Democracy on the Edge: Use the First Amendment to Stop False Speech by Government Officials

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INTRODUCTION

Everybody reading this article no doubt knows the score. In the weeks and months leading up to the 2020 presidential election, Donald Trump routinely spoke falsely about how the use of mail-in ballots would result in a fraudulent election process.[1] The election came, and

1. *See, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (May 24, 2020), https://twitter.com/realDonaldTrump/status/1264558926021959680 ("The United States cannot have all Mail In Ballots. It will be the greatest Rigged Election in history. People grab them from mailboxes, print thousands of forgeries and "force" people to sign. Also, forge names. Some absentee OK, when necessary. Trying to use Covid for this Scam!"); Donald J. Trump (@realDonaldTrump), TWITTER (May 26, 2020), https://twitter.com/realDonaldTrump/status/1265255835124539392 ("There is NO WAY (ZERO!) that Mail-In Ballots will be anything less than substantially fraudulent. Mail boxes will be robbed, ballots will be forged & even illegally printed out & fraudulently signed. The Governor of California is sending Ballots to millions of people, anyone....."); Donald J. Trump (@realDonaldTrump), TWITTER (May 28, 2020), https://twitter.com/realDonaldTrump/status/1266047584038256640 ("So ridiculous to see Twitter trying to make the case that Mail-In Ballots are not subject to FRAUD. How stupid, there are examples, & cases, all over the place. Our election process will become badly tainted & a laughingstock all over the World"); Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 23, 2020), https://twitter.com/realDonaldTrump/status/1297495295266357248 ("So now the Democrats are using

voter tallies from the states established that Joe Biden won the election. At that point, Mr. Trump declared that he won the election fair-and-square and that Joe Biden appeared to lead in the battle-ground states only because massive voter fraud occurred. The day that Congress was to certify the election results, typically a perfunctory affair, thousands of Trump supporters descended on the capital and stormed the capitol building to protest the election deemed fraudulent, causing massive destruction in an attempt to overturn the election result. Lives were lost.

Mr. Trump's lies and those of other elected officials have come to be accepted as part of the political landscape. It is considered political speech that is recognized as part of the marketplace of ideas, the metaphorical frame of reference initially posited by Oliver Wendell Homes in 1920 that serves as justification for the First Amendment permitting all political speech to remain unchecked because of its supposed value to democracy.[2] The marketplace of ideas is premised on the theory that if all ideas are presented, the collective good will benefit; therefore, the government may not restrict the dissemination of ideas.[3]

However, not all speech relating to public affairs furthers democracy. Hannah Arendt has pointed out that before totalitarian leaders seize power their speech "is marked by its extreme contempt for facts."[4] False speech supports a fascist political sphere by "creat[ing]

Mail Drop Boxes, which are a voter security disaster. Among other things, they make it possible for a person to vote multiple times. Also, who controls them, are they placed in Republican or Democrat areas? They are not Covid sanitized. A big fraud!"); Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 25, 2020), https://twitter.com/realDonaldTrump/status/1309455713882828802 ("RINO Governor Charlie Baker of Massachusetts is unsuccessfully trying to defend Mail In Ballots, when there is fraud being found all over the place. Just look at some of the recent races, or the Trump Ballots in Pennsylvania that were thrown into the garbage. Wrong Charlie!"). For the absence of factual basis for these contentions, *see infra* note 337 and accompanying text.

2. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 452 (2011) (explaining that because speech on matters of public affairs is the essence of self-government, it "'occupies the "highest rung of the hierarchy of First Amendment values," and is entitled to special protection'") (quoting Connick v. Meyers, 461 U.S. 138, 145 (1983)).

3. *See infra* notes 18, 125–27 and accompanying text.

4. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 350 (1968). Professor Arendt addressed the connection between false government speech and totalitarianism and in so doing described one authoritarian leader. She spoke of his "'phenomenal untruthfulness,' 'the lack of demonstrable reality in nearly all his utterances,'

a state of unreality, in which conspiracy theories and fake news replace reasoned debate."[5]

Professors Levitsky and Ziblatt point out how much of our democracy is supported by unwritten norms to which our elected leaders have generally adhered.[6] The marketplace of ideas, perhaps *the* foundational pillar of the First Amendment, also relies on unwritten norms, including that speakers will speak in good faith to advance what the speaker, in good faith, believes will contribute to the collective good. However, unwritten norms are only as strong as the willingness of speakers to adhere to them and to place the common good above their own self-interest. Just like any other setting in which unwritten norms govern behavior, the marketplace of ideas will break down when speakers whose voices listeners give credence to place their self-interest above the collective good by making false statements of fact to further their own goals instead of the greater good.

The First Amendment aims to further democratic values by making us better citizens.[7] We become better citizens when we become more knowledgeable about the affairs of the day and then use this knowledge to think critically and dispassionately. However, the dissemination of false speech, *i.e.*, speech containing false factual content, has become a problem of enormous proportions.[8] This has been due,

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[and] his 'indifference to facts which he does not regard as vitally important.'" *Id.* While Donald Trump may be the first leader that comes to mind as he has been described as having a "flagrant disregard for facts," https://www.nytimes.com/2023/04/06/magazine/fox-dominion-jan-6.html, Professor Arendt spoke of Adolf Hitler. *Id.* (quoting KONRAD HEEDEN, DER FUEHRER 368, 374 (1944)). Hitler's willingness to reject reality illustrates how a rejection of factual truth can serve as canary in the coalmine type warning about leaders who are willing to destroy societal norms and flaunt laws to pursue a desire to achieve authoritarian and undemocratic aims. *See infra* notes 186–202 and accompanying text.

5. JASON STANLEY, HOW FASCISM WORKS: THE POLITICS OF US AND THEM, at xvi–xvii (2018).

6. STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 100 (2018).

7. *See infra* notes 124–29 and accompanying text.

8. *See, e.g.*, Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1771–84 (2019); S.I. Strong, *Alternative Facts and the Post-Truth Society: Meeting the Challenge*, 165 U. PA. L. REV.137 (2016); Cass R. Sunstein, *Falsehoods and the First Amendment*, 33 HARV. J. L. & TECH. 387 (2020); Daniel P. Tokaji, *Truth, Democracy, and the Limits of Law*, 64 ST. LOUIS U. L.J. 569, 570 (2020).

in no small part, to the firmly established protections afforded to speakers by the First Amendment. One foundational principle supporting the marketplace of ideas is that the remedy for false speech is more speech.[9] However, there is no guarantee that permitting more speech will generate an amount of truthful speech that will offset the pernicious effects of false speech so as to maintain an informed citizenry, which in turn, will enable our country to function in a way close to the manner envisioned by the Framers of the Constitution.[10]

Professor Paul Horowitz has set forth the conundrum caused by a constitutional structure that has valued speech for much of the last one hundred years:

> If a central goal of the First Amendment is to improve the quantity and quality of knowledge in our society, but First Amendment doctrine is mostly disabled from suppressing false facts and does not necessarily protect true ones, is there anything left in our doctrine that can help us enhance public discourse, by increasing our knowledge or reducing the number of falsehoods in circulation.[11]

To better support democracy, we must develop a First Amendment doctrine that enables this country to do a better job of warding off the harms caused by false speech. We must do so in a way that does not adversely affect the values that the First Amendment aims to serve.

This article takes the position that one way to help resolve the conundrum posed by Professor Horowitz is to interpret the First Amendment to prohibit false and misleading speech by government officials.[12] To date, virtually all First Amendment jurisprudence has

9. *See infra* note 90 and accompanying text.

10. *See infra* notes 54–56 and accompanying text.

11. Paul Horowitz, *The First Amendment's Epistemological Problem*, 87 WASH. L. REV. 445, 473 (2012).

12. By government officials, I mean those elected to office and those appointed to positions of significant authority by elected officials. These are individuals whose speech would not be significantly chilled by a First Amendment interpretation that recognizes a citizens' right to truthful information. *See infra* notes 260–62 and accompanying text. Also subject to this interpretation of the First Amendment would be

focused on the rights of speakers when the government has sought to place limits on speech. However, the harms caused by false speech require an evaluation of not only those interests that warrant speaker protection, but also those interests that warrant listener protection. Only through the reconciling and prioritizing of First Amendment interests can we determine the appropriate scope of speaker and listener rights.

Justice Holmes, who first used the concept of a "market" as a metaphor to explain how speech contributed to society, viewed the market as a place to trade ideas.[13] Prohibiting false and misleading speech aids the marketplace of ideas because any examination of the merits of any idea requires an assessment of the facts that support the idea. If one does not know what is true and what is false, one cannot make informed decisions about ideas that circulate in the market.

Part I(A) of this article traces the evolution of the marketplace of ideas from the time it took root in the writings of John Stuart Mill and then Oliver Wendell Holmes and explains how the Supreme Court fundamentally misconstrued Mill's concept of truth. Part I(B) details the findings of modern social science as they relate to assumptions underlying the marketplace of ideas. Part I(B) then explains how these findings debunk many of the assumptions that underlie modern Supreme Court jurisprudence that has, to date, conferred substantial leeway on speakers to say what they want.

Part II of this article addresses how the Supreme Court has viewed the scope of First Amendment protection for false speech. This section will also address the degree to which false speech has been protected under the common law because the Supreme Court has said that the First Amendment will not protect speech that has historically been unprotected.

Parts III(A) and (B) of this article delineate the values that the First Amendment seeks to further and examine the impact of false and misleading speech on these values. Prohibiting government officials from speaking falsely or in a misleading way furthers First Amendment values of self-governance, truth-finding, and autonomy interests of listeners.[14]

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those who have been deemed state actors, such as candidates for elected office. *Cf.* Smith v. Allwright, 321 U.S. 649, 663–64 (1944).

13. *See infra* notes 21–24 and accompanying text.

14. *See infra* notes 160–79, 207–09 and accompanying text.

Part III(C) evaluates the competing First Amendment interests of listeners and speakers and argues that the First Amendment interests of listeners are greater than the interests of speakers. Part III(D) examines the chilling impact on the First Amendment interests of government official speakers. This article argues that interpreting the First Amendment to prohibit false and misleading speech by government officials will not unduly chill their truthful factual speech or any ideas they may wish to disseminate, the latter of which by definition can be neither true nor false.

Part III(E) examines the government official/speaker relationship with the citizen/listener and the impact of this relationship on First Amendment values. This article argues that in the context of the First Amendment, this relationship is sufficiently fiduciary in nature, which further justifies imposing a duty of truthfulness on government officials when they speak on matters of governance.[15] Part III(F) defines the scope of listeners' rights not to be subject to false or misleading speech from government officials. Part III(G) addresses authority that can be interpreted to support the position that the First Amendment permits government officials to speak falsely and misleadingly. These include the Supreme Court's decision in *United States v. Alvarez*,[16] the government speech doctrine, and case law invalidating attempts by the government to limit false speech in the election context.

Part IV first examines what constitutes a false or misleading statement of fact. It then sets forth criteria courts should consider when determining whether to remedy false or misleading speech. Part V briefly addresses issues of standing and remedies that will arise if a court were to interpret the First Amendment to prohibit false and misleading speech by government officials.

To be clear, this listener-based right places limitations on the speech of government officials regardless of the speaker's state of mind. Both the harmful impact on First Amendment values by false speech and the absence of chill that government officials will suffer warrant imposing this First Amendment limitation on government officials' speech, regardless of their state of mind.

15. *See infra* notes 263–80 and accompanying text.

16. 567 U.S. 709 (2012).

I. THE MARKETPLACE OF IDEAS: THE FOUNDATION OF PUBLIC DISCOURSE

A. The Historic Evolution of the Marketplace of Ideas: Free Trade of Ideas, Not Facts

In *Red Lion Broadcasting Company v. FCC*,[17] the Supreme Court declared that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or [others]."[18] The concept of the free trade of ideas derives from Justice Holmes' dissent in *Abrams v. United States*.[19] Justice Holmes dissented from the Supreme Court's affirmance of the defendant's conviction under the Espionage Act when he extolled the virtues of Russia's political system and denigrated America's capitalist system.[20] Justice Holmes first recognized that generally-accepted thought has been proven wrong over time and laid out the First Amendment's foundations when he stated that,

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundation of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[21]

Justice Holmes went out of his way to emphasize that he spoke "only of expressions of opinion and exhortations, which were all that were uttered" by Mr. Abrams.[22]

17. 395 U.S. 367 (1969).
18. *Id.* at 390.
19. Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting).
20. *See id.* at 620.
21. *Id.* at 630.
22. *Id.* at 631.

For Holmes, "truth" meant the subjective correctness of unverifiable concepts such as religion, social relations, and morality, or in the case of Mr. Abrams, the evils of the capitalist system.[23] It did not mean parsing factual truth from falsity.[24]

Holmes' market concept can be traced back centuries to John Stuart Mill and John Milton. For Milton, truth meant the correctness of unverifiable ideas, and he believed the best way to arrive at the wisest conclusions was through dialogue. Milton wrote, "'[l]et truth and Falsehood grapple; who ever knew Truth put to the wors[t] in a free and open encounter.'"[25] Milton wrote this as a challenge to the British government's censorship of a pamphlet entitled *The Doctrine and Discipline of Divorce*, in which he argued for the liberalization of strict Anglican rules governing divorce law.[26] For Milton, "'all opinions, yea errors, known, read, and collated, are [of] main service and assistance toward the speedy attainment of what is truest.'"[27] Milton also believed that banning ideas deemed unworthy kept people from learning of their falsity, *i.e.*, lack of merit: "'[t]hough all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength.'"[28] When Milton spoke of truth, he could not have been referring to verifiable factual occurrences because regulation of factual falsity, such as fraud laws, did not exist, defamation law was in its infancy, and it was understood that the government possessed the power to regulate factual falsity.[29]

Mill followed Milton's path, arguing against censorship of ideas on the ground that it could not be known which ideas could ultimately withstand the test of time. Those who sought to suppress speech "'of

23. *See* David S. Han, *Conspiracy Theories and the Marketplace of Facts*, 16 FIRST AMEND. L. REV. 178, 183 n.25 (2017) (citing Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 911 (2010)); Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 868–69 (2018).

24. *See* Han, *supra* note 23, at 183.

25. Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 851–52 (2018) (quoting JOHN MILTON, AREOPAGITICA 167 (1644)).

26. Schauer, *supra* note 23, at 903.

27. Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 652 (2006) (quoting MILTON, *supra* note 25, at 20).

28. *Id.* (quoting MILTON, *supra* note 25, at 59).

29. Schauer, *supra* note 23, at 903.

course deny its truth; but they are not infallible . . . . All silencing of discussion is an assumption of infallibility.'"[30] This is because some ideas, thought to be "true," *i.e.*, meritorious, were later proved false.[31]

For Mill, like Milton, "truth" did not involve verifiable factual matter but "'morals, religion, politics, social relations, and the business of life,'" along with some factual propositions such as mathematics, for which there were right and wrong answers.[32] Mill also recognized the importance of facts in helping society reach the wisest opinions, stating that "[w]rong opinions and practices gradually yield to fact and argument; but facts and arguments, to produce any effect on the mind, must be brought before it."[33]

Mill also believed that it was the duty of governments to help individuals reach the truest opinions, *i.e.*, those that were the wisest or most well-grounded.[34] However, this did not mean that the search for truth never ended or government should sit by idly when individuals attempted to disseminate information that clearly harmed the public. Rather, when the government was "sure" of the correctness of certain propositions,

> it is not conscientiousness but cowardice to shrink from acting on their opinions, and allow doctrines which they honestly think dangerous to the welfare of mankind, either in this life or in another, to be scattered abroad without restraint, because other people, in less enlightened times, have persecuted opinions now believed to be true.[35]

Hence, Mill believed that once certain propositions were established by a particular level of certainty, the government should regulate their falsity.

30. Sunstein, *supra* note 8, at 398 (quoting JOHN STUART MILL, ON LIBERTY AND THE SUBJECTION OF WOMEN 24 (Alan Ryan ed., Penguin Books 2006 (1859)).

31. Bambauer, *supra* note 27, at 652 (citing MILL, *supra* note 30, at 88).

32. Schauer, *supra* note 23, at 905.

33. MILL, *supra* note 30, at 26 (discussing the analytical process as one drawn from facts).

34. MILL, *supra* note 30, at 25.

35. *Id.*

Both Mill and Holmes recognized that authorities could properly place limitations on speech when such speech might produce imminent harm. For Mill, speech lost its protection

> when the circumstance in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn dealer, or when handed among the same mob in the form of a placard.[36]

Holmes famously said that "the character of every act depends on the circumstances in which it is done. The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic."[37]

The link between Mill and Holmes can also be seen in the recognition that those who are quite confident in their ideas may be ultimately wrong. Mill said, "'[t]hose who desire to suppress it, of course deny its truth; but they are not infallible . . . To refuse a hearing to an opinion, because they are sure that it is false, is to assume that their certainty is the same thing as absolute certainty.'"[38] Holmes echoed this thought when he stated that "'[c]ertitude is not the test of certainty. We have been cock-sure of many things that were not so.'"[39]

That Milton, Mill, and Holmes were not referencing factual truth but rather the worthiness of ideas and propositions suggests that, to the extent that Holmes' market serves as a North Star in First Amendment jurisprudence, the First Amendment should prioritize the protection of ideas, opinions, and propositions or hypotheses about

36. Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 NW. U. L. REV. 647, 699–700 (2013) (quoting MILL, *supra* note 30, at 136).

