

**PROTECTING ELECTIONS FROM  
DISINFORMATION: A MULTIFACETED PUBLIC-  
PRIVATE APPROACH TO SOCIAL MEDIA AND  
DEMOCRATIC SPEECH**

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## I. INTRODUCTION

The rise of social media has brought renewed attention to a profound dilemma confronting democratic theory and practice.<sup>1</sup> On the one hand, social media allows for new and accessible forms of speech, persuasion, and association, thereby strengthening the discourse that lies at the heart of a democratic system of government. On the other hand, social media gives rise to a host of ills, including fake news, polarization, echo chambers, extremism, radicalization, and fragmentation, which undermines the long-term health of democracy.<sup>2</sup> Russian interference in the 2016 U.S. election provides the most vivid illustration of the destabilizing impact of social media on democracy. Domestic engagement in disinformation likewise poses a significant threat.<sup>3</sup>

In one sense, the free speech dilemma is hardly new. The freedom of speech has always been indispensable for, yet potentially detrimental to, democracy. However, the familiar argument about the truth-revealing character of the marketplace of ideas has been put to the test in recent years, particularly in the face of fake news and the emergence of deep fakes. Moreover, the decline of democracy and the concomitant rise of populist authoritarianism around the globe has revealed the inherent

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<sup>1</sup> CASS R. SUNSTEIN, *#REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA* 24-25 (2017) (cataloguing the complex issues raised by social media for freedom of speech); Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 *FIRST AMEND. REV.* 200, 200 (2018) (observing that the democratization of speech has a dark side, namely the undermining of mediating and stabilizing institutions).

<sup>2</sup> Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 *J. DEMOCRACY* 63 (2017); Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a "Post-Truth" World*, 64 *ST. LOUIS U. L.J.* 535, 535-36 (2020) (manuscript at 2-3). See generally CASS R. SUNSTEIN, *#REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA* (2017).

<sup>3</sup> Persily, *supra* note 2, at 70 (noting that “fake news is a problem because voters may be manipulated and make important policy and political choices based on dubious information”); Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating “Fake News” and Other Online Advertising*, 91 *S. CAL. L. REV.* 1223, 1237 (2018) (noting that disinformation damages democracy “by undermining our faith in our institutions, weakening voter competence, and splintering the electorate”).

fragility of democratic institutions, processes, and norms.<sup>4</sup> The dilemma posed by social media thus presents an urgent issue when considering the ongoing health and sustainability of a democratic order.<sup>5</sup>

This Article focuses on Canada's efforts to confront the challenges of social media and disinformation. It makes two interrelated claims. First, it argues for a multifaceted public-private approach that employs a suite of complementary tactics including: (1) disclosure and transparency laws; (2) content-based regulation and self-regulation; (3) norm-based strategies; and (4) civic education and media literacy efforts. It outlines Canada's efforts to inoculate the electoral process from the harms of disinformation, focusing in particular on both public and private initiatives for each of the four categories. In addition, it argues that the Canadian approach contains a mix of legal regulation (regulation imposed by the state), self-regulation (regulation by private actors), and co-regulation (regulation through cooperation between private actors and public actors).<sup>6</sup> As such, the Canadian approach is multifaceted in two respects: first, because it employs a suite of tactics; and second, because it involves a mix of regulatory approaches.

Second, the Article argues that the objective of this multifaceted public-private approach is to optimize the tradeoff between defending against disinformation and protecting the freedom of speech. Removing all disinformation would be too costly from a free-speech perspective. The

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<sup>4</sup> TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 163 (2018); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 5-10 (2018).

<sup>5</sup> For an analysis of the harms of the internet, and possible reforms, see NATHANIEL PERSILY, KOFI ANNAN FOUNDATION THE INTERNET'S CHALLENGE TO DEMOCRACY: FRAMING THE PROBLEM AND ASSESSING REFORMS (2019). Professor Persily identifies a number of possible reforms, including deletion, demotion, disclosure, delay, dilution and divergence, deterrence, and digital literacy." *Id.* at 6-7, 36-50.

<sup>6</sup> Andreas Busch, Patrick Theiner & Yana Breindl, *Internet Censorship in Liberal Democracies: Learning from Autocracies?*, in MANAGING DEMOCRACY IN THE DIGITAL AGE: INTERNET REGULATION, SOCIAL MEDIA USE, AND ONLINE CIVIC ENGAGEMENT 16 (Julia Schwanholz, Peter-Tobias Stoll & Todd Graham eds., 2018). Generally, English-speaking countries (the United States, Canada, the United Kingdom) have preferred self-regulation, while EU members are more likely to use co-regulation and legal regulation. *Id.* at 20.

dilemma posed by social media is in some sense irresolvable and unavoidable. The Article catalogues the various shortcomings with the tactics adopted in Canada but it concludes that this multifaceted approach is preferable to no action at all. Despite the flaws of each tactic, the combined and interactive effects of a multifaceted approach provide helpful protections against some of the harms of disinformation while still protecting the freedom of speech. In addition, Canada's multifaceted public-private approach signals the importance of electoral integrity thereby shoring up the public trust that is indispensable to sustaining a democratic order.<sup>7</sup> Democratic stability depends in no small measure on citizen trust in the integrity of elections.

This Article is organized in five sections. Part II provides a brief overview of the electoral system in Canada. Part III turns to disclosure and transparency laws, focusing in particular on the new legally mandated political ad registry and industry responses to it. Part IV addresses content-based regulation and content-based self-regulation. It claims that narrow content-based regulations prohibiting “false election speech,”<sup>8</sup> as adopted in Canada, help to protect electoral integrity, and by extension, foster ongoing confidence in the democratic process. Part V examines two publicly-led initiatives—the Declaration on Electoral Integrity and the Digital Charter—which I suggest play an important role establishing and reinforcing democratic norms with respect to the digital world. Part VI focuses on citizen education and media literacy initiatives by both public and private entities, which help to build social resilience to disinformation. The conclusion summarizes the main themes.

## II. ELECTIONS IN CANADA

The right to vote is constitutionally protected in Canada. Section 3 of the *Charter of Rights and Freedoms* provides that “every citizen of Canada has the right to vote in an election of the members of the House of Commons or of a legislative assembly and to be qualified for

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<sup>7</sup> Hasen, *supra* note 1, at 33 (describing confidence in free and fair elections as the “bedrock of democracy”).

<sup>8</sup> *Id.* at 14.

membership therein.”<sup>9</sup> The *Charter* contains two additional provisions that protect democratic rights. Section 4 sets a maximum duration of five years for the life of the House of Commons or a provincial legislature, although this period can be extended in the event of a national crisis. Section 5 guarantees a sitting of Parliament and the legislatures at least once every year. The democratic rights protected under sections 3, 4 and 5 of the *Charter* cannot be overridden by the legislative exercise of the notwithstanding clause in section 33, although they are subject under section 1 to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” The Supreme Court of Canada has handed down several significant election law decisions.<sup>10</sup> For example, the court upheld the constitutionality of campaign finance regulations,<sup>11</sup> struck down restrictions on inmate voting,<sup>12</sup> and set a standard for electoral redistricting.<sup>13</sup>

Canada has a first-past-the-post electoral system. National elections are governed by the *Canada Elections Act*, and administered by Elections Canada, an independent and non-partisan agency.<sup>14</sup> In 2007, Canada adopted fixed election date legislation which stipulates that a general election is to take place every four years on the third Monday of October. Despite the fixed date legislation, the Governor General, on the advice of the Prime Minister, can still call an election at any time. Another important feature of the electoral system is the election period (also known as the writ period), which lasts for a minimum of 36 days before the date of the election. The *Canada Elections Act* sets out campaign finance limits for advertising expenses incurred by political

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<sup>9</sup> Canadian Charter of Rights and Freedoms, s 3, Part I of the Constitution Act, *being* Schedule B to the Canada Act 1982, 1982, c 11 (U.K.).

