competence*, 73 *BROOK. L. REV.* 1009, 1009 (2008); Nina A. Vershuta, *New Rules of War in the Battle of the Experts: Amending the Expert Witness Disqualification Test for Conflicts of Interest*, 81 *BROOK. L. REV.* 733, 735–36 (2016) (citations omitted).

<sup>350</sup> Richard T. Stilwell, *Kumho Tire: The Battle of the Experts Continues*, 19 *REV. LITIG.* 193, 194 (2000). By virtue of their expert status, experts at trial can of course opine on matters beyond what mere fact witnesses can. See *id.*

<sup>351</sup> NICHOLS, *supra* note 344, at x.

<sup>352</sup> *Id.*, at xiii.

While the internet is an unparalleled information resource with the promise to improve humanity,<sup>353</sup> the internet as an information source continues to have two major drawbacks. First, internet website algorithms can create a biased “filter bubble” by selectively guessing what information an individual user would like to see based upon their past digital data profile. In so doing, such algorithms can intentionally isolate the user from any contrary information inconsistent with their worldview. The biased choices these algorithms make are also not transparent.<sup>354</sup>

Second, as previously discussed, misinformation<sup>355</sup> can flourish on the internet because it is easy to create deceptive “fake news” online<sup>356</sup> and it can be difficult to determine whether or not an online source is trustworthy.<sup>357</sup> In a 2019 Gallup poll, although 64% of polled Americans stated that they get their news online, only 40% of them said that they trusted online news!<sup>358</sup>

The most trusted news sources in the Gallup poll were local TV, newspaper, and radio news.<sup>359</sup> Unfortunately, easy access to internet news, national media competition, and the loss of advertising revenue during the COVID pandemic have conspired to eviscerate local journalism.<sup>360</sup> As *Washington Post* media critic and *Ghosting the News* author Margaret Sullivan observed, “local journalism . . . has been in free fall for at least 15 years.”<sup>361</sup> By 2019, 2,000 American local newspapers had folded.<sup>362</sup> Since the pandemic

<sup>353</sup> See KATHLEEN STANSBERRY, JANNA ANDERSON & LEE RAINIE, EXPERTS OPTIMISTIC ABOUT THE NEXT 50 YEARS OF DIGITAL LIFE 55-81 (Pew Rsch. Ctr. 2019) (interviewing experts who believe that the “internet will continue to make life better”).

<sup>354</sup> Snow, *supra* note 66, at 26 (citation omitted).

So, the internet should never replace books. Florida State University student body president, Rhodes Scholar, and philosophy major Joe O’Shea thus was wrong when he astonishingly said,

I don’t read books. I go to Google, and I can absorb relevant information quickly. Sitting down and going through a book from cover to cover doesn’t make sense. It’s not a good use of my time, as I can get all the information I need faster through the Web.

Baehr, *supra* note 185, at 34–35 (quoting NICHOLAS CARR, *THE SHALLOWS: HOW THE INTERNET IS CHANGING THE WAY WE THINK, READ AND REMEMBER* 179–80 (2019)).

<sup>355</sup> See *supra* Part III.A.

<sup>356</sup> See *supra* Part II.

<sup>357</sup> Baehr, *supra* note 185, at 32.

<sup>358</sup> Megan Brenan, *In U.S., 40% Trust Internet News Accuracy, Up 15 Points*, GALLUP (Aug. 22, 2019), <https://news.gallup.com/poll/260492/trust-internet-news-accuracy-points.aspx>.

<sup>359</sup> *Id.*

<sup>360</sup> *Q&A: Margaret Sullivan on the Death of Local News*, CTR. FOR PUB. INTEGRITY (July 31, 2020), <https://publicintegrity.org/inside-publici/qa-margaret-sullivan-on-the-death-of-local-news/> (citing MARGARET SULLIVAN, *GHOSTING THE NEWS: LOCAL JOURNALISM AND THE CRISIS OF AMERICAN DEMOCRACY* (2020) (audiobook)).

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

began, about 37,000 local news workers have been laid off, furloughed, or had their pay reduced.<sup>363</sup>

Like local media, BRACs can be local in mission, scope, and membership. Putting trusted community members on a BRAC can increase that BRAC's local credibility. In addition, a BRAC has the flexibility to encourage dialogue between skeptical laypeople and particular experts.

### C. Distrust of the “Deep State”

Until 2017, Americans generally did not consider government civil servants the so-called “deep state.”<sup>364</sup> The “deep state” appears to refer to independent career civil servants—including career scientists, lawyers, national security analysts, economists, and administrative personnel—who comprise much of the federal government” and can be perceived as disloyal or actively resisting the current Presidential Administration.<sup>365</sup> Since 2017, the American civil service corps' essential political independence and institutional competence has been popularly vilified into a shadowy scapegoat.<sup>366</sup> Although an examination of the overall benefits of the U.S. civil service is beyond the scope of this Article,<sup>367</sup> nonpartisan, independent government civil servants are essential to a functioning democracy<sup>368</sup> and attempts to politicize them as at-will employees who can be replaced without cause by partisan cronies with every new Presidential Administration are misguided.<sup>369</sup>

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<sup>363</sup> Marc Tracy, *News Media Outlets Have Been Ravaged by the Pandemic*, N.Y. TIMES (Sept. 21, 2021), [https://www.nytimes.com/2020/04/10/business/media/news-media-coronavirus-jobs.html?utm\\_source=Watchdog&utm\\_campaign=c4521e31dc-EMAIL\\_CAMPAIGN\\_2019\\_12\\_13\\_06\\_05\\_COPY\\_01&utm\\_medium=email&utm\\_term=0\\_ffd1d0160d-c4521e31dc-103582941&mc\\_cid=c4521e31dc&mc\\_eid=\[17e5bb893d\]](https://www.nytimes.com/2020/04/10/business/media/news-media-coronavirus-jobs.html?utm_source=Watchdog&utm_campaign=c4521e31dc-EMAIL_CAMPAIGN_2019_12_13_06_05_COPY_01&utm_medium=email&utm_term=0_ffd1d0160d-c4521e31dc-103582941&mc_cid=c4521e31dc&mc_eid=[17e5bb893d]).

<sup>364</sup> Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1653 (2018).

<sup>365</sup> Heidi Kitrosser, *Accountability in the Deep State*, 65 UCLA L. REV. 1532, 1534 (2018).

<sup>366</sup> Michaels, *supra* note 364, at 1657–64.

<sup>367</sup> See generally Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 534 (2015).

<sup>368</sup> As the *Washington Post* editorial board commented, “Populist politicians point to the ‘deep state’ as the root of America’s ills. In fact, what they cast as a threat—a professional, merit-based, experienced civil service—is one of the country’s greatest assets.” Editorial, *Congress Must Prevent Another Trumpian Attempt to Purge the Government*, WASH. POST (Aug. 29, 2022, 2:04 PM), <https://www.washingtonpost.com/opinions/2022/08/29/schedule-f-trump-civil-service-politics/>.

<sup>369</sup> See *Creating Schedule F in the Excepted Service*, Exec. Order No. 13,957, 85 Fed. Reg. 67631 (2020) (creating a new Schedule F excepted service category removing federal positions “of a confidential, policy-determining, policy-making, or policy-advocating character” from civil service protections), *revoked by Protecting the Federal Workforce*, Exec. Order No. 14,003, 86 FED. REG. 7231 (2021) (stating that Schedule F “not only was unnecessary to the conditions of good administration, but also undermined the foundations of the civil service and its merit system principles”). If elected to a second term, former President Donald Trump apparently intends not

Regardless of policy imprudence, however, popular misinformation,<sup>370</sup> disdain for even the need of expertise,<sup>371</sup> and bunk about a bureaucratic bogeyman provide fertile soil for post-factualism to flourish. Although industry BRACs could be dismissed as the capitalist puppet masters of both the “swamp” and the “deep state,”<sup>372</sup> most other BRACs are distinguishable from the government bureaucracy by their advisory, private citizen status.<sup>373</sup> Given the likelihood that a post-factualist “deep state” adherent would reject any official government organization as untrustworthy, a BRAC might provide the only institutional way even to attempt to engage “deep state” loathing post-factualists.

#### IV. FEELING “BLUE” OVER THE CURRENT LACK OF BLUE-RIBBON ADVISORY COMMITTEE STANDARDS:

This Part takes two historical statuses, the blue ribbon and the government advisory committee, traditionally associated with selfish, abusive elites, and attempts to repurpose them for a post-fact world. Although historically the so-called “blue ribbon” has long represented the highest level of wealth, class, or excellence, Part IV.A reveals that today it has become a distinction without a difference.

Likewise, Part IV.B explains how private citizen membership in a select government advisory committee was historically accompanied with the perception—whether real or imagined—of special insider status and an outsized influence on the government policy within the advisory committee’s bailiwick, notwithstanding any real or perceived conflicts of interest. With the ridiculous breadth and sophistication of the modern administrative state, advisory committees have proliferated like smartphones, encompassing practically every human endeavor.<sup>374</sup>

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only to reissue his Schedule F executive order but also to expand upon it. Jonathan Swan, *A Radical Plan for Trump’s Second Term*, AXIOS (July 22, 2022), <https://www.axios.com/2022/07/22/trump-2025-radical-plan-second-term>.

<sup>370</sup> See *supra* Part III.A.

<sup>371</sup> See *supra* Part III.B.

<sup>372</sup> For a discussion of the fear of biased industry advisory committees controlling government regulators, see *infra* Part IV.B.

<sup>373</sup> For a discussion of advisory committees’ non-governmental advisory status, see *id.*

<sup>374</sup> See Brian D. Feinstein & Daniel J. Hemel, *Outside Advisers Inside Agencies*, 108 GEO. L.J. 1139, 1142 (2020) (collecting examples of the wide range of federal advisory committees). Both President Donald Trump and President Bill Clinton issued Executive Orders to reduce federal advisory committees by one-third. See MEGHAN M. STUESSY, CONG. RSCH. SERV., IN11139, EXECUTIVE ORDER TO REDUCE THE NUMBER OF FEDERAL ADVISORY COMMITTEES 1 (June 27, 2019) (citing *Termination and Limitation of Federal Advisory Committees*, Exec. Order No. 12,838, 58 Fed. Reg. 8207 (1993); *Evaluating and Improving the Utility of Federal Advisory Committees*, Exec. Order No. 13,875, 84 Fed. Reg. 28711 (2019)).

Although federal, state, and local advisory committees associated with all three branches of government essentially provide the same role of formally giving private citizens an advisory voice in policymaking, Part IV.C reveals that different advisory committees are governed by a Byzantine mess of different laws. In particular, so-called blue-ribbon advisory committees (“BRACs”) appear to lack any uniform or substantive standards behind their blue-ribbon status.

Finally, in Part IV.D, the Article examines two recent federal advisory committees which had different strategies with and opposite impacts on post-factualism. First, the Commission on Evidence-Based Policymaking (“CEP”), created by a bipartisan federal statute,<sup>375</sup> constructively thwarted post-factualism by studying and improving the federal government’s program evaluation infrastructure. More than five years after its conclusion, the CEP continues to exist through a successor advisory committee, the Bipartisan Policy Center.<sup>376</sup> Second, the nefariously named Disinformation Governance Board (“DGB”)<sup>377</sup> formed by a so-called “Blue”<sup>378</sup> Democratic Administration not only was quickly

<sup>375</sup> Evidence-Based Policymaking Commission Act of 2016, Pub. L. No. 114-140, 130 Stat. 317 (2016).

<sup>376</sup> U.S. Commission on Evidence-Based Policymaking, BIPARTISAN POL’Y CTR., <https://bipartisanpolicy.org/commission-evidence-based-policymaking/> (last visited Dec. 2, 2022).

<sup>377</sup> See Press Release, Dep’t Homeland Sec., Following HSAC Recommendation, DHS Terminates Disinformation Governance Board (Aug. 24, 2022), <https://www.dhs.gov/news/2022/08/24/following-hsac-recommendation-dhs-terminates-disinformation-governance-board>.

<sup>378</sup> This Article does not address the “Blue” argument that the “Red” Republican Party actively encourages post-factualism more than other political parties for two reasons. See, e.g., Thomas E. Mann & Norman J. Ornstein, *Finding Common Good in an Era of Dysfunctional Governance*, 142 DAEDALUS 15 (2013) (“The Republican Party has become a radical insurgency—ideologically extreme, scornful of facts and compromise, and dismissive of the legitimacy of its political opposition.”). First, as the CEF observed, evidence-based policymaking and post-factualism are both nonpartisan. See *infra* Part IV.D.1. Labeling one political party as being more or less post-factualist is counterproductive if such labelling causes that party to ignore or even discredit what otherwise would be legitimate advice.

Second, as the historical evolution of U.S political parties demonstrates, political parties like all organizations can change. Historically, neither political party has a monopoly on truth or deception. See generally Jan-Werner Mueller, *The Pre-History of Post-Truth*, PROJECT SYNDICATE (Apr. 26, 2019), <https://www.project-syndicate.org/onpoint/the-pre-history-of-post-truth-by-jan-werner-mueller-2019-04> (citing DAVIES, *supra* note 142; BERNHARD PÖRKSEN, DIE GROSSE GEREIZTHEIT: WEGE AUS DER KOLLEKTIVEN ERREGUNG (THE GREAT IRRITABILITY: WAYS OF COPING WITH COLLECTIVE AGITATION) (2018); SOPHIA ROSENFELD, DEMOCRACY AND TRUTH: A SHORT HISTORY (2018)). For instance, in the 1850s, the aptly-named Know-Nothing Party flourished in the United States. See Amy Tikkanen, *Know-Nothing Party: Political Party, United States*, ENCYCLOPAEDIA BRITANNICA (Sept. 14, 2022), <https://www.britannica.com/topic/Know-Nothing-party>. In 1856, the Antislavery Know-Nothings joined the Republican Party while Southern Know-Nothings joined

destroyed by a post-factual misinformation attack but also inspired Missouri, Louisiana, and the “Red” Republican Party to sue the Biden Administration for allegedly conspiring with social media giants to suppress Republican free speech under the fallacious pretext of post-factualism.<sup>379</sup>

*A. The Elitist Paternalism of Blue Ribbons*

1. Historical Significance of the “Blue-Ribbon” Award

The term “blue-ribbon” has been long associated with the highest quality or standard of excellence since the dark blue-ribbon badge of honor bestowed upon the Queen’s Most Noble Order of the Garter, the oldest and highest British order of chivalry founded in 1348.<sup>380</sup> In France, “Le Cordon Bleu,” (French for “the Blue Ribbon”) “has been synonymous with excellence since 1578, when King Henry III created ‘L’Ordre des Chevaliers du Saint Esprit’” (“The Order of the Holy Spirit”), whose members were awarded crosses suspended from blue ribbons called “Cordon Bleus.”<sup>381</sup> The massive banquets after the award ceremonies were apparently so legendary that the internationally known French Le Cordon Bleu culinary school took its name from the ancient award.<sup>382</sup>

À propos our inquiry, in 2018, U.S. Le Cordon Bleu schools settled a class action lawsuit brought by 2,200 students by paying back 44% of student tuition or loan amounts and then closing.<sup>383</sup> In particular, the class alleged that the for-profit school secretly conspired with the formerly government-backed

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the Democrats. In 1860, remnants of the Know-Nothings joined old-line Whigs to form the Constitutional Union Party. *Id.*

<sup>379</sup> See *Missouri v. Biden*, No. 3:22-CV-01213, 2022 WL 2825846, at \*1 (W.D. La. July 12, 2022).