37. Schenck v. United States, 249 U.S. 47, 52 (1919).

38. Bambauer, *supra* note 27, at 652 (citing MILL, *supra* note 30, at 88).

39. Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 20 (2004) (quoting Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40 (1918)).

which reasonable people can disagree.[40] It does not require the protection of factual falsity.

However, the Supreme Court first began to conflate protection for opinions and uncertain factual propositions with protection for facts in *New York Times v. Sullivan.*[41] In *Sullivan*, the Court addressed the scope of First Amendment protection for false statements of fact about government officials. The Court recognized that without adequate First Amendment protection, libel laws would chill not only false speech but also true speech. In the context of a libel case, the Court clearly referred to factual occurrences when it spoke of truth and falsity.[42] However, in what can be described as a gratuitous footnote, the Court conflated Mill's concept of truth as the most well thought-out proposition with factual contentions when it cited Mill's statement in *On Liberty.* The Court, quoting Mill, stated that "a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"[43] The concurrence in *United States v. Alvarez*[44] quoted this footnote to support its contention that false statements of objective, documentable fact can serve socially useful purposes.[45]

Relying on Mill's perspective on "truth" in *New York Times v. Sullivan* was problematic if for no other reason than Mill's concept of truth differs from what constitutes "truth" for purposes of a libel suit. As detailed more fully *infra* at 318*,* in the context of a libel suit, "truth" consists of objectively verifiable events that can be provable as true or false.[46] However, "truth" has numerous meanings—meanings that

40. *See* Ashutosh Bhagwat, *Specific Facts and the First Amendment*, 86 S. CAL. L. REV. 1, 42–43 (2012).

41. 376 U.S. 254 (1964).

42. *Id.* at 279.

43. *Id.* at 279 n.19 (quoting MILL, *supra* note 30, at 15). For good measure, the Court added Milton's Areopagitica as a "see also" cite. At issue in *Sullivan* was the truth and falsity of objective information: an advertisement carried by the New York Times made numerous factual errors when setting forth how the Montgomery Alabama police treated African-American protestors. *See* 376 U.S. at 257–59.

44. 567 U.S. 709 (2012).

45. *Id.* at 733 (Breyer, J., concurring).

46. *See* Milkovich v. Lorain J. Co., 497 U.S. 1, 22 (1990). While *Milkovich* came sixteen years after *Sullivan*, at issue in *Sullivan* was the same kind of statements about which the Court spoke about in *Milkovich*: statements of verifiable events, specifically, the actions of an Alabama official. *See* 376 U.S. at 257–59.

conform to both Mill's concept of truth and the Supreme Court's concept of truth in the context of a libel suit. One dictionary contains the following definitions of "truth":

> The state of being the case: FACT . . . the body of real things, events, and fact: ACTUALITY . . . a transcendent fundamental or spiritual reality . . . a judgment, proposition, or idea that is true or accepted as true . . . the body of true statements and propositions . . . the property of being in accord with fact or reality.[47]

It is reasonable to believe that the airing of numerous perspectives will result in an accurate resolution of hypotheses for which there is no accepted answer. However, as Mill recognized, some propositions are certain. In such situations, the airing of different perspectives becomes the airing of falsity. By conflating Mill's concept of truth with a concept of truth that has a more objective component, the Court in *Sullivan* attributed to Mill a philosophical perspective to which he did not subscribe.[48]

B. Fallacies upon Which the Market Is Built—At Least as the Market Relates to Statements of Fact

The marketplace of ideas model in general, and its perceived ability to arrive at truth, as posited by the Supreme Court in regard to

47. MERRIAM-WEBSTER, WEBSTER'S NINTH COLLEGIATE DICTIONARY 1268 (1984).

48. When one generally speaks of what is true, one generally speaks about truth in the more objective mode: what has occurred as documented by our senses. As one authority has noted, truth is correspondence with facts; as Aristotle noted "'to say of what is that it is, and of what is not that it is not, is true.'" Christopher T. Wonnell, *Truth and the Marketplace of Ideas*, 19 U. C. DAVIS L. REV. 669, 676 (1986) (quoting ARISTOTLE, METAPHYSICS 1011 (W. Ross ed. 1924). One authority defines fact as an actual occurrence and information presented as having objective reality. MERRIAM-WEBSTER, *supra* note 47, at 444. Accordingly, when this article refers to statements about what actually occurred in a way observable to the senses, it will characterize them as "statements of fact." *See* Burt Neuborne, *Taking Hearers Seriously*, 91 TEX. L. REV. 1425, 1443 (2013) (recognizing factual falsity consists of those statements that are capable of objective assessment). This article uses "truth" in the way Holmes did: the wisest opinions and the best-supported propositions drawn from facts.

the First Amendment's truth-finding function in particular, contains a number of assumptions, each built upon another.[49] These models assume that there can never be too much speech.[50] They also assume that those exposed to false speech will also be exposed to true speech.[51] They next assume that people possess an ability to engage in a certain level of rational detachment to enable them to properly parse information to which they are exposed, separating factual falsity from factual truth.[52] These models lastly assume that those exposed to false and true information will value true information more than they do false information.[53]

One would hope that the foundational assumptions underlying some of the most important rules in our constitutional structure—rules governing freedom of speech—are grounded in reality. As explained below, they are not.

Professor Schauer has detailed many factors that influence a person's receptiveness to a message other than the truth or falsity of it.[54] He concludes that placing "faith in superiority of truth" over the numerous other factors that impact a person's receptiveness to a message "requires a substantial degree of faith in pervasive human rationality and an almost willful disregard of the masses of scientific and marketing research to the contrary."[55] Indeed, "scientific research has almost uniformly rejected the idea" that the truth or falsity of a

49. A plurality of the Supreme Court vividly set forth these assumptions in *United States v. Alvarez*, 567 U.S. 709 (2012), to justify limiting the First Amendment's reach to combat false speech. *See infra* note 90 and accompanying text.

50. Philip M. Napoli, *What If More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L.J. 55, 61 (2018).

51. *Id.*

52. *See* Han, *supra* note 23, at 185; Napoli, *supra* note 50, at 67.

53. Napoli, *supra* note 50, at 67.

54. Schauer, *supra* note 23, at 909. These factors include the following: the speaker's charisma, authority or persuasiveness; the consistency between the proposition and the hearer's prior beliefs; the consistency of the proposition and with what the hearer believes that other hearers believe; the frequency in which the proposition is uttered; the extent to which visual or aural embellishments accompany the proposition; and the extent to which the proposition will make the listener feel good. *Id.*

55. *Id.*

proposition is the dominant factor in whether people will believe a particular proposition.[56]

Instead, individuals' decision-making process is far from completely rational,[57] and false factual content plays into the irrational aspects of decision-making in a number of ways and for a number of reasons. People tend to seek out information that confirms existing beliefs and avoid information that challenges their beliefs. This is known as confirmation bias.[58] Confirmation bias exists because factual inconsistency with one's beliefs creates dissonance. Dissonance feels uncomfortable. Hence, people make judgments that fit one's existing beliefs and attitudes. Accordingly, they make biased decisions that reinforce prior beliefs instead of attempting to make accurate judgments that create dissidence with their current beliefs.[59] People will assess information they receive in a biased way when the need to hold on to existing beliefs outweighs a need for factual correctness.[60] As one set of authorities has found, misperceptions fit comfortably into individuals' worldviews because they seemingly confirm their prior beliefs.[61] Indeed, people are susceptible to false content because they like believing the information is true; a form of thinking called "motivated reasoning."[62]

Trust in the source of information will also impact how individuals assess information they receive; people judge the credibility of information they receive based upon whether they judge the source of the

56. Sunstein, *supra* note 8, at 393.

57. *See* April A. Strickland et al., *Motivated Reasoning and Public Opinion*, 36 J. HEALTH POL., POL'Y & L. 935, 942 (2011).

58. *See id.* at 938.

59. *See* James H. Kuklinski et al., *Misinformation and the Currency of Democratic Citizenship*, 62 J. POL. 790, 794, 811 (2000).

60. Michael Hameleers, et al., *Misinformation and Polarization in a High-Choice Media Environment: How Effective Are Political Fact-Checkers?*, 47 COMMC'N RSCH. 227, 228 (2019).

61. S.I. Strong, *Alternative Facts and the Post-Truth Society: Meeting the Challenge*, 165 U. PA. L. REV. ONLINE 137, 139–40 (2017) (citing Brendan Nyhan & Jason Reifler, *The Roles of Information Deficits and Identity Threat in the Prevalence of Misperceptions* 1, 3 (Nov. 11, 2016) (unpublished manuscript) [hereinafter Nyhan & Reifler, *Roles*], http://www.dartmouth.edu/~nyhan/opening-political-mind.pdf [https://perma.cc/T36Q-HG59].

62. Sunstein, *supra* note 8, at 406–07.

information credible or authoritative.[63] Moreover, confirmation bias impacts credibility determinations because a tendency exists for people to view information as credible if it conforms to existing beliefs and not credible if it counters their existing beliefs.[64]

In addition, empirical research suggests that even when a person learns that information she has received is false, the false information can continue to impact her decision-making.[65] The misinformation creates a "belief echo" in which receipt of the false information continues to influence her decision-making, notwithstanding a recognition that the information received was false.[66] Belief echoes are inconsistent with assumptions underlying the marketplace of ideas because they result in an inability to divorce oneself from false ideas when facts or true propositions cause too much dissidence.[67]

Studies also establish what logically follows from the previous empirical studies: people find it difficult to distinguish between true and false factual content.[68] More alarmingly, false factual content can spread more quickly than true content as people have proven to be gullible when it comes to assessing false content and otherwise lack the ability to distinguish true content from false.[69] In what might be the most famous study of this phenomenon, researchers at the Massachusetts Institute of Technology found that false news spreads faster and

63. Miriam Metzger & Andrew J. Flanagin, *Credibility and Trust of Information in Online Environments: The Use of Cognitive Heuristics*, 59 J. PRAGMATICS 210, 214 (2013).

64. *Id.* at 215.

65. Emily A. Thorson & Stephan Stohler*, Maladies in the Misinformation Marketplace*, 16 FIRST AMEND. L. REV. 444 (2007).

66. *Id.*

67. *See id.* However, it should be noted that some research suggests that the impact of belief echoes is not as great as originally thought. *See, e.g.*, Thomas Wood & Ethan Porter, *The Elusive Backfire Effect: Mass Attitudes' Steadfast Factual Adherence*, 41 POL. BEHAV. 41, 41 (2018); Ullrich K.H. Ecker et al., *Can Corrections Spread Misinformation to New Audiences? Testing for the Elusive Familiarity Backfire Effect*, 5 COGNITIVE RESEARCH: PRINCIPLES AND IMPLICATIONS 41 (2020)

68. Lili Levi, *Real "Fake News" and Fake "Fake News*,*"* 16 FIRST AMEND. L. REV. 232, 253 (2018); Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONS. L. & PUB. POL'Y, 57, 66 (2017).

69. *See* Gaughan, *supra* note 68, at 66–68.

to more people than true stories, reaching more people than any other type of information.[70]

Professor Schauer proved quite prescient when in 2010 he stated

> No matter how many examples and how much serious scientific research refute the view that falsity typically yields to truth, or that the truth of a proposition is the dominant factor in determining which propositions will be accepted and which rejected, free speech claimants, sometimes in legal proceedings but far more often in public advocacy, trot out the tired old clichés that are little more than modern variants on Milton's now-legendary but almost certainly inaccurate paean to the pervasiveness and power of human rationality.[71]

Two years later, Justice Kennedy trotted out these tired old clichés upon which the marketplace of ideas has been built to justify limiting the government's ability to prohibit false speech.[72] However, social science has made clear that some foundational First Amendment principles, alternatively referred to by Professor Schauer as tired clichés, are simply wrong.[73]

II. THE SCOPE OF PROTECTION FOR FALSE STATEMENTS OF FACT UNDER SUPREME COURT JURISPRUDENCE

Analysis of the Supreme Court's treatment of speech that contains false factual content begins with a recognition that while generally, the First Amendment prohibits the government from restricting speech because of its message, ideas, subject matter or content,[74] exceptions to this rule exist. There are a number of "'well-defined and

70. Soroush Vosoughi, Deb Roy and Sinan Aral, *The Spread of True and False News Online*, 359 Science 1146–51 (Mar. 2018), https://science.sciencemag.org/content/359/6380/1146.

71. Schauer, *supra* note 23, at 911.

72. *See infra* note 90 and accompanying text.

73. *See supra* notes 54–70 and accompanying text.

74. Ashcroft v. Am. C.L. Union, 535 U.S. 564, 573 (2002).

narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.'"[75]

Until 2012, false statements of fact appeared to unquestionably constitute one category of speech that lacked First Amendment protection. In *Garrison v. Louisiana*,[76] the Supreme Court recognized that at the time the states ratified the First Amendment, "there were those unscrupulous enough and skillful enough to use deliberate or reckless falsehood as an effective tool" to gain political advantage.[77] The Court then reasoned that knowingly lying is at odds "with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected."[78] The Court further stated, "[a]t the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration."[79] From *Garrison* in 1964 until 2012, the Court continued to recognize that false factual assertions lacked constitutional value and were therefore undeserving of First Amendment protection.[80]

However, in 2012, the Court concluded that the First Amendment protects at least some false factual assertions when, in *United States v. Alvarez*,[81] the Court affirmed the Ninth Circuit's reversal of a conviction under the Stolen Valor Act. The statute prohibited

75. United States v. Stevens, 559 U.S. 460, 468–69 (2010) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)). For a discussion of these prohibited categories, see *infra* notes 83, 103–04 and accompanying text.

76. 379 U.S. 64 (1964).

77. *Id.* at 75.

78. *Id.*

79. *Id.*

80. *See* Gertz v. Robert Welch, 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact."); Herbert v. Lando, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials."); Va. St. Bd. of Pharm. v. Va. Cit. Cons. Council, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake."); Brown v. Hartledge, 456 U.S. 45, 60–61 (1982) ("[D]emonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements."); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas.").

81. 567 U.S. 709 (2012).

individuals from falsely claiming that they received military decorations or medals.[82] The plurality characterized the restriction of Mr. Alvarez's speech as a content-based restriction and stated that generally, the First Amendment permitted content-based restrictions "only when confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'"[83] Previous pronouncements from the Supreme Court recognizing the lack of First Amendment protection for false assertions of fact "derive[d] from cases discussing . . . [a] legally cognizable harm associated with a false statement."[84] The plurality recognized that the Stolen Valor Act "target[ed] falsity and nothing more."[85] The plurality seemed to take more issue with the statute itself than its application to Mr. Alvarez. The plurality recognized that Mr. Alvarez lied at a public meeting, which arguably implicated issues of public discourse. However, the statute criminalized all false statements on the subject, including statements whispered in the home.[86]

In this way, the Stolen Valor Act differed from other statutes that permissibly limited speech because of the harms caused. The plurality further recognized that the First Amendment does not protect "false claims . . . made to effect a fraud or secure moneys or other valuable considerations, say offers of employment."[87] The Stolen Valor Act created the potential to adversely impact these First Amendment aspirations by impermissibly chilling speech without a showing that the speaker used the false speech to gain material advantage.[88] If the First Amendment countenanced such governmental activity, "it would give government a broad censorial power unprecedented in this Court's cases or in . . . [the nation's] . . . constitutional tradition."[89]

The plurality then turned to Justice Holmes' market concept to further justify its decision and noted that

82. 18 U.S.C. § 704.

83. *Alvarez*, 567 U.S. at 717 (quoting United States v. Stevens, 559 U.S. 460, 470 (2010)). These categories included advocacy to incite imminent lawless action, defamation, "fighting words," child pornography, fraud, true threats, and speech that presents a grave and imminent threat to the government. *Id.*

84. *Id.* at 719.

85. *Id.* at 722.

86. *Id.* at 723.