<sup>10</sup> For an overview of the Supreme Court of Canada’s election law decisions, see Yasmin Dawood, *Democratic Rights*, in *THE OXFORD HANDBOOK OF THE CANADIAN CONSTITUTION* (Peter Oliver, Patrick Macklem & Nathalie Des Rosiers eds., 2017).

<sup>11</sup> *Harper v. Canada*, [2004] S.C.R. 827 (Can.).

<sup>12</sup> *Sauvé v. Canada*, [2002] S.C.R. 519 (Can.).

<sup>13</sup> *Reference re Provincial Electoral Boundaries (Sask)*, [1991] 2 S.C.R. 158 (Can.).

<sup>14</sup> For a discussion of the institutional role played by Elections Canada in the larger electoral ecosystem, see Daniel P. Tokaji, *Campaign Finance Regulation in North America: An Institutional Perspective*, 17 *ELECTION L.J.* 188, 195-96 (2018).

parties, candidates, and third parties during the election period. These advertising expenses are partially reimbursed subject to various requirements, thereby providing a significant public dimension to the campaign finance regime. The *Canada Elections Act* also establishes contribution limits for individuals and prohibits donations by corporations and unions.

In December 2018, the federal government passed the *Elections Modernization Act*, Bill C-76 (the “Act”), which ushered in sweeping amendments to the *Canada Elections Act*. The *Elections Modernization Act* reversed several changes that had been introduced by the *Fair Elections Act*, which was enacted by the previous Conservative government in 2014.<sup>15</sup> For example, the Act reintroduced vouching and allowed voter information cards to be used as proof of identity. The Act also introduced new rules, such as limiting the election period to 50 days, introducing reporting requirements for third parties, implementing measures to prevent foreign interference, and requiring that online platforms maintain a registry of all digital political advertisements.<sup>16</sup> The Act also ushered in a new “pre-election period” which begins on the June 30th before the holding of a general election and ends on the first day of the election period.<sup>17</sup> New campaign finance rules apply to

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<sup>15</sup> The last major change to Canada’s elections laws was the *Fair Elections Act*, passed by the previous Conservative government in 2014. Major changes introduced by the *Fair Elections Act* included the elimination of vouching, limitations on what information the Chief Electoral Officer and Elections Canada could communicate to the public, moving the Commissioner of Canada Elections out of Elections Canada and into the office of the Director of Public Prosecutions, and increasing donation limits. The *Fair Elections Act* was heavily criticized by experts, in particular by hundreds of academics who wrote two open letters, which generated considerable public attention (full disclosure: I was one of the principal authors of the open letters). See Melissa Williams et al., *An Open Letter on the Fair Elections Act*, GLOBE & MAIL (Apr. 23, 2014), <https://www.theglobeandmail.com/opinion/an-open-letter-from-academics-on-bill-c-23/article18114166/> [<https://perma.cc/27KD-7NQQ>].

<sup>16</sup> Marco Vigliotti, *Elections Bill Gets Royal Assent After Fractious Path Through Parliament*, IPOLITICS (Dec. 14, 2018, 4:30 PM), <https://ipolitics.ca/article/elections-bill-gets-royal-assent-after-fractious-path-through-parliament/> [<https://perma.cc/Q9MA-KDYT>].

<sup>17</sup> The election period often begins on the 37th day before the date of the general election, which for fixed date elections is the third Monday of October four years

political parties<sup>18</sup> and third parties<sup>19</sup> for advertising expenses during the pre-election period.

### III. DISCLOSURE AND TRANSPARENCY

To respond to the problem of disinformation, the Canadian government has primarily relied on transparency and disclosure requirements for political advertising. The *Election Modernization Act* requires third parties to identify themselves using taglines in all partisan advertising messages during the pre-election period<sup>20</sup> and all election advertising messages during the election period.<sup>21</sup> Third parties must also comply with new accounting and disclosure requirements.<sup>22</sup> In addition, political parties are now required to add disclaimers for partisan advertising messages.<sup>23</sup>

The main mechanism, however, is that online platforms are now required to publish a digital registry of partisan and election advertising messages.<sup>24</sup> Not every online platform, however, is subject to the requirement. The registry requirement applies only to online platforms

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after the last general election. Elections Modernization Act, S.C. 2018, c 31, s 2(7), amending Canada Elections Act, S.C. 2000, c 9, s 2(1) (Can.).

<sup>18</sup> The limit on partisan advertising expenses during the pre-election period for registered political parties will be \$2,046,800 for 2019 (a base amount of \$1.4 million, multiplied by an inflation adjustment factor). ELECTIONS CANADA, POLITICAL FINANCING HANDBOOK FOR REGISTERED PARTIES AND CHIEF AGENTS 70 (Jun. 2019).

<sup>19</sup> ELECTIONS CANADA, POLITICAL FINANCING HANDBOOK FOR THIRD PARTIES, FINANCIAL AGENTS AND AUDITORS 30 (Jun. 2019).

<sup>20</sup> Elections Modernization Act, S.C. 2018, c 31, s 222(3), amending Canada Elections Act, S.C. 2000, c 9, s 349.5 (Can.).

<sup>21</sup> *Id.* at s 352. The taglines must contain the third party's name, phone number, civic or internet address and an indication that it has authorized the message.

<sup>22</sup> Awanish Sinha et al., *Canada's Election Laws Are Changing—Here's What You Need to Know*, MCCARTHY TÉTRAULT LLP (May 10, 2019), <https://www.mccarthy.ca/en/insights/articles/canadas-election-laws-are-changing-heres-what-you-need-know> [https://perma.cc/5F5L-7QKS].

<sup>23</sup> Elections Modernization Act, S.C. 2018, c 31, s 262, amending Canada Elections Act, S.C. 2000, c 9, s 429.3 (Can.).

<sup>24</sup> Elections Modernization Act, S.C. 2018, c 31, s 208.1, amending Canada Elections Act, S.C. 2000, c 9, s 325.1(2) (Can.).

that, during a specified time period, had a certain number of monthly visits by internet users in Canada.<sup>25</sup> Online platforms that meet this threshold must publish a digital registry of partisan advertising messages (which are displayed during the pre-election period) and election advertising messages (which are displayed during the election period) on the platform.<sup>26</sup> Partisan advertising messages are basically the equivalent of express advocacy, while election advertising messages include express advocacy and issue advertising that is associated with a party or a candidate.<sup>27</sup> As such, the Act requires online platforms to provide information about issue advertising during the election period but not during the pre-election period.

In terms of specific requirements, the registry must include an electronic copy of each partisan or election advertising message published on the platform and the name of the person who authorized the message.<sup>28</sup> The publication period of the registry is fairly lengthy. For election and partisan advertising messages, the platform must publish the relevant information starting on the first day the platform publishes the ad and ending two years after the end of the election period.<sup>29</sup> The online platform must keep the information included in the registry for five years after the end of the publication period.<sup>30</sup> The person or entity purchasing the advertisement is responsible for providing the platform

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<sup>25</sup> *Id.* An online platform is broadly construed as any website or application that displays regulated advertising.

<sup>26</sup> *Id.*

<sup>27</sup> Election advertising is defined as “the transmission to the public by any means during an election period of an advertising message that promotes or opposes a registered party or the election of a candidate, including by taking a position on an issue with which a registered party or candidate is associated,” while partisan advertising is defined as “the transmission to the public by any means during a pre-election period of an advertising message that promotes or opposes a registered party or eligible party or the election of a potential candidate, nomination contestant or leader of a registered party or eligible party, otherwise than by taking a position on an issue with which any such party or person is associated.” Canada Elections Act, S.C. 2000, c 9, s 2(1) (Can.).