<sup>380</sup> See *The Order of the Garter*, THE ROYAL HOUSEHOLD, <https://www.royal.uk/order-garter> (last visited Sept. 28, 2022).

<sup>381</sup> *About Le Cordon Bleu Culinary Schools*, LE CORDON BLEU DE PARIS, <https://www.chefs.edu/about-us#:~:text=The%20name%20%22Le%20Cordon%20Bleu,order%20in%20France%20until%201789> (last visited Sept. 28, 2022).

<sup>382</sup> See *id.*

<sup>383</sup> See Nina Mehlhaf, *Portland Culinary Students Getting Tuition Money Back After Lawsuit*, KGW8 NEWS (Feb. 5, 2018, 7:57 PM), <https://www.kgw.com/article/news/local/portland-culinary-students-getting-tuition-money-back-after-lawsuit/283-515118349>.

private loan company Sallie Mae,<sup>384</sup> to overcharge students and sued for fraudulent concealment, unlawful trade practices, diminished value, and fraud.<sup>385</sup>

From the mid-1800s until the late 1950s, the Blue Riband was unofficially awarded to the passenger ship with the fastest average transatlantic crossing speed.<sup>386</sup> “Riband” is a Middle English term which eventually became “ribbon.”<sup>387</sup>

The *Oxford English Dictionary* defines a “blue ribbon” as the “greatest distinction available; the most distinguished place, position, . . . the best or highest quality of its type” and “[o]f the highest quality, first-class; comprising, designed for, or characteristic of an elite; (also) designating people of the highest standing or caliber in a particular area or field.”<sup>388</sup>

The very term “blue ribbon” evokes first-place and grand-prize award winners from childhood.<sup>389</sup> In 1938, the tenth most popular song in the United States was Bing Crosby’s *You Must Have Been a Beautiful Baby*<sup>390</sup> with the refrain “And when it came to winning blue ribbons You must have shown the

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<sup>384</sup> See Rund Abdelfatah & Ramtin Arablouei, *Throughline: The Origins of Federal Student Loans and Promises the Government Made*, NPR (Aug. 11, 2022, 5:07 AM), <https://www.npr.org/2022/08/11/1116880026/stirred-a-debate-over-the-government-s-role-in-helping-pay-for-higher-education>. President Richard Nixon created the Student Loan Marketing Association, which became known as “Sallie Mae,” as a government-sponsored enterprise (“GSE”) to use U.S. Treasury funds to purchase government-backed student loans from banks. DEANNE LOONIN, *THE SALLIE MAE SAGA: A GOVERNMENT-CREATED, STUDENT DEBT FUELED PROFIT MACHINE 1* (Nat’l Consumer L. Ctr. 2014).

<sup>385</sup> See Mehiahaf, *Portland Culinary Students Getting Tuition Money Back after Lawsuit*, KGW8 NEWS (Feb. 5, 2018, 7:57 PM), *See Complaint*, ¶¶ 15–26, *Surrett v. W. Culinary Inst., Ltd.*, No. 0803-03530 (Ore. Cir. Ct. May 16, 2017).

<sup>386</sup> See *Blue Riband, or Ribband*, in *OXFORD COMPANION TO SHIPS AND THE SEA* (Dear Kemp & Peter Kemp eds., 2d ed. 2017) (citing C. MACKENZIE-KENNEDY, *THE ATLANTIC BLUE RIBAND* (1993)).

<sup>387</sup> *Riband*, *OXFORD ENGLISH DICTIONARY* (3d ed. 2013).

<sup>388</sup> *Blue Ribbon*, *OXFORD ENGLISH DICTIONARY* (3d ed. 2013).

<sup>389</sup> The familiar practice of having different colored ribbons represent different awards like blue for first place and red for second place apparently began in the nineteenth century. Pamela A. Parmal, *Ribbon*, in 3 *ENCYCLOPEDIA OF CLOTHING AND FASHION* 107 (Valerie Steele ed., 3d ed. 2005).

<sup>390</sup> BING CROSBY, *YOU MUST HAVE BEEN A BEAUTIFUL BABY* (Decca Records 1938).



other kids how . . .”<sup>391</sup> In 1984, Frank Sinatra sang in *The Best of Everything*, “I hope you win that prize—pass that blue-ribbon test.”<sup>392</sup>

As adults, blue-ribbon clubs, societies, or organizations were exclusively for elites who were considered better than the less gifted or credentialed.<sup>393</sup> For our present purposes, perhaps the most useful historical blue-ribbon legal antecedent was the prevalence of “blue-ribbon” or “key man” juries.<sup>394</sup> The “blue-ribbon jury” remains a special jury whose members are still considered more knowledgeable and trustworthy than regular juries.<sup>395</sup>

## 2. The Blue-Ribbon Jury

While judicial adjudication is beyond this Article’s scope, the practice of using blue-ribbon versus conventional petit and grand juries<sup>396</sup> evokes the same elitism-versus-populism tension present in BRACs’ conflicting desire to be composed of the best qualified members while accurately representing the regular private citizen’s perspective.<sup>397</sup> Juries also evaluate evidence—to include expert testimony about scientific, technical, or other specialized knowledge<sup>398</sup>—and serve as “triers of fact.”<sup>399</sup> Judges are the gatekeepers of the evidence juries may evaluate, excluding unreliable or misleading expert testimony as

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<sup>391</sup> “*You Must Have Been a Beautiful Baby*” Lyrics, LYRICS.COM, <https://www.lyrics.com/lyric-1f1345617/Bing+Crosby/You+Must+Have+Been+A+Beautiful+Baby> (last visited Sept. 28, 2022). Many other musicians have covered it since, including Tommy Dorsey, Perry Como, Bobby Darin, the Dave Clark Five, Peggy Lee, the Mormon Tabernacle Choir, Warner Brothers Looney Tunes and Merrie Melodies cartoons, and Michael Bubl ; Canary, *You Must Have Been a Beautiful Baby*, SECONDHANDSONGS.COM, <https://secondhandsongs.com/work/98228/versions> (last visited Sept. 28, 2022).

<sup>392</sup> *The Best of Everything*, FANDOM.COM, [https://sinatra.fandom.com/wiki/The\\_Best\\_of\\_Everything](https://sinatra.fandom.com/wiki/The_Best_of_Everything) (last visited Sept. 28, 2022).

<sup>393</sup> See Nino C. Monea, *Vanguards of Democracy: Juries as Forerunners of Representative Government*, 28 UCLA WOMEN’S L.J. 169, 197 (2021).

<sup>394</sup> See *id.*

<sup>395</sup> See *id.*

<sup>396</sup> A “petit” jury is a civil or criminal trial fact-finder whereas a “grand” jury determines whether a prosecutor has presented sufficient evidence of criminality to find probable cause and indict a defendant. *Types of Juries*, U.S. COURTS, <https://www.uscourts.gov/services-forms/jury-service/types-juries> (last visited Sept 28, 2022).

<sup>397</sup> For further discussion of BRACs’ elitism-versus-populism tension, see *infra* Part V.C.

<sup>398</sup> FED. R. EVID. 702.

<sup>399</sup> JODY GEORGE, DEIRDRE GOLASH & RUSSELL WHEELER, HANDBOOK ON JURY USE IN THE FEDERAL DISTRICT COURTS 1 (Fed. Jud. Ctr. 1989).

inadmissible.<sup>400</sup> A judge may also try cases where the right to trial by jury does not attach with an advisory petit jury.<sup>401</sup>

Blue-ribbon juries began in 14th century England.<sup>402</sup> A blue-ribbon jury was called in cases requiring jurors who possessed either (1) “expert knowledge of the subject matter concerned” or (2) “the necessary intelligence to decide issues of a serious or unusual nature, such intelligence seemingly being measured by the size of the juror’s wallet.”<sup>403</sup>

This common law practice carried over to U.S. state law. In 1947, the *Harvard Law Review* observed that the blue-ribbon jury was a state legislative attempt to correct “the alleged incompetence of the ordinary juror to handle the job assigned to him in the administration of justice.”<sup>404</sup> Recognizing the historical connotation of the “blue-ribbon” distinction, the *Harvard Law Review* observed that “the name ‘blue-ribbon’ suggests the inherent tendency” of blue-ribbon juries “to obtain jurors of high business standing,” “broad educational experience,” and “of more than ordinary income.”<sup>405</sup>

Although state blue-ribbon jury statutes consistently survived constitutional challenges in the late 1960s and early 1970s,<sup>406</sup> most were subsequently abolished after federal juries adopted the “fair cross-section” of the

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<sup>400</sup> See FED. R. EVID. 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999); see also David L. Faigman, Christopher Slobogin & John Monahan, *Gatekeeping Science: Using the Structure of Scientific Research to Distinguish Between Admissibility and Weight in Expert Testimony*, 110 NW. U. L. REV. 859, 861 (2016).

<sup>401</sup> See FED. R. CIV. P. 39(c); ARTHUR R. MILLER, 9 FED. PRAC. & PROC. CIV. § 2335 (4th ed. 2022).

<sup>402</sup> Richard C. Baker, *In Defense of the “Blue Ribbon” Jury*, 35 IOWA L. REV. 409, 409 (1950).

<sup>403</sup> *Id.*; see also Kristy Lee Bertelsen, *From Specialized Courts to Specialized Juries: Calling for Professional Juries in Complex Civil Litigation*, 3 SUFFOLK J. TRIAL & APP. ADVOC. 1, 9–12 (1998).

<sup>404</sup> Note, *The “Blue-Ribbon” Jury*, 60 HARV. L. REV. 613, 613–14 (1947).

<sup>405</sup> *Id.* at n.2.

<sup>406</sup> See, e.g., *Carter v. Jury Commission*, 396 U.S. 320 (1970); *U.S. ex rel. Torres*, 427 F.2d 168, 169 (2d Cir. 1970); *Haas v. United Technologies Corp.*, 450 A.2d 1173, 1183 (Del. 1982); *People v. Jackson*, 20 N.Y.2d 440, 456 (N.Y. 1967); *State v. Rochester*, 105 N.J. Super. 529, 554 (N.J. Super. Ct. Law Div. 1967).

community requirement.<sup>407</sup> More recently, there has been a renewed call to resurrect blue-ribbon juries in patent<sup>408</sup> and complex litigation cases.<sup>409</sup>

### 3. The Potential Problem of Regulatory Capture by Special Interests

Although regulatory capture is difficult to define<sup>410</sup> and often in the eye of the beholder,<sup>411</sup> there is broad agreement that it is wrong.<sup>412</sup> The fear of regulatory capture is essentially the fear of the fox guarding the hen house,<sup>413</sup> where a group controls the political or regulatory body intended to regulate that group.<sup>414</sup>

#### B. Advisory Committees Can Only Persuade

Government advisory committees have existed since the beginning of the U.S. republic.<sup>415</sup> Delegates to the U.S. Constitutional Convention unsuccessfully attempted to mandate a permanent Presidential advisory committee called the Privy Council to “advise” the President “in the matters respecting the execution of his office, which he shall think proper to lay before

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<sup>407</sup> See *Taylor v. Louisiana*, 419 U.S. 522, 537–38 (1975). See also *Jury Service and Selection Act of 1968*, 28 U.S.C.A. § 1861 (West 2022).

<sup>408</sup> See Michael A. Fisher, *Going for the Blue Ribbon: The Legality of Expert Juries in Patent Litigation*, 2 COLUM. SCI. & TECH. L. REV. 1 (2001); Jordan M. Halle, *Avoiding Those Wearing Propeller Hats: The Use of Blue Ribbon Juries in Complex Patent Litigation*, 43 U. BALT. L. REV. 435 (2014); Joshua L. Sohn, *Specialized Juries for Patent Cases: An Empirical Proposal*, 18 U. PA. J. BUS. L. 1175 (2016).

<sup>409</sup> See Bertelsen, *supra* note 403, at 1; Alan Feigenbaum, *Special Juries: Deterring Spurious Medical Malpractice Litigation in State Courts*, 24 CARDOZO L. REV. 1361 (2003).

<sup>410</sup> Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1342–43 (2013).

<sup>411</sup> “Beauty is in the eye of the beholder.” MARGARET WOLFE HUNGERFORD, MOLLY BAWN 206 (1878).

<sup>412</sup> See Livermore, *supra* note 410, at 1343–44.

<sup>413</sup> “Fox Guarding the Henhouse,” FREE DICTIONARY BY FARLEX (2022), <https://idioms.thefreedictionary.com/fox+guarding+the+henhouse> (defined as “[a] person likely to exploit the information or resources that they have been charged to protect or control.”).

<sup>414</sup> Jack Brown, *A Blind Eye: How the Rational Basis Test Incentivizes Regulatory Capture in Occupational Licensing*, 17 J.L. ECON. & POL’Y 135, 136–37 (2022). Economist George Stigler is credited with developing capture theory. *Id.* at 138. Regulatory capture is considered part of public choice theory. *Id.*

<sup>415</sup> See COMM. ON GOV’T OPERATIONS, THE ROLE AND EFFECTIVENESS OF FEDERAL ADVISORY COMMITTEES, H.R. REP. NO. 48-006, at 2 (1970).

them; but their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt.”<sup>416</sup>

Every U.S. Presidential administration has created advisory committees.<sup>417</sup> As a congressional committee noted, “Every branch of our Government turns to advisory committees for aid or recommendations.”<sup>418</sup> Advisory committees “wield influence over numerous aspects of American life, from the food we eat and the water we drink to the air we breathe and the wars we fight.”<sup>419</sup> The purpose of an advisory committee is to allow private citizens who do not work in government to advise government agencies.<sup>420</sup> As a 1957 House Committee Report observed, advisory committees make available to government “at little to no cost, the best technical brains and experience of all fields of business, industrial, or professional endeavor.”<sup>421</sup> Government advisory committees are so numerous, diverse, and influential that they have been called the fifth branch of government,<sup>422</sup> with the administrative state being the fourth branch.<sup>423</sup>

President George Washington is credited with establishing the first American advisory committee, an ad hoc citizens’ commission to investigate the Whiskey Rebellion.<sup>424</sup> Since the 1840s, Congress has legislated control over federal advisory committees.<sup>425</sup> Before 1972, Congress primarily controlled

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<sup>416</sup> Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 56, 56 n.1 (1994) (quoting 1 THE DEBATES IN SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (1987) (J. Elliott ed., 1836)).

<sup>417</sup> See COMM. ON GOV’T OPERATIONS, THE ROLE AND EFFECTIVENESS OF FEDERAL ADVISORY COMMITTEES, H.R. REP. NO. 48-006, at 2 (1970).

<sup>418</sup> *Id.*

<sup>419</sup> Brian D. Feinstein & Daniel J. Hemel, *Outside Advisers Inside Agencies*, 108 GEO. L. J. 1139, 1142 (2020).

<sup>420</sup> See 5 U.S.C.A. app. § 3(2) (West 2022) (excluding federal government officials from federal advisory committees and explaining that their primary purpose is to advise the federal government).

<sup>421</sup> COMM. ON GOV’T OPERATIONS, AMENDING THE ADMINISTRATIVE EXPENSES ACT OF 1946, H.R. REP. NO. 576, 85th Cong. (1957), in 1 VIRGINIA A. MCMURTRY, FEDERAL ADVISORY COMMITTEE ACT (PUBLIC LAW 92-463): SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 47 (1978) [hereinafter H.R. REP. NO. 576].