87. *Id.*

88. *Id.*

89. *Id.*

> [t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth.[90]

Two concurring justices recognized that certain areas of speech and thought in which government attempts to regulate would pose "a grave and unacceptable danger of suppressing truthful speech."[91] These include "[l]aws restricting statements about philosophy, religion, history, the social sciences, the arts, and the like[.]"[92] However, there is a lower risk of suppressing valuable ideas when the government

90. *Id.* at 727. In support of this approach to remedy false speech, the plurality cited only Justice Brandeis' concurrence in *Whitney v. California*, 274 U.S. 357, 377 (1927). Justice Brandeis stated that

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . [Those who won out independence further believed] that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law.

274 U.S. at 375–76 (Brandeis, J., concurring). Justice Brandeis added that "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." 274 U.S. at 377 (Brandeis, J., concurring).

91. United States v. Alvarez, 567 U.S. 709, 731 (2012) (Breyer, J., concurring) (internal quotes omitted).

92. *Id.* at 731 (internal quotes omitted).

targets speech false statements of fact because false statements of fact are "less likely than are true factual statements to make a valuable contribution to the marketplace of ideas."[93] Like the plurality, the concurring justices recognized that the First Amendment permitted the government to regulate lies that were "particularly likely to produce harm."[94]

The dissenters in *Alvarez* concluded that by upholding the Ninth Circuit's reversal, the plurality and concurrence broke "sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest."[95] Moreover, the Stolen Valor Act criminalized only "statements that could reasonably be interpreted as communicating actual facts," which meant that any prohibited statements were "highly unlikely to be tied to any particular . . . ideological message."[96]

If we are keeping score, nine justices recognized that the First Amendment does not protect every false statement of fact, although four of the justices would have required a showing of material harm before a false statement of fact lost its First Amendment protection.[97] Likewise, nine justices believed that the First Amendment barred the government from serving as arbiters of truth and falsity because of the potential for government abuse and overreach, particularly in areas unrelated to direct political participation, such as history and the arts.[98] Six justices believed that counterspeech could remedy false statements of fact.[99]

The Supreme Court's decision in *United States v. Stevens*,[100] has created an additional frame of reference to assess the degree to which the First Amendment protects speech that contains false factual content. In *Stevens,* a defendant challenged his conviction under a law that criminalized the depiction of animal cruelty on First Amendment grounds. The government argued that the First Amendment did not protect depictions of animal cruelty because "a categorical balancing

93. *Id.* at 732.
94. *Id.* at 734.
95. *Id.* at 739.
96. *Id.* at 740–41.
97. *Alvarez*, 567 U.S. at 740 (Alito, J., dissenting).
98. *Id.*
99. *Id.*
100. 559 U.S. 460 (2010).

of the value of the speech against its societal costs" warrants a determination that depictions of animal cruelty are of such minimal social value as to render them unworthy of First Amendment protection.[101] The Court rejected this contention, concluding that the First Amendment protects more than speech that survives an ad hoc balancing of social costs and benefits.[102] Rather, only categories of speech that consist of "historic and traditional categories long familiar to the bar" lack First Amendment protection.[103] This speech included obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. These categories of speech constituted "'well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.'"[104] The Court further recognized that there may exist other categories of speech not mentioned that have historically been unprotected, and other categories of speech that case law "discussed" in a way that recognized its unprotected nature.[105]

Professor Genevieve Lakier has gone to great lengths to detail the scope of historical protection, and lack thereof, afforded by the First Amendment to false speech.[106] As detailed below, the upshot is that historically the First Amendment did not protect false statements of fact—at least where the false statements impact matters of governance. Professor Lakier has pointed out that Justice Story concluded

> [T]he language of [the first] amendment imports no more, than that every man shall have a right to speak, write and print his opinions upon any subject whatsoever, without prior restraint, so always, that he does not injure any other person in his rights, person, property, or reputation; and so always that he does not thereby

101. *Id.* at 470.

102. *Id.* at 468.

103. *Id.* (quoting Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring)).

104. *Id.* (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)).

105. *Stevens*, 559 U.S. at 472.

106. Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015).

> disturb the public peace, or attempt to subvert the government.[107]

Professor Lakier has further detailed that in the eighteenth century, some categories of speech were subject to censure, and the "'government had a positive responsibility to monitor—and, when necessary, to step in and moderate—political communication.'"[108] This is because the long-term stability of the government required the regulation of speech "'inconsistent with the peace and safety of th[e] state' . . . Only by routing out licentiousness could government protect genuine liberty 'from those would exploit and degrade it.'"[109]

These limitations were consistent with the concerns of the Constitution's Framers who believed that charismatic speakers "posed grave threats to a democratic state, and thus sought to limit such speakers' power and influence through norms of discourse along with structural constraints."[110] Authorities feared that the dissemination of false speech "might become the scourge of the republic" by facilitating the introduction of "despotism in its worst form."[111]

Indeed, in 1805, one court, in language eerily applicable to the consequences of Mr. Trump's attempted subversion of the 2020 election, concluded that speech on matters of public concern motivated by a malicious intent undermined the ideals of democracy "because such speech functioned to 'unloosen the social band of union, totally to unhinge the minds of the citizens, and . . . produce popular discontent with the exercise of power.'"[112] Consequently, as noted, according to

107. *Id.* at 2180 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1784, at 732 (1833)).

108. *Id.* at 2194 (quoting David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1707 (1991)) (other internal quotes omitted).

109. *Id.* at 2194 (quoting Sarah Barringer Gordon, *Blasphemy and the Law of Religious Liberty in Nineteenth-Century America*, 52 AM. Q. 682, 693–95 (2000)).

110. Helen Norton, *The Government's Manufacture of Doubt*, 16 FIRST AMEND. L. REV. 342, 344 (2017).

111. Lakier, *supra* note 106, at 2194 n.119 (quoting 3 STORY, *supra* note 107, at 733).

112. *Id.* at 2196 n.131 (quoting Respublica v. Dennie, 4 Yeates 267, 270 (Pa. 1805)).

Justice Story, the government could sanction speech that was made to "subvert the government."[113]

Hence, if in modern times courts have failed to recognize that historically the First Amendment did not protect false speech that undermined the ideals of democratic government, it is only because no one has challenged such speech so as to provide a court an opportunity to engage in any such analysis. On the other hand, it can also be said that the Court's recognition in *Garrison* that unscrupulous political actors can use calculated falsehoods to undermine democratic government amounts to the Court delineating a form of speech that the Court "specifically . . . discussed" if not "identified" as not "historically protected."[114] Speech that undermines democratic values is not necessarily limited speech that directly and imminently impacts democratic values, such as Donald Trump's lies about the 2020 election. Rather, it includes speech that directly impacts citizens' decision-making regarding important affairs of the day, such as false speech about global warming, because this type of false speech subverts the process of an informed self-government, the governmental structure upon which our system of democracy is based.[115]

The Supreme Court has recognized the potential for arbitrariness when defining categories of protected conduct for purposes of constitutional analysis.[116] Accordingly, the Supreme Court has held that when history serves as a framework to assess the scope of a constitutional right, a court should focus upon "the most specific level at which a relevant tradition protecting or denying protection to the asserted right can be identified."[117] The Supreme Court has told us to

113. *Id.* at 2180 (citing 3 STORY, *supra* note 107, § 1874, at 732).

114. United States v. Stevens, 559 U.S. 460, 468 (2010).

115. *See infra* notes 128–35 and accompanying text.

116. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989).

117. *Id.* It is not particularly relevant that in *Michael H.* resorting to history was necessary because a resolution of the scope of substantive due process protection depends on whether the liberty that a plaintiff sought to exercise had been "'deeply rooted in this Nation's history and tradition.'" Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (quoting Moore v. City of East Cleveland, 431 U.S. 484, 503 (1977)). If the need to avoid arbitrary decision making factors into any constitutional analysis, which in turn, compels reliance on history to serve as a guide to determine the scope of constitutional protection, then the particular source of constitutional protection at issue lacks relevance. This is because defining the scope of constitutional protection

look to history to see what categories of speech the First Amendment did not protect. Professor Lakier has detailed that false statements of fact that interfered with the affairs of government was a category of speech that lacked such protection.

III. THE IMPACT OF FALSE AND MISLEADING SPEECH ON FIRST AMENDMENT VALUES

The Supreme Court has stated that when determining the scope of constitutional protection afforded to one who claims the protection of a constitutional provision, a court should examine "the nature, history, and purpose of the particular constitutional provision."[118] History tells us that the First Amendment did not protect false speech that adversely impacted governmental affairs.[119] The nature and function of the First Amendment follows.

A. The Values the First Amendment Seeks to Preserve and Further

There are three overarching values that the First Amendment seeks to further: (1) the principle of self-governance or democracy; (2) the fostering of truth or knowledge; and (3) individual self-fulfillment or autonomy.[120] The First Amendment also helps to maintain a balance between stability and change in society[121] and serves as a check on government authority as part of the overall system of checks and balances.[122] Whether the latter goal is a distinct aspiration unto itself or part of the goal of self-government is semantical. It suffices to say that

> "Freedom of speech is based in large part on a distrust of the ability of government to make the necessary

at the most specific relevant historically defined level helps to prevent subjective decision making by judges. *See Michael H.*, 491 U.S. at 127 n.6.

118. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778 n. 14 (1978).

119. *See supra* notes 107–13 and accompanying text.

120. *See, e.g.,* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 878 (1963); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 478 (2011); Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L.J. 1351, 1395 n.230 (2019); Vincent Blasi, *Free Speech and Good Character*, 46 UCLA L. REV. 1568 (1999).

121. Emerson, *supra* note 120, at 878–79.

122. Blasi, *supra* note 120, at 1574.

> distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a more general sense."[123]

1. Self-Government

The Supreme Court has recognized numerous times that our governmental structure is one of self-government and the First Amendment is an integral component of the structure of self-government.[124] The Framers envisioned the First Amendment as a mechanism "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[125] As a result, one goal of the First Amendment is to produce "an informed public capable of conducting its own affairs."[126] The right to free speech is a means to an end—to "produce a more capable citizenry and more perfect polity."[127]

123. Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 818 (2010) (quoting FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 86 (1982)). "'[T]he First Amendment is primarily about constraining the collective authority of temporary political majorities to exercise their power by determining for everyone what is true and false . . . . [S]tructural interpretation builds into the First Amendment a deep skepticism about the good faith of those controlling the government.'" Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31, 83 n.190 (2016) (quoting Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. L. REV. 1, 3, 21 (2008)).

124. *See, e.g.*, Knox v. Serv. Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 308 (2012) ("Our cases have often noted the close connection between our Nation's commitment to self-government and the rights protected by the First Amendment"); First Natl. Bank of Bos. v. Bellotti, 435 U.S. 765, 777 n.12 (1978) (quoting Garrison v., Louisiana, 379 U.S. 74–75 (1964)) (recognizing that "'speech concerning public affairs is more than self-expression; it is the essence of self-government'"); Buckley v. Valeo, 424 U.S. 1, 93 n.127 (1976) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)) (recognizing that First Amendment sought to produce "a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish").

125. Roth v. United States, 354 U.S. 476, 484 (1957).

126. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 392 (1969).

127. Cohen v. California, 403 U.S. 15, 24 (1971).

Professor Alexander Meiklejohn detailed the relationship between the First Amendment and self-governance, stating that the principle of free speech "springs from the necessities of the program of self-government" and the primary purpose of the First Amendment is to enable citizens "so far as possible, understand the issues which bear upon our common life."[128] Similarly, the Supreme Court "has emphasized the role of the First Amendment in guaranteeing our capacity for democratic self-government."[129] This self-governance theory is the First Amendment theory most widely accepted among scholars.[130]

Governments derive their just powers from the consent of the governed,[131] and elections facilitate the process of self-government by enabling those who are subject to laws to believe that they participate in the making of the laws.[132] Speech enables people to make informed, intelligent decisions when they go to vote.[133] As far back as 1800, James Madison stated that electing public officials is "the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of

128. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27, 88–89 (1948). *See also* Harry Kalven, Jr., *The New York Times Case: A Note on "the Central Meaning of the First Amendment*,*"* 1964 SUP. CT. REV. 191, 208 (1964) ("The [First] Amendment has 'a central meaning'—a core of protection of speech without which democracy cannot function, without which, in Madison's phrase, 'the censorial power' would be in the Government over the people and not 'in the people over the Government.'").

129. Va. State Bd. of Pharm. v. Va. Citizens Consumers Council, 425 U.S. 748, 765 n.19 (1976).

130. Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CAL. L. REV. 1, 33 (2012).

131. *See* MEIKLEJOHN, *supra* note 128, at 3.

132. *See* Post, *supra* note 120, at 482.

133. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1409–10 (1986); *see also* Murray Dry, *The First Amendment Freedoms, Civil Peace and the Quest for Truth*, 15 CONST. COMMENT. 325, 345 (1998) (implicit assumption underlying concept of government by consent is that people are able, with appropriate information to judge those who will be undertaking governmental action in their name); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 227 (1997) (Breyer, J., concurring in part) (noting that the First Amendment seeks to achieve a process of "public discussion and informed deliberation"); Bates v. Little Rock, 361 U.S. 516, 522–23 (1960) (recognizing that the Framers of the Constitution considered freedom of speech to lie at the foundation of government "based upon the consent of an informed citizenry").

the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits."[134] Accordingly, the Supreme Court has recognized that it is the "responsibility of the individual citizen for the successful functioning . . . of [the electoral] . . . process."[135] Hence,

> The First Amendment does not protect a "freedom to speak." It protects the freedom of those activities of thought and communication by which we "govern." It is concerned, not with private rights, but with a public power, a governmental responsibility.[136]

Effective self-government requires that voters not simply make choices but make informed choices.[137]

Democratic competence is the process by which an intelligent citizenry exercises its knowledge to further its policy preferences.[138] Professor Alexander Meiklejohn believed that agents of the electorate, *i.e.*, government officials, lack authority themselves to determine what

134. Catherine J. Ross, *Ministry of Truth? Why Law Can't Stop Prevarications, Bullshit, and Straight-out Lies in Political Campaigns*, 16 FIRST AMEND. L. REV. 367, 393 (2017) (quoting Harte-Hanks Commc'ns., Inc. v. Connaughton, 491 U.S. 657, 687–688 (1989) (citing THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE FEDERAL CONSTITUTION 575 (Jonathan Elliot ed., 4th ed. 1861))).

135. McConnell v. FEC, 540 U.S. 93, 136–37 (2003); s*ee also* First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 788–89 (1978) (sustaining an active, alert citizenry to facilitate the wise conduct of government is a government interest of the highest importance).

136. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. REV. 1, 26 (1971) (quoting Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255).

137. Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 680 (1991). Accordingly, as one court has found, "[u]ndoubtbly, the State interest in preserving the integrity of the election process and allowing the electorate to choose among candidates on the basis of accurate information is of paramount importance." Scotland v. Crawford, 306 N.W. 614, 623 (N.D. 1981).

138. Chris Edelson, *Lies, Damned Lies, and Journalism: Why Journalists Are Failing to Vindicate First Amendment Values and How a New Definition of "the Press" Can Help*, 91 OR. L. REV. 527, 535 (2012).

serves the general welfare, and only an informed, reflective citizenry legitimately exercises decision-making power:[139]

> "Public discussion of public issues . . . together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing power, they have no power. Over their governing, we have sovereign power."[140]

Constitutional scholars believe the First Amendment limits the speech of those who seek to interfere with the collective self-government process:

> Thus Fiss, like Meiklejohn, would use government power to censor speakers whose expression is deemed incompatible with the achievement of a rich and informative public dialogue. He is willing to deny those speakers access to the processes of democratic self-government because he desires to fashion a public dialogue capable of empowering "people to vote intelligently and freely, aware of all the options and in possession of all the relevant information."[141]

139. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 555 (1977).

140. William J. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 12 (1965) (quoting Meiklejohn, *supra* note 136, at 257).

141. Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1120 (1993) (quoting Fiss, *supra* note 133, at 1410). "'[M]any of our free speech disputes should be resolved with reference to the Madisonian claim that the First Amendment is associated above all with democratic self-government.'" Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1660 n.98 (2021) (quoting CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH xviii, xx (1993)).

2. Truth-Finding

From Holmes' dissent in *Abrams* came a recognition that freedom of speech promotes the search for truth.[142] The First Amendment's truth-finding purpose aims to help people acquire knowledge, which furthers both individual and societal interests:

> In the traditional theory, freedom of expression is not only an individual but a social good. It is, to begin with, the best process for advancing knowledge and discovering truth. Considered in this aspect, the theory starts with the premise that the soundest and most rational judgment is arrived at by considering all facts and arguments which can be put forth on behalf of or against any proposition.[143]

The search for knowledge is an evolving process:

> [One] must consider all alternatives, test his judgment by exposing it to opposition, make full use of different minds to sift the true from the false . . . The process is a continuous one. As further knowledge becomes available, as conditions change, as new insights are revealed, the judgment is open to reappraisal, improvement or abandonment . . . The theory demands that discussion must be kept open no matter how certainly true an accepted opinion may seem to be.[144]

142. Tokaji, *supra* note 8, at 585.

143. Emerson, *supra* note 120, at 881. "[K]nowledge helps us navigate the world and achieve our goals . . . ." Mark Spottswood, *Falsity, Insincerity, and the Freedom of Expression*, 16 WM. & MARY BILL RTS. J. 1203, 1231–32 (2008).