<sup>28</sup> Elections Modernization Act, S.C. 2018, c 31, s 208.1, amending Canada Elections Act, S.C. 2000, c 9, s 325 (Can.).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*



with the necessary information for the online registry.<sup>31</sup> Owners and operators of online platforms could face fines of up to \$50,000 if they intentionally violate the registry requirement, whereas unintentional violations are subject to fines of up to \$2,000, and/or a term of imprisonment of up to three months.<sup>32</sup>

The Act's online ad registry requirements are similar in approach to the proposed *Honest Ads Act* in the U.S.<sup>33</sup> The objective of the proposed *Honest Ads Act* is to expand disclosure rules for online advertisements. The bill was prompted by concerns over Russian interference in the 2016 U.S. presidential election, as well as the "growing centrality of online platforms in the lives of Americans."<sup>34</sup> The bill would expand the definition of "electioneering communication" to include paid internet and digital advertisements, placing such advertisements within the ambit of election and campaign finance laws.<sup>35</sup> It would require online platforms that meet a threshold of monthly visitors to keep a publicly accessible record of all political ad purchases in excess of \$500.<sup>36</sup> It would also require "paid for" disclosures on a wide array of online ads. Media outlets and online platforms would be required to make "reasonable efforts" to ensure that foreign nationals are not buying political advertisements, directly or indirectly.<sup>37</sup> The bill was reintroduced in 2019, but it is unlikely to pass in the Republican-dominated Senate.<sup>38</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> Elections Modernization Act, S.C. 2018, c 31, s 349, amending Canada Elections Act, S.C. 2000, c 9, s 505(3) (Can.); Elections Modernization Act, S.C. 2018, c 31, s 346(1), amending Canada Elections Act, S.C. 2000, c 9, s 500(1) (Can.).

<sup>33</sup> For a discussion of the *Honest Ads Act*, see Brian Beyersdorf, *Regulating the "Most Accessible Marketplace of Ideas in History": Disclosure Requirements in Online Political Advertisements After the 2016 Election*, 107 CALIF. L. REV. 1061, 1089-90 (2019).

<sup>34</sup> *Honest Ads Act*, S. 1356, 116th Cong. § 4 (2019).

<sup>35</sup> Maggie Miller, *Bipartisan Group of Senators Seeks to Increase Transparency of Online Political Ads*, HILL (May 8, 2019), <https://thehill.com/homenews/senate/442598-bipartisan-group-of-senators-seek-to-increase-transparency-of-online> [<https://perma.cc/U37R-HVJ5>].

<sup>36</sup> *Id.*

<sup>37</sup> *Honest Ads Act*, S. 1356, 116th Cong. § 9 (2019).

<sup>38</sup> Miller, *supra* note 35. The House previously passed H.R. 1 which included the *Honest Ads Act*.

There are advantages and drawbacks to Canada's online ad registry.<sup>39</sup> On the plus side, the registry promises to enhance transparency and reduce disinformation because both the ad and the name of the person who authorized the message are made publicly available in the registry. There are, however, criticisms of the ad registry. First, some critics have argued that the ads registry does not go far enough because it does not require platforms to provide information about advertisers' targeting strategies, thereby missing an opportunity for the public oversight of targeted advertising and for gathering data about the effectiveness of micro-targeting.<sup>40</sup> A second drawback to the ads registry is that it is unlikely to uncover foreign interference. Foreign adversaries engaging in covert interference will most likely impersonate Canadian citizens and organizations and will not provide the platforms with genuine information. In the U.S., for example, employees of the Russian IRA entity impersonated U.S. individuals and entities in order to buy political ads on social media.<sup>41</sup>

A third category of criticism is that online ad registries go too far. These registries may dampen free speech because online providers will forgo political advertising in order to avoid the reporting requirements. Concerns about self-censorship and overreach are mitigated somewhat by the fact that the registry applies only to paid advertisements, which Elections Canada has clarified as referring to messages that have or

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<sup>39</sup> For a discussion of the drawbacks of disclosure as a general matter, see Abby K. Wood, *Campaign Finance Disclosure*, 14 ANN. REV. L. & SOC. SCI. 11, 22-24 (2018) (identifying costs of disclosure as chilling speech, harassment, onerous reporting requirements, and the facilitation of corruption). For an analysis of the administrative and enforcement challenges connected with regulating political advertising on social media in Canada, see Michael Pal, *Social Media and Democracy: Challenges for Election Law and Administration in Canada*, 19 ELECTION L.J. 200, 204-205 (2020).

<sup>40</sup> Jesse Hirsh, *Canadian Elections Can't Side-step Social Media Influence*, CTR. FOR INT'L GOVERNANCE INNOVATION (Nov. 20, 2018), <https://www.cigionline.org/articles/canadian-elections-cant-side-step-social-media-influence> [<https://perma.cc/9TRU-N4X7>].

<sup>41</sup> ROBERT S. MUELLER, III, U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 14 (Mar. 2019). For a similar argument, see Pal, *supra* note 39, at 204.

would otherwise have a placement cost.<sup>42</sup> As a result, many forms of political communication will escape the requirements.<sup>43</sup> For instance, advertising messages could avoid the registry if they are posted for free on social media, even if expenses were incurred in their creation. The regulations also explicitly exclude a number of categories of communication, including: (1) text messages, e-mails, and other private messages; (2) user-generated content posted for free on social media; (3) editorials, columns, or news articles; and (4) messages and content, including videos, on a political entity's own website or on free websites, such as YouTube.<sup>44</sup>

With respect to self-censorship by online platforms, the experience in Canada has been mixed. In response to the online registry requirement, several online platforms, including Microsoft (Bing, MSN), Reddit, Amazon.ca, and Google banned political ads during the Canadian election altogether, citing concerns about setting up the registries in the given time period.<sup>45</sup> Google announced in March 2019 that it would be banning political advertising on its platforms ahead of the 2019 federal election, on the basis that the new ad registry rules would be too difficult to comply with in the time frame.<sup>46</sup> A 2016 study estimated that Google accounted for 47.7% of Internet advertising market share in Canada.<sup>47</sup> Google's decision to not accept political advertising could have

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<sup>42</sup> *New Registry Requirements for Political Ads on Online Platforms*, ELECTIONS CAN. [hereinafter *New Registry Requirements*], <https://elections.ca/content.aspx?section=pol&dir=regifaq&document=index&lang=e> [<https://perma.cc/4S2W-5QLP>].

<sup>43</sup> Joan Bryden, *New Registry Law for Online Ads Only Applies to Paid Campaigns: Elections Canada*, GLOBAL NEWS (Apr. 24, 2019, 7:19 PM), <https://globalnews.ca/news/5200262/online-registry-political-adverts/> [<https://perma.cc WR39-3VKD>].

<sup>44</sup> *New Registry Requirements*, *supra* note 42.

<sup>45</sup> Elizabeth Thompson, *Most of Canada's Top Websites Won't Post Federal Election Ads This Year*, CBC NEWS (May 1, 2019, 4:00 AM), <https://www.cbc.ca/news/politics/online-election-advertising-canada-1.5116753> [<https://perma.cc/L3JU-7AZA>].

<sup>46</sup> Tom Cardoso, *Google To Ban Political Ads Ahead of Federal Election, Cites New Transparency Rules*, GLOBE & MAIL (Mar. 4, 2019), <https://www.theglobeandmail.com/politics/article-google-to-ban-political-ads-ahead-of-federal-election-citing-new/> [<https://perma.cc/7DRP-CCRJ>].

<sup>47</sup> *Id.*

impacted other websites as well given their reliance on Google for programmatic ad serving.<sup>48</sup>

Twitter banned partisan political advertisements during the pre-election period, which began on June 30, 2019.<sup>49</sup> The reason for the ad prohibition was that Twitter had to build the necessary infrastructure support.<sup>50</sup> Issue advertisements, however, were permitted over the summer.<sup>51</sup> Twitter planned to launch its online ad registry once the election period began, at which time both partisan and issue advertisements would be permitted. However, in October 2019, Twitter adopted a global prohibition of paid political content.<sup>52</sup>

Elections Canada confirmed that companies were still bound by their obligations under the law even if they banned political ads on their platform, and that they could be fined thousands of dollars if regulated ads appeared on their site without being included in a registry.<sup>53</sup> These fines, however, may not furnish a significant deterrence given the

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<sup>48</sup> Elizabeth Thompson, *Who Authorized That Election Ad? Under New Rules Website Owners Must Know Before They Display*, CBC NEWS (Jun. 30, 2019, 4:00 AM), <https://www.cbc.ca/news/politics/election-online-advertising-canada-1.5195484> [<https://perma.cc/D3M2-FKU4>].