<sup>422</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-04-328, FEDERAL ADVISORY COMMITTEES: ADDITIONAL GUIDANCE COULD HELP AGENCIES BETTER ENSURE INDEPENDENCE AND BALANCE I (2004) (citing *Hearings on S. 1637, S. 2064, S. 1964 before the Subcomm. on Intergovernmental Rel. of the S. Comm. on Gov’t Operations*, 92nd Cong. 12, pt. 1 (1971)) [hereinafter GAO-04-328].

<sup>423</sup> *Id.*

<sup>424</sup> WENDY GINSBERG & CASEY BURGAT, CONG. RSCH. SERV., R44253, FEDERAL ADVISORY COMMITTEES: AN INTRODUCTION AND OVERVIEW 2 (Oct. 27, 2016) (citing *Whiskey Insurrection in Western Pennsylvania*, in 4 PENN. ARCHIVES 155–64 (John B. Linn & William H. Egle eds., 2d series 1794)).

<sup>425</sup> *Id.* at 2.

federal advisory committees through its budget by limiting committee funding and pay.<sup>426</sup>

Since 1972, the Federal Advisory Committee Act (“FACA”),<sup>427</sup> and its related federal administrative regulations<sup>428</sup> and executive orders,<sup>429</sup> provide the most comprehensive law on advisory committees.<sup>430</sup> FACA had two principal purposes: to increase federal advisory committees’ public accountability and to reduce federal advisory committee waste.<sup>431</sup>

FACA regulates “government policy” advice—choices between alternative courses of action.<sup>432</sup> A FACA advisory committee aids “decision makers in choosing the direction of government behavior.”<sup>433</sup>

Because, by their very name, advisory committees are supposed to be limited to *advice*,<sup>434</sup> regulatory capture by or through an advisory committee is especially repugnant.<sup>435</sup> The U.S. Supreme Court has held that the delegation of

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<sup>426</sup> *Id.* For a history of Presidential advisory committees before FACA, see Bybee, *supra* note 416, at 56–73.

<sup>427</sup> 5 U.S.C.A. app. 2 (West 2022).

<sup>428</sup> See 41 C.F.R. § 102-3 (Federal Advisory Committee Management).

<sup>429</sup> See, e.g., *Relating to the Transfer of Certain Advisory Committee Functions*, Exec. Order No. 12,024, 3 C.F.R. § 158 (1977); *Termination and Limitation of Federal Advisory Committees*, Exec. Order No. 12,838, 58 Fed. Reg. 8207 (1993).

<sup>430</sup> A comprehensive review of FACA is beyond the scope of this Article. See generally *Fed. Advisory Committee Management: Advice and Guidance*, U.S. GEN. SERVS. ADMIN. (Oct. 3, 2022), <https://www.gsa.gov/policy-regulations/policy/federal-advisory-committee-management/advice-and-guidance>; UNIV. OF CALIF. SAN DIEGO LIBGUIDE: U.S. GOV’T INFO., FED. ADVISORY COMMITTEES, (Oct. 30, 2022 3:16 PM), <https://ucsd.libguides.com/usgov/faca>.

<sup>431</sup> *Public Citizen v. U.S. Dep’t of Just.*, 491 U.S. 440, 459 (1989).

<sup>432</sup> See James T. O’Reilly, *Overview*, in 3 FEDERAL INFORMATION DISCLOSURE § 24.1 (2022).

<sup>433</sup> *Id.* (quoting *Judicial Watch, Inc. v. Clinton*, 76 F.3d 1232, 1234 (D.C. Cir. 1996)) (internal quotations omitted).

<sup>434</sup> Under its Findings and Purpose, FACA clearly states that “the function of advisory committees should be *advisory only*, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.” 5 U.S.C.A. § 2 (West 2022) (emphasis added).

<sup>435</sup> See generally Kevin D. Karty, *Closure and Capture in Federal Advisory Committees*, 4 BUS. & POL. 213 (2002). For social science studies of federal advisory committees suggesting that advisory committee membership is dominated by private and nonprofit influence peddlers, see Steven J. Balla & John R. Wright, *Interest Groups, Advisory Committees, and Congressional Control of the Bureaucracy*, 45 AM. J. POL. SCI. 799 (2001); G. William Domhoff, *The Corporate Community, Nonprofit Organizations, and Federal Advisory Committees: A Study in Linkages, Who Rules America?* (Feb. 10, 2017), [https://whorulesamerica.ucsc.edu/power/federal\\_advisory\\_committees.html](https://whorulesamerica.ucsc.edu/power/federal_advisory_committees.html); Gwen Moore, Sarah Sobieraj, J. Allen Whit & Olga Mayorova et al., *Elite Interlocks in Three U.S. Sectors: Nonprofit, Corporate, and Government*, 83 SOC. SCI. Q. 726 (2002); T.B. Priest, Richard T. Sylves, David F. Scudder, *Corporate Advice: Large Corporations and Federal Advisory Committees*, 65 SOC. SCI.

federal legislative authority to a self-interested private party violated the Fifth Amendment Due Process Clause because “in the very nature of things, one person may not be [e]ntrusted with the power to regulate the business of another, and especially of a competitor.”<sup>436</sup> Being the only formal institutional way for private citizens to participate directly in government, advisory committees historically may have fueled rumors,<sup>437</sup> or even conspiracy theories,<sup>438</sup> of “blue-ribbon” privileged and monied special interests unduly influencing government policy for selfish gain. Ironically, in the past, advisory committees may have been perceived as the deepest special interest “swamps” which many politicians have promised to drain.<sup>439</sup> In contrast to the so-called “deep state” of career civil servants,<sup>440</sup> advisory committees may “constitute a ‘shallow state’ whose composition ebbs and flows with the political tides.”<sup>441</sup>

While there are scant specific examples of advisory committee regulatory capture in its legislative history,<sup>442</sup> FACA has always sought to

Q. 100 (1984); Diana Roose, *Top Dogs and Top Brass: An Inside Look at a Government Advisory Committee*, 5 INSURGENT SOCIO. 53 (1975).

<sup>436</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); accord NORMAN SINGER & SHAMBIE SINGER, 1 SUTHERLAND STATUTORY CONSTRUCTION 4:11 (7th ed. 2022); Louis L. Jaffe, *Law Making by Private Groups*, 61 HARV. L. REV. 201, 206–07 (1937); Sidney A. Shapiro, *Public Accountability of Advisory Committees*, 1 RISK 189, 191 & n.2 (1990) (citations omitted).

<sup>437</sup> For a definition of “rumor,” see *supra* Part III.A.

<sup>438</sup> For a definition of “conspiracy theory,” see *supra* Part III.A.

<sup>439</sup> The political expression “drain the swamp” has been used (and abused) by politicians across the political spectrum since at least 1912. See “Drain the Swamp,” *Politics Dictionary*, DICTIONARY.COM (May 15, 2018), <https://www.dictionary.com/e/politics/drain-the-swamp/>.

<sup>440</sup> See *supra* Part III.C.

<sup>441</sup> Brian D. Feinstein & Daniel J. Hemel, *Outside Advisers Inside Agencies*, 108 GEO. L. J. 1139, 1140 (2020).

<sup>442</sup> In 1957, according to the House Congressional Record, Michigan Representative Clare Eugene Hoffman (R-MI) commented that the pending legislation was “intended to protect the Government from some claimed sinister influence of advisory committees.” H.R. REP. NO. 576, *supra* note 421, at 89 (statement of Rep. Clare Hoffman (R-MI)). Hoffman, who opposed the bill, then asked for specific examples to support the implied “charge that some advisory committees have acted corruptly.” *Id.* New York Representative Emanuel Celler (D-NY) immediately replied with the rather cryptic, “[T]here have crept into this advisory committee system many grave abuses and our subcommittee of the Committee on the Judiciary investigating this matter did ferret out a considerable number of abuses.” *Id.* (statement of Rep. Emanuel Celler (D-NY)).

In response to Hoffman’s challenge, other congressmen mentioned some specific examples of possible regulatory capture before FACA. Celler then raised the U.S. Department of Commerce Business Advisory Council (“BAC”) as an example of the problems with a hybrid private-government advisory committee:

Partaking of both governmental and private characteristics, the BAC is able on the one hand to claim all of the privileges and immunities of the executive departments. On the other hand, unencumbered by the rigid restrictions applicable to Government agencies, BAC is able to cut a wide swath across all areas of Government and business.

prevent regulatory capture.<sup>443</sup> The 1957 Bill of what would eventually become FACA clearly stated in its preface

that protection of the public interest requires that the activities of [advisory] committees and groups be made subject to certain uniform requirements as a minimum safeguard against the use

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*Id.* at 90 (statement of Rep. Emanuel Celler (D-NY)). Fellow New York Representative Kenneth Keating (R-NY) then disagreed with Celler's characterization of the BAC, retorting that most of the BAC members performed "a patriotic service for our country without a dollar of compensation." *Id.* at 91 (statement of Rep. Kenneth Keating (R-NY)).

North Carolina Representative Lawrence H. Fountain (D-NC), Chairman of the Government Operations subcommittee overseeing the U.S. Department of Agriculture ("DOA"), then raised the unique instance of the Commodity Credit Corporation ("CCC"), a DOA government corporation that annually bought and sold millions of dollars of agricultural commodities. *See id.* at 93 (statement of Rep. Lawrence Fountain (D-NC)). Industry representatives on CCC advisory committees had built-in conflicts of interest because they "advise the CCC about selling the same commodities [their] company is buying from CCC." *Id.* Hoffman related at least five specific instances where industry members of DOA's Dairy Industry Task Committee, Cotton Export Advisory Committee, a CCC co-sponsored industry conference, and the Advisory Committee on Grain Exports appeared to obtain massive private profit from their insider advisory committee membership. *See id.* at 93–94.

In 1951, DOJ claimed that a U.S. Department of the Interior ("DOI") World War II advisory committee, the Petroleum Advisory Council ("PAC"), may have intermingled their government functions with the industry advisory committee. In particular, DOJ alleged that DOI's Petroleum Administration for War essentially rubber stamped whatever the industry-dominated PAC had initially decided, which "resulted in complete delegation to such committees of functions which properly must reside exclusively in Government officials." *Id.* at 84 (statement of Rep. Dante Bruno Fascell (D-FL)) (quoting Letter from DOJ to U.S. Secretary of the Interior (Feb. 16, 1951)).

Among the many different kinds of federal advisory committees, scientific and health advisory committees staffed with the greatest non-governmental scientific and medical minds provide invaluable insights to the National Institutes of Health ("NIH") and are critical to maintaining the U.S. scientific and medical sector's worldwide competitive advantage. *See* GAO-04-328, *supra* note 422, at 8. In 2003, the National Academy of Sciences vaguely concluded that "[a]t times in the past, administrations have tried to exert greater control over NIH, and there has been conflict over the perceived politicization of the advisory committee appointment process." NAT'L RSCH. COUNCIL, ENHANCING THE VISIBILITY OF THE NATIONAL INSTITUTES OF HEALTH: ORGANIZATIONAL CHANGE TO MEET NEW CHALLENGES 13 (2003).

<sup>443</sup> As James O'Reilly observed, whether the supposed evils of advisory committees "were pervasive or incidental" before FACA "remains open to debate." O'Reilly, *supra* note 432. The U.S. Court of Appeals for the District of Columbia and the Fifth Circuit have interpreted FACA's requirement that advisory committees be "fairly balanced in terms of . . . the functions to be performed," 5 U.S.C.A. app. 2 § 5(b)(2), to also require that advisory committees avoid "inappropriate influence." *Cargill, Inc. v. United States*, 173 F.3d 323, 336 (5th Cir. 1999). *See also* *Young v. U.S. Env't Prot. Agency*, No. 21-2623, 2022 WL 4598693, at \*4 (D.C. Cir. Sept. 30, 2022).

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of any such group to influence public policy for the benefit of private interests.<sup>444</sup>

In 1951, concerned of possible industry regulatory capture (or at least the appearance of improper industry capture),<sup>445</sup> the Antitrust Division of the U.S. Department of Justice (“DOJ”) recommended advisory committee guidelines (“Antitrust Division Guidelines”) which later became the initial impetus for FACA.<sup>446</sup> During a 1956 House of Representatives hearing, the Assistant Attorney General (“AAG”) in charge of the Antitrust Division testified that because about half of the approximately 5,400 then-existing federal advisory committees were authorized by statute, the Antitrust Division Guidelines did not

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<sup>444</sup> H.R. REP. NO. 576, *supra* note 421, at 37. *See also* Idaho Wool Growers Assoc. v. Schafer, 637 F. Supp. 2d 868, 880 (D. Idaho 2009) (“[O]ne goal of [FACA] was to . . . counter[] the fear that advisory committees would be dominated by representatives of industry and other special interest groups seeking to advance their own agendas.”). The House Committee on Government Operations expanded upon this regulatory capture fear in its 1957 Report accompanying the proposed legislation:

[U]nder the veil of secrecy which now [(well before FACA’s 1972 passage)] surrounds the activities of [advisory committees], it is possible and entirely probable that some of them are established not for the primary purpose of giving advice.

The [House Committee] suggests that the advisory committee system as it now operates may be channeled into a convenient and effective source of support for established programs or policies or those contemplated by the Government administrators. Under the ostensible objective of seeking advice and counsel, the real purpose may be in many instances to enlist support of the regulated in the process of regulation. In this manner, advisory committee activities may be directed into channels for the accomplishment of objectives which the departments legally may not directly pursue. A selling campaign may be subtly initiated by encouraging favorable public statements by [advisory] committee members and the interest groups from which they come. Lobbying programs and partisan political activity are also distinct possibilities under this type of [advisory] committee usage.

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Dangers inherent in the use of advisory committees in Government are not imaginary. The [DOJ] recognized one area of danger when it proposed standards of operation designed to minimize possible antitrust law evasions. Of equal significance is the field of conflicts of interest. All members of advisory committees to some degree represent segments of special interest which frequently do not coincide with the interests of the country as a whole. An advisory body composed of members outside the Government and not answerable to the people or to the Congress for their actions should never be placed in a position where it can assume the functions of a board of directors or indirectly usurp the managerial functions which are the responsibility of the governmental agency.

H.R. REP. NO. 576, *supra* note 421, at 48, 76 (statement of Ohio Rep. Clarence J. Brown (R-OH)) (“In the past, . . . there have been some rather peculiar developments . . . showing that there has been a conflict of interest so far as membership of some of these advisory committees is concerned.”).

<sup>445</sup> For a discussion of regulatory capture, see *supra* Part IV.A.3.

<sup>446</sup> H.R. REP. NO. 576, *supra* note 421, at 46–47.



apply to them.<sup>447</sup> Of the remaining 1,393 committees that were eligible to adopt the Guidelines, according to the AAG, only 615 committees (about 44% of the eligible committees or 11% of all committees) were actually complying with the Antitrust Division Guidelines.<sup>448</sup> To ensure that all federal advisory committees, whether statutorily authorized or not, would avoid the appearance of impropriety DOJ recognized, Congress introduced the first bill (of what would eventually become FACA) in 1957.<sup>449</sup>

Recognizing the special risk of regulatory capture by an advisory committee composed of industry representatives, President John F. Kennedy in 1962 issued Executive Order 11,007 defining an “industry advisory committee” as “an advisory committee composed predominantly of members or representatives of a single industry or group of related industries, or of any subdivision of a single industry made on a geographic, service or product basis.”<sup>450</sup>

### C. Federal, State, and Local Advisory Committees

Although promulgated, regulated, and funded by a myriad of different federal, state, and local laws and regulations, all advisory committees at any level are essentially the same. This Article therefore treats all advisory committees as functionally equivalent. They provide a formal institutional way for non-governmental citizens to advise federal, state, and local government in a bewildering variety of topics.<sup>451</sup> While federal advisory committees under FACA

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<sup>447</sup> *Id.* at 46.