144. Emerson, *supra* note 120, at 881. "'Through the process of open discussion we find out what we ourselves think and are then able to compare that with what others think on the same issues. The end result of this process, we hope, is that we will arrive at as close to an approximation of the truth as we can.'" Brian C. Murchison, *Speech and the Truth-Seeking Value*, 39 COLUM. J. L. & ARTS 55, 66, n.56 (2015) (quoting LEE C. BOLLINGER, THE TOLERANT SOCIETY 45 (1986)).

3. Autonomy

The autonomy theory of the First Amendment rests on a belief that

> "[i]individuals, within the limits of their intellectual and emotional development, their physical environment, and the restraints which may be imposed on them by other persons, are capable of free choice and are responsible for the behavior which they choose. The philosophy of free speech presumes the existence of the freedom to accept or reject the alternatives which are offered."[145]

The Supreme Court has condensed this concept to the following: "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."[146] Justice Robert Jackson elaborated on the meaning of the concept of autonomy when he said "[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . In this field, every person must be his own watchman for truth because the forefathers did not trust any government to separate the true from the false for us."[147]

Hence, the foundation of our status as free and rational beings rests on an ability to reach conclusions about what is good and then act on these beliefs.[148] Speech is a part of acting on one's beliefs and enables one to participate in the life of one's society, thereby becoming a full citizen and fulfilling one's human potential.[149] For purposes of political speech, people, as listeners, are presumed to be rational beings

145. Frederick Schauer, *Free Speech and the Assumption of Rationality*, 36 VAND. L. REV. 199, 204 (1983) (quoting F. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 6–7 (1981)).

146. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977).

147. Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

148. Charles Fried, *Speech in the Welfare State – The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992).

149. Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 681 (1991).

who can parse truth from falsity and otherwise withstand potential harm from speech that contains false factual content or lacks meritorious ideas.[150]

4. The Inter-Connective Nature of First Amendment Values

While self-governance, truth-finding, and autonomy are distinct values that the First Amendment aims to protect, ultimately they are fused together. Professor Tokaji has noted that "[i]t's unfortunate that the truth and democracy theories of free speech were decoupled over time. As consensus has developed around democratic self-government as the main justification for protecting speech, we have lost sight of the fact that democracy and truth are intertwined."[151] Similarly, the Supreme Court has recognized that "[t]he individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion, although the two often converge."[152]

Effective self-government requires a certain level of public intelligence, and without public intelligence, self-government becomes impossible.[153] Public discourse is the mechanism by which the individual interest in self-expression manifests itself as a means to further the goal of self-government.[154] Speakers who engage in public discourse "are constitutionally presumed to be engaged in the formation of public opinion, to the end of making government responsive to their views."[155]

Professor Fiss highlighted the interconnection among the autonomy, self-government (democracy), and truth theories supporting the First Amendment as follows: "Autonomy is protected . . . as a means

150. *See* Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1215 (2016).

151. Tokaji, *supra* note 8, at 587.

152. First Natl. Bank of Boston v. Bellotti, 435 U.S. 765, 777 n.12 (1978).

153. *See* MEIKLEJOHN, *supra* note 128, at 69–70; *see also* Meiklejohn, *supra* note 136, at 255; Mark Spottswood, *supra* note 143, at 1232 (observing that knowledge enhances an individual's ability to engage in process of self-government, which enhances societal interests as a whole).

154. *See* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1275 (1995).

155. Post, *supra* note 120, at 484.

or instrument of collective self-determination. We allow people to speak so others can vote. Speech allows people to vote intelligently and freely, aware of all the options and in possession of all the relevant information."[156]

In other words, when speakers express themselves, they enhance their listeners' knowledge, thereby making them smarter and better participants in the structure of self-government.[157] In this way, knowledge enables a person to develop his own perspectives on all aspects of life and influences how he will exercise judgment on both personal matters and those of society as a whole.[158] In sum, knowledge serves as a guide to informed action.[159]

B. The Impact of the Dissemination of False Statements of Fact on First Amendment Values

Scholars have recognized that the dissemination of false factual statements undermines the self-governance, truth-finding, and autonomy values that the First Amendment aims to protect.[160] To say that the dissemination of false factual statements undermines the truth seeking and knowledge enhancing functions is to state the obvious. The wisdom of ideas depends on facts supporting them. If people rely on false content to judge the wisdom of ideas, then their decision-making

156. Fiss, *supra* note 133, at 1409–10.

157. *See* MEIKLEJON, *supra* note 128, at 16–17 ("[t]he freedom of mind that befits the members of a self-governing society is not a given and fixed part of human nature. It can be increased and established by learning, by teaching, by the unhindered flow of accurate information by giving men health and vigor and security, by bringing them together in activities of communication and mutual understanding").

158. *See* Emerson, *supra* note 120, at 880.

159. Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 470 (2019).

160. *See, e.g.*, Helen Norton, *The Government's Lies and the Constitution*, 91 IND. L. J. 73, 100 n.128 (2015) (asserting that false speech undermines democratic self-governance, individual autonomy, fostering the discovery of truth and the dissemination of knowledge); Marc Jonathan Blitz, *Lies, Line Drawing, and Deep Fake News*, 71 OKLA. L. REV. 59, 78 (2018) (factual falsehoods do not promote autonomy and do not provide a foundation for democratic deliberation and collective self-government; rather, factual falsehoods likely undermine these values).

process becomes flawed because it provides people with a false impression of the state of objective reality.[161]

Nor can it be said that counter-speech can help people parse true content from false. Too much empirical data exists that details the psychological dynamics that keep people from ferreting out the truth when confronted with false information.[162] Moreover, as authorities have pointed out, there will be situations, such as elections, that involve narrow windows of time in which people must make decisions.[163] The dissemination of false information during these narrow timeframes and the subsequent reliance on this information can produce "irremediable effects,"[164] including electing officials whom voters would not have voted for had they known the truth.[165]

A comparison between prohibited censorship and the dissemination of false speech is instructive. The First Amendment prohibits the government from controlling the flow of information that any person may receive; any such action constitutes impermissible censorship.[166] However, if censorship constitutes an impermissible interference with the development of individuals' thinking, disseminating false content arguably amounts to more of an interference. The former involves a denial of information that will assist individuals in arriving at conclusions and making choices. If a person has learned *5x* the amount of information, and the government has censored content, she still possesses *5x* the amount of information upon which she can base decisions. However, disseminating false content often involves interfering with information that individuals already possess and serves to negate other information received by the individual pursuant to her First Amendment rights. Hence, if a person has previously received *5x* amount of information about a subject, the dishonest statements may controvert anywhere from *1x* to *5x* of honest information, which, as detailed below, can cancel out the utility of the truthful information in the listener's mind. This, in turn, leaves the listener to parse significantly less

161. Han, *supra* note 23, at 184.

162. *See supra* notes 54–70 and accompanying text.

163. Chesney & Citron, *supra* note 8, at 1778.

164. *Id.*

165. Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections*, 74 MONT. L. REV. 53, 55–56 (2013).

166. *See* Citizens United v. Fed. Elections Comm'n, 558 U.S. 310, 356 (2010).

information to make a rational choice, and otherwise creates confusion.[167]

The dissemination of false statements of fact harms the self-governance process as much as it harms the truth-finding value. As noted earlier, our system of self-government is premised upon, and requires, an informed electorate.[168] It is factual truth that informs political thought and freedom of opinion "'is a farce unless factual information is guaranteed and the facts themselves are not in dispute.'"[169] Justice White was surely correct when he stated that "[m]isinformation. . . is as antithetical to the purposes of the First Amendment as the calculated lie . . . Its substance contributes nothing to intelligent decision-making by citizens or officials."[170]

While the citizenry is expected to be informed, it is not expected that people will spend all their free time studying the issues of the day.[171] The dissemination of false factual statements can result in people supporting the positions endorsed by government officials, which they would not have done if they did not believe the false statements.[172] These mistakes can create outcomes not supported by the public if they

167. *See supra* notes 68–70; *infra* notes 177 and accompanying text.

168. *See, e.g.*, William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 294 (2004); Staci Lieffring, *First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech after* United States v. Alvarez, 97 MINN. L. REV. 1047, 1064 (2013).

169. ROBERT C. POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 29 (2012) (quoting HANNAH ARENDT, BETWEEN PAST AND FUTURE 238 (1968).

170. Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 301 (1971) (White, J., concurring).

171. Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a 'Post-Truth' World*, 64 ST. LOUIS U. L. J. 535, 540 (2020).

172. Hasen, *supra* note 165, at 55–56. The recent technological advances have heightened the risk of people making erroneous choices because of false speech. Technology has created the ability of messengers to bombard people with massive amounts of factual content. *See* JOHANN HARI, STOLEN FOCUS 30–34 (2022). But such recent technology as Twitter and Facebook provide factual content in concise staccato bursts that has produced shortened attention spans. *Id.* at 34–37; 270–77. This limiting of attention has no doubt exacerbated the problems created by such psychological phenomena as motivated reasoning, confirmation bias, and a limited trust in information provided that is inconsistent with one's belief system. All of this adversely impacts on the population's ability to engage in nuanced and complex thinking. *Id.* at 1141–42.

knew the facts relevant to their particular decisions. Hence, false speech undermines the legitimacy of both the elected officials and the particular positions staked out by the officials to which the false statements contained relevance.[173]

The importance of maintaining the integrity of the voting process justifies restricting the First Amendment freedoms of speakers when their speech interferes with the integrity of the electoral process.[174] This is because, *inter alia*, "'[o]ther rights, even the most basic, are illusory if the right to vote is undermined.'"[175]

There are many variables that impact decision-making, but regardless of how people come to believe what they believe, the dissemination of misinformation that presently exists will result in pernicious outcomes. Evidence suggests that misinformation causes some people to stop believing in facts altogether.[176] The continued dissemination of misinformation creates confusion as to what occurred, and a significant portion of the population will simply come to the conclusion that exactly what occurred is unknowable.[177]

The inability of people to discern truth from falsity and the other psychological dynamics that exist when people hear false speech results in people believing false factual speech, which in turn results in the erosion of a shared reality.[178] The absence of a shared reality has the potential to render the government dysfunctional because, before

173. *See* Lieffring, *supra* note 168, at 1064.

174. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 378–79 (1995) (Scalia, J., dissenting).

175. *Id.* (quoting Wesbury v. Sanders, 376 U.S. 1, 17 (1964)).

176. Stephan Lewandowsky et al., *Beyond Misinformation: Understanding and Coping with the Post-Truth Era*, J. APPLIED RSCH. MEMORY & COGNITION (2017). DOI: 10.1016/j.jarmac.2017.07.008. at 7 (Abstract).

177. *See* Lewandowsky et al., *supra* note 176, at 27. This is what has happened as a result of assertions that vaccines cause autism. The link between vaccines and autism has been debunked. *See, e.g.*, Moises Velasquez, *The Anti-Vaccine Movement's New Frontier*, N.Y. TIMES (May 31, 2022), https://www.nytimes.com/2022/05/25/magazine/anti-vaccine-movement.html. Nevertheless, individuals continue to peddle false information about vaccines. *See, e.g.*, *id.* As a likely result, one poll found that 46% of Americans are unsure as to whether vaccines cause autism. R.J. Reinhart, *Fewer in U.S. Continue to See Vaccines as Important*, (Jan. 14, 2020), https://news.gallup.com/poll/276929/fewer-continue-vaccines-important.aspx.

178. *See, e.g.*, Norton, *supra* note 110, at 342 n.3.

the government can act, there must be some agreement as to the factual underpinnings for any government actions.[179]

False factual statements can also result in people's distrust of the political process, which, in turn, can produce voter alienation.[180] The less people trust the government, the less they will cooperate with it, which adversely impacts the government's ability to govern effectively.[181] People who become disengaged from the political process lose their ability to fulfill their roles in the self-governance structure and become rife for manipulation. Instead of carefully scrutinizing speech and working hard to parse truth from falsity, biases take over, and people reach conclusions consistent with their biases, whether or not the decisions are grounded in reality. They become, as Justice Brandeis feared, an inert people who pose a great menace to freedom.[182]

If nothing else, as a country, we have an intellectually inert populace. As one authority has stated, "'the political ignorance of the American voter is one of the best documented data in political science' [and] . . . . [m]any citizens, scholars have shown over and over, are profoundly uninformed."[183]

Recent events have demonstrated that the dissemination of false factual statements results in a circular process of illegitimacy created by nefarious government officials who wish to impose ideological preferences on the citizenry but lack a sufficient factual basis to do so. The obvious example is the issue of voter fraud. False allegations of voter fraud produce a belief among a certain percentage of the population that voter fraud is a problem that requires government action to remedy.[184] Government officials can then justify taking action to address the non-existent problem, in this case imposing unwarranted

179. *See* Chesney & Citron, *supra* note 8, at 1777.

180. Marshall, *supra* note 168, at 295.

181. Norton, *supra* note 160, at 82.

182. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

183. James Kuklinski et al., *"Just the Facts, Ma'am": Political Facts and Public Opinion*, 560 THE ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI., 143, 145 (1988) (quoting Larry M. Bartels, *Uniformed Votes: Informational Effects in Presidential Elections*, 40 AM. J. POL. SCI. 194 (1996)).

184. *See* Michael Wines, *In Statehouses, Stolen Election Myth Fuels a G.O.P. Drive to Rewrite Rules*, N.Y. TIMES (Feb. 27, 2021), https://www.nytimes.com/2021/02/27/us/republican-voter-suppression.html.

restrictions on voting, on the ground that people believe a problem exists and that in itself requires action.[185]

In this way, the dissemination of false statements of fact by government officials can help grease the runway from democracy to fascism. As authorities have recognized, without a commitment to factual truth, democracy cannot function,[186] and the lack of commitment to factual accuracy creates openings for fascism or autocracy.[187] The dissemination of false factual content amounts to a form of ideological supremacy by producing particular opinions, regardless of whether or not a factual basis exists for such opinions.[188] The undermining of trust in the government created by an inability to discern truth from falsity can create an opening for those with fascist ideals.[189] As one authority has concluded, "[t]o abandon facts is to abandon freedom. If nothing is true, then no one can criticize power, because there is no basis upon which to do so. If nothing is true, then all is spectacle."[190]

An inability to criticize the government results in an inability to check power.[191] An inability to hold government officials to factual truth creates opportunities for those officials who value raw power over democratic ideals to create one's own reality. The creation of what can be incongruously referred to as an alternative reality enables those who desire to erode foundational democratic principles to do so in order to achieve power. Baseless assertions can become facts that justify

185. *See e.g.*, Ben Kamisar, *Florida Passes Voting Law That Includes Restrictions on Vote-by-Mail and Drop Boxes*, NBC NEWS, https://www.nbcnews.com/politics/elections/florida-passes-new-voting-law-includes-restrictions-vote-mail-drop-n1265765 (reporting on a legislator justifing restrictions on voting by asserting that "[f]raud will be reduced as much as we possibly can do it").

186. Tokaji, *supra* note 8, at 570.

187. Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L.J. 1351, 1362 (2019).

188. *Id.* at 1863 (citing LEE MCINTYRE, POST-TRUTH 3 (2018)).

189. *Id.* at 1362.

190. Tokaji, *supra* note 8, at 592 (quoting TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY 65 (2017)).

191. *See* Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1132 (2006) ("[G]overnment deception impairs the enlightenment function of the First Amendment, limiting the citizenry's capacity to check government abuse and participate in self-governance to the maximum extent.").

undemocratic action. Thus, baseless allegations of voter irregularities transmogrify into the existence of voter irregularities. At least five states have recently changed the mechanisms by which votes are tallied and otherwise scrutinized, the effect being to make it easier for political partisans to decide which votes are valid.[192] Similarly, at least fourteen states have passed laws governing the administration and oversight of elections, laws that would have made it easier for Donald Trump to subvert the results of the 2020 election.[193] As one commentator has noted, those who speak of election fraud as if it were an actual problem have done so "to indoctrinate voters with the terror of stolen elections, and to pave the way for a hostile takeover of American democracy in the future."[194] In 2018 two academics published "How Democracies Die," a book that contained numerous parallels between what went on during the first two years of the Trump administration and other countries in which democracy stopped functioning. Even before all of the post-2020 anti-democratic shenanigans that have relied on falsehoods to subvert the democratic process, one of the authors, Steven Levitsky, noted that he and his co-author were criticized as too alarmist, but "[i]t turns out we weren't alarmist enough."[195]

An inability to enforce truth creates an opportunity for those in power to choose their own facts to perpetuate a hold on power for themselves and their political allies. Whether or not their decision was produced by motivated reasoning and confirmation bias, or simply a desire to hold onto power, that 147 members of Congress voted not to certify the election based upon little more than the incessant lying of Mr.