<sup>49</sup> *Id.*

<sup>50</sup> Michele Austin, *Providing Clarity on Political Advertising in Canada*, TWITTER (June 26, 2019), [https://blog.twitter.com/en\\_ca/topics/company/2019/political\\_advertising\\_in\\_canada.html](https://blog.twitter.com/en_ca/topics/company/2019/political_advertising_in_canada.html) [<https://perma.cc/97SX-33ML>].

<sup>51</sup> Elizabeth Thompson, *Twitter Banning Political Ads in Canada Until Election Campaign*, CBC NEWS (June 26, 2019, 10:06 AM), <https://www.cbc.ca/news/politics/twitter-online-advertising-election-1.5190465> [<https://perma.cc/KE8W-RYE2>].

<sup>52</sup> The Associated Press, *Twitter Bans All Political Advertising on its Service, Diverging From Rival Facebook*, CBC NEWS (Oct. 30, 2019, 5:08 PM), <https://www.cbc.ca/news/technology/twitter-bans-political-advertisements-1.5341655> [<https://perma.cc/CQA4-NJZN>].

<sup>53</sup> Rachel Aiello, *Online Platforms Warned of Fines, Charges if They Don't Comply with New Political Ad Rules*, CTV NEWS (Apr. 24, 2019, 12:17 PM), <https://www.ctvnews.ca/politics/online-platforms-warned-of-fines-charges-if-they-don-t-comply-with-new-political-ad-rules-1.4392884> [<https://perma.cc/6VAN-2TYV>].

revenue generated by online advertising.<sup>54</sup> Furthermore, political ad bans by online platforms may be ineffective because these platforms could continue to sell advertising space despite the restrictions. In response to Washington state's political advertising transparency regulations, for example, both Google and Facebook announced that they would no longer sell political ads for local races because they could not meet the state's disclosure requirements.<sup>55</sup> However, in spite of its ban on political ads, Google continued to sell ads for Washington state campaigns, receiving more than \$13,000 for ads targeting the November 2018 election.<sup>56</sup>

While most online platforms in Canada experienced some difficulty complying with new ad registry legislation, Facebook appeared to have complied by rolling out several new initiatives. First, Facebook announced the launch of an Ad Library in June 2019 in order to meet the ad registry requirements in the *Elections Modernization Act*.<sup>57</sup> Ads about social issues, elections, or politics will remain in the Ad Library for 7 years, including demographic information about the ad's viewers such as age, gender, and location.<sup>58</sup> Facebook had already established a publicly searchable archive of all political and issue advertisements on Facebook and Instagram in the United States.<sup>59</sup> Second, Facebook identified Canada-specific issues for the "Ads About Social Issues,

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<sup>54</sup> Sara Salinas, *Alphabet Drops After Revealing Declining Advertising Prices and Rising Costs*, CNBC (Feb. 4, 2019, 3:33 PM), <https://www.cnbc.com/2019/02/04/alphabet-earnings-q4-2018.html> [https://perma.cc/TC5D-DL5P].

<sup>55</sup> Eli Sanders, *Since Google Banned Political Ads in Washington State, It's Sold More Than \$13K of Them*, STRANGER (Jan. 16, 2019, 8:55 AM), <https://www.thestranger.com/slog/2019/01/16/37975177/google-banned-political-ads-in-washington-state-then-kept-on-selling-them> [https://perma.cc/C6YW-YA9D].

<sup>56</sup> *Id.*

<sup>57</sup> Facebook Can., *Facebook Launches Ads Transparency Tools In Canada Ahead Of 2019 Federal Election*, CISION (June 10, 2019, 4:00 PM), <https://www.newswire.ca/news-releases/facebook-launches-ads-transparency-tools-in-canada-ahead-of-2019-federal-election-807760417.html> [https://perma.cc/X8BH-FBZJ].

<sup>58</sup> *Id.*

<sup>59</sup> Rob Leathern, *Shining a Light on Ads With Political Content*, FACEBOOK NEWSROOM (May 24, 2018), <https://newsroom.fb.com/news/2018/05/ads-with-political-content/> [https://perma.cc/C77Y-SUXU].

Elections or Politics” policy.”<sup>60</sup> Social issues are broadly defined to include the following topics: civil and social rights, economy, environmental politics, health, immigration, political values and governance, security and foreign policy.<sup>61</sup> Elections or politics include political figures, political parties, legislation and “get out the vote” campaigns.<sup>62</sup> Ads about social issues will remain in the Ad Library for 7 years, and will be accompanied by various metrics such as its range of impressions and the demographic information of the people who saw the ad.<sup>63</sup> Third, Facebook implemented an authorization process for all advertisers in Canada who are running ads about social issues, elections, or politics.<sup>64</sup> The authorization process requires advertisers to confirm their identity and location in Canada in addition to disclosing the person responsible for the ad.<sup>65</sup> Fourth, Facebook began offering access to the Ad Library API, which allows customized keyword searches of the ads stored in the Ad library.<sup>66</sup> Researchers, journalists, and academics can use the API to study political advertising and social issues. As discussed in Part IV.B below, however, there are significant concerns about how digital platforms, including Facebook, engage in self-regulation of fake news.

In sum, the main drawback to mandatory disclosure such as the political ad registry requirement is self-censorship. However, once online platforms have built the necessary infrastructure, the benefits from disclosure are significant. It should be noted, however, that the ad registry requirement applies only to paid political content; as such, there is no regulation of organic content, which can likewise be affected by disinformation campaigns.

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<sup>60</sup> Facebook Can., *supra* note 57.

<sup>61</sup> Press Release, Facebook Can., Canada Authorizations Digital One-Sheet: New Requirements For Ads About Social Issues, Elections Or Politics In Canada (June 10, 2019),

<https://www.dropbox.com/s/m184xn0quf68rvj/Facebook%20Canada%20Authorizations%20%20Digital%20One-Sheet%5B3%5D.pdf?dl=0>.

<sup>62</sup> *Id.*

<sup>63</sup> Facebook Can., *supra* note 57.

<sup>64</sup> *Id.*

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

<sup>66</sup> *Id.*

#### IV. CONTENT-BASED REGULATION AND SELF REGULATION

Content-based regulations for combatting disinformation raise significant free speech concerns. France's fake news law, for example, has been described as censorship by opposition politicians and the media.<sup>67</sup> Some countries have imposed criminal penalties for the creation or dissemination of fake news.<sup>68</sup> For instance, Singapore has passed a law requiring online media platforms carry warnings or remove content the government deems false, with violations carrying a prison term of up to 10 years.<sup>69</sup> Russia has passed several laws targeting fake news, including a bill that bans the spread of "unreliable socially-important information" that could endanger public security and order.<sup>70</sup> According to Freedom House, the broad wording of the Russian legislation allows for politically motivated removals in addition to threatening the freedom of expression.<sup>71</sup> Given the need to protect the freedom of speech, government bans on fake news are not a viable option in liberal democracies.

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<sup>67</sup> Ciara Nugent, *France Is Voting on a Law Banning Fake News. Here's How It Could Work*, TIME (June 7, 2018), <http://time.com/5304611/france-fake-news-law-macron/> [<https://perma.cc/QB3X-GTBQ>].

<sup>68</sup> Alana Schetzer, *Governments Are Making Fake News a Crime—but It Could Stifle Free Speech*, CONVERSATION (July 7, 2019, 4:10 PM), <https://theconversation.com/governments-are-making-fake-news-a-crime-but-it-could-stifle-free-speech-117654> [<https://perma.cc/9WYC-B2Z5>].

<sup>69</sup> *Singapore Fake News Law a 'Disaster' for Freedom of Speech, Says Rights Group*, GUARDIAN (May 9, 2019, 12:20 AM), <https://www.theguardian.com/world/2019/may/09/singapore-fake-news-law-a-disaster-for-freedom-of-speech-says-rights-group> [<https://perma.cc/T9QF-M54J>].