<sup>448</sup> *Id.*

<sup>449</sup> *Id.*

<sup>450</sup> Exec. Order No. 11,007, 27 Fed. Reg. 1875 (Feb. 28, 1962), *superseded by* Exec. Order No. 11,671, 37 Fed. Reg. 11,307 (June 7, 1972).

<sup>451</sup> See Brian D. Feinstein & Daniel J. Hemel, *Outside Advisers Inside Agencies*, 108 GEO. L.J. 1139, 1142 (2020).

remain the easiest to find,<sup>452</sup> every state,<sup>453</sup> county,<sup>454</sup> and major municipality<sup>455</sup> also uses advisory committees.

This patchwork of legal justifications for advisory committees varies not only by level of government but also by branch of government. For example, FACA only applies to some executive and legislative federal advisory committees. Advisory committees composed entirely of part-time or full-time federal employees,<sup>456</sup> created by the National Academy of Sciences,<sup>457</sup> the National Academy of Public Administration,<sup>458</sup> the Central Intelligence Agency,<sup>459</sup> the Office of National Intelligence,<sup>460</sup> or the Federal Reserve<sup>461</sup> are exempt from FACA. Advisory committees authorized by statute may or may not

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<sup>452</sup> FACA requires the General Services Administration's ("GSA") Committee Management Secretariat ("CMS"), "responsible for all matters relating to [federal] advisory committees," to conduct an annual comprehensive review of all FACA advisory committees. 5 U.S.C. App. 2 §7. The CMS' annual review is now maintained as an online database. See *Reporting Fiscal Year 2022 Government Totals*, GOV'T SERVS. AGENCY FED. ADVISORY COMM. ACT DATABASE, <https://www.facadatabase.gov/FACA/apex/FACAPublicTotals?fy=2022> (last visited Sept. 5, 2022) [hereinafter *2022 Government Totals*, FACA DATABASE].

<sup>453</sup> There appears to be no standardized organization (or nomenclature) for state advisory committees. For example, Maryland has Executive Commissions, Committees, Task Forces, and Advisory Boards. See *Executive Commissions, Committees, Task Forces, & Advisory Boards*, MD. MANUAL ON-LINE (Oct. 24, 2022), <https://msa.maryland.gov/msa/mdmanual/26excom/html/00list.html>. Washington has boards, commissions, and advisory committees. See *Boards, Commissions and Advisory Committees (BCC)*, WASH. STATE DEP'T HEALTH, <https://doh.wa.gov/about-us/boards-commissions-and-advisory-committees-bcc>.

Although there is far less research on state advisory committees than on federal advisory committees, one educational study found that states had established more than 50 blue-ribbon advisory committees focused on higher education issues from 1965–1983. JANET ROGERS-CLARKE JOHNSON & LAURENCE R. MARCUS, *BLUE-RIBBON COMMISSIONS AND HIGHER EDUCATION: CHANGING ACADEME FROM THE OUTSIDE* 17 (1986).

<sup>454</sup> For example, the Office of the County Executive for Montgomery County, Maryland, maintains a list of County boards, committees, and commissions (including advisory committees). Office of the County Executive, *Boards, Committees, and Commissions*, MONTGOMERY CNTY., MD., <https://www.montgomerycountymd.gov/boards/list.html>.

<sup>455</sup> For example, the City of Los Angeles, California, maintains a list of City boards and commissions (including advisory boards). *Meet Your Government: Boards and Commissions*, LACITY.GOV, <https://lacity.gov/government/boards-commissions>.

<sup>456</sup> See 5 U.S.C.A. app. 2 § 3(i) (West 2022).

<sup>457</sup> See *id.* § 3(ii).

<sup>458</sup> See *id.*

<sup>459</sup> See *id.* app. 2 § 4.

<sup>460</sup> See *id.*

<sup>461</sup> See *id.*

be covered by FACA.<sup>462</sup> FACA also does not apply to state and local advisory committees.<sup>463</sup>

Furthermore, FACA does not apply to judicial or U.S. Sentencing Commission advisory committees.<sup>464</sup> Federal judicial rules advisory committees are authorized by the Rules Enabling Act<sup>465</sup> and the Judicial Conference of the United States' own procedures.<sup>466</sup> FACA does not apply to advisory committee subcommittees and privately contracted committees.<sup>467</sup>

For Fiscal Year 2022, the GSA reported that there were 939 active FACA advisory committees and 65 administratively inactive committees (for a total of 1,004 advisory committees) operating at a current actual cost of \$31,872,590 with 31,029 total serving members that fiscal year.<sup>468</sup> During the past fiscal year, according to GSA, those advisory committees made 3,257,571 total recommendations, of which 5% (162,878 recommendations) had been or will be fully implemented by the associated agency and 1% (32,575 recommendations), partially implemented.<sup>469</sup> Of the GSA's seven functional descriptions, 145 (14.5%) were National Policy/Issue committees,<sup>470</sup> 250 (25%) were Non-Scientific committees,<sup>471</sup> 206 (20.6%) were Scientific/Technical committees,<sup>472</sup> 91 (9.1%) were Grant Review committees,<sup>473</sup> 28 (2.8%) were

<sup>462</sup> See *Center for Law & Educ. v. U.S. Dept. of Educ.*, 209 F. Supp. 2d 102 (D.C. Cir. 2005).

<sup>463</sup> See 5 U.S.C.A. app. 2 § 4 (West 2022).

<sup>464</sup> See 5 U.S.C. § 551(b) (West 2022); *Wash. Legal Found. v. U.S. Sent'g Comm'n*, 17 F.3d 1446 (D.C. Cir. 1994).

<sup>465</sup> 28 U.S.C.A. §§ 2071–2077 (West 2022).

<sup>466</sup> See *Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and its Advisory Rules Committees*, in 1 GUIDE TO JUD. POL'Y § 440, JUD. CONF. U.S. (2011).

<sup>467</sup> See GINSBERG, *supra* note 424, at 2 (quoting H.R. 2347, 114th Cong. (2021)).

<sup>468</sup> *2022 Government Totals*, FACA DATABASE, *supra* note 452.

<sup>469</sup> *FY 2022 Performance Measures (ACR) Totals*, GOV'T SERVS. AGENCY FED. ADVISORY COMM. ACT DATABASE, <https://www.facadatabase.gov/FACA/apex/FACAPublicPerfMeasureTotals?fy=2022> (last visited Sept. 5, 2022) [hereinafter *Performance Measures*, FACA DATABASE].

<sup>470</sup> *2022 Government Totals*, FACA DATABASE, *supra* note 452. A National Policy Issue Advisory Board provides advice on so-called national policy issues. *Frequently Asked Questions (FAQ): What Are the Different Types of Federal Advisory Committees?*, GOV'T SERVS. AGENCY FED. ADVISORY COMM. ACT DATABASE, <https://d2d.gsa.gov/report/federal-advisory-committee-act-faca-data> (last visited Sept. 5, 2022) [hereinafter *Frequently Asked Questions*, FACA DATABASE].

<sup>471</sup> *2022 Government Totals*, FACA DATABASE, *supra* note 452. A Non-Scientific Program Advisory Board provides advice on non-scientific issues. *Frequently Asked Questions*, FACA DATABASE, *supra* note 470.

<sup>472</sup> *2022 Government Totals*, FACA DATABASE, *supra* note 452.

<sup>473</sup> A Grant Review Committee provides advice on grant programs and awards. *Frequently Asked Questions*, FACA DATABASE, *supra* note 470.

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Grant Review Special Emphasis Panel committees,<sup>474</sup> three (0.3%) were Regulatory Negotiation committees,<sup>475</sup> and 276 (27.6%) were Other committees.<sup>476</sup>

Of the many different federal advisory committees, two recent ones concerned post-factualism. While one advisory committee provides bipartisan encouragement, the other advisory committee provides a cautionary tale.

#### *D. Two Illustrative Federal Advisory Committees*

Two recent federal advisory committees—one successful and the other a failure—provide useful insight into possible advisory committee approaches to combat post-factualism.<sup>477</sup>

##### 1. The Bipartisan Commission on Evidence-Based Policymaking (“CEP”)

In 2016, the bipartisan Evidence-Based Policymaking Commission Act<sup>478</sup> created a federal advisory committee, the Commission on Evidence-Based Policymaking (“CEP”). The Act passed the House with suspended rules,<sup>479</sup> passed the Senate unanimously,<sup>480</sup> and was signed by President Barack Obama

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<sup>474</sup> *Id.*; *Frequently Asked Questions*, FACA DATABASE, *supra* note 470. SEPs

are composed of recognized biomedical-related and/or behavioral research authorities who represent the forefront of research and technical knowledge and who provide first-level merit review of highly scientific and technical research grant applications and/or contract proposals in the fields relating to basic and clinical sciences, and applied research and development of programs[.]

*Committee Detail: HHS-85-National Cancer Institute Special Emphasis Panel-Authorized by Law*, GOV’T SERVS. AGENCY FED. ADVISORY COMM. ACT DATABASE, <https://www.facadatabase.gov/FACA/FACAPublicCommittee?id=a10t0000001h0Ew> (last visited Sept, 5, 2022) [hereinafter *Committee Detail*, FACA DATABASE].

<sup>475</sup> *2022 Government Totals*, FACA DATABASE, *supra* note 452. A Regulatory Negotiations Committee provide advice about negotiations related to federal regulations. See *Frequently Asked Questions*, FACA DATABASE, *supra* note 470.

<sup>476</sup> *2022 Government Totals*, FACA DATABASE, *supra* note 452. An “Other” committee either meets more than one committee description or none of them. See *Frequently Asked Questions*, FACA DATABASE, *supra* note 470.

<sup>477</sup> For a discussion of post-factualism, see *supra* Part I.B.3.

<sup>478</sup> Evidence-Based Policymaking Commission Act of 2016, Pub. L. No. 114-140, 130 Stat. 317 (2016).

<sup>479</sup> See *H.R. 1831—Evidence-Based Policymaking Commission Act of 2016: Actions Overview*, *H.R. 1631—114th Cong. (2015–2016)*, U.S. CONG., <https://www.congress.gov/bill/114th-congress/house-bill/1831/actions>.

<sup>480</sup> See *id.*

on March 30, 2016.<sup>481</sup> The Act, co-sponsored by Speaker of the House Paul Ryan (R-WI) and Senator Patty Murray (D-WA), created a 15-member advisory commission “to study ways to improve the use of administrative data on Federal programs and tax expenditures” and to “consider whether to establish a clearinghouse for information collected by federal agencies.”<sup>482</sup>

On July 27, 2015, when the Bill passed the House, Representative Jason Chaffetz (R-UT), who Chaired the House Committee on Oversight and Government Reform, said that the “Bill was supported by a wide range of private sector organizations, from The Heritage Foundation to the Urban Institute.”<sup>483</sup> Chaffetz added that the Bill “exemplifies the high-level and bipartisan momentum for doing more to tap this important resource. It is important that we come together.”<sup>484</sup>

Speaker Ryan expressed even greater enthusiasm for the bipartisanship over the CEP:

We’re trying to change the mindset in Washington.  
 Right now, when we’re making policy, we focus on inputs . . .  
 on effort—like how much money we’re spending, how many  
 people we’re serving, how many programs we’re creating.  
 What we need to do is focus on outcomes . . . on results—like  
 how many people we’re getting out of poverty.  
 Creating this commission is the first step in a long-term effort.  
 We’re going to bring together the best minds on data collection  
 and figure out how we can up our game.  
 Let’s use the data we’re already collecting to improve how  
 government works.  
 How can we use data to evaluate policy?  
 How can we protect people’s privacy?  
 How can we get the best results for the American people?  
 If we do this right, we’ll stop having debates over what’s  
 Republican and what’s Democrat . . . or what’s liberal or  
 conservative . . . And we’ll start having debates over what works  
 and what doesn’t work.<sup>485</sup>

After passage of the Act and appointment of the CEP’s members, the CEP Co-Chairs on July 22, 2016, issued an equally effusive and hopeful Joint Statement on the Commencement of the Commission on Evidence-based Policymaking:

<sup>481</sup> *See id.*

<sup>482</sup> 161 CONG. REC. H5487 (daily ed. July 27, 2015) (statement of Rep. Brenda L. Lawrence (D-MI)).

<sup>483</sup> *Id.* (statement of Rep. Jason Chaffetz (R-UT)).

<sup>484</sup> *Id.*

<sup>485</sup> *Id.* (statement of Rep. Paul Ryan (R-WI)).

The Commission on Evidence-Based Policymaking begins its work in the midst of an unprecedented movement toward evidence-based policymaking. This movement has been growing for more than a decade at the federal and state levels, and reflects a continued desire from the American public and policymakers that credible information be available to inform decisions about government programs and activities. Congress and the President created this bipartisan Commission to provide the nation with guidance on ways to further expand our approaches to evidence-building in government. We recognize that we have been given an enormous opportunity to help the country move towards better and more effective government in the coming decades, and look forward to developing a bipartisan strategy to ensure that evidence increasingly informs the important decisions that affect the lives of Americans.<sup>486</sup>

The CEP issued its final report on September 17, 2017. The advisory committee's report made recommendations on "(1) how the Federal government can provide the infrastructure for secure access to data, (2) the mechanisms to improve privacy protections and transparency about the uses of data for evidence building, and (3) the institutional capacity to support evidence building."<sup>487</sup> In its report, the CEP concluded by stressing how evidence-based policymaking remains non-partisan:

Generating and using evidence to inform government policymaking and program administration is not a partisan issue. The strategy described in this report offers a non-partisan approach to improving how government staff, private researchers, foundations, non-profits, the business community, and the public interact to make sure government delivers on its promises.<sup>488</sup>

In September 2017, the Bipartisan Policy Center launched its Evidence-Based Policymaking Initiative to continue the CEP's work and to advocate for the implementation of all 22 of the CEP's recommendations.<sup>489</sup>

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<sup>486</sup> COMM'N ON EVIDENCE-BASED POLICYMAKING, THE PROMISE OF EVIDENCE-BASED POLICYMAKING APPENDICES 192 app. F (2017) (CEP Public Meeting Materials and Presentations).

<sup>487</sup> *Id.* at 1.

<sup>488</sup> *Id.* at 3.

<sup>489</sup> *U.S. Commission on Evidence-Based Policymaking*, BIPARTISAN POL'Y CTR., <https://bipartisanpolicy.org/commission-evidence-based-policymaking/>. The American Evaluation Association published a follow-up report in 2019. *See AN EVALUATION ROADMAP FOR A MORE EFFECTIVE GOV'ERNMENT*, AM. EVAL. ASS'N (Sept. 2019). In its report, the Commission also identified eight prior evidence-based policymaking federal advisory committees: the 1903 Commission appointed by the U.S. Secretary of the Treasury, the 1966 Kaysen Committee (the

In response to the CEP's report, the Foundations for Evidence-Based Policymaking Act (the "Evidence Act") became law in 2019.<sup>490</sup> The Act outlines expectations that federal agencies establish a core infrastructure for program evaluation.<sup>491</sup>

The CEP serves as an example of not only a federal advisory committee that has successfully responded to post-factualism but also the non-partisan nature of true evidence-based policymaking.