192. *See Voting Laws Roundup: May 2021*, BRENNAN CENTER (May 28, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021.

193. *See* Nick Carasaniti & Reid Epstein, *How Republican States Are Expanding Their Power over Elections*, N.Y. TIMES (June 19, 2021), https://www.nytimes.com/2021/06/19/us/politics/republican-states.html.

194. Jesse Wegman, *Surprise! There's No Voter Fraud. Again.*, N.Y. TIMES (Dec. 17, 2021), https://www.nytimes.com/2021/12/17/opinion/election-vote-fraud-data.html.

195. Travis Waldron, *"We Weren't Alarmist Enough": Experts Warn Trump and GOP Could Destroy Democracy*, HUFFINGTON POST (Sept. 16, 2020), https://www.huffpost.com/entry/trump-republicans-democracy-at-risk_n_5f5fb18fc5b6e27db1314744.

Trump,[196] illustrates the fragile nature of this country constitutional structure at this time. What does it say about the 147 Republicans who accepted the lies about a fraudulent election when in sixty-one of sixty-two cases, judges rejected legal challenges by Mr. Trump?[197]

Moreover, threats to democracy continue to increase. This election cycle those refusing to accept the validity of President Biden's victory have sought to place themselves in positions to determine election outcomes, including the presidential election. Over twenty individuals who believe that Mr. Trump won the 2020 election sought the office of Secretary of State.[198] Election deniers became the Republican nominee for Secretary of State in Arizona, Michigan, Nevada and Pennsylvania.[199] While these candidates lost, the fact that Ted Budd, who believed the 2020 election was stolen, won a U.S. Senate seat in North Carolina illustrates the very real potential for those who subscribe to an alternative reality to subvert democracy.[200] Beyond these offices in the battleground states, more than 370 Republican candidates "questioned and, at times, outright denied the results of the 2020 election despite overwhelming evidence to the contrary."[201] Voters elected almost 200

196. Karen Yourish et al., *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. TIMES (Jan. 7, 2021), https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html.

197. *See* William Cummings et al., *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, U.S.A. TODAY (Jan. 6, 2021), https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001.

198. *See* Jennifer Medina et al., *Campaigning to Oversee Elections, While Denying the Last One*, N.Y. TIMES (Jan. 30, 2022), https://www.nytimes.com/2022/01/30/us/politics/election-deniers-secretary-of-state.html.

199. *See* Jennifer Medina et al., *In 4 Swing States. G.O.P. Election Deniers Could Oversee Voting*, N.Y. TIMES (Aug. 3, 2022), https://www.nytimes.com/2022/01/30/us/politics/election-deniers-secretary-of-state.html.

200. Nick Corsaniti et al*., Election Denial Didn't Play as Well as Republicans Hoped*, N.Y. TIMES (Nov. 9, 2022), https://www.nytimes.com/2022/11/09/us/politics/trump-election-candidates-voting.html.

201. Karen Yourish et al., *How Election Lies Took over the Republican Ticket Nationwide*, N.Y. TIMES (Oct. 13, 2022), https://www.nytimes.com/interactive/2022/10/13/us/politics/republican-candidates-2020-election-misinformation.html.

candidates who questioned or denied the outcome of the 2020 presidential election.[202]

Those whose motivated reasoning and susceptibility to confirmation bias, or desire for power, result in a refusal to accept the results of a fair election may find that they have at least three friends, and perhaps more at the Supreme Court in the most important electoral context of all: presidential elections, as well as other federal elections. At one time or another, at least five justices of the Supreme Court appeared to cede great power to state legislatures to conduct federal elections, which would likely lay the groundwork for giving legislatures the ability to choose presidential electors in any manner that they choose.[203] However at the oral argument in *Moore v. Harper*,[204]two of these justices, Chief Justice Roberts and Justice Kavanaugh appeared more reluctant to cede absolute authority to set rules for federal elections than what their previous writings indicated.[205] Justice Coney-Barrett appeared to subscribe to a position similar to Chief Justice Roberts and Justice Kavanaugh.[206] At the time this article goes to print, there can be no certainty about the extent to which the Supreme Court is willing to cede authority to state legislatures to conduct federal elections. In

202. Karen Youorish et al*., Election Skeptics Are Winning Races Across the Country*, N.Y. TIMES (Nov. 9, 2022), https://www.nytimes.com/2022/11/09/us/politics/election-deniers-midterm-wins.html.

203. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 836, 839 (2015) (Roberts, C.J., dissenting); Democratic Nat'l Comm. v. Wis. State Legislature, 141 S.Ct. 28, 29 (2020) (Gorsuch, J., concurring). Both *Ariz. State Legislature* and *Democratic Nat'l Comm.* involved an interpretation of the Elections Clause of the Constitution. The relevant provision of this clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." Art. I, § 4, cl. 1. Article II, § 1 governs the elections of presidents. This section provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." Any justice who believes that an interpretation of Art I, § 4, cl. 1 requires that absolute power be given to legislatures in federal elections is likely to believe that Article II, § 1 requires that similar absolute authority be given to legislatures in the choosing of a president.

204. Moore v. Harper, 142 S. Ct. 1089 (2022).

205. *See* Adam Liptak, *Supreme Court Seems Split over Case That Could Transform Federal Elections*, N.Y. TIMES (Dec. 7, 2022), https://www.nytimes.com/2022/12/07/us/supreme-court-federal-elections.html.

206. *Id.*

presidential elections, allegations of voter irregularities provide justification for state legislatures that possess a majority but have lost the presidential vote, to ignore the will of the voters and choose their own slate of electors to vote for the candidate of their party.

Government officials who make false statements of fact also undermine the First Amendment autonomy value.[207] False speech undermines autonomy because it interferes with the listener's "control over her own reasoning processes" and thus, furthers the speaker's ends, not the listeners.[208] False speech amounts to tools to manipulate listeners by "tricking" them, which undermines their capacity for autonomous acts.[209] No rational person wants to base her actions on false premises, but that is what a government official who speaks falsely aims for: listeners making judgments and taking action based on the false information disseminated by the speaker.[210]

Moreover, both the importance of knowledge in relation to the furtherance of First Amendment values and the appropriateness of prioritizing listener interests over speaker interests to further First Amendment purposes[211] warrant a recognition that the First Amendment must prohibit not only falsity but misleading statements as well. Elected officials have spent many years parsing language and have speechwriters who also do the same; thus, they have the ability to deceive while using language that is not literally false. What has been said about the false speaker applies in the exact same way to the misleading speaker.

Congress recognized that if it was going to adequately protect consumers in their dealings with merchants, it must prohibit not only false speech but also speech that, while not literally false, nevertheless deceived consumers.[212] Commercial speakers may not speak in a way that "'is literally false as a factual matter.'"[213] However, they also may not speak in a way that "is likely to deceive or confuse customers" even

207. *See, e.g.*, Blocher, *supra* note 159, at 442.

208. Varat, *supra* note 191, at 1114.

209. *Id.*

210. *See* Blitz, *supra* note 160, at 92.

211. *See infra* notes 217–19 and accompanying text.

212. *See* 15 U.S.C. § 11225(a).

213. *See* 15 U.S.C. § 11225(a); S.C. Johnson & Son v. Clorox, 241 F.3d 232, 238 (2d Cir. 2001) (quoting Nat'l Basketball Ass'n v. Motorola, 105 F.3d 841, 855 (2d Cir. 1997).

if it is not literally false.[214] Adequate protection for First Amendment values warrants providing the same protections to political listeners as are provided to commercial listeners, at least to the extent that such protections are consistent with other First Amendment values.

C. The Prioritizing of Competing Listener and Speaker First Amendment Interests

Although the dissemination of false statements of fact undermines the First Amendment interests of listeners,[215] a determination of the scope of listeners' First Amendment rights depends on assessing the competing First Amendment interests of speakers who disseminate false statements of fact and listeners. Speakers who make false statements of fact may have autonomy interests in speaking falsely. However, listeners have autonomy, knowledge enhancing, and democratic self-governance interests in receiving truthful information that empowers their decision-making.[216] Hence, beyond a mathematical tally, listeners possess far greater qualitative interests in receiving accurate information than speakers have in disseminating false information. Professors Meiklejohn and Post believe that "the First Amendment must take as its point of ultimate interest . . . not the 'words of the speakers, but the minds of the hearers.'"[217] This is because the purpose of speech, first and foremost, is to produce wise decision-making by the collective group of individual citizens so as to make society better.[218] As the Supreme Court has recognized, the historic function of freedom of discussion is to "'enable the members of society to cope with the exigencies of their period.'"[219]

214. *Clorox*, 241 F.3d at 238 (quoting *Nat'l. Basketball Ass'n*, 105 F.3d at 855).

215. *See supra* notes 160–83 and accompanying text.

216. Norton, *supra* note 123, at 55.

217. POST, *supra* note 169, at 33–34. (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1965)).

218. *See* MEIKLEJOHN, *supra* note 217, at 25 (recognizing that the process of self-government consists of "a group of free and equal men, cooperating in a common enterprise, and using for that enterprise responsible and regulated discussion"); *see also* Erwin Chemerinsky, *Free Speech and the First Amendment,* 71 OKLA. L. REV. 1, 6 (2018) ("[V]alue of speech is in informing the [public].").

219. First Natl. Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (quoting Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940)).

Professors Massaro and Norton argue that when different competing First Amendment theories collide, the principle of democratic self-governance should serve as "a tiebreaker" for resolving the issue at hand. This seems to be the correct approach, if for no other reason than the nation's system of democracy is a more foundational principle to our constitutional structure than is the First Amendment.[220]

In the commercial sphere, the First Amendment affords protection to a speaker not so much to protect the speaker but "principally by the value to consumers of the information such speech provides."[221] Accordingly, the First Amendment countenances restrictions on the scope of a commercial speaker's First Amendment freedoms in order to protect listeners. Restrictions on speakers' freedoms exist "'in order to dissipate the possibility of consumer confusion or deception.'"[222]

Professor Paul Horowitz has pointed out that the Supreme Court has not explained why citizens can be relied upon to distinguish between true and false statements in the political realm but not in other areas, such as in the commercial sphere or in the context of securities fraud.[223] It is far more likely than not that no reasonable explanation is possible. This is because social scientists have demonstrated that it *is* possible to explain why citizens cannot distinguish between true and false statements in the political realm.[224] However, the amount of protection given to political listeners is inversely related to the amount of protection given to political speakers. Considerations warranting protection for speakers has meant less protection for political listeners than commercial listeners.

The societal interest in minimizing confusion and, ultimately, the formation of erroneous beliefs, *i.e.*, conclusions based on incorrect information, among the citizenry is at least as great, and probably greater, in the political sphere than the interest in protecting consumers in the commercial sphere. Certainly, decisions about whom to choose to carry out one's political preferences in such areas as health care, environmental regulation, civil rights, and international relations are more important than what air conditioner to buy or what fruit juice warrants

220. *Cf. supra* note 175 and accompanying text.

221. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

222. *Id.* (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982)).

223. Paul Horowitz, *The First Amendment's Epistemological Problem*, 87 WASH. L. REV. 445, 457 (2012).

224. *See supra* notes 54–70 and accompanying text.

drinking.[225] Hence, if the First Amendment provides less protection to listeners in the political sphere than in the commercial, it cannot be that listener interests in the commercial sphere are greater than in the political sphere.

If listener interests in the political sphere are as great, if not greater, than in the commercial sphere, then the lesser protection for listeners in the political sphere than in the commercial sphere can first be explained by a recognition that the First Amendment entitles political speakers to more protection than the First Amendment provides to commercial speakers. Political speech is deemed to be of greater value than commercial speech because, as has been explained, "in a democracy, the economic is subordinate to the political."[226] However, if political speakers warrant greater protection than commercial speakers, then political listeners should be entitled to more protection than commercial listeners. Hence, another reason must exist for protecting false political speech more than commercial speech.

Professor Reddish provides the answer. He concludes that the Supreme Court has been more solicitous of political speech than commercial speech, not because of the value of political speech but because of the greater danger of regulation in the political sphere.[227] First Amendment jurisprudence recognizes that if the government is permitted to regulate political speech, those in power can use their authority in politically motivated ways to harm their opponents.[228] The ability of the government to determine truth and falsity would give the government an unprecedented censorial power that would chill speakers.[229]

225. *See* In POM Wonderful, LLC, v. Fed. Trade Comm'n, 777 F.3d 478, 499 (D.C. Cir. 2015). The Court of Appeals scrutinized in substantial detail the claims of a maker of pomegranate products to determine whether the First Amendment permitted it to make the claims that it made. The court found that First Amendment did not protect the claims because numerous studies did not adequately substantiate its contentions. *See id.* at 490–505.

226. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 599 (1980) (Rhenquist, J., dissenting).

227. Martin H. Redish, *Values of Free Speech*, 130 U. PA. L. REV. 591, 634 (1982).

228. *See id.*; Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections*, 74 MONT. L. REV. 53, 56 (2013); *see also* Varat, *supra* note 191, at 1120 (recognizing dangers created by partisanship infecting any governmental truth-finding process).

229. United States v. Alvarez, 567 U.S. 709, 723 (2012).

Hence, as one federal appellate court has concluded, it should be "[t]he citizenry, not the government, [who] should be the monitor of falseness in the political arena."[230]

As the dissent in *Alvarez* pointed out, government attempts to determine truth and falsity on matters of public concern create an unacceptable risk of suppressing truthful speech.[231] This is because "[t]oday's accepted wisdom sometimes turns out to be mistaken."[232] Hence, as Professor Sunstein has noted, if the government were to punish or censor what it characterized as falsity, it might punish or censor what turns out to be true.

The ability to sanction or otherwise regulate speech "also opens the door for the state to use its power for political ends," thereby creating an impermissible risk of an abuse of power.[233] The First Amendment limits government interference with speech also because such action can result in the suppression of those with unpopular views and those whom the government views as an unwanted check on its authority.[234]

Concerns about the ability of those in power to use their authority to suppress or sanction unpopular speech that ultimately turns out correct, and regulate speech for political ends are relevant to a consideration of competing First Amendment interests when the government passes a law regulating speech and hence, seeks to sanction speech. As detailed below, it is far less relevant when assessing the competing interests of listeners and speakers and determining how to best accommodate these competing interests in a way that best furthers First Amendment values.

The enforcement of factual truth and falsity by individuals or entities with standing, at least as to those factual contentions that government officials have put into issue, does not result in one of the justifications for protecting false speech: government officials seeking to enforce truth for political gain. Rather, enforcement of truth is being done by one or more citizens to help facilitate a more informed citizenry in order to further the political aims of each of the citizen

230. Care Comm. V. Arneson, 766 F.3d 774, 796 (8th Cir. 2014).

231. *See Alvarez*, 567 U.S. at 751–52.

232. *Id.* at 752 (Alito, J., dissenting).

233. *Id.*

234. *See* Varat, *supra* note 191, at 1120.

plaintiffs. The dangers involved when the state attempts to regulate speech should not leave the citizenry, as a whole, defenseless when government officials who seek to undermine First Amendment values speak. Indeed, the citizenry's enforcement of false speech made by government officials amounts to quintessential self-governing action.

In sum, speakers' rights have been developed in the context of government attempts to regulate speech. For the reasons detailed, the First Amendment has placed substantial limits on these government attempts to do so. Hence, the rights of speakers are a function, to one degree or another, of the need to place limitations on the government. However, this does not mean that the First Amendment does not impose restraints independent of government attempts to limit speech. In the absence of such government attempts, the constitutional equation differs from when government intervention exists.