<sup>70</sup> Vladimir Isachenkov, *Russian Bill Aims To Crack Down on 'Fake News' and Disrespect to the Government*, GLOBAL NEWS (Mar. 12, 2019, 10:55 AM), <https://globalnews.ca/news/5047214/russian-bill-crack-down-fake-news-disrespect-government/> [<https://perma.cc/F9SE-LH5G>].

<sup>71</sup> *Freedom on the Net 2018 – Russia Country Report*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-net/2018/russia> [<https://perma.cc/E9HG-JF8G>].

**a. Government Restrictions on Misleading Publications and False Statements**

Canada has two narrow content-based restrictions to target “false election speech,” which Richard Hasen has defined as false speech about the mechanics of voting.<sup>72</sup> The Canadian version covers a broader category of speech since it also addresses false statements about candidates and party leaders. These restrictions apply only during the election period.

With respect to the first mechanism, the prohibition on misleading publications, the *Elections Modernization Act* creates an offence of distributing or publishing any material during an election period that purports to be “made, distributed, transmitted or published by or under the authority of the Chief Electoral Officer, or a returning officer, political party, candidate or prospective candidate” where the material was not authorized but was published with the intent of misleading the public into believing that it was so authorized.<sup>73</sup> Previously, only the impersonation of such persons was prohibited under the *Canada Elections Act*.<sup>74</sup> The restriction also provides factors a court may use to determine whether the offense has been committed, including whether the material contained a name, logo, or domain name that is “distinctive and commonly associated with” the Chief Electoral Officer, political party, or candidate.<sup>75</sup> The prohibition exempts parody and satire.<sup>76</sup>

The second legal mechanism to combat disinformation is the prohibition on publishing false statements to affect election results. The *Elections Modernization Act* made significant amendments to an existing prohibition in Section 91 of the *Canada Elections Act*. As revised by the Act, Section 91 prohibits a person with the intention of affecting the

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<sup>72</sup> Hasen, *supra* note 1, at 14.

<sup>73</sup> Canada Elections Act, S.C. 2000, c 9, s 481, as amended by Elections Modernization Act, S.C. 2018, c 31, s 323 (Can.).

<sup>74</sup> Canada Elections Act, S.C. 2000, c 9, s 480.1 (Can.), as it appeared on January 18, 2019.

<sup>75</sup> Canada Elections Act, S.C. 2000, c 9, s 481, as amended by Elections Modernization Act, S.C. 2018, c 31, s 323 (Can.).

<sup>76</sup> Canada Elections Act, S.C. 2000, c 9, ss 480.1(2), 481(3) (Can.).



results of an election from making or publishing during the election period (1) a false statement that a candidate, prospective candidate, party leader, or public figure associated with a party has committed a federal or provincial offense (or has been charged with or is under investigation for an offense) and (2) a false statement about the “citizenship, place of birth, education, professional qualifications or membership in a group or association” with respect to a candidate, prospective candidate, party leader, or public figure associated with a party.<sup>77</sup> The previous version of Section 91 prohibited persons from knowingly making any false statement of fact relating to a candidate or prospective candidate’s “personal character or conduct” with the intention of affecting the results of an election.<sup>78</sup> The revised version removes the word “knowingly” from Section 91, thereby broadening the scope of the restrictions. The revised version has also been expanded to include statements about the leader of a political party or a public figure associated with a political party. At the same time, the revised version significantly narrows the type of content covered from false statements about “personal character or conduct” to false statements about an itemized list of basic facts. The *Elections Modernization Act* also revised Section 92, which originally forbade any person from “knowingly” making false statements that a candidate has withdrawn but which was revised to exclude the word “knowingly.”<sup>79</sup>

These two government measures—the prohibition on misleading publications and the prohibition on false statements—raise constitutional concerns. In *R. v. Zundel*, the Supreme Court of Canada affirmed that false speech is constitutionally protected under section 2(b) of the *Charter*. The court struck down a provision of the *Criminal Code* which prohibited the publication of false information or news.<sup>80</sup> The defendant had been convicted for violating this false news provision

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<sup>77</sup> Elections Modernization Act, S.C. 2018, c 31, s 61, amending Canada Elections Act, S.C. 2000, c 9, ss 91, 92 (Can.).

<sup>78</sup> Canada Elections Act, S.C. 2000, c 9, s 91 (Can.) as it appeared on January 18, 2019.

<sup>79</sup> Elections Modernization Act, S.C. 2018, c 31, s 61, amending Canada Elections Act, S.C. 2000, c 9, s 92 (Can.).

<sup>80</sup> *R. v. Zundel*, [1992] 2 S.C.R. 731 (Can.).

due to his publication of a booklet espousing denial of the Holocaust.<sup>81</sup> The court rejected the idea that deliberate lies can never have social value, and noted the difficulty in determining whether some statements are true or false.<sup>82</sup> Despite the holding in *Zundel*, the Supreme Court of Canada has generally been more receptive to restrictions on speech as compared to the U.S. Supreme Court. For instance, the Supreme Court of Canada upheld the constitutionality of restrictions on speech such as pornography, hate speech, and commercial speech. In general, if the restriction is minimally impairing, and if the salutary effects of the law outweigh the deleterious effects, a court is likely to find the restriction on speech to be justified. Crucially, for the two false election speech measures at issue, the court has also upheld the constitutionality of campaign finance regulations.<sup>83</sup> In addition, the court upheld a regulation which prohibited the publicizing of election results from some electoral districts before polls had closed in others.<sup>84</sup> While the court subjects restrictions on the right to vote to rigorous scrutiny, it tends to be deferential to Parliament when it comes to many of the rules that govern the electoral process.<sup>85</sup>

With respect to the restriction on misleading publications, a court is likely to find that the regulation violates the freedom of expression but is nonetheless justified under section 1 of the *Charter*. The ban on misleading publications applies only to publications which purport to be published by Elections Canada, a political party, or a candidate. It applies only during the election period and it exempts parody and satire. The restriction is narrowly drawn to prevent misinformation that could mislead voters and undermine public confidence in the integrity of the electoral process.

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Harper v. Canada*, 2004 SCC 33, [2004] 1 S.C.R. 827 (Can.).

<sup>84</sup> *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527 (Can.).

<sup>85</sup> See Yasmin Dawood, *Democracy and the Right to Vote: Rethinking Democratic Rights Under the Charter*, 51 OSGOODE HALL L.J. 251 (2013); see also Yasmin Dawood, *Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review*, 62 U. TORONTO L.J. 499 (2012).

The prohibition on false statements, however, presents a closer case. Its constitutionality has been recently challenged in court.<sup>86</sup> A central question is whether the Supreme Court's decision in *R. v. Zundel*, the false speech case discussed above, can be distinguished. One important distinction is that the prohibition at issue in *Zundel* was very broad since it banned "false statements deemed likely to injure or cause mischief to any public interest."<sup>87</sup> By contrast, the revised Section 91 is far narrower in scope. It only covers, in the context of an election, false statements about a limited range of topics: citizenship, place of birth, education, professional qualifications, membership in a group or association, and the commission of an offense (or being charged with or under investigation for an offense). It is even narrower than the previous version of Section 91, which forbade false statements about the candidate's personal character or conduct. Indeed, the Commissioner of Canada Elections Yves Côté, when testifying before the Senate in November 2018, described the revised version of Section 91 as "unnecessarily restrictive" because it no longer covered a wide range of false statements.<sup>88</sup> In addition, the restriction only applies during the election period, further limiting its impact on free expression. That being said, the revised Section 91 no longer requires that the false statement be made "knowingly," thereby broadening the scope of affected speech. While it is difficult to prove that a person knew a statement was false, removing the knowledge requirement means that the innocent replication of a false statement, such as by sharing it over social media, could also amount to a publication of that statement under Section 91. Even though it is highly unlikely that Section 91 would be enforced in such situations, there is no explicit exemption for innocent

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<sup>86</sup> A Charter challenge has been filed against Section 91 on the basis that it violates the Charter's protection of freedom of expression under section 2(b). See *Canadian Constitutional Foundation v. Attorney General of Canada*, Notice of Application filed in the Ontario Superior Court of Justice, Docket CV - 1900627380 (Sept. 13, 2019). The Ontario Superior Court declined the Canadian Constitution Foundation's application to have the issue determined on an urgent basis during the election period of the 2019 federal election. See *Canadian Constitution Foundation v. Canada (Attorney General)*, 2019 ONSC 5795, at para. 8. As of this writing, the case has yet to be heard.