## 2. The Ill-Fated Disinformation Governance Board and the Pending *Missouri & Louisiana v. Biden* Lawsuit

In marked contrast to the CEP's indirect, advisory approach to post-factualism, the Department of Homeland Security ("DHS") Disinformation Governance Board's ("DGB's") direct, heavy-handed approach to post-factualism failed quickly and spectacularly. From its announcement to its "pause" (without having met even once) and eventual disbandment, the DGB only lasted three weeks.<sup>492</sup> Another federal advisory committee, the Homeland Security Advisory Committee ("HSAC"), recommended that the DGB be terminated on August 24, 2022.<sup>493</sup>

In the meantime, the DGB's erstwhile Executive Director Nina Jankowicz faced withering online attacks, harassment, and vile death threats against herself and her family until she finally resigned.<sup>494</sup> Jankowicz later admitted that DHS failed to explain what the DGB was supposed to do and that

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Task Force on the Storage of and Access to Government Statistics), the 1968 House Committee on Government Operations Hearings on Privacy and the National Data Bank Concept, the 1971 Wallis Commission (the President's Commission on Federal Statistics), the 1977 Private Protection Study Commission, the 1977 Commission on Federal Paperwork, the 1979 Bonnen Project (the President's Reorganization Project for the Federal statistical System), and the 1990 Boskin Working Group to Improve the Quality of Economic Statistics. COMM'N ON EVIDENCE-BASED POLICYMAKING, *supra* note 486, at 2319–21 app. H (Prior Commissions Related to Evidence Building).

<sup>490</sup> Pub. L. No. 115-435, 132 Stat. 5529 (2019); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-119, EVIDENCE-BASED POLICYMAKING: SELECTED AGENCIES COORDINATE ACTIVITIES, BUT COULD ENHANCE COLLABORATION (2019).

<sup>491</sup> *See* AM. EVAL. ASS'N, *supra* note 489, at 2.

<sup>492</sup> Rachel Martin, *After a Discrediting Campaign, DHS Pauses a Board Created to Combat Disinformation*, NPR (May 20, 2022, 5:09 AM), <https://www.npr.org/2022/05/20/1100327213/after-a-discrediting-campaign-dhs-pauses-a-board-created-to-combat-disinformatio>.

<sup>493</sup> *See* Press Release, Dep't Homeland Sec., Following HSAC Recommendation, DHS Terminates Disinformation Governance Board (Aug. 24, 2022), <https://www.dhs.gov/news/2022/08/24/following-hsac-recommendation-dhs-terminates-disinformation-governance-board>.

<sup>494</sup> *See* Martin, *supra* note 492.

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## RETOOLING BLUE-RIBBON ADVISORY COMMITTEES

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“[b]asically, everything you may have heard” about the DGB “is wrong or is just a flat-out lie.”<sup>495</sup>

When asked why DHS communicated the DGB’s advisory committee purpose<sup>496</sup> so poorly, Jankowicz blamed DHS’ unwieldy bureaucracy and lack of foresight:

That speaks again to the behemoth agency that DHS is. There’s a lot of cooks in the kitchen when these decisions are being made. And unfortunately, I think . . . the department had had other priorities at the time the rollout was happening, and they didn’t anticipate this fierce backlash and weren’t able to mount a transparent, open, rapid response when these criticisms came down the pike. I wish it went differently. And I definitely think that the information vacuum that we created allowed people to fill in the blanks. It frankly showed exactly how disinformation campaigns work.<sup>497</sup>

With the admitted benefit of hindsight, there were at least four ways that the DGB failed to benefit from the CEP’s earlier success: (i) obtain bipartisan support from the supposed opposing side and perhaps involve them in the advisory committee membership selection process; (ii) proactively legitimize the advisory committee as much as possible before it is even begins, stressing the advisory committee’s transparency and strictly advisory status; (iii) carefully frame the advisory committee’s identity and charge, anticipating the predictable concerns and more sinister post-factualist attacks; and (iv) avoid advisory committee members or leaders with a long digital trail who could be labeled—fairly or unfairly—as partisan hacks. All of the DGB’s problems were eminently predictable.

*i. Involve the Opposing Side in Establishing the Advisory Committee*

First, the advisory committee must find someone from the ostensible opposing side to support the advisory committee’s establishment. The CEP was fortunate enough to have enabling federal legislation co-sponsored by legislators

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<sup>495</sup> *Id.*

<sup>496</sup> Although some Republican Senators claim to have received internal DHS whistleblower documents which suggest that the DGB had more governmental authority than an advisory committee, at the time of writing this claim remains speculative so this Article shall continue to assume that the DGB was an advisory committee. See Jerry Dunleavy, *Mayorkas Misled Under Oath About DHS Disinfo Board, GOP Senators Charge*, WASH. EXAMINER (June 10, 2022), <https://www.washingtonexaminer.com/news/senate/biden-disinformation-board-mayorkas-misled-senators-hawley-grassley>.

<sup>497</sup> *Id.*



across the aisle.<sup>498</sup> That enabling legislation also allowed opposing sides to select CEP members so that the CEP's membership was truly bipartisan.<sup>499</sup>

ii. *Expect the Coming Post-Factualist Attack on the Advisory Committee and Prepare Proactively and Accordingly*

Second, as Jankowicz recognized too late,<sup>500</sup> DHS' failure to anticipate the foreseeable partisan criticism and post-factualist attacks doomed the advisory committee from the start.<sup>501</sup> There should never be an information vacuum surrounding the rollout of a new advisory committee.<sup>502</sup> The sponsoring government agency cannot finger drill an advisory committee opposed to post-factualism. Better not to create the advisory committee at all than to do it halfway. There also must be a clear, transparent selection committee with a clear chain of command.<sup>503</sup>

Establishing the advisory committee right at the beginning must be the agency's top priority.<sup>504</sup> The government must also have carefully preplanned a clear, coordinated, and effective communication strategy to explain that the advisory committee is bipartisan and solely advisory. Three months after the DGB's debacle, DHS' Office of Inspector General concluded that DHS still

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<sup>498</sup> See Evidence-Based Policymaking Commission Act of 2016, *supra* note 479.

<sup>499</sup> 161 CONG. REC. H5486 (daily ed. July 27, 2015) (Evidence-Based Policymaking Commission Act of 2015) (stating that the President—who was a Democrat at the time—could pick three members, that the Speaker of the House—who was a Republican at the time—could pick three members, that the House Minority Leader—who was a Democrat at the time—could pick three members, that the Senate Majority Leader—who was a Republican at the time—could pick three members, and that the Senate Minority Leader—who was a Democrat at the time, could pick the last three members). Finally, the Democratic President picked the CEP's Chairperson and the Republican Speaker of the House picked the CEP's Co-Chair. For the House leadership of the 114th Congress, see *Congress Profiles, 114th Congress (2015-2017)*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPS., <https://history.house.gov/Congressional-Overview/Profiles/114th/>. For the Senate leadership of the 114th Congress, see United States Senate, *Complete List of Majority and Minority Leaders*, U.S. SEN., <https://www.senate.gov/senators/majority-minority-leaders.htm>.

<sup>500</sup> Rachel Martin, *After a Discrediting Campaign, DHS Pauses a Board Created to Combat Disinformation*, NPR (May 20, 2022, 5:09 AM), <https://www.npr.org/2022/05/20/1100327213/after-a-discrediting-campaign-dhs-pauses-a-board-created-to-combat-disinformatio>.

<sup>501</sup> See *id.*

<sup>502</sup> See *id.*

<sup>503</sup> See *id.*

<sup>504</sup> See *id.*

inexplicably lacked “a unified strategy to counter disinformation campaigns that appear in social media.”<sup>505</sup>

iii. *Carefully Frame the Advisory Committee’s Identity and Charge to Anticipate the Predictable Concerns and More Sinister Attacks*

Third, both DHS Secretary Alejandro Mayorkas and Jankowicz have admitted that DHS failed to communicate the DGB’s purpose appropriately to the American public.<sup>506</sup> Perhaps the most glaring error was the advisory committee’s dystopian-sounding “Disinformation Governance Board” name. As Laura Manley, Executive Director of the Shorenstein Center on Media, Politics, and Public Policy at the Harvard Kennedy School of Government, concluded, “To put ‘disinformation’ and ‘governance’ together in one title was a disastrous choice. These are loaded words.”<sup>507</sup>

Instead of framing the advisory committee negatively with such loaded, controversial terms, why not frame it positively and constructively like the CEP, focusing more on evidence-based policy and stressing its non-governmental, advisory nature? Like an interview suit, an advisory committee’s name, if not affirmatively helpful, should at least not distract observers from the committee’s substantive business.

Above all, DHS should have stressed that the DGB only concerned foreign threats and would not monitor any Americans.<sup>508</sup> Even though the DGB

<sup>505</sup> DEP’T OF HOMELAND SEC., OFF. OF THE INSPECTOR GEN., OIG-22-58, DHS NEEDS A UNIFIED STRATEGY TO COUNTER DISINFORMATION CAMPAIGNS 1 (2022).

<sup>506</sup> See Dana Bash, *Mayorkas: Disinformation Board Won’t Monitor American Citizens*, CNN (May 1, 2022), <https://edition.cnn.com/videos/politics/2022/05/01/mayorkas-on-disinformation-board.cnn> (admitting that DHS could have better communicated the DGB’s purpose while insisting that Republican criticisms were “precisely the opposite” of what the DGB would have done); Shannon Bond, *She Joined DHS to Fight Disinformation. She Says She Was Halted by Disinformation*, NPR (May 21, 2022, 5:00 AM), <https://www.npr.org/2022/05/21/1100438703/dhs-disinformation-board-nina-jankowicz> (“[DHS] should have anticipated this response. I think that we absolutely should have done better in communicating it. I understand the American people’s hesitance to get behind an initiative that sounds as scary as the name communicated.”).

<sup>507</sup> Marcela García, Editorial, *How the Disinformation Governance Board Fell Victim to Disinformation*, BOS. GLOBE (May 21, 2022), <https://www.bostonglobe.com/2022/05/20/opinion/how-disinformation-governance-board-fell-victim-disinformation/>.

<sup>508</sup> Only during TV interviews well after misinformation had already crippled the DGB, Secretary Mayorkas finally explained that the DGB would “gather together best practices in addressing the threat of disinformation from foreign state adversaries, from the cartels, and disseminate those best practices to the operators that have been executing in address this threat for years.” When asked if the DGB would monitor American citizens, Mayorkas definitively replied, “No, . . . We at [DHS] don’t monitor American citizens.” Christiano Lima, *DHS Tries to Right*

was announced on April 27, 2022,<sup>509</sup> DHS failed to proactively control the DGB's narrative from the beginning. DHS only defensively and reactively released a Fact Sheet about the DGB on May 2, 2022, five days later, apparently to counter public "confusion" over DGB's role.<sup>510</sup> Moreover, the Fact Sheet was rather densely written and could have also been perceived as defensive. Instead of stressing the DGB's non-governmental advisory role, the Fact Sheet rather inscrutably stated that the DGB "does not have any operational authority or capability."<sup>511</sup> The Fact Sheet concludes with what could be considered defensive double speak,

There has been confusion about the [DGB], its role, and its activities. The reaction to [the DGB] has prompted DHS to assess what steps we should take to build the trust needed for the Department to be effective in this space. . . . DHS is exploring additional ways to enhance the public's trust in this important work.<sup>512</sup>

iv. *Avoid Advisory Committee Members or Leaders with a Long Digital Trail Who Could Be Dismissed as Partisan Hacks*

Finally, following the reasoning of the interview suit analogy, do not select advisory committee members or leaders whose past record is controversial

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*Controversial Rollout of Its Disinformation Governance Board*, WASH. POST (May 2, 2022 9:00 AM), <https://www.washingtonpost.com/politics/2022/05/02/dhs-tries-right-controversial-rollout-its-disinformation-governance-board/>.

<sup>509</sup> See Amanda Seitz, *Disinformation Board to Tackle Russia, Migrant Smugglers*, ASSOC. PRESS NEWSWIRES (Apr. 28, 2022, 11:57 AM), <https://apnews.com/article/russia-ukraine-immigration-media-europe-misinformation-4e873389889bb1d9e2ad8659d9975e9d>. Jillian York, Director for International Freedom of Expression at the Electronic Frontier Foundation agreed, tweeting, "I don't think they could've come up with a more dystopian name than 'Disinformation Governance Board' if they tried." Jillian C. York (@jilliancyork), Twitter (May 1, 2022, 3:30 PM), <https://twitter.com/jilliancyork/status/1520848137786736640>.

<sup>510</sup> See *DHS Defends Plan for "Disinformation" Working Group*, 99 INTERPRETER RELEASES 19, May 9, 2020, at 14,

<sup>511</sup> *Fact Sheet: DHS Internal Working Group Protects Free Speech and Other Fundamental Rights When Addressing Disinformation That Threatens the Security of the United States*, DEP'T. HOMELAND SEC. 1-2 (May 2, 2022), <https://www.dhs.gov/news/2022/05/02/fact-sheet-dhs-internal-working-group-protects-free-speech-other-fundamental-rights>.

Secretary Mayorkas echoed the bureaucratic doublespeak of the Fact Sheet during interviews, so the language may have been intentional. He called the DGB a "small working group" without "any operational authority or capability." Christiano Lima, *DHS Tries to Right Controversial Rollout of Its Disinformation Governance Board*, WASH. POST (May 2, 2022, 9:00 AM), <https://www.washingtonpost.com/politics/2022/05/02/dhs-tries-right-controversial-rollout-its-disinformation-governance-board/>.

<sup>512</sup> *Id.*

enough to divert public attention from the committee's present work to a member's past. Having been already vetted and selected by bipartisan federal leaders,<sup>513</sup> the 15 members of the CEP remained blissfully anonymous through the advisory committee's work. In contrast, whether justified or not, DGB Executive Director Nina Jankowicz's arguably past partisan record and past online postings became the predictable (yet further distracting) focus of Republican congressional ire.<sup>514</sup>

The incompetent DGB disaster also inspired the Missouri and Louisiana Attorney Generals, on May 5, 2022, to sue the Biden Administration, including Jankowicz.<sup>515</sup> As the U.S. district court found, Missouri and Louisiana

alleged that Government Defendants have [(1)] colluded with and/or coerced social media companies to suppress disfavored speakers, viewpoints, and content on social media platforms by labeling the content "disinformation," "misinformation," and "malinformation" . . . [and (2)] created a "Disinformation Governance Board" ("DGB"), which is intended to be used and will be used to induce, label, and pressure the censorship of disfavored content, viewpoints, and speakers on social-media platforms.<sup>516</sup>

In their Second Amended Complaint, Missouri and Louisiana claim that the DGB is the Orwellian culmination<sup>517</sup> of the Biden Administration's "attempt[s] to suppress free speech by labeling the speech as 'misinformation.'"<sup>518</sup> Specifically, Missouri and Louisiana plead First

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<sup>513</sup> See 161 CONG. REC. H5486 (daily ed. July 27, 2015).