The vindication of a listener's First Amendment right to truthful disclosure would require courts to act as ultimate arbiters of truth and falsity in actions brought by a listener with standing or those with third-party standing. However, judges determine factual truth every time they conduct a bench trial, and numerous authorities recognize they are well-suited to make these determinations, as do some of the most eminent constitutional scholars.[235] Justice White recognized that the legal system relies on judges and juries to make decisions regarding life and

235. *See* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1420 (1986) (noting that judges are ultimate guardians of constitutional values and more likely than other government officials to be independent from political forces due to tenure and professional norms to which they are subject); *see also* Sunstein, *supra* note 8, at 398; (notwithstanding imperfections of judges and the legal system, such as biases, judiciary serves as an important check on self-serving actions of those in government); *see also* Emerson, *supra* note 120, at 897 (discussing independence of judiciary, its relative immunization from political pressures, the training of judges, and the use of political procedures make judges appropriate guardians of First Amendment values); *see also* Tokaji, *supra* note 8, at 583 (observing that the judicial process that requires judges to base their decisions on evidence renders them better able than other government officials to determine truth and falsity); Thomas Kane, *Malice, Lies and Videotape: Revisiting New York Times v. Sullivan in the Modern Age of Political Campaigns*, 30 RUTGERS L.J. 755, 797 (1999) (noting that, notwithstanding imperfections of courts, we trust them to make determinations of truth in the whole range of human affairs).

liberty. Hence, "[i]t is perverse indeed to say that those bodies are incompetent to inquire into the truth of a statement of fact."[236]

One must further recognize that when assessing the scope of listener rights, constitutional rights do not serve only to enhance "the autonomy or atomistic self-interest of the right holder" but also serve to promote "the realization of various common goods."[237] As noted, one such common good that the First Amendment protects is democratic self-governance.[238] This view of the First Amendment is consistent with that of Professor Emerson, who has stated that freedom of expression is a right whose function is to reach other broader goals. Hence, the resolution of First Amendment questions must take into account other values, such as public order, justice, moral progress, and the need to promote those ideals to fit the First Amendment into the broader structure of society.[239]

Professor Pildes further instructs that "there is likely no single unitary conception of the role rights play in American constitutional practice."[240] However, it certainly appears that the Framers designed the First Amendment, more than other rights, to further the common good.[241] Accordingly, any interpretation of the First Amendment must "remain consistent with democracy itself," which means that "'public officials can[not]use democratic processes to destroy democracy.'"[242] This is another reason why First Amendment jurisprudence requires courts to devise rules that protect the integrity of underlying First Amendment values, which includes citizen participation in the governing process.

236. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 768 n.2 (1985) (White, J. concurring).

237. Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 732 (1998).

238. *Id. See also supra* notes 124–41 and accompanying text.

239. Emerson, *supra* note 120, at 916; *see also* Post, *supra* note 154, at 1279 (because constitutional value inheres in specific forms of social order, speech has received protection necessary to accomplish this task); *see also id.* (arguing that courts should view the First Amendment as an instrument that helps define and sustain desirable social practices).

240. Pildes, *supra* note 237, at 731 n.20.

241. *See supra* notes 120-44 and accompanying text.

242. Richard H. Pildes, *supra* note 237, at 740 n.46 (quoting AMY GUTMAN, DEMOCRATIC EDUCATION 14 (1987)).

Admittedly, courts must also give appropriate weight to other relevant interests and consequences flowing from any particular interpretation of law that they make.[243] One interest that courts would no doubt deem relevant is the interest of government officials, particularly the President, in avoiding unwarranted scrutiny of, and interference with, his actions.[244] However, requiring a president and other government officials to speak truthfully would not facilitate excessive scrutiny of a president's actions. He can gather all the information he deems appropriate by speaking to whomever he wants and analyze any data that he deems necessary. He simply cannot then lie to, or otherwise mislead, the country in an attempt to garner political support for his actions. Because a challenge to the truthfulness of presidential speech would not amount to a challenge to any substantive aspects of a presidential decision, a challenge to presidential speech is not the type of action that would warrant a court declining jurisdiction pursuant to the political question doctrine, a relevant consideration when speech involves matters of foreign affairs.[245]

Admittedly, private citizens could attempt to harass those with opposing political views via the litigation process. Indeed, Professor Norton has pointed out that if someone asserted that an elected official spoke falsely, courts might be reluctant to scrutinize the allegation on the ground, *inter alia,* that partisan interests might have motivated the challenger.[246] However, the cost of litigation and the ability of courts to sanction those who file frivolous lawsuits should adequately deter abusive citizens who may seek to act in ways antithetical to First Amendment values. Furthermore, courts must recognize that partisan interests may have motivated a governmental speaker to speak falsely as much as it motivated the challenge to the speech. Ultimately, a consideration of partisan motivation would factor into any credibility determination and the court's decision.

One can also argue that permitting citizens to challenge government official's speech would unduly interfere with the official's governmental duties by spending too much time defending her speech in court. Admittedly, preparation of a defense might require the official

243. *See* Koppelman, *supra* note 36, at 712.

244. *See, e.g.*, Norton, *supra* note 160, at 118–19.

245. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPALS AND POLICIES 154–55 (6th ed. 2019).

246. *See* Norton, *supra* note 160, at 118–19.

to speak to her lawyers about what she believed constituted the factual basis underlying her speech. However, most of the work in defense of the speech would fall to the official's lawyers to build a case as to why a court should not intervene to remedy the speech.

Finally, Professor Varat believes that the ability of any citizen to walk into court to sanction false speech without a concomitant requirement of fault "leaves inadequate breathing space for freedom of speech."[247] This may be true of the citizenry as a whole; it is less likely to impact elected and other governmental officials.[248]

D. The Impact of Issues of Chill on the Assessment of First Amendment Interests

The First Amendment protects people from being deterred from speaking.[249] Hence, any delineation of First Amendment boundaries must not result in excessively chilling of individuals when they wish to speak. We do not want to chill speech because we do not want to suppress valuable ideas.[250] Accordingly, First Amendment jurisprudence recognizes the difference between the chilling of protected, as opposed to unprotected, speech.[251] On the other hand, the chilling of unprotected speech can chill protected speech.[252]

However, the chilling of false statements of fact produces a social benefit and should be welcomed at times. As Professor Sunstein has asserted, the most appropriate question to ask is not whether speech

247. Varat, *supra* note 191, at 1132.

248. *See infra* notes 260–62 and accompanying text.

249. *See* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B. U. L. REV. 685, 689 (1978) (equating chilling effect within First Amendment jurisprudence with deterrence).

250. *See* United States v. Alvarez*,* 567 U.S. 709, 731–72 (2012) ("dangers of suppressing valuable ideas are lower where . . . regulations [of false speech] concern false statements about easily verifiable facts that do not concern such subject matter[s]" as philosophy, religion, history social sciences and the arts).

251. *Compare* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 336 (2010) (recognizing pernicious nature of chill on protected speech caused by government regulation), *with Alvarez*, 567 U.S. at 739 (lies that have "no value in and of themselves" means that "proscribing them does not [impermissibly] chill any valuable speech").

252. *Alvarez*, 567 U.S. at 733 (Breyer, J., concurring).

has been chilled but what is the "optimal level of chill" to which a speaker should be subject.[253]

A number of factors impact the degree of chill a speaker faces. The severity of the sanction imposed on a speaker for making an unlawful statement is one factor.[254] The Supreme Court has recognized that criminal sanctions create a greater deterrent than civil sanctions.[255] Similarly, the degree of certainty as to what speech the First Amendment protects and what speech it does not also impacts the level of chill a speaker faces.[256] Less of danger from such suppression exists when people are deterred from only making false statements of fact.[257]

The Supreme Court's decision in *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, Inc.*[258] serves as a highly instructive guide as to how to reconcile the public interest in preventing false and misleading factual information with interest in not unduly chilling potentially socially useful speech. The Court gave two reasons for its conclusion that the First Amendment did not protect false or misleading commercial speech, notwithstanding the importance of ensuring that the flow of truthful and legitimate commercial remained

253. Sunstein, *supra* note 8, at 407.

254. *See* Ashcroft v. Free Speech Coalition, 353 U.S. 234, 244 (2002).

255. *See* Virginia v. Hicks, 539 U.S. 113, 119 (2003). Admittedly, the Supreme Court concluded that the cost of civil litigation can serve to deter speech. *See* Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 794 (1988). However, the operative question is not whether civil litigation will chill, but the degree to which it will. First, the relative lack of difficulty in verifying statements of fact should lessen the fear of civil liability. Second, while a violation of the First Amendment arguably subjects a government official to liability under 42 U.S.C. § 1983, the availability of the qualified immunity defense lessens the deterrent impact. Finally, at least federal officials need not fear the costs of representation. *See* DEPARTMENT OF JUSTICE, § 4-5.120 TORTS BRANCH COMPONENTS–CONSTITUTIONAL AND SPECIALIZED TORTS, https://www.justice.gov/jm/jm-4-5000-tort-litigation (documenting representation by Department of Justice in civil right suits on behalf of current and former federal officials sued in their official duties).

256. *See* Denver Area Educ. Telecom. Consortium v. F.C.C., 518 U.S. 727, 751 (1996).

257. *See Alvarez*, 567 U.S. at 731–72 (Breyer, J., concurring) ("dangers of suppressing valuable ideas are lower where . . . regulations [of false speech] concern false statements about easily verifiable facts that do not concern such subject matter[s]" as philosophy, religion, history social sciences and the arts).

258. 425 U.S. 748 (1976).

unimpaired.[259] First, those who make statements of fact in the commercial realm are better positioned to verify the truth and falsity of the information about which they have spoken.[260] Second, the ability of speech to produce profits serves as an adequate incentive to keep talking even if the commercial speaker will face sanctions if he speaks falsely.[261] Indeed, these two attributes of commercial speech produce sufficient protections for a commercial speaker's First Amendment interests, which means that the First Amendment can require additional speech to ensure that the speaker's message is not misleading.

Government officials who make statements of fact are far more similar to commercial speakers than they are to people like Jacob Abrams, the person whose plight Justice Holmes was called upon to determine when he first posited the market of ideas. First, imposing a requirement of speaking truthfully and a manner that does not mislead should not deter them from entering the marketplace of ideas when they so desire. The nature of their job requires them to speak and learn about the subjects about which they speak.

Similarly, the resources that government officials possess enable them to verify statements of fact without too much difficulty. This means that when they speak falsely or misleadingly, they do so either as a strategy to misinform or as a result of a lack of care as to the impact of erroneous speech on the mind of the listener. Furthermore, because government officials also "'usually enjoy significantly greater access to the channels of effective communication,'"[262] their ability to communicate is far easier than that of the average citizen. All of these considerations combine to make chill of government officials' speech far less of a concern than when the populace as a whole is subject to speech regulation.

E. The Impact of the Government-Official Speaker/Citizen-Listener Relationship on First Amendment Values

The Supreme Court has recognized that the nature of a relationship between a speaker and listeners will, at times, warrant the

259. *Id.* at 771 n.24.

260. *Id.*

261. *See id.*

262. Milkovich v. Lorain J. Co., 497 U.S. 1, 15 (1990) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 344–45 (1974)).

imposition of constraints on speech that might not otherwise exist.[263] This is particularly the case when either the knowledge speakers possess or the relationship between speaker and listener, places the speaker in a position of trust.[264] For example, underlying the informed consent doctrine is a recognition that it is appropriate to require a physician to provide information to a patient to enable her to make an informed, autonomous decision about the medical treatment that she chooses to receive.[265]

Professor Post has pointed out that because governmental organizations must manage the speech of those within their control, the First Amendment permits restrictions on the speech of those within the organizations' control.[266] A slightly different way of looking at the same issue is to recognize that people who choose certain governmental vocations must accept less First Amendment protection for their speech because the nature of their work justifies imposing restraints on their speech in furtherance of governmental objectives. For example, the

263. *See* Norton, *supra* note 123, at 37 (noting that although professionals and other fiduciaries "may have substantial expressive interests of their own, governments—and courts—sometimes choose to privilege listeners' autonomy, enlightenment and self-governance interests in receiving accurate information by prohibiting lies and requiring truthful disclosure"). Two cases illustrate this principle. In Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626 (1985), the Court upheld the imposition of sanctions on an attorney for making deceptive advertisements regarding a client's potential responsibility to pay fees. *Id.* at 650–52. In NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), the Court stated that an employer's speech to employees about the potential impact of unionization "must be carefully phrased on the basis of objective fact." *Id.* at 618.

264. Helen Norton, *Powerful Speakers and Their Listeners*, 90 UNIV. COLO. L. REV. 441, 460 (2019); *see also* Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1216 (2016) (recognizing that discrepancy in knowledge between doctor and patient warrants imposing constraints on the speech of doctors when engaged in the doctor-patient relationship).

265. *See* Norton, *supra* note 123, at 59, n.109 (quoting Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 972 (2007)) ("'Informed consent doctrine mandates the communication of medical knowledge to the end that a lay patient can receive the expert information necessary to make an autonomous, intelligent and accurate selection of what medical treatment to receive.'").

266. Post, *supra* note 154, at 1274. Professor Post gave the following examples: the military can regulate speech of its soldiers, courts can manage speech of litigants and witnesses, and schools can manage the speech of their students. *Id.*

military can impose restraints on the speech of its soldiers to further the special needs of the military.[267] Similarly, Congress can limit the political speech of federal employees in order to avoid the appearance of undue partisanship in the federal government and ensure that federal employees do not accrue a disproportionate amount of political power.[268] On a more general level, a government agency can limit the speech of its employees if an adequate justification exists for treating the employees differently from others in the general public.[269] The nature of government service is such that "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom."[270] These cases illustrate the principle that "the source of the speech . . . may be relevant in determining whether a given message is protected under the First Amendment."[271]

Professor Norton has explained why the relationship between certain speakers and those who listen to them impacts the scope of the speaker's First Amendment freedoms.[272] This is because, in certain speaker-listener relationships, listeners should be able to rely upon the speech made by those with more knowledge because the listener lacks access to the content of information that is the subject of discussion and should not be expected to gather the information on her own.[273]

In this vein, fiduciary law serves as a framework under which the law should allocate responsibilities among an elected official-

267. Brown v. Glines, 444 U.S. 348, 354–57 (1980).

268. U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO, 413 U.S. 548, 565 (1973).

269. Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

270. *Id.*

271. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 585 (1980) (Rehnquist, J., dissenting).

272. *See* Norton, *supra* note 123, at 56 (quoting Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 869 (1999) ("'Content-based government regulation that assists in maintaining the boundaries of the discourse is . . . permissible, although similar regulation would not be allowed absent the special relationship between the speaker and listener.'").

273. *See* Norton, *supra* note 123, at 57 (citing SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 132 (2014)).

speaker and her constituent-listeners.[274] Our founding fathers, and going back further, John Locke, recognized that public officials served in a fiduciary role.[275] It is hard to argue otherwise.

When we as citizens cast our vote, we place our trust in the candidate to both consider our preferences and utilize her knowledge to act in our best interest.[276] As such, elected officials are our agents in carrying out our wishes through the law-making process.[277] The trust we put in the officials for whom we cast our vote warrants the imposition of a concomitant duty to act in our best interest, just as any fiduciary would be required to do.[278]

When running for office, elected officials seek our vote by telling us that they will serve us better than will the other candidate. We should expect that the trust that we place in our elected officials through our vote results in them telling us the truth. This is because, by virtue of holding elected office, elected officials have far greater access to information pertaining to the affairs of the day, which makes them far more knowledgeable about such affairs.[279] This creates an unequal and asymmetrical relationship that renders citizens vulnerable to those in whom they have placed trust at the ballot box.[280]

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274. *See, e.g.*, Norton, *supra* note 160, at 119 n.211 (recognizing that "the public should expect the same loyalty from its government as it would from other fiduciaries")

275. David L. Ponet & Ethan J. Leib, *Fiduciary's Law's Lessons for Deliberative Democracy*, 91 B.U. L. REV. 249, 1254–55 (2011).

276. This is the case regardless of the particular model of democracy to which one subscribes. Under the liberal version, citizens view the legislative process as a means for promulgating their own individual values. Under the republican form of democracy, the legislative process aims for the common good. *See* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 680–81, 680 n.249 (1991).

277. *See* Frank I. Michelman, *Traces of Self-Government*, 100 HARV. L. REV. 4, 72 (1986).

278. *See* Norton, *supra* note 160, at 81–82 n.37 (duty of care requires fiduciary to act for the sole benefit of those whom they serve).

279. One can argue that candidates for office lack the resources possessed by officeholders. This may be the case. However, the financial ability of candidates to run for office means that they possess enough resources to fact-check information about which they speak.

280. *See* Ponet & Leib, *supra* note 275, at 1255–56 (arguing that it is appropriate to consider elected officials as fiduciaries because "[t]he inequality and asymmetry within the [fiduciary] relationship usually flows from the fiduciary's possession of

Acting in citizens' best interest includes providing them with accurate information in the government official's possession regarding important events of the day so that each citizen can assess the merits of government action pertaining to the particular issue at hand in regard to both the actions of each individual representative and the collective action of the government as a whole. Eventually, this will help inform the thinking process of citizens the next time they cast a ballot.

One can argue that officials must lie at times to govern effectively. However, this is rarely the case. If public knowledge of important information will interfere with effective government performance, officials can simply proceed without speaking. Keeping the citizenry uninformed is antithetical to First Amendment values, but it is less antithetical to First Amendment values than keeping the citizenry misinformed.