<sup>87</sup> *Zundel*, [1992] 2 S.C.R. at 743.

<sup>88</sup> Canada, Parliament, *Debates of the Senate*, 42nd Parl, 1st Sess, Vol 150, No 244 at 6725 (Nov. 6, 2018) (statement of Comm'r of Can. Elections Yves Côté), [https://sencanada.ca/en/content/sen/chamber/421/debates/244db\\_2018-11-06-e#52](https://sencanada.ca/en/content/sen/chamber/421/debates/244db_2018-11-06-e#52).

errors. The lack of a knowledge requirement is partially offset by the requirement that the person making the false statement intends to affect the results of the election. Unlike the ban on misleading publications, however, the prohibition on false statements lacks exemptions for satire and parody. In addition, the revised Section 91 includes false statements made about public figures “associated with” a party, which could in theory cover any public figure whose political affiliation is a matter of public record.

On the other hand, a court could be persuaded that the prohibition is a necessary protection against the harm of false election information. Electoral disinformation disseminated through social media could seriously undermine the fairness and integrity of an election, and by extension, could destabilize public confidence in the election. Like the ban on misleading publications, the prohibition on false statements is meant to prohibit a constrained subset of fake news that could mislead voters about essential information necessary for informed voting. The measure does not prohibit false statements about the vast majority of political issues at stake in an election, which mitigates to some degree concerns about the prohibition’s chilling effect on speech. The fact that the prior version of section 91, which was broader in its reach, had already been in operation likewise mitigates such concerns. As revised, Section 91 focuses on certain basic facts about a candidate, such as citizenship and place of birth, which are verifiable and therefore raise fewer thorny questions about the definition of “false” speech. Given current concerns about disinformation and foreign interference, a court could find that the main thrust of Section 91 is constitutional but it would likely only do so while simultaneously reading in exemptions for innocent errors, and for satire or parody, in addition to excluding the provision’s application to public figures associated with a party. Alternatively, a court could issue a suspended declaration of invalidity to enable the government to include such exemptions and tailor the scope of the prohibition. Because it is a close constitutional question, much will ultimately turn on the sufficiency of the government’s evidence not only with respect to the harm of disinformation in general but also with respect to the narrower issue of the harm caused by false statements concerning certain basic facts about candidates and party leaders.

### b. Content-Based Self-Regulation

In many liberal democracies, online platforms engage in the self-regulation of user-generated content.<sup>89</sup> The platforms are incentivized by statutory limited liability regimes under which intermediaries are not held responsible for third party content.<sup>90</sup> In exchange for the limited liability, online platforms are asked to cooperate with government requests to remove illegal content.<sup>91</sup> Content removal regulation broadly follows a notice-and-takedown approach rather than requiring platforms to monitor content on an ongoing basis. Online platforms, however, are increasingly seeking out and removing certain types of content. Typically, content filtering is restricted to extremist and terrorist speech.<sup>92</sup> Facebook is developing technology, including artificial intelligence, to proactively remove content such as nudity and graphic violence, hate speech, fake accounts, spam, and terrorist propaganda.<sup>93</sup> Online platforms also vet paid political content, although they do so without significant accountability or transparency.<sup>94</sup> However, Mark Zuckerberg announced in October 2019 that Facebook would not police

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<sup>89</sup> See Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018) (arguing that private content platforms are systems of governance); see also Persily, *supra* note 2, at 74 (arguing that online platforms are the “new intermediary institutions for our present politics”).

<sup>90</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *THE ROLE OF INTERNET INTERMEDIARIES IN ADVANCING PUBLIC POLICY OBJECTIVES* 75 (2011). In Canada, the Supreme Court upheld the innocent dissemination defense for online platforms. *Crookes v. Newton*, 2011 SCC 47, [2011] 3 S.C.R. 269 (Can.).

<sup>91</sup> See Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1179 (2018) (noting that governments “aim at infrastructure providers in order to get them to censor or regulate the speech of people that governments cannot easily otherwise control”).

<sup>92</sup> Klonick, *supra* note 89, at 1638.

<sup>93</sup> Guy Rosen, *F8 2018: Using Technology to Remove the Bad Stuff Before It's Even Reported*, FACEBOOK NEWSROOM (May 2, 2018), <https://newsroom.fb.com/news/2018/05/removing-content-using-ai/> [<https://perma.cc/BNZ9-47HK>].

<sup>94</sup> Daniel Kreiss & Shannon C. McGregor, *The “Arbiters of What Our Voters See”: Facebook and Google’s Struggle with Policy, Process, and Enforcement Around Political Advertising*, 36 POL. COMM. 499, 500 (2019).

political advertising on the grounds that tech companies should not be monitoring political content, even if the content contains false claims.<sup>95</sup>

Although online platforms initially resisted the idea that misinformation spread through their platforms could sway election results, they have since taken steps to address election interference.<sup>96</sup> As discussed above, Facebook established an Ad Library to comply with the digital registry requirements of the *Elections Modernization Act*.<sup>97</sup> In 2017, Facebook launched the Canadian Election Integrity Initiative.<sup>98</sup> The initiative includes a digital news literacy campaign, a crisis hotline for politicians and political parties whose accounts are hacked, and a “cyber hygiene” guide for Canadian politicians.<sup>99</sup> The objective of the cyber hygiene guide is to provide politicians with information on cyber threats and social media security management.<sup>100</sup> In June 2018, Facebook launched third-party fact-checking with an international certified fact-checker, Agence France-Presse (AFP).<sup>101</sup> AFP fact-checkers review news stories, photos, and videos and rate them for accuracy.<sup>102</sup> Facebook reduces the distribution of stories that are rated “false” and it also informs those who have already shared the false story that there is

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<sup>95</sup> *Facebook Has No Business Policing Political Speech, Zuckerberg Argues*, CBC NEWS (Oct. 17, 2019, 12:35 PM), <https://www.cbc.ca/news/technology/zuckerberg-facebook-free-speech-1.5324440> [<https://perma.cc/7D45-LDU5>].

<sup>96</sup> Persily, *supra* note 2, at 73.

<sup>97</sup> *Facebook Launches Ads Transparency Tools in Canada Ahead of 2019 Federal Election*, CISION, (June 10, 2019), <https://www.newswire.ca/news-releases/facebook-launches-ads-transparency-tools-in-canada-ahead-of-2019-federal-election-807760417.html> [<https://perma.cc/F9G4-3FDJ>].

<sup>98</sup> Rahul Kalvapalle, *Facebook Canada Unveils Plan to Fight Fake News, Hacking in Lead-up to 2019 Election*, GLOBAL NEWS (Oct. 19, 2017), <https://globalnews.ca/news/3814648/facebook-canadian-election-integrity-initiative/> [<https://perma.cc/R245-UK9E>].

<sup>99</sup> *Id.*

<sup>100</sup> *Cyber Hygiene Guide: Politicians and Political Parties*, FACEBOOK CANADA (2017), <http://facebookcanadianelectionintegrityinitiative.com/files/Cyber-Hygiene-Report-en-ca.pdf> [<https://perma.cc/4QTY-GTC5>].

<sup>101</sup> *About This Project*, FACEBOOK CANADIAN ELECTION INTEGRITY INITIATIVE, <http://facebookcanadianelectionintegrityinitiative.com/about.html> [<https://perma.cc/CL66-7KJU>].