<sup>514</sup> See Emily Brooks, *GOP Seeks Testimony from DHS Disinformation Board Head*, THE HILL, (May 5, 2022), <https://thehill.com/homenews/house/3478416-gop-seeks-testimony-from-dhs-disinformation-board-head/> (quoting Letter from House Judiciary Committee Republicans to DGB Executive Director Nina Jankowicz re: Discovery and Testimony) ("[J]udging from your past statements, Americans can not and should not trust you with your newfound authority to act as the Biden Administration's arbiter of the truth."); see also Lev Golinkin, *Meet the Head of Biden's New "Disinformation Governing Board,"* THE NATION (May 12, 2022), <https://www.thenation.com/article/politics/meet-the-head-of-bidens-new-disinformation-governing-board/> (left-leaning publication criticizing Jankowicz's past history working with the Ukrainian anti-misinformation organization StopFake as problematic); Terry Gross, *How an Expert on Online Disinformation and Harassment Became the Target of Both*, NPR: FRESH AIR (May 26, 2022, 2:07 PM), <https://www.npr.org/2022/05/26/1101439528/how-an-expert-on-online-disinformation-and-harassment-became-the-target-of-both> (interviewing Jankowicz).

<sup>515</sup> Nina Jankowicz is sued "in her official capacity as director of the so-called 'Disinformation Governance Board.'" Second Amended Complaint at 3, *Missouri et al. v. Biden*, No. 3:22-cv-01213 (W.D. La. Oct. 6, 2022) (No. 84).

<sup>516</sup> *Missouri v. Biden*, No. 3:22-CV-01213, 2022 WL 2825846, at \*1 (W.D. La. July 12, 2022).

<sup>517</sup> Second Amended Complaint at ¶ 254, *Missouri et al. v. Biden*, No. 3:22-cv-01213 (W.D. La. Oct. 6, 2022) (No. 84).

<sup>518</sup> *Missouri*, 2022 WL 2825846, at \*1.

Amendment violations,<sup>519</sup> Administrative Procedures Act violations,<sup>520</sup> and related state constitutional violations.<sup>521</sup>

Seeking a preliminary injunction, Missouri and Louisiana's motion for expedited discovery has been granted. On October 21, 2022, the district court ordered the depositions of eight high-ranking Biden Administration officials.<sup>522</sup>

Needless to say, another challenge with political leaders attempting to combat post-factualism directly through government action (as opposed through private citizen advisory committees) is the risk that the policy focus becomes scoring cheap partisan points instead of improving evidence-based policymaking. Political leaders of course should be prevented from abusing post-factualism to censor legitimate opposing political speech. Regardless of merit, however, energy and resources fighting such partisan political battles are energy and resources no longer available to fight post-factualism.<sup>523</sup>

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<sup>519</sup> U.S. CONST. amend. 1.

<sup>520</sup> 5 U.S.C.A. § 706(2)(A)–(D) (West 2022).

<sup>521</sup> See MO. CONST. art. I, § 8; LA. CONST. art. I, § 7.

<sup>522</sup> The Court ordered depositions of National Institute of Allergy and Infectious Diseases (“NIAID”) Director and White House Chief Medical Advisor Dr. Anthony Fauci; Deputy Assistant to the President and Director of White House Digital Strategy Rob Flaherty or former White House Senior COVID-19 Advisory Andrew Slavitt; former White House Press Secretary Jennifer Psaki; FBI Supervisory Special Agent Elvis Chan; DHS Cybersecurity and Infrastructure Security Agency (“CISA”) Director Jen Easterly or CISA official Lauren Protentis; Surgeon General Vivek Murthy; Centers for Disease Control and Prevention (“CDC”) Chief of the Digital Media Branch Carol Crawford; and Acting Coordinator of the State Department’s Global Engagement Center Daniel Kimmage. Memorandum Order Regarding Witness Depositions at 27, *Missouri*, No. 3:22-CV-01213 (W.D. La. Oct. 21, 2022) (No. 90).

<sup>523</sup> Accord Rachel Martin, *After a Discrediting Campaign, DHS Pauses a Board Created to Combat Disinformation*, NPR: MORNING ED. (May 20, 2022, 5:09 AM), <https://www.npr.org/2022/05/20/1100327213/after-a-discrediting-campaign-dhs-pauses-a-board-created-to-combat-disinformatio>. Jankowicz observed, “[T]his needs to be a wake-up call that things aren’t getting better in this country by ignoring them, that our democratic discourse, the way it is so polarized[,] . . . childish[,] and not focused on the real threats, leaves us vulnerable to attacks from without and within.” See also Andrea Bernstein & Ilya Marritz, *How the Biden Administration Caved to Republicans on Fighting Election Disinformation*, PROPUBLICA (Nov. 1, 2022) (arguing that falsely conflating efforts to combat post-factualism as political censorship chills further efforts to combat post-factualism).

A senior Biden Administration official allegedly said that the DGB “had become ‘a distraction that was making it harder for us to do the work we thought was essential.’” *Id.* Another former high-level DHS official allegedly decried that the “answer is not how do we do it better; in the face of criticism, it’s to shut it all down.” *Id.* The bitter irony is that politicized attacks on attempts to limit misinformation can also chill outside researchers. As University of Washington Professor Kate Starbird recognized, “the very thing we are studying is being used against us because the tactics work. They undermine trust in institutions and in government and tie our hands when we try to protect ourselves.” *Id.*

## V. BLUE-RIBBON ADVISORY COMMITTEE BEST PRACTICES:

This Article's minimum recommendations for BRACs are simple by design. Although there are many additional requirements that might be nice to have, as the CEP and the DGB have demonstrated, better to begin with KISS—keep it simple, stupid. Because post-factualism ultimately is about trust, it is essential that any BRAC from the get-go establish trust with policymakers, the party currently not in power, and the divided American people.

In fact, the most critical time for a BRAC is probably its beginning. A BRAC should expect a misinformation campaign as soon as it starts and, frankly, if the BRAC cannot survive the initial attack then it probably has no business trying to address post-factualism.

In our view, a BRAC's three most basic requirements are (A) an open, credible selection process (*who?*); (B) clarity and specificity about the BRAC's mission (*what?*, *where?*, *why?*, and *how?*); and (C) a clear expiration date so the BRAC remains focused on accomplishing their mission and not taking on a life of its own (*when?*). These three requirements are interrelated with each influencing the other.

### A. *Transparent Selection*

First, because a BRAC remains advisory and primarily composed of private citizens, its only real source of power is *who* its members are. Unlike elected political leaders, a BRAC member does not possess instant authority by virtue of their position. Because the “blue ribbon” in every BRAC's name is intended to combat post-factualism, always relevant and important is how the BRAC might be perceived—fairly or unfairly—by post-factualist or uninformed citizens and politicians. In fact, a BRAC should not only expect misinformation campaigns about it but also should take the initiative in proactively nullifying anticipated attacks. Ideally, the BRAC could select someone to serve on it who either is especially adept at responding to such attacks or possesses greater credibility with uninformed and post-factualist audiences.

Consequently, a BRAC's ultimate success or failure in addressing post-factualism might depend upon the success or failure of its selection process. The BRAC's mission and target audience<sup>524</sup> should determine the selection process. That selection process must be publicly transparent and any U.S. citizen should have standing to challenge any proposed BRAC member's qualifications in court.<sup>525</sup> Anybody should be able to nominate anyone for any BRAC. As far as

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<sup>524</sup> A BRAC's target audience is whom precisely the BRAC is trying to influence, benefit, or burden. See Will Rhee, *Entitled to Be Heard: Improving Evidence-Based Policy Making Through Audience and Public Reason*, 85 IND. L.J. 1315, 1321 (2010).

<sup>525</sup> For example, any private citizen or organization could file a motion with the local, state, or federal trial court geographically closest to the BRAC's designated headquarters to remove a

possible, the BRAC selection committee should be well-respected by all stakeholders and lack any possible bias or conflict of interest. Better to take the extra time to get it right than to rush selection with an artificial deadline. Ideally, no one on the BRAC selection committee convened by the sponsoring government agency<sup>526</sup> should serve on the BRAC or otherwise benefit in any way from the BRAC.

Although FACA has a “fairly balanced” requirement for its advisory committees,<sup>527</sup> a BRAC might not always want to have a “fairly balanced” membership. As part of its comprehensive selection process strategy, however, a BRAC should always be prepared to rebut predictable “whataboutism” false equivalency attacks.

If the BRAC’s mission and target audience is not “fairly balanced,” then the BRAC should not be either. For instance, Dr. Kate, anti-vaxxer Sarah’s childhood friend from Part I.A, is now a county public health director battling online misinformation about what is and is not actually considered from nature in vaccines. Dr. Kate is not interested in a BRAC where half the members are anti-vaxxers and the other half are pro-vaxxers. She frankly would have no use for such a “fairly balanced” committee. She needs a purposefully *imbalanced* BRAC of scientifically or medically-trained natural lifers to help with outreach to the growing natural living community in her county.

Dr. Kate’s target audience is to help anti-vaxxers like Sarah who are committed to only ingesting natural substances to distinguish between what is really from nature and what is misleading misinformation. Antibodies, after all, were originally created in nature.<sup>528</sup> Dr. Kate believes that a BRAC composed of bona fide scientists and naturalists who happen to share Sarah’s commitment to only ingesting natural substances could help debunk online lies and also serve as a trusted intermediary between Dr. Kate’s public health office and the growing natural living community in her county. In particular, Dr. Kate is hopeful that the BRAC might help convince natural lifers to take the Novavax vaccine because it is derived from moth and tree bark protein.<sup>529</sup>

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proposed BRAC member. The trial court judge could evaluate such a motion under the well-established lay and expert evidentiary standards of Federal Rules of Evidence 702 and 703 or their state equivalent. *See* FED. R. EVID. 702, 703.

<sup>526</sup> FACA requires all new federal advisory committees file a charter prior to operating that states the committee’s affiliated agency. *See* 5 U.S.C. App. § 10(d), Publicly identifying an advisory committee’s affiliated government organization from the outset is a best practice.

<sup>527</sup> 5 U.S.C.A. app. 2 § 5(b)(2) (West 2022).

<sup>528</sup> *See* Joanna Palma et al., *Natural Antibodies—Facts Known and Unknown*, 53 CENT. EUR. J. IMMUNOLOGY 466, 466 (2018).

<sup>529</sup> *See Moths and Tree Bark: How the Novavax Vaccine Works*, NEBRASKAMED.COM (July 21, 2022), <https://www.nebraskamed.com/COVID/moths-and-tree-bark-how-the-novavax-vaccine-works>.

Working with Sarah and Sarah's colleagues, Dr. Kate drafts a careful Natural Living BRAC job description that leading natural living experts would understand and appreciate. She also makes sure to disseminate the job description not only in the usual places but also in specialized spaces that only fellow natural lifers would know. Dr. Kate appoints a selection board of accomplished scientists well-respected in the natural living community. She also makes sure that the entire process is publicly transparent and that anyone can nominate anyone else for the BRAC.

Although being so inclusive and supportive of the natural living minority in her county has caused the BRAC selection process to be slower and more expensive, Dr. Kate now believes that the additional time was well worth it. Having earned the trust and respect of the natural living community, the Natural Living BRAC is now flourishing as the local one-stop shop for all things natural living. All of the BRAC's members are legitimate medical, health, and scientific experts who happen to have a spiritual if not religious commitment to natural living. Because the Natural Living BRAC understands both the broader conventional living perspective and the narrower natural living perspective, the BRAC serves as an effective intermediary between the two communities. In particular, the BRAC truly understands the high-level science and medicine often at issue. As a result, the two communities now interact more, have reduced their fear of each other, and have increased their knowledge and respect for each other. Through the BRAC, Dr. Kate has also learned that with the natural living community it is best to try natural, holistic means and justifications first before resorting to more default, conventional public health measures.

### *B. A Specific Charge*

Not only should the BRAC have a clear mission but also that mission should be in writing and publicly available. At the end of the day, the BRAC's charge should be tailored to accomplish whatever is specifically needed to combat post-factualism<sup>530</sup> and promote civic competence.<sup>531</sup> While we articulate four basic types for starters, a BRAC could incorporate more than one (or none). The four different types of basic BRAC's form the tongue-in-cheek acronym "*BS TD*."

#### 1. The Breakdown BRAC

The purpose of the *Breakdown BRAC* is to provide a transparent, independent advisory public forum to investigate a disaster or policy breakdown to avoid the appearance of impropriety, conflict of interest, or bias that would

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<sup>530</sup> See *supra* Part I.B.3.

<sup>531</sup> See *supra* Part I.B.4.



result with a conventional government investigation. As President Herbert Hoover somewhat loftily explained, Breakdown BRACs “are not for executive action (for which they are anathema), but are one of the sound processes for the search, production, and distribution of the truth.”<sup>532</sup>

These high-profile special investigative BRACs are probably the most well-known advisory committees. They include the 9/11 Commission on the September 11, 2001, terrorist attacks,<sup>533</sup> Hillary Clinton’s Health Care Task Force,<sup>534</sup> Bush’s National Education Goals Panel on the future of American education,<sup>535</sup> the Tower Commission that investigated the Reagan Administration’s Iran-Contra Affair,<sup>536</sup> the Kerner Commission on Civil Disorders,<sup>537</sup> the Warren Commission on the Assassination of President Kennedy,<sup>538</sup> the Roberts Commission on the Pearl Harbor attack,<sup>539</sup> and the Wickersham Commission on the enforcement of Prohibition-era laws.<sup>540</sup> Although often named after the commission chair, who may or may not be an active government official, these BRACs are predominantly composed of non-governmental citizens.<sup>541</sup>

What distinguishes Breakdown BRACs from other independent committees like congressional investigative committees,<sup>542</sup> is the nature of the perceived government breakdown contributing to post-factualism. As part of the government, congressional investigative committees generally probe alleged abuses of executive power as part of the separation of powers checks and balances,<sup>543</sup> whereas a Breakdown BRAC investigates a broader government breakdown across branches. The perceived popular mistrust of the entire

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<sup>532</sup> Bybee, *supra* note 416, at 56 & n.1 (quoting Letter from Herbert Hoover to W.C. Thompson (Jan. 1930)).

<sup>533</sup> *See id.* (citations omitted).

<sup>534</sup> *See id.* (citations omitted).

<sup>535</sup> *See id.* (citations omitted).

<sup>536</sup> *See id.* (citations omitted).

<sup>537</sup> *See id.* (citations omitted).

<sup>538</sup> *See id.* (citations omitted).

<sup>539</sup> *See id.* (citations omitted).

<sup>540</sup> *See id.* (citations omitted).

<sup>541</sup> Under FACA, a federal advisory committee cannot be “composed wholly” of government officials. 5 U.S.C.A. app. 2 § 3(2) (West 2022).

<sup>542</sup> *See* James Hamilton, Robert F. Muse & Kevin R. Amer, *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115, 1121–35 (2007) (explaining Congress’ constitutional and statutory investigative authority).