F. Defining Listeners' First Amendment Right

If the First Amendment prohibits government officials from speaking falsely or misleadingly, then it is reasonable to ask how this prohibition translates into a right for listeners. One can define the right as follows: the right not to be subject, or have one's fellow citizens subject, to false or misleading material information from government officials on matters of governance. Material information is information that is important or has influence or effect.[281]

First Amendment values and considerations inform this definition. Nine Supreme Court justices have indicated that they believe that the First Amendment does not protect false factual content that is

greater expertise or greater information than the beneficiary, leaving the beneficiary vulnerable to the fiduciary's predation . . . rulers usually have access to information and law-making expertise that lay citizens do not").

281. BLACK'S LAW DICTIONARY 880 (5th ed. 1979); *see also* Martin H. Redish & Julio Pereyra, *Resolving the First Amendment's Civil War: Political Fraud and the Democratic Goals of Free Expression*, 62 ARIZ. L. REV. 451, 477 (2020) (material means "'having a natural tendency to influence or being capable of influencing, the decision-making body to which it was addressed'") (quoting Christopher P. Guzelian, *False Speech: Quagmire?*, 51 SAN DIEGO L. REV. 19, (2014)).

harmful.[282] Materiality is required because speech that is not material will not impact the decision-making of citizens.[283]

Similarly, speech related to matters of governance is the kind of speech that most warrants listener protection. This is because the Supreme Court has recognized that speech of matters of self-governance is the most valued of speech.[284] This means that it is the kind of speech that should contain the greatest protection for listeners. It is to state the obvious to say that speech unrelated to matters of self-governance cannot harm the self-governance process. Likewise, the fiduciary-type relationship between citizen-listeners and government speakers helps support listeners' First Amendment right. Hence, this relationship should help inform the scope of listeners' rights and speakers' obligations. The nature of this relationship warrants imposing a duty of truthfulness on matters relating to self-governance because that is what the citizen-listener/government official speaker relationship relates to: the self-governance process. In addition, matters relating to self-governance are the areas in which it is reasonable to expect officials to develop expertise.

Next, citizens' First Amendment right includes the right to band together with others to further political aims.[285] When false speech impacts the decision-making process of those citizens who believe the speech, it adversely affects the ability of those who oppose the views of the speaker. This supports the conclusion that recognizing that listeners' First Amendment rights include not subjecting all members of the citizenry to false speech. This is because any one individual's right to participate meaningfully in the self-governance process requires that his fellow citizens are informed. Finally, false speech relating to matters of governance is a category of speech that the First Amendment did not historically protect.[286]

282. *See supra* notes 87, 94–95, and accompanying text.

283. To the extent that other areas of the law can serve as a guide as to how society believes it is appropriate to allocates rights and obligations, common law fraud limits listener protection to statements that are material. *See, e.g.*, M & D, Inc. v. McConkey, 573 N.W.2d 281, 284 (Mich. Ct. App. 1997); Hart v. Wright, 16 S.W.3d 872, 877 (Tex. App. 2000).

284. *See supra* notes 2, 226, and accompanying text.

285. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295–96 (1981).

286. *See supra* notes 107–13, and accompanying text.

Assessing the validity of speech from the mind of the listener requires courts to consider not only the truth or falsity of the speech but also its misleading nature. This is because democratic self-governance requires informed decision-making. Prohibiting false but not misleading speech enables government officials to continue to speak in ways that will produce misinformed and ill-informed decisions. It is very easy to speak in differing levels of generalities and specificities as to enable speakers to deceive their listeners when it serves the speakers' purposes. To illustrate, ninety-seven percent of climate scientists have concluded that "'[c]limate-warming trends over the past century are extremely likely due to human activities.'"[287] Hence, a speaker who wants to sow confusion and ignorance can truthfully say, "some scientists believe humans cause global warming, but other scientists believe otherwise." For listeners who do not carefully assess the statement, it creates the impression that the question of whether humans cause global warming is a question for which there is reasonable disagreement, when in all likelihood, this is not the case.

G. Responding to Alvarez and Other Authority Protective of False Governmental Speech

As noted previously, a plurality of four justices in *Alvarez* found that the Stolen Valor Act, which prohibited the making of false statements regarding the receipt of medals in military service, constituted a content-based statute that the First Amendment did not permit. Two justices concurred. This provides support for those who argue that the First Amendment permits making false statements when one speaks politically. Further support for this position exists from cases that have invalidated statutes that sought to prohibit making false statements in political campaigns.[288] Similarly, the government speech doctrine

287. John Inazu, *Holmes, Humility, and How Not to Kill Each Other*, 94 NOTRE DAME L. REV. 1631, 1650 (2019) (quoting *Scientific Consensus: Earth's Climate Is Warming*, NASA, https://climate.nasa.gov/scientific-consensus).

288. *See, e.g.,* Susan B. Anthony List v. Driehaus, 814 F.3d 466, 475 (8th Cir. 2016) (holding that a law criminalizing false campaign speech was not narrowly tailored to meet government interests); 281 Care Committee v. Arneson, 766 F.3d 774, 782–96 (8th Cir. 2014) (holding that a statute criminalizing false statements on ballet initiatives was not narrowly tailored to meet compelling government interest); Commonwealth v. Lucas, 34 N.E.3d 1242, 1248–55 (Mass. 2015) (holding that a content-based regulation prohibiting false election speech was not necessary to serve

grants the government substantial leeway in speaking in order to further its desired policies.[289] However, a number of reasons why *Alvarez*, cases invalidating statutes regulating false election speech, and the government speech doctrine do not compel a result different than that set forth in this article.

A substantial difference exists between the government attempting to limit speech and a citizen seeking to enforce her First Amendment rights as a member of the body politic. Restrictions on content can be traced to *Police Department of City of Chicago v. Mosley*, in which the Court stated, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[290] The Court added, "[t]o permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, *free from government censorship.* The essence of this forbidden censorship is content control."[291]

Hence, just as the Due Process Clause serves as a bulwark against certain government action that infringes on life, liberty, and property,[292] the First Amendment stands as a bulwark against government attempts to limit individual participation in the process of self-governing. Limiting false speech by a government official does not compromise this First Amendment goal when limitations are imposed on the speech of government officials when citizens enforce their listener-based First Amendment rights. Rather, it is consistent with First Amendment values.

compelling governmental interest in free and fair elections); Rickert v. State Pub. Disclosure Comm'n, 168 P.3d 826, 830 (Wash. 2007) (holding that a statute prohibiting making false material information about a candidate violated the First Amendment because it was not narrowly tailored to meet government interests); State ex rel Pub. Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691, 695–99 (Wash. 1998) (holding that a statute prohibiting false political advertising made with malice impermissibly interfered with political speech because it did not serve a compelling state interest).

289. *See infra* notes 301–10 and accompanying text. Presumably, this leeway extends to individuals within the government, at least in the executive branch, whose job it is to help further government policy.

290. Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

291. *Id.* at 92, 95–96 (1972) (emphasis added).

292. Albright v. Oliver, 510 U.S. 266, 303 (1994) (Stevens, J., dissenting).

First, it is simply part of the participatory process of self-governing as it is a citizen's attempt to help make his fellow citizens more informed. A government official who speaks falsely does not build the nation's politics and culture; he tears it down.

Nevertheless, one who disagrees with the thesis of this article can cite the plurality in *Alvarez*, who stated that true speech is the remedy for false speech.[293] However, this statement from the Court should not be interpreted to mean that freedom of speech and thought are so important that the First Amendment proscribes *any* attempts to limit it in any way. Significantly, the Court stated that it held the way it did, *inter alia*, because the government failed to establish through a factual record that prohibiting false speech about military valor was necessary in order for the government to satisfy its interest in ensuring that false claims would undermine public perception of the military.[294]

The concurrence looked to the various contexts in which one's speech could be subject to prosecution, recognizing that harm-causing falsity differed from harmless falsity when assessing the scope of First Amendment protection.[295] These parts of both opinions suggest that a showing of harm through the development of a factual record will warrant limiting the scope of a speaker's right to speak falsely.[296]

Nor does a concern that what has been accepted as true, *i.e.,* factually correct, may turn out to be false warrant giving a speaker leeway to disseminate demonstrably false information. Admittedly, the dissent in *Alvarez* acknowledged that "[t]oday's wisdom sometimes turns out

293. United States v. Alvarez, 567 U.S. 709, 727 (2012).

294. *See id.* at 728.

295. *Id.* at 736.

296. This article has previously addressed some other concerns raised in the various opinions issued by the Court in *Alvarez*. The plurality in Alvarez was concerned about the dangers of giving "government a broad censorial power." *Id.* at 723. Permitting a citizen to stop false speech by a government official does not enhance the government censorial power in any way. *See also id.* at 709. Admittedly, in *Alvarez,* the concurrence recognized that false speech receives some protection because the failure to protect it will chill protected speech. *Id.* at 733. However, as noted, government officials are chilled far less than the citizenry as a whole. Rather, government officials are well-placed to speak carefully and truthfully. *See supra* notes 260–62 and accompanying text. Similarly, another danger posited by the concurrence in *Alvarez* when the government regulates speech*,* the risk of prosecutorial selectivity, *Alvarez*, 567 U.S. at 736, is non-existent when the citizenry enforces falsity.

to be mistaken."[297] It is fair to ask, how often does this happen? The few times that it has does not justify permitting government officials to mislead the citizenry, routinely if officials so desire. As Mill recognized, many propositions become sufficiently established so that the government must accept them as true and act accordingly.[298] Prohibiting government officials from deceiving by disseminating what has been determined to be false content does not foreclose further discussion on the topic. Individual citizens can continue to express their views on the subject. Imposing constraints on government officials while not doing the same to citizens strikes the proper balance between all First Amendment values implicated by the recognition that at times, some, but certainly not all, and probably only a few, matters deemed false have turned out to be true.

Similarly, the cases that have invalided statutes prohibiting false campaign speech do not serve as authority for the proposition that political speech is so important that the First Amendment protects false political speech under any and all circumstances. Rather, courts struck down these statutes because they failed to satisfy relevant criteria that governed government regulation of speech: the statutes were not narrowly tailored to meet compelling government interests,[299] or government interests were deemed not compelling in the first place.[300]

Finally, the government speech doctrine does not confer upon government officials the right to lie and speak misleadingly. The Supreme Court set forth the government speech doctrine in *Pleasant Grove City, Utah v. Summum*,[301] in which the Court stated that "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."[302] Accordingly, the government may speak as it wishes because this freedom is necessary for the

297. *Alvarez*, 567 U.S. at 752.

298. *See supra* note 35 and accompanying text.

299. *See* Susan B. Anthony List v. Driehaus, 814 F.3d 466, 474 (8th Cir. 2016); 281 Care Comm. v. Arneson, 766 F.3d 774, 782–96 (8th Cir. 2014); Commonwealth v. Lucas, 34 N.E. 3d 1242, 1257 (Mass. 2015); Rickert v. State Pub. Disclosure Comm'n, 168 P.3d 826, 830 (Wash. 2007); State v. 119 Vote No! Comm., 957 P.2d 691, 695–99 (Wash. 1998) (holding that a statute prohibiting false political advertising made with malice impermissibly interfered with political speech).

300. State v. 119 Vote No! Committee, 957 P.2d 691, 695–99 (Wash. 1998).

301. Pleasant Grove City, Utah v. Summum, 555 U.S. 460 (2009).

302. *Id.* at 467.

government to function.[303] However, this does not mean that the First Amendment confers *carte blanche* on the government to say whatever it wants.

Rather, the Supreme Court has recognized that both the Free Speech Clause and other provisions of the Constitution impose some limits on government speech.[304] This includes limitations on speech that independently violate constitutional provisions, including the First Amendment.[305] Hence, the government speech doctrine cannot override structures put in place by the First Amendment or other constitutional provisions.

The general thrust of justification for the absence of limitations on government speech is that this speech enables the government to govern as it deems appropriate: "to promote a program, espouse a policy or take a position."[306] Accordingly, government speech serves to give breathing space to the government to exercise the responsibilities delegated to it by the citizenry. It is foolish to believe that the citizenry wants to give government officials the ability to deceive it. The government speech doctrine also serves to help establish the proper structure between the government and the citizenry, which, in turn, helps the citizenry serve as a check on the government.[307]

Hence, government speech is ultimately a component of self-government principles. When the government speaks, "it represents its citizens and carries out its duties on their behalf."[308] As such, government speech must be subject to those First Amendment strictures that support the marketplace of ideas, which serve to produce informed public opinion. The marketplace of ideas, in turn, aims to make the government "'more responsive to the will of the people.'"[309] Hence, the government may speak because "it is the democratic electoral process that first and foremost provides a check on governmental speech."[310] However, "first and foremost" does not mean only. The more

303. *See* Walker v. Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015).

304. *Id.* at 208.

305. *Id.*

306. *Id.* at 208.

307. *See* Ozan O. Varol, *Structural Rights*, 105 GEO. L. J. 1001, 1034 (2017).

308. *Walker*, 576 U.S. at 208.

309. *Id.* at 207 (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).

310. *Walker*, 576 U.S. at 207.

government officials speak falsely, the less informed the public, and the less effective check on the government the electoral process becomes.

IV. DETERMINING WHAT CONSTITUTES A FALSE OR MISLEADING STATEMENT OF FACT THAT WARRANTS JUDICIAL INTERVENTION TO CORRECT

Any attempt to remedy a false statement by a government official will require a court to make two determinations at the outset: whether the statement made is a statement of fact; and, if it is, whether the statement is false. If these determinations result in findings that the speech constituted a factual statement and is false, then, as detailed *infra* at 331–33, these findings would further require a court to examine other First Amendment considerations to determine whether it is appropriate to remedy the speech. [311]

Defamation case law can provide some guidance as to what constitutes a statement of fact. At least in the defamation context, the Supreme Court has said that statements of fact consist of "objectively verifiable event[s]" that can be "provable as false."[312] The Supreme Court has equated ideas with opinions and has said that there is no such thing as a false idea.[313] Ideas or opinions have been characterized as evaluative statements, *i.e.*, statements for which there is little objective basis

311. Because any attempt to remedy the false speech by equitable relief will require a court to exercise discretion, *see infra* note 362 and accompanying text, such exercise of discretion will require a court to consider other factors. *See infra* notes 363–69 and accompanying text.

312. Milkovich v. Lorrain Journal Co., 497 U.S. 1, 22 (1990).

313. *See id.* at 18. The Court distinguished unprotected fact and protected opinion by reconciling the competing interests furthered by Holmes' marketplace of ideas and the need to protect individual reputation. *Id.* The Court then added that "'[h]owever, pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.'" *Id.* (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974)). The Court then concluded that in the context in which the Court had used the terms "idea" and "opinion" the word "idea" in the first sentence is to be equated with "opinion" in the second sentence. *Milkovich*, 497 U.S. at 18. Hence, the above quoted passage simply reaffirmed Holmes' marketplace of ideas concept. *See id.*

to measure whether it is true or false.[314] Evaluative statements can be contrasted with deductive comments. A deductive comment consists of inferences drawn from the existence of other facts.[315] Determining what constitutes objectively verifiable events and deductions drawn from other facts is no easy task, and the line between fact and opinion for purposes of First Amendment protection is often difficult to draw.[316]

In *Milkovich v. Lorain Journal Co.*,[317] the Supreme Court attempted by example to shed light on the distinction between protected evaluative opinion and unprotected deductive comment if proven false. If someone says, "'[i]n my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,'" such a statement constitutes a protected opinion. It is not possible to objectively assess whether or not accepting the opinions of Marx and Lenin makes someone an abysmally ignorant person.[318] On the other hand, "[i]f a speaker says, '[i]n my opinion, John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth."[319]

A court must distinguish between statements that imply a basis in facts that the speaker has not disclosed to the listener and statements of opinion accompanied by a recitation of facts on which one's assessment is based. The First Amendment does not protect the former because, as the Court in *Milkovich* recognized, a reader or listener would infer that the speaker or writer knows certain facts unknown to the recipient of the message, which supports the conclusion, *i.e.,* deductive comment, given.[320] On the other hand, when a speaker sets forth facts that serve as the basis for his conclusions, his statement is to be considered an opinion because it amounts to the speaker's inferences drawn

314. *See* Kathryn Dix Sowle, *A Matter of Opinion: Milkovich Four Years Later*, 3 WM. & MARY BILL RTS. J. 467, 554 (1994).

315. *Id.* at 554, n.524 (1994) (citing W. Page Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1233 (1976)).

316. *See* Ollman v. Evans, 750 F.2d 970, 975 (D.C. Cir. 1984).

317. 497 U.S. 1, 17–23 (1990).

318. *Id.* at 19–20.

319. *Id.* at 18.