<sup>102</sup> *Id.*

additional reporting.<sup>103</sup> If a Facebook page is a repeat offender, Facebook will reduce the distribution of the page as a whole, and will also prevent it from advertising or making money on the site.<sup>104</sup> One fact-checking AFP journalist has revealed that between 300 to 2,000 posts are flagged in Canada every day.<sup>105</sup> A common category is fake news about immigration, religion, or the current government.<sup>106</sup>

The impact of fact-checking is questionable. For example, Facebook's fact-checking program debunked a false story which claimed that 200 soldiers from Mali were sent to Canada and then disappeared.<sup>107</sup> Although the false post was flagged by AFP's Canada bureau, it received 14,600 engagements on Facebook as compared to only 109 engagements for AFP's fact-checking post.<sup>108</sup> Facebook claims, however, that false articles have dropped by 80% thanks to the fact-checking program.<sup>109</sup> However, there is no independent verification process. Critics have argued that Facebook should make its data

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<sup>103</sup> Aaron Wherry, *Facebook's Fake News Squad Comes to Canada – Just in Time for 2019*, CBC NEWS (June 27, 2018, 6:00 AM), <https://www.cbc.ca/news/politics/facebook-fact-check-canada-1.4722349> [<https://perma.cc/8WBJ-RZXV>].

<sup>104</sup> Tessa Lyons, *Hard Questions: How Is Facebook's Fact-Checking Program Working?*, FACEBOOK NEWSROOM (June 14, 2018), <https://newsroom.fb.com/news/2018/06/hard-questions-fact-checking/> [<https://perma.cc/66TG-58LM>].

<sup>105</sup> *Meet the Montreal-Based Journalist Fact-Checking False News on Facebook*, CBC NEWS (Oct. 10, 2018, 2:16 PM), <https://www.cbc.ca/news/canada/montreal/fake-news-fact-checker-louis-baudoin-laarman-1.4857159> [<https://perma.cc/58GA-T3LZ>].

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

<sup>107</sup> Louis Baudoin-Laarman, *Non, 200 soldats maliens ne se sont pas “volatilisés dans la nature” au Canada [No, 200 Malian Soldiers Did Not “Vanish into the Wild” in Canada]*, AFP FACTUEL (Jan. 15, 2019, 1:59 PM), <https://factuel.afp.com/non-200-soldats-maliens-ne-se-sont-pas-volatilises-dans-la-nature-au-canada> [<https://perma.cc/XJ7Y-ASBN>].

<sup>108</sup> Daniel Funke, *This Hoax Got 250 Times More Facebook Engagement Than Two Fact Checks Combined*, POYNTER (Jan. 23, 2019), <https://www.poynter.org/fact-checking/2019/this-hoax-got-250-times-more-facebook-engagements-than-two-fact-checks-combined/> [<https://perma.cc/KFB9-F968>].

<sup>109</sup> Wherry, *supra* note 103.

publicly available so that there can be an independent assessment of the impact of fact-checking on the prevalence of fake news.<sup>110</sup>

In addition to complying with the ad registry requirements, Twitter set up a site integrity team to monitor the platform on a daily basis, and to ensure the authenticity of tweets during the election period.<sup>111</sup> In July 2019, Twitter announced that it was rolling out a pilot project in Canada that would allow users to hide some responses on their tweets, with readers needing to click on a feature to reveal them. While the hidden replies would be available, they would not be included in the original tweet thread.<sup>112</sup> The objective of this feature is to give users greater control over the debates prompted by their tweets.<sup>113</sup> Twitter took other steps to prevent disruption of the election, such as cracking down on bots, and working with Elections Canada and the Commissioner of Canada Elections.<sup>114</sup> Critics contend, however, that Twitter had not done enough to prevent abuse on its platform, including the use of automated bots.<sup>115</sup>

While there are benefits to content-based self-regulation, a certain amount of skepticism is warranted. It must be kept in mind, as Abby Wood and Ann Ravel observe, that there is a conflict of interest at work because online platforms are primarily motivated by a profit motive, rendering them unreliable as self-regulators due to the revenue streams generated by disinformation.<sup>116</sup> Nor are online platforms reliable defenders of democracy. As Nathaniel Persily argues, online platforms “were not created principally to serve democratic values and do not have as their lodestar the fostering of a well-informed and critically minded electorate.”<sup>117</sup>

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

<sup>111</sup> Thompson, *supra* note 51.

<sup>112</sup> Elizabeth Thompson, *Twitter Pilot Project Will Allow Canadians to Hide Replies to Posts – to a Point*, CBC NEWS (July 11, 2019, 10:34 AM), <https://www.cbc.ca/news/politics/twitter-canada-hiding-posts-1.5207923> [<https://perma.cc/LAV2-MLCG>].

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Wood & Ravel, *supra* note 3, at 1237, 1245.

<sup>117</sup> Persily, *supra* note 2, at 74.



## V. NORM-BASED INITIATIVES

The Canadian government has launched two norm-based initiatives to address disinformation. These public-led initiatives identify standards, best practices, and objectives to govern the digital world. The first initiative is the Declaration on Election Integrity, a non-binding document issued by the (now-abolished) Ministry of Democratic Institutions and signed by several major online companies. The second initiative, the Digital Charter, which was issued by the Ministry of Innovation, Science and Economic Development, sets out ten principles that will be used by the government to guide innovation and regulation.

The first initiative, The Declaration on Electoral Integrity, was announced by the government in May 2018. It was designed “to help combat the spread of misinformation in the run-up to the fall federal election . . . .”<sup>118</sup> Major companies, including Facebook, Microsoft, Google, and Twitter, signed on to the Declaration.<sup>119</sup> The Declaration acknowledged the dilemma posed by social media, noting that while social media plays “a meaningful role in promoting a healthy and resilient democracy,” online platforms have also been “used to spread disinformation in an attempt to undermine free and fair elections and core democratic institutions and aggravate existing societal tensions.”<sup>120</sup> The Declaration also stated that the government and online platforms would work together to protect the upcoming election and “to support healthy political discourse.”<sup>121</sup> To this end, the Declaration identified three pillars—integrity, transparency, and authenticity—with corresponding objectives for each pillar.<sup>122</sup>

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<sup>118</sup> Josh O’Kane, *Ottawa Asks Social Media Platforms to Combat Misinformation Ahead of Election*, GLOBE & MAIL (May 27, 2019), <https://www.theglobeandmail.com/business/article-ottawa-asks-social-media-to-combat-misinformation-ahead-of-election/> [https://perma.cc/22CM-7MB4].

<sup>119</sup> *Id.*

<sup>120</sup> *Canada Declaration on Electoral Integrity Online*, GOV’T CAN. (May 27, 2019), <https://www.canada.ca/en/democratic-institutions/services/protecting-democracy/declaration-electoral-integrity.html> [https://perma.cc/C43S-CHRV].

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

With respect to integrity, online platforms committed to intensify their efforts to combat disinformation and promote transparency while keeping Canadians informed about their “efforts to safeguard the Internet ecosystem.”<sup>123</sup> They would also apply their most effective tools to protect democratic processes and institutions, in particular with respect to cybersecurity incidents, the protection of privacy, and the protection against the misrepresentation of candidates, parties, and electoral officials.<sup>124</sup> With respect to transparency, online platforms committed to ensure transparency for regulated political advertising, and to ensure that their terms and conditions are easily accessible and fairly enforced. As for authenticity, online platforms pledged to remove fake accounts and inauthentic content on their platforms, block and remove malicious bots, and help users understand the sources of information.<sup>125</sup> For its part, the government committed to provide online platforms with points-of-contact for election-related matters, and the public with clear and impartial information on any cyber incidents. It also pledged to promote information sharing that could help to identify and thwart malicious actors.<sup>126</sup> Both the government and online platforms committed to work with civil society and educational institutions to support efforts to improve digital literacy and cybersecurity practices.<sup>127</sup>

A year later, in May 2019, the federal government announced a second initiative, the Digital Charter.<sup>128</sup> The purpose of the Digital Charter is to modernize the regulatory framework for the digital sphere while rehabilitating citizens’ trust in the digital landscape. The Charter identifies ten principles which will provide a framework for harnessing the power of digital transformation while protecting citizens’ privacy.<sup>129</sup>

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Press Release, Innovation, Sci. & Econ. Dev. Can., Gov’t Can., Minister Bains Announces Canada’s Digital Charter (May 21, 2019), <https://www.canada.ca/en/innovation-science-economic-development/news/2019/05/minister-bains-announces-canadas-digital-charter.html> [<https://perma.cc/9KNN-4FQ8>].