<sup>543</sup> *See id.*

government necessitates the citizen Breakdown BRAC similar to the reasoning behind Civilian Police Review Boards.<sup>544</sup>

As Senate Watergate Commission Chair<sup>545</sup> Senator Sam Ervin, Jr. (D-NC) commented, advisory committees can be a double-edged sword. On the one hand, they “can be the catalyst that spurs Congress and the public to support vital reforms in our nation’s laws.”<sup>546</sup> But, on the other hand, they “afford a platform for demagogues and the rankest partisans.”<sup>547</sup> In light of the outsized media and popular attention, a Breakdown BRAC must avoid grandstanders or obstructionists who might seek to torpedo the BRAC’s outreach to the uninformed, misinformed, and post-factualist. So long as a disagreeing member has a public forum through which to communicate their disagreement, dissenting members must otherwise be prohibited from interrupting or undermining the majority’s communications.<sup>548</sup>

## 2. The Special Expertise/Knowledge BRAC

A *Special Expertise/Knowledge (“SEK”) BRAC* is probably the most common citizen advisory committee, especially in science, technology, engineering, and mathematics (“STEM”).<sup>549</sup> A SEK BRAC is composed of private citizen experts who possess special knowledge, skills, and experience<sup>550</sup>

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<sup>544</sup> As Executive Director of the American Civil Liberties Union of New Jersey, Udi Ofer, wrote:

The concept behind a civilian [police] review board is a simple one: civilians and not police personnel should have the power to investigate and make findings on police officer wrongdoing. Having police officers police themselves presents obvious conflicts of interest, while having civilians conduct these investigations provides an external check on the police.

Udi Ofer, *Getting It Right: Building Effective Civilian Review Boards to Oversee Police*, 46 SETON HALL L. REV. 1033, 1039 (2016).

<sup>545</sup> The Watergate Commission was officially called the Select Committee on Presidential Campaign Activities. See *Select Committee on Presidential Campaign Activities (The Watergate Committee)*, U.S. SEN. HIST. OFF., <https://www.senate.gov/about/powers-procedures/investigations/watergate.htm> (last visited Nov. 24, 2022).

<sup>546</sup> *A Look at the History and Importance of Congress’ Power to Investigate*, VOICE OF AM. NEWS (Jan. 14, 2019, 9:03 PM), <https://www.voanews.com/a/a-look-at-the-history-and-importance-of-congress-power-to-investigate/4743218.html>.

<sup>547</sup> *Id.*

<sup>548</sup> We want to reiterate however that this is a concern more about process, decorum, and professionalism than outcome or content. BRAC members can and should have every opportunity to express their disagreement and dissent with the committee majority, but in a professional manner such as authoring a dissenting statement in a final report or holding a separate press conference right after the majority BRAC has addressed the media.

<sup>549</sup> See GAO-04-328, *supra* note 422, at 8; NAT’L RSCH. COUNCIL, *supra* note 442, at 13.

<sup>550</sup> See FED. R. EVID. 702.

beyond existing government capabilities. It ironically is a vestige of the overly elitist blue-ribbon jury.<sup>551</sup>

While these successful specialized advisory committees should generally continue to operate as they have been—“if it ain’t broke, don’t fix it,”<sup>552</sup> they should observe two somewhat conflicting considerations. First, as both the General Accounting Office and National Research Council previously recommended,<sup>553</sup> the STEM professionals should select the most qualified advisory committee members without political interference. Second, in addition to ensuring the best possible expert outcomes, SEK BRACs should consider how to communicate those outcomes most effectively to their target audience.

The biggest difference between the SEK BRAC and the Targeted Fact BRAC (explained more below) is the SEK BRAC’s intended audience. The SEK BRAC is intended for expert “inside baseball.” Its intended audience is primarily fellow experts.<sup>554</sup> A SEK BRAC therefore should prioritize getting the expert knowledge right over communicating it more effectively.

Ideally, the two considerations need not be at odds. Moreover, multiple BRACs can work together to further both considerations. Much like the difference between a consulting expert and a testifying expert in civil litigation,<sup>555</sup> there could be a “consulting” SEK BRAC staffed with the most respected experts in their field who might not be the greatest communicators and a “testifying” SEK BRAC staffed with experts who while perhaps less well-known in their field might be much more effective at communicating the new expert information to the target audience.

For example, the incredible expert success of “Operation Warp Speed”<sup>556</sup> in developing a safe, effective mRNA COVID vaccine in record time

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<sup>551</sup> For a discussion of blue-ribbon juries, see *supra* Part IV.A.

<sup>552</sup> This famous saying is popularly attributed to Thomas Bertram Lance, the Director of the Office of Management and Budget during the Carter Administration. Jason Perlow, *‘If It Ain’t Broke Don’t Fix It’? Bad Advice Can Break Your Business*, ZDNET.COM (Apr. 8, 2014), <https://www.zdnet.com/article/if-it-aint-broke-dont-fix-it-bad-advice-can-break-your-business/>.

<sup>553</sup> See NAT’L RSCH. COUNCIL, *supra* note 442, at 13; See GAO-04-328, *supra* note 422.

<sup>554</sup> Full-time professionals qualified “by knowledge, skill, experience, training, or education” to offer an expert opinion beyond the scope of a less qualified layperson. See FED. R. EVID. 702.

<sup>555</sup> In federal civil litigation, testifying expert is subject to civil discovery and deposition questioning whereas a consulting expert is not. See DAMIAN D. CAPOZZOLA, EXPERT WITNESSES IN CIVIL TRIALS § 8:5 (2022). Likewise, a “testifying” BRAC might be subject to public scrutiny and criticism whereas a “consulting” BRAC might not.

<sup>556</sup> Operation Warp Speed was “a federal effort that supported multiple COVID-19 vaccine candidates to speed up development.” Chuck Young, *Fast Facts, Operation Warp Speed: Accelerated COVID-19 Vaccine Development Status and Efforts to Address Manufacturing Challenges*, GOV. ACCOUNTABILITY OFF. (Feb. 11, 2011), <https://www.gao.gov/products/gao-21-319>. See also ACCELERATED COVID-19 VACCINE DEVELOPMENT STATUS AND EFFORTS TO ADDRESS MANUFACTURING CHALLENGES, GAO-21-319, U.S. GOV’T ACCOUNTABILITY OFF. 1 (2004).

has been heralded as changing the future of vaccine science for the better.<sup>557</sup> If “Operation Warp Speed” was a SEK BRAC, by any definition, it has been a successful one. Nevertheless, a vaccine’s effectiveness ultimately must be measured by how many citizens have actually been vaccinated.

At the time of writing, 80% of Americans have received at least one COVID vaccination.<sup>558</sup> This overall rate ranks the United States 50th among other countries worldwide for at least one vaccination.<sup>559</sup> Vaccination rates of course vary by state and region, with Wyoming having the lowest U.S. state one-time vaccination rate of 60% and Palau; Rhode Island; Vermont; Massachusetts; Washington, DC; Maine; and Connecticut having the highest one-time vaccination rate of 95%.<sup>560</sup>

With the benefit of hindsight, U.S. public health administrators concede that the messaging behind the new COVID vaccines was botched.<sup>561</sup> Although many subject-matter experts might disdain public relations and popular messaging, the undeniable truth is that for any expert factual finding to have lasting impact in democratic policymaking, the larger population and their elected leaders must not only believe it but also act upon it appropriately.

### 3. The Targeted Fact BRAC

The *Targeted Fact BRAC* compliments the SEK BRAC. In particular, the Targeted Fact BRAC also considers the tension between technical accuracy and popular understanding and acceptance but unlike the SEK BRAC, prioritizes persuasion above expertise. In other words, the Targeted Fact BRAC attempts to understand and, if possible, influence popular post-factualist opinion about a strategically selected key adjudicative fact in an ongoing policy debate. The targeted fact may involve expert or layperson opinion (*what to do next?*) or disputed events (*what happened?*). Although essential to a broader polarized policy debate, the targeted fact should be deliberately chosen to be “low-hanging

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<sup>557</sup> See Phillip Ball, *The Lightning-Fast Quest for COVID Vaccines—and What It Means for Other Diseases*, 589 NATURE 16 (2021).

<sup>558</sup> See Josh Holder, *Tacking Coronavirus Vaccinations around the World*, N.Y. TIMES (Nov. 14, 2022), <https://www.nytimes.com/interactive/2021/world/covid-vaccinations-tracker.html> (based on data provided by the Oxford University’s Our World in Data Project).

<sup>559</sup> See *id.*

<sup>560</sup> See Danielle Ivory et al., *See How Vaccinations Are Going in Your County and State*, N.Y. TIMES (Oct. 20, 2022), <https://www.nytimes.com/interactive/2020/us/covid-19-vaccine-doses.html>.

<sup>561</sup> See Elizabeth Wallace, Saskia Popescu, Elizabeth Garman, *Managing Communications during a Pandemic*, in ASSOC. FOR PROF. INFECTION CONTROL & EPIDEMIOLOGY, BETWEEN A ROCK AND A HARD PLACE: RECOMMENDATIONS FOR BALANCING PATIENT SAFETY AND PANDEMIC RESPONSE 46 (2022) (“It is important to instill transparency through early communication from trusted sources about the changing nature of pandemics and to continually emphasize that [infection prevention and control] decisions are made by prioritizing staff and patient safety.”).

fruit” against post-factualism. Consistent with emerging research, the fact should not be foundational a person’s identity or worldview.<sup>562</sup> Critical here is to attempt to gain a relatively easy “win” against post-factualism to attract popular attention and further to build popular momentum.

The Targeted Fact BRAC’s makeup thus should reflect its specific charge. It might require a combination of experts, popular opinion influencers, popular celebrities, gifted communicators, or trusted laypeople. Whatever it takes to understand and influence popular and political perception of the targeted fact.

For instance, a Mississippi Targeted Fact BRAC might be charged with understanding (and, if possible, influencing) why parents who have received at least one dose of a COVID vaccine have not vaccinated their six-month-old to four-year-old children. According to the CDC and the American Academy of Pediatrics (“AAP”), as of November 9, 2022, only 2% of Mississippi children in that age group have received at least one dose of COVID vaccine.<sup>563</sup> Mississippi’s overall one-shot vaccination rate is 61%, only one percent higher than the lowest state rate.<sup>564</sup> Vaccinated parents not vaccinating their children would appear counterintuitive because if parents decided to vaccinate themselves why would they not also want to vaccinate their children?

The Mississippi Targeted Fact BRAC might want to select a combination of respected Mississippi medical and public health professionals, respected retired politicians from both parties, young vaccinated Mississippi parents with credibility from another domain (*i.e.*, county or state Teacher of the Year), and maybe a revered vaccinated Mississippi celebrity who is also a parent like Faith Hill.<sup>565</sup> The point being that, as with any BRAC, a Targeted Fact BRAC must be intentional with its staffing and that such staffing must be part of a broader, carefully crafted communications strategy.

Once formed, the Targeted Fact BRAC could first obtain all the relevant micro-level survey and demographic data available and all current related

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<sup>562</sup> See *supra* Part III.A.2.

<sup>563</sup> Presentation, *Children and COVID-19 Vaccination Trends*, AM. ACAD. PEDIATRICS 8 (Nov. 9, 2022), [https://downloads.aap.org/AAP/PDF/Child%20Vaccinations%20Report%20US%20Cumulative%20and%20Weekly%20November%209%202022%20updated.pdf?\\_ga=2.261098116.802662697.1668547586-30967159.1668547586](https://downloads.aap.org/AAP/PDF/Child%20Vaccinations%20Report%20US%20Cumulative%20and%20Weekly%20November%209%202022%20updated.pdf?_ga=2.261098116.802662697.1668547586-30967159.1668547586).

<sup>564</sup> *Id.*

<sup>565</sup> Faith Hill was born in Mississippi and lived there until age 19. Hill’s 2005 single *Mississippi Girl* was her eighth number one country hit as a solo artist. See Bobby Moore, *Faith Hill’s ‘Mississippi Girl’: The ‘Coal Miner’s Daughter’ of the 21st Century*, WIDE OPEN COUNTRY (July 26, 2022), <https://www.wideopencountry.com/faith-hill-mississippi-girl/>. Hill also participated in an NBC–Walgreens TV special *Roll Up Your Sleeves* broadcast on April 18, 2021, which aimed “to educate viewers, raise awareness and dispel concerns surrounding the COVID-19 vaccines, all with the goal of increasing vaccination rates.” *Roll-Up Your Sleeves*, NBC (Apr. 18, 2021), <https://www.nbc.com/roll-up-your-sleeves-presented-by-walgreens/about>.

research. A respected public health statistician and scholar on the BRAC could be in charge of synthesizing all the available data and research into an accurate executive summary for the rest of the members.

After reviewing all the available data and research, the BRAC could identify hypotheses about why one-in-four allegedly previously vaccinated parents refuse to vaccinate their young children.<sup>566</sup> Those hypotheses to explain parental refusal could include: (i) when my child got COVID their case was very mild; (ii) the vaccine poses a greater risk to my child's health than COVID; (iii) my child might experience serious side effects from the vaccine; (iv) not enough is currently known about the vaccine's long-term effects in children to risk my child getting it; (v) the vaccine won't protect my child from getting sick with COVID; (vi) I can't take time off from work to get my child vaccinated or to watch my child if they experience side effects; (vii) I can't get my child the vaccine from a place I trust; (viii) I can't afford to pay for the COVID vaccine; and (ix) I want to discuss the vaccine with my pediatrician or other health care provider.<sup>567</sup>

The BRAC then could explore these hypotheses with targeted surveys and interviews. Perhaps interviews could be filmed (with the participants' permission) for a possible future documentary film. One of the BRAC members could be a respected documentarian or independent film maker. The Targeted Fact BRAC might prioritize the second through fifth hypotheses because they are arguably related to post-factualism or misinformation.

In its publicly available final report (as specified in the BRAC's initial charge and job description), the Targeted Fact BRAC could not only detail on a county or smaller level the descriptive data it found for each hypothesis but also make prescriptive suggestions including live and online town hall meetings to answer parents' questions in real time, short online videos, informational brochures, a social media campaign, and medical professional trainings. In its report, the BRAC would include estimated budgets and available resources, prioritize possible next steps, disclose who on the BRAC would be willing to continue to work on which initiatives, and specify what the BRAC believes has and has not been learned about key issues. Although the advisory BRAC lacks the funding to implement these recommendations, with the details in the final report, federal authorities, Mississippi state or local authorities, or private non-profits have sufficient information to build upon the BRAC's efforts.

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<sup>566</sup> According to the Kaiser Family Foundation ("KFF"), as of July 2022, about one in four (27%) of surveyed parents who claim to be vaccinated say they will "definitely not" get their young child vaccinated. *43% of Parents with Children Under 5 Newly Eligible for a COVID-19 Vaccine Say They Will "Definitely Not" Get Them Vaccinated*, KAISER FAM. FOUND.: COVID-19 VACCINE MONITOR (July 2022), <https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-july-2022/>.

<sup>567</sup> *See id.*

#### 4. The Dialogue Facilitation BRAC

The decentralized *dialogue facilitation BRAC* seeks to foster increased dialogue and understanding among mutually respectful people—be they political, business, cultural, or community leaders; celebrities; or less well-known laypeople—who fundamentally disagree on divisive policy issues. Like any other BRAC, its membership should reflect its mission and target audience. For example, since 2019 the dialogue facilitation group Braver Angels “began adapting and piloting its programs with elected officials, candidates, and political staff at all levels of government.”<sup>568</sup>

Although there are many definitions for dialogue facilitation, the kind of “dialogue” this BRAC seeks to further is

a conversation in which people who have different beliefs and perspectives seek to develop mutual understanding. While doing so, they typically experience a softening of stereotypes and develop more trusting relationships. They often gain fresh perspectives on the costs of the conflict and begin to see new possibilities for interaction and action outside the dialogue room.<sup>569</sup>

While debate is more about winning, dialogue is more about understanding.<sup>570</sup> Because there are so many different dialogue facilitation organizations,<sup>571</sup> we believe that Dialogue Facilitation BRACs should be decentralized to encourage as many effective approaches as possible. What all Dialogue Facilitation BRACs have in common are: (1) equal representation of the different viewpoints on a polarizing policy issue; (2) an agreement among everyone to formal ground rules and civility; and (3) a willingness to listen more than to be heard. The best way for federal, state, and local government to support Dialogue Facilitation BRACs might be through grants to private dialogue facilitation organizations. The government can provide a designated government

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<sup>568</sup> *Braver Politics: What We’ve Accomplished So Far*, BRAVER ANGELS, <https://braverangels.org/braver-politics-successes/> (last visited Dec. 2, 2022).

<sup>569</sup> MAGGIE HERZIG & LAURA CHASIN, FOSTERING DIALOGUE ACROSS DIVIDES: A NUTS AND BOLTS GUIDE FROM ESSENTIAL PARTNERS 4 (2017).

<sup>570</sup> *See id.*

<sup>571</sup> For a listing of major national U.S. dialogue facilitation organizations, see *Dialogue Facilitation Organizations*, MORTON DEUTSCH INT’L CTR. FOR COOP. & CONFLICT RESOL., <https://icccr.tc.columbia.edu/resources/dialogue-facilitation-organizations/> (last visited Dec. 2, 2022). For a map of National Coalition for Dialogue and Deliberation (“NCDD”) member organizations, see NCDD, *Map of NCDD Member Network*, NAT’L COAL. FOR DIALOGUE & DELIBERATION, <https://www.ncdd.org/map.html> (last visited Nov. 15, 2022).

official<sup>572</sup> to work with the organization and insist that the BRAC report outcome data and success stories for accountability.

In addition to promoting civil discourse and a more nuanced understanding of opposing viewpoints, Dialogue Facilitation BRACs can also combat perhaps post-factualism's most pernicious consequence, affective polarization, where "[o]rdinary Americans increasingly dislike and distrust those from the other party. Democrats and Republicans both say that the other party's members are hypocritical, selfish, and closed-minded, and they are unwilling to socialize across party lines."<sup>573</sup> Essential to a healthy deliberative democracy and unavoidable policy compromises are the freedom to believe what you believe without opprobrium and the ability to agree to disagree without being disagreeable.

Affective polarization is not only ridiculous but also dangerous. The idea that someone who disagrees with you on a policy issue is not worthy of friendship or community is illogical and irresponsible. As Republican President Ronald Reagan said about his friendship with Democratic Speaker of the House Tip P. O'Neill, "the fact of our friendship is testimony to the political system that we're a part of and the country we live in, a country which permits" two adversarial political leaders "to have it out on the issues rather than on each other or their countrymen."<sup>574</sup>

When taken to its logical conclusion, affective polarization can lead to violence and civil war. A recent University of Notre Dame Rooney Center for the Study of American Democracy national survey ominously entitled "On the Brink of a New Civil War" found that overall 36.5% of surveyed Americans (51.5% of Republicans, 35.1% of Democrats, and 23% of Independents) "believe the United States is on the brink of a new civil war."<sup>575</sup> The fact that something

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<sup>572</sup> FACA regulations define a "Designated Federal Officer ('DFO')" as "an individual designated by the by the agency head, for each advisory committee for which the agency head is responsible." 41 C.F.R. § 102-3.25 (2022).

<sup>573</sup> Iyengar, *supra* note 332, at 130.

<sup>574</sup> President Ronald Reagan, Remarks at a Dinner Honoring Speaker of the House Tip P. O'Neill, Jr. (Mar. 17, 1986), <https://www.reaganlibrary.gov/archives/speech/remarks-dinner-honoring-speaker-house-representatives-thomas-p-oneill-jr>.

<sup>575</sup> Press Release, University of Notre Dame Rooney Ctr. for the Stud. of Am. Democracy, Carrie Gates, 'On the Brink of a New Civil War': New National Survey Highlights Fragility of American Democracy, Stark Partisan Divides (Nov. 3, 2022), <https://news.nd.edu/news/on-the-brink-of-a-new-civil-war-new-national-survey-highlights-fragility-of-american-democracy-stark-partisan-divides/>. The survey also found that 44.7% of surveyed Democrats agreed "that the government should be allowed to shut down media outlets that spread disinformation." *Id.* 37.9% of surveyed Republicans disagreed with the statement that "everyone should be allowed to vote." *Id.* 22% of Democrats and 44% of Republicans agreed that the "'true American way of life' is disappearing so fast that 'we may have to use force to save it.'" *Id.*



so previously anathema as political violence<sup>576</sup> has become expected to over one-third of Americans demonstrates how post-factualism has fueled the polarized fires of our collective dysfunction.

Perhaps part of the problem is the lack of public examples of true community and friendship across partisan lines like Reagan and O'Neill, Mary Matalin and James Carville, and Justice Ruth Bader Ginsburg and Justice Antonin Scalia. The famous politically-at-odds couple Mary Matalin and James Carville, co-authors of the 2014 *New York Times* Bestseller *Love & War*,<sup>577</sup> explained how “considerations in marriages are way different than considerations in politics.”<sup>578</sup> An opera, *Scalia/Ginsburg*, has been composed about Justice Scalia and Justice Ginsburg’s long lasting friendship in spite of their deep ideological disagreement.<sup>579</sup> Judge Jeffrey Sutton, U.S. Court of Appeals for the Sixth Circuit, also relates a remarkable story about the Ginsburg-Scalia friendship where Justice Scalia concluded, “Some things are more important than votes.”<sup>580</sup>

<sup>576</sup> See EDWARD H. CARR, *THE TWENTY YEARS CRISIS, 1919–1939*, at 208–23 (1964) (recognizing the “peaceful transition problem” as a core international relations dilemma).

<sup>577</sup> MARY MATALIN & JAMES CARVILLE, *LOVE & WAR: TWENTY YEARS, THREE PRESIDENTS, TWO DAUGHTERS AND ONE LOUISIANA HOME* (2014).

<sup>578</sup> As Matalin and Carville explained:

*Mary*: Considerations in marriages are way different than considerations in politics. Our core values are in sync; it’s just our ways to get there that differ.

. . . Our basic philosophical thrust about the level of government interaction is diametrically opposed, but our love for policy and politics and the need for informed citizenry and participatory democracy is the same. . . . We’re very practical in our local politics, and we’re philosophically opposed on the role and scope of government, but we love each other. What can I say?

*James* [(who Mary affectionately calls “Snake Head”): I’d rather stay happily married than pick a fight with my wife over politics.

*Mary*: In our case, I don’t care what our problems are, we’re never gonna not love each other, we’re never gonna get divorced, and we’re never gonna do anything that will jeopardize the happiness of our children.

Jeff Burger, *James Carville and Mary Matalin*, *BUS. JET TRAVELER* (Sept. 2016), <https://www.bjtonline.com/business-jet-news/james-carville-and-mary-matalin> (emphasis added).

<sup>579</sup> Derrick Wang, *Scalia/Ginsburg: An Opera by Derrick Wang*, DERRICKWANG.COM, <http://www.derrickwang.com/scalia-ginsburg> (with the slogan “We are different. We are one.”). The Opera was “inspired by the opinions of U.S. Supreme Court Justices Ruth Bader Ginsburg and Antonin Scalia.” *Id.*

<sup>580</sup> Judge Sutton wrote:

During one of my last visits with Justice Scalia, I saw striking evidence of the Scalia-Ginsburg relationship. As I got up to leave his chambers, he pointed to two dozen roses on his table and noted that he needed to take them down to “Ruth” for her birthday. “Wow,” I said, “I doubt I have given a total of 24 roses to my wife in almost 30 years of marriage.” “You ought to try it sometime,” he retorted. Unwilling to give him the last word, I pushed back: “So what good have all these roses done for you? Name one 5-4 case of any significance where you got Justice Ginsburg’s vote.” “Some things,” he answered, “are more important than votes.”

After meeting civil and genuine people who happen to be part of the political opposition, it is much more difficult to demonize the so-called “enemy.”<sup>581</sup> Under much more barbaric, literally life-or-death conditions abroad fighting Islamic terrorism, General Stanley McCrystal presciently observed “if you sat down and listened to [the other side], you would see that if you had the same background and experiences, you would likely reflect the same positions they do. We may be no more right than they are.”<sup>582</sup>

By providing contemporary examples of respected people with opposing viewpoints sincerely listening to each other to truly understand the other side as opposed to attempting to compile more cheap public political points, a Dialogue Facilitation BRAC can do much in a local community or nationally to lower the political temperature and prevent partisan violence. For example, TV celebrity interviewer (and Mississippi native) Oprah Winfrey could facilitate a live TV broadcast dialogue between country music Star Faith Hill and Hollywood actor Matthew McConaughey about vaccinating young children against COVID. McConaughey infamously stated that although he was vaccinated, he “wanted more information” before vaccinating his own young children.<sup>583</sup>

### C. Limited Duration

Finally, to avoid wasteful unnecessary bureaucratic proliferation<sup>584</sup> and to focus its efforts, all BRACs should have clear completion criteria and an expected termination date. FACA’s existing automatic two-year termination date for congressional advisory committees<sup>585</sup> is a good starting point. If a sponsoring government agency wants to continue a useful BRAC beyond its automatic termination date, then the BRAC should repeat these three steps anew. In

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I let him have the last word.

Jeffrey Sutton, *Introduction*, THE ESSENTIAL SCALIA: ON THE CONSTITUTION, THE COURTS, AND THE RULE OF LAW at xx (Jeffrey Sutton & Edward Whelan eds., 2020) (emphasis added).

<sup>581</sup> See Iyengar, *supra* note 332, at 139–41 (2019).

<sup>582</sup> Stanley McCrystal, *On Sen. Joe Manchin (D-WV)’s “From Hurt to Healing” Panel*, DOMINION POST (Aug. 30, 2020), <https://pathofex.com/manchin-and-panelists-discuss-race-and-police-in-from-hurt-to-healing-listening-tour-session-dominion-post/>.

<sup>583</sup> Elizabeth Chuck, *Surgeon General to Matthew McConaughey: Covid “Not Harmless” in Kids*, NBC NEWS (Nov. 11, 2021, 10:13 AM), <https://www.nbcnews.com/news/us-news/surgeon-general-matthew-mcconaughey-covid-not-harmless-kids-rcna5091>. For an example of recorded actual dialogue facilitations between Americans, see *The Jubilee Project Video Channel*, YOUTUBE.COM, <https://www.youtube.com/user/jubileeProject>.

<sup>584</sup> Congress explicitly stated in FACA that federal advisory committees “should be kept to the minimum necessary,” 5 U.S.C. app. 2 § 2(b)(2), and “should be terminated when they are no longer carrying out the purposes for which they were established.” *Id.* at § 2(b)(3).

<sup>585</sup> See *id.* app. 2 § 14. See also *Carpenter v. Morton*, 424 F. Supp. 603, 606 (D. Nev. 1976) (“[I]t is clear that when Congress enacted the FACA, it was concerned about the proliferation of advisory committees which had outlived their usefulness.”).

essence, for every renewal, a BRAC should be reconstituted as if a new entity. All previous committee members should have to re-apply and go through the same public, transparent selection process again.

Although there are many other advisory committee best practices worthy of consideration, a BRAC should first focus on getting these simple requirements right. Only after a BRAC has proven itself successful in accomplishing its charge and effectively combatting post-factualism should a BRAC even consider adopting additional advisory committee policies or procedures.<sup>586</sup>

### CONCLUSION

In a deliberative democracy where our elected officials are ostensibly a reflection of the general citizenry, we ultimately shall contain the post-factualist contagion metastasizing within our body politic only if we help ourselves. Unfortunately, there is no other way.

This Article repurposes two historically elitist concepts, the blue ribbon<sup>587</sup> and the advisory committee,<sup>588</sup> for populist self-help. While this Article has hopefully framed evidence-based policymaking,<sup>589</sup> post-factualism,<sup>590</sup> misinformation,<sup>591</sup> and blue-ribbon advisory committees (“BRACs”)<sup>592</sup> simply and—dare we say—helpfully, at best this Article can only provide tools. It is up to every citizen, regardless of ideology, to pick up such tools and put in the inconvenient hard work to rebuild our “more perfect Union.”<sup>593</sup>

When touring our great nation promoting their book, Mary Matalin and James Carville were impressed by how most people they met “would like the

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<sup>586</sup> In spite of legitimate criticisms, FACA has effectively managed the legion of federal advisory committees for over 50 years. *See generally 50 Facts for 50 Years: Promoting Openness, Transparency and Public Access*, GOV. SERVS. ADMIN. BLOG (Oct. 14, 2022), <https://www.gsa.gov/blog/2022/10/14/50-facts-for-50-years-promoting-openness-transparency-and-public-access>. The Administrative Conference of the United States maintains a useful comprehensive FACA wiki page on its online *Federal Administrative Procedure Sourcebook*. *See Federal Advisory Committee Act*, FED. ADMIN. PROC. SOURCEBOOK (June 1, 2022), [https://sourcebook.acus.gov/wiki/Federal\\_Advisory\\_Committee\\_Act/view](https://sourcebook.acus.gov/wiki/Federal_Advisory_Committee_Act/view).

<sup>587</sup> *See supra* Part IV.A.

<sup>588</sup> *See supra* Part IV.B–C.

<sup>589</sup> *See supra* Part I.

<sup>590</sup> *See supra* Part I.B.3.

<sup>591</sup> *See supra* Part III.A.

<sup>592</sup> *See supra* Part V.

<sup>593</sup> *See* U.S. CONST., preamble. *See also* President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), [https://avalon.law.yale.edu/19th\\_century/lincoln1.asp](https://avalon.law.yale.edu/19th_century/lincoln1.asp).

country to ‘get back together,’” to return to “collegial relationships among people from both parties.”<sup>594</sup>

To reduce polarization, and better understand post-factualism, we all could benefit from Carville’s admonition to seek out people with whom you disagree and learn from them. “Always test the way that you think,” said Carville, “At the end of the day, you may very well conclude that you were right in the first place, but at least you came to that conclusion yourself.”<sup>595</sup> Ultimately, post-factualism’s danger to democracy is its unwillingness to test beliefs and to listen to those with whom you think you disagree. This is the only way we can rebuild the trust in public policy, trust in institutions, and trust in each other so that our 246-year-old Republic<sup>596</sup> can make it to 300.

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<sup>594</sup> Mary Matalin & James Carville, *Afterword*, LOVE & WAR: TWENTY YEARS, THREE PRESIDENTS, TWO DAUGHTERS AND ONE LOUISIANA HOME 200 (2014) (ebook).

<sup>595</sup> Charles Lussier, *Political Odd Couple James Carville, Mary Matalin Say It’s OK to Disagree, Even Over Trump*, THE ADVOCATE (Feb. 6, 2019 7:07 PM), [https://www.theadvocate.com/baton\\_rouge/news/education/article\\_02d02290-28c1-11e9-9bd1-5bfe28919a73.html](https://www.theadvocate.com/baton_rouge/news/education/article_02d02290-28c1-11e9-9bd1-5bfe28919a73.html).

<sup>596</sup> See Joe Sommerlad & Justin Vallejo, *Fourth of July 2022: What Is the History Behind America’s Biggest National Holiday?*, INDEPENDENT (UK) (July 4, 2022 1:14 PM), <https://www.independent.co.uk/news/world/americas/4th-of-july-2022-history-independence-b2115281.html> (stating that in 2022 the United States was 246 years old).