<sup>129</sup> *Id.*

The ten principles of the Charter are: universal access; safety and security; control and consent; transparency, portability and interoperability; open and modern digital government; a level playing field; data and digital for good; strong democracy; freedom from hate and violent extremism; and strong enforcement and real accountability.<sup>130</sup> Although the Digital Charter does not have legal force, the government indicated that it would aim to introduce new legislation after the 2019 federal election.<sup>131</sup>

While both the Declaration on Electoral Integrity and the Digital Charter are publicly-led initiatives, the Declaration on Electoral Integrity has the advantage of also being privately endorsed by online platforms. The main drawback to a norms-based approach, however, is that it relies on large social media platforms to do the right thing rather than requiring them to do so. That being said, there is value to the Declaration on Electoral Integrity and the Digital Charter because they establish democracy-enhancing norms which will help to guide actions or at the very least will provide a standard by which to judge actions taken or not taken. Not only do norms play a crucial role in regulating democratic practices, they also have the potential of being adopted at some point as mandatory regulations.

## VI. MEDIA LITERACY AND CITIZEN EDUCATION

Prior to the 2019 federal election, the Canadian government announced funding of \$7 million under the auspices of the Digital Citizen Initiative to promote digital media literacy.<sup>132</sup> The literacy program would be

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<sup>130</sup> *Canada's Digital Charter: Trust in a Digital World*, GOV'T CAN.: INNOVATION, SCI. & ECON. DEV. CAN., [https://www.ic.gc.ca/eic/site/062.nsf/eng/h\\_00108.html](https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00108.html) [<https://perma.cc/8VKP-5TNL>] (last modified June 25, 2019).

<sup>131</sup> Josh O'Kane & Tamsin McMahon, *Ottawa Launches Data Strategy, Eyes Fines Tied to Tech Giants' Revenue*, GLOBE & MAIL (May 21, 2019), <https://www.theglobeandmail.com/business/technology/article-ottawa-launches-new-digital-charter-to-protect-canadians-personal/> [<https://perma.cc/6CLS-YY9S>].

<sup>132</sup> Press Release, Canadian Heritage, Gov't of Can., *Helping Citizens Critically Assess and Become Resilient Against Harmful Online Disinformation* (July 2, 2019), <https://www.canada.ca/en/canadian-heritage/news/2019/07/helping-citizens-critically-assess-and-become-resilient-against-harmful-online-disinformation.html> [<https://perma.cc/4UWQ-9ZW2>].

provided through third-party educational activities. The objective is to enhance the resilience of citizens against online harms by giving them the tools to critically assess online information, to recognize malicious interference, to avoid online manipulation, and to engage effectively in public debate.<sup>133</sup> A second investment of almost \$20 million has been earmarked for a new Digital Citizen Research Program to address online disinformation and its impact on society.<sup>134</sup>

Elections Canada also took steps to ensure that Canadians have access to reliable information in the lead-up to the 2019 federal election. It provided information on how to register, vote and be a candidate through a multimedia information campaign. Elections Canada also monitored the information environment to keep tabs on incidents that could undermine the administration of the election and on inaccurate information that could confuse people or prevent them from voting. In addition, the agency committed to take active steps to correct any false information about the electoral process, in particular with respect to fake accounts impersonating Elections Canada.<sup>135</sup>

Various jurisdictions have invested in media literacy. For example, Finland, Sweden and the Netherlands teach school children digital literacy and fact-checking methods to detect misinformation.<sup>136</sup> California passed a law in 2018 that requires the Department of Education to provide media literacy resources on its website.<sup>137</sup>

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *How Elections Canada Contributes to Election Security*, ELECTIONS CAN. (Apr. 9, 2019), <https://elections.ca/content.aspx?section=vot&dir=bkg/sec&document=legal&lang=e> [<https://perma.cc/56Y4-EWJ7>].

<sup>136</sup> Emma Charlton, *How Finland Is Fighting Fake News – in the Classroom*, WORLD ECON. F. (May 21, 2019), <https://www.weforum.org/agenda/2019/05/how-finland-is-fighting-fake-news-in-the-classroom/> [<https://perma.cc/W3UR-ES4D>].

<sup>137</sup> Marissa Melton, *California Joins Other States in Passing New Media Literacy Law*, VOICE AMERICA (Sept. 23, 2018, 6:30 AM), <https://www.voanews.com/usa/california-joins-other-states-passing-new-media-literacy-law> [<https://perma.cc/69Y8-PNBC>].

Connecticut, Rhode Island, New Mexico, and Washington state have also passed legislation relating to media literacy education in schools.<sup>138</sup>

In addition, online platforms have adopted media literacy programs. In 2017, Google announced that it would be providing \$500,000 for media literacy training aimed at Canadian elementary and high school students.<sup>139</sup> The program was further expanded in May 2019.<sup>140</sup> For the 2019 election, Google launched a dedicated channel on its YouTube platform to highlight “authoritative” news coverage of the campaign.<sup>141</sup> It pledged that it would not attempt to balance stories in terms of their political leanings or coverage of the parties.<sup>142</sup> Facebook recently launched a two-year partnership with MediaSmarts in order to promote media literacy.<sup>143</sup>

The main drawback to citizen education and media literacy initiatives is that they are not on their own sufficient to address the problem of disinformation. Furthermore, these efforts do not lead to the education of the majority of the population. That being said, these educational efforts are preferable to a state of affairs in which neither the government nor online platforms make media literacy a priority.

## VII. CONCLUSION

This Article has argued for a multifaceted public-private approach to the challenge of protecting the electoral process from the harms of disinformation. Such an approach employs a suite of complementary strategies—including disclosure rules, political ad registries, narrow

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<sup>138</sup> *Id.*

<sup>139</sup> *Is It Fake News? A New Program Aims to Enhance Media Literacy Among Canadian Students*, CBC NEWS (Sept. 19, 2017, 4:48 AM), <https://www.cbc.ca/news/canada/toronto/fake-news-students-media-literacy-1.4297256> [<https://perma.cc/QE7Z-QKAN>].

<sup>140</sup> Bill Curry, *Google Sticking with Election Ad Ban, Will Launch Youtube Channel to Highlight ‘Authoritative’ News Coverage of Campaign*, GLOBE & MAIL (May 2, 2019), <https://www.theglobeandmail.com/politics/article-google-sticking-with-election-ad-ban-will-launch-youtube-channel-to/> [<https://perma.cc/G8HB-3NEB>].

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *See About this Project*, *supra* note 101.

content-based regulations against false election speech, self-regulation by online platforms, norm-based initiatives, civic education, and media literacy. It also deploys a mix of regulatory styles, including legal regulation, self-regulation, and co-regulation. This Article has shown how the approach in Canada is multifaceted in both of these respects. In addition to incorporating a wide range of tactics by both public and private actors, the Canadian approach has adopted a mix of regulatory styles. The Article also canvasses the advantages and drawbacks of each individual tactic.

In addition, this Article has focused on the dilemma posed by protecting the democratic process from disinformation while also protecting the freedom of speech. It has argued that a multifaceted public-private approach allows for the trade-off between disinformation and free speech to be optimized. The combined and interactive effects of a multifaceted approach provide helpful protections against some of the harms of disinformation. More importantly, the adoption of these multifaceted public-private strategies signals the importance of electoral integrity to citizens thereby bolstering public trust in elections, a key ingredient of long-term democratic stability.<sup>144</sup>

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<sup>144</sup> Wood & Ravel, *supra* note 3, at 1247 (noting that government regulation is “symbolically important”).