320. Gross v. New York Times, 82 N.Y.2d 146, 153–54 (1982).

from underlying facts[321] or amounts to a proffered hypothesis that serves as a basis for the conclusion drawn by the speaker. This conveys to the audience that the proffered statement is conjecture only.[322]

That the 2020 presidential election was stolen from Donald Trump is an example of a deductive comment. It is a statement of fact because it implies the existence of other facts that support the inference that there were events that necessarily lead to the conclusion that if all the relevant election rules were followed by election officials and subsequently enforced by the courts, Donald Trump would have won the 2020 presidential election. It is a deductive comment because it consists of one or more inferences drawn from the existence of other facts.[323]

While defamation litigation can provide some guidance for determining what types of statements the First Amendment might warrant restricting, the values at stake in defamation litigation involve reputational harm, and thus, defamation litigation, while perhaps helpful, is not necessarily completely transferrable to the issues at hand. As two courts have recognized, "the term 'fact' need not have the same meaning in every legal context. The meaning we give to it should depend on the purposes of the law being applied."[324] Hence, an assessment of the type of speech from government officials that the First Amendment prohibits, *i.e.*, speech that does not fall neatly within a fact or opinion categories, requires an evaluation of the values that the First Amendment furthers.

A defamation lawsuit pits an individual's reputational interest against the societal interest in the free flow of information, often, if not

321. *See* Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1290 (4th Cir. 1987).

322. *See Gross*, 82 N.Y.2d at 154. Since *Milkovich* numerous courts have found that the First Amendment protects opinions and subjective assessments of events when they contain the factual underpinnings for the author's beliefs. *See e.g.*, Moldea v. New York Times Co., 22 F.3d 310, 317 (D.C. Cir.), *cert. denied* 513 U.S. 875 (1994); Partington v. Bugliosi, 56 F.3d 1147, 1156 (9th Cir. 1995); Chapin v. Knight-Ridder, Inc., 993 F.3d 1087, 1093 (4th Cir. 1993); Phantom Touring, Inc. v. Affiliated Publ'ns, 953 F.2d 724, 730 (1st Cir.), *cert. denied*, 504 U.S. 974 (1992).

323. *See* Sowle, *supra* note 314, at 554 n.254 (citing Keeton, *supra* note 315, at 1233).

324. Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302 (8th Cir. 1986); *see also Crawford Fitting Co*., 829 F.2d at 1288 n.27.

generally, regarding matters of public concern.[325] In this way, a defamation defendant generally represents the public interest in advancing knowledge through not only the particular speech at hand but through other speech that the disseminator of speech may make. On the other hand, a defamation plaintiff stands as a potential barrier to knowledge by taking steps to deter speech that might benefit the public.[326]

No doubt because courts recognize the importance of speech to public discourse, defamation case law tends to favor speakers. The Supreme Court has directed lower courts to overlook minor inaccuracies in the alleged libelous statement and instead focus on whether the substance of the statement is true.[327] Similarly, some circuit courts have held that when determining whether a statement constitutes an actionable factual assertion or a non-actionable opinion, "[w]here the question of truth or falsity is a close one, a court should err on the side of non-actionability."[328]

However, the calculus should be different when there exists questions as to whether government officials have misinformed the citizenry as a whole as to make their judgments about issues of self-governance less informative. It is no longer one individual's interest in reputation against the interests of the citizenry as a whole in obtaining information. Rather, it is a government official's interest in attempting to persuade the citizenry against the citizenry's interest in making an informed decision about a particular issue relating to the affairs of the day. The speaker and citizenry are not aligned. Accordingly, the type of deference courts give to speakers in the defamation context is not warranted when someone asserts that a government official speaks falsely or misleadingly.

325. *See, e.g.*, McCabe v. Rattiner, 814 F.3d 839, 843 (1st Cir. 1987) (recognizing potential impact of defamation action to adversely impact on "freedom of debate that lies at the core or our democracy"); Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 515 (1991) (stating that defamation action exists to redress injury to reputation by defamatory and false statement).

326. *Cf.* Time, Inc. v. Hill, 385 U.S. 374, 388–90 (1967) (discussing importance of the role the press when recognizing that the First Amendment bars sanctions against innocent and negligent misstatements but not calculated falsehoods).

327. *See* Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 516–17 (1991).

328. Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1292 (D.C. Cir. 1988); *see also* Steam Press Holdings, Inc. v. Haw. Teamsters, Allied Workers Union, Loc. 996, 302 F.3d 998, 1008 (9th Cir. 2002).

Hence, whereas courts err on the side of the speaker in a defamation lawsuit, both the prioritizing of the listener interests over those of the speaker and the lesser chill felt by government officials when they speak together warrant courts erring on the side of the listener when assessing whether a statement constitutes one of fact or opinion. Hence, the difference in settings between a defamation lawsuit and a situation in which one attempts to remedy a government official's speech that can mislead the citizenry should produce some different results in terms of what constitutes protected and unprotected speech. To illustrate, one type of statement that has been held to constitute a protected opinion in the defamation context that should not receive similar protection when uttered by a government official when trying to persuade is what one can characterize as a predictive statement. In a defamation lawsuit, a speaker's assessment of what will occur, which in one particular case was an assessment that an attorney "'will' be disbarred, is but an outsider's prediction of the uncertain outcome of a future adjudication," and hence constitutes protected opinion.[329]

However, predictive speech is one type of empirical statement: a statement that gives information based upon the speaker's experience in the world.[330] This includes assessments about what will follow from the existence of one occurrence. "If Congress passes this piece of legislation, the following consequences will result" is an example of this type of empirical statement. People often rely on predictive statements from government officials because they lack the resources, ability and/or time to make a reasoned assessment of this type of statement.

To illustrate, one month after Sarah Palin made one of the more infamous predictive statements in recent memory when she said that the Affordable Care Act would produce death panels, a poll found that thirty percent of the public believed that the statute contained provisions for death panels.[331] It is more than reasonable to ask what percentage of people opposed passage of the Affordable Care Act, legislation that provided life-saving and significant life-enhancing treatment

329. Lewis v. Time, Inc., 710 F.2d 549, 552 (9th Cir. 1983).

330. JOHN WILSON, LANGUAGE & THE PURSUIT OF TRUTH 58 (Cambridge, University Press, ed., 1956) (1967).

331. Angie Holan, *Sarah Palin Falsely Claims Barack Obama Runs a 'Death Panel,'* POLITIFACT (Aug. 10, 2009), https://www.politifact.com/factchecks/2009/aug/10/sarah-palin/sarah-palin-barack-obama-death-panel.

to many, because they wrongfully believed that the Affordable Care Act would create death panels.

On one hand, one cannot verify as true or false a statement that asserts a particular result will follow from the existence of another occurrence because there is nothing to verify. Nevertheless, while one cannot verify a prediction, it is possible to assess the likely accuracy of predictive statements. Hence, the use of predictive statements in the political sphere will require courts to assess the likelihood of an event occurring to determine whether a predictive statement is true or false. Using Sarah Palin's "death panels" statement as an example, a determination of truth or falsity would require a careful review of the Affordable Care Act to determine if it contained provisions for which it would be reasonable to interpret to provide discretion to hospital administrators to withhold care for those near death.

Pertinent to the present analysis is the concurring opinion of Justice Talmadge in *State v. 119 Vote No! Committee.*[332] In *119 Vote NO! Committee*, the state sought to sanction speech that opposed a voter initiative titled the "Death with Dignity Act." A leaflet distributed by opponents of the initiative would permit doctors to end patients' lives without safeguards, lacked rules protecting against the coercion of patients, and further lacked protection for vulnerable individuals.[333] Justice Talmadge concluded that these statements constituted "debatable assertions of opinion" and "were sufficiently debatable to fall within the wide latitude this Court has traditionally given to political speech."[334] The contents of the initiative illustrate that it is often difficult to apply the lessons of *Milkovich* in which the Court attempted to illustrate the difference between fact and opinion with hypothetical statements about John Jones and those who subscribe to the teachings of Lenin and Marx. It may be impossible to determine who constitutes a vulnerable individual and what constitutes coercion. On the other hand, there may be other statutes similar to the initiative in question that contain the specific rules governing communication between physicians and those with terminal illness, which contain specific procedural protections that care providers must adhere to before one can

332. State v. 119 Vote NO! Committee, 957 P.2d 691, 701 (Wash. 1998) (Talmadge, J., concurring).

333. 957 P.2d at 711.

334. *Id.*

choose to end one's life. The lesson of this case is not that all assessments of the impact of a law are opinions that are exempt from challenge, but rather that the impact of laws are *sometimes* sufficiently uncertain that a court would lack the ability to determine whether statements about them are false.[335]

Assessing the accuracy of the likely occurrence of a future event is not an uncommon task for courts. They do so in such areas as civil commitment and sentencing when they determine a person's dangerousness, *i.e.*, the likelihood of a person causing harm.

Just like an assessment of danger, an assessment of the accuracy of any predictive statement requires an assessment of the factual predicates underlying the predictive statement. Take, for example, one of Mr. Trump's many statements about mail-in ballots: that there is no way that they "will be anything less than substantially fraudulent" subject to illegal printouts and fraudulent signatures.[336] However, empirical data establishes that mail-in ballots do not result in fraudulent voting.[337] Statements like these illustrate why the prioritizing of listener interests over that of speakers requires holding government officials accountable for speech like this that is not grounded in fact. First, the position of trust that a president carries has enabled Mr. Trump to influence how a substantial portion of the population thinks. Moreover, exempting statements like this from scrutiny greases the skids for those with autocratic aims to create an alternative sense of reality that justifies autocratic actions by providing a false factual basis that justifies anti-democratic action that could never have been taken in the absence of this false factual content.

To be sure, this article raises questions about how much leeway should be given to government officials when they speak. It will require courts to draw lines. One can find an infinite number of

335. Courts often encounter difficulty applying legal standards. *See infra* note 361 and accompanying text for an example of when a court encountered difficulty in trying to determine whether a speaker made a statement of fact or opinion.

336. *See supra* note 1 and accompanying text.

337. *See, e.g.*, Matt Baretto et al., *Vote by Mail: Debunking the Myth of Voter Fraud in Mail Ballots*, UCLA VOTING RIGHTS PROJECT (Apr. 14, 2020), https://latino.ucla.edu/research/ucla-voting-rights-project-debunking-the-myth-of-voter-fraud-in-mail-ballots; *Debunking the Voter Fraud Myth*, THE BRENNAN CENTER (Jan. 31, 2017), https://www.brennancenter.org/our-work/research-reports/debunking-voter-fraud-myth.

statements that would no doubt pose difficulty for courts when determining whether a statement is factual in nature and false as to warrant remedying. Let's take a few examples and see how courts might come down. Reasonable people might disagree as to how these cases might play out, but these examples attempt to illustrate that what this article proposes is reasonably workable.

First, in 2021 former Vice-President Mike Pence said critical race theory teaches children "to be ashamed of their skin color."[338] While Mr. Pence offered nothing to support this contention, is this statement sufficiently rhetorical to afford protection? How much leeway do we want to give officials to posture politically? But if we are to take the concept of an informed electorate seriously and keep officials from appealing to low common denominators, would we not be far better off if Mr. Pence said, "we need to examine to what degree the teaching of critical race theory may result in children becoming ashamed of their skin color." Is this not what he would have said, or uttered words to this effect, if he was more concerned with fostering an intelligent assessment of the impact of critical race theory than he was in addressing a topic to appeal to the visceral nature of his supporters as to score political points?

Next, numerous Congressional Republicans declared that the congressional committee investigating the actions at the Capitol on January 6th was engaged in the "persecution of ordinary citizens engaged in legitimate political discourse."[339] Is this statement the kind of evaluative statement that renders it protected First Amendment opinion? Many people would no doubt say that it is because there are no metrics to determine what constitutes legitimate political discourse. One can also argue that the assertion that violence is justified when it accompanies strongly held political convictions is an opinion. However, others could push back.

Much of the citizenry does not distinguish between evaluative and deductive statements. Rather, they just hear a message from government officials that engaging in violence in the name of correcting a

338. Timothy Egan, *Biden May Be the Calm Between Two Storms*, N.Y. TIMES (June 11, 2021), https://www.nytimes.com/2021/06/11/opinion/republicans-democrats-midterm-election.html.

339. Jonathan Weisman & Reid J. Epstein, *G.O.P. Declare Jan. 6 Attack 'Legitimate Political Discourse*,*'* N.Y. Times (Feb. 5, 2022), https://www.nytimes.com/2022/02/04/us/politics/republicans-jan-6-cheney-censure.html.

perceived political injustice constitutes lawful First Amendment activity. If nothing else, it is misleading unless, as detailed below, there is a basis for this conclusion. The statement those who are the subject of the January 6 investigation are being persecuted for engaging in legitimate political discourse implies knowledge of legal principles that can serve to justify the actions of those at the Capitol.

Next, let's take an arguably more difficult case that demonstrates that sometimes other considerations are relevant when determining whether a court can limit speech because of its misleading nature. Many members of Congress have attempted to justify their assertions that the 2020 presidential election "was stolen" on the ground that changes to states' voting procedures by state courts violated the Constitution because, under the Constitution, only state legislatures can change state voting procedures.[340] These officials can attempt to argue their conclusion is a protected evaluative statement because at the time of the statement there is no definitive court case declaring that this legal conclusion is correct. Hence, it is a statement based not on factual underpinnings but a legal underpinning that cannot be said to be wrong.

However, the word stolen has a particular connotation. It implies that some people engaged in some type of nefarious behavior. Engaging a state's legal system in an attempt to ensure the pandemic did not disenfranchise citizens' right to vote is not nefarious conduct. The Trump campaign and his allies attempted to argue that these changes in procedures violated the Constitution; they did not succeed.[341]

Alternatively, if one believes the courts should have upheld the Trump campaign challenges to the change in voting procedures without going into the basis for this conclusion one can certainly say the 2020 electoral process was flawed. This language does not connote the type of nefarious, unlawful conduct that did not occur and which has generated levels of distrust in the democratic system that threatened democracy. At the very least, the statement "the election was stolen," without

340. *See* Steve Edor et al., *They Legitimized the Myth of a Stolen Election – and Reaped the Rewards*, N.Y. TIMES (Oct. 23, 2022), https://www.nytimes.com/2022/10/03/us/politics/republican-election-objectors.html.

341. *See id.*

more, is misleading because it implies that there was unlawful, nefarious conduct, which is false.[342]

A Congressman who asserted that the election was stolen can reply that First Amendment jurisprudence protects rhetorical hyperbole, imaginative expression, and caustic comments and has further recognized that political discourse would be considerably poorer without such charged language.[343] However, the Supreme Court has countenanced this type of language when, in the Court's words, the speech "could not reasonably be understood as describing actual events."[344]

The Congressman can next assert that in the Court in *Hustler* further recognized that the contribution to political discourse made by sharp, deliberate distortions of fact.[345] However, in so doing the court referred to political cartoons; political cartoons are a mode of communication in which a reader can understand the difference between literal and figurative statements.

Ultimately, context matters. Mill recognized this when he said one can offer an opinion that corn dealers are starvers of the poor when published but not when a mob was assembled before the home of a corn dealer.[346] Perhaps if Donald Trump had not set the stage for a mass mistrust of the electoral process by falsely and repeatedly asserting that mail-in ballots would produce fraudulent results, the rhetorical hyperbole that many in Congress now use would not prove as harmful to First Amendment values that it does.

342. On the other hand, if one says "the election was stolen because state courts altered election procedures," presents a case that likely compels a different result. The statement is akin to an opinion because the speaker has set forth the basis for his statement, which informs the listener of the basis for what amounts to conjecture. *See supra* notes 321–22 and accompanying text.

343. *See* Milkovich v. Lorain J. Co., 497 U.S. 1, 20 (1990); Hustler Magazine v. Falwell, 485 U.S. 45, 51, 54 (1988).

344. *Hustler Magazine*, 485 U.S. at 57 (internal quotes and citations omitted). In *Hustler*, a magazine published a parody of a nationally known conservative minister, Jerry Falwell, that suggested that the minister's first sexual encounter was a drunken incestuous affair with his mother in an outhouse. *See id.* at 48. I suspect this speech would have crossed the line into libel if at the time of publication there had been numerous allegations by families in the minister's congregation that he counseled families to engage in incestuous relationships as a way for young teenagers to learn about sexual activity.

345. *Id.* at 54–55.

346. *See supra* note 36 and accompanying text.

The Congressman (and critics of this article) can reply that it is too dangerous to permit individual judges to determine when sharp figurative language constitutes a positive contribution to political discourse. Consequently, the First Amendment presumes that political speech adds to discourse. However, this should be a rebuttable presumption that a court can assess by looking at criteria that is relevant to a determination of whether a court should enjoin speech.[347] To say courts should countenance speech that serves to destroy the democratic structure creates opportunities for despots and authoritarians that the Framers feared and sought to protect against.[348] The dangers from this inaction vastly exceed any dangers from any slippery slope that some may believe can arise from limiting speech in the manner suggested by this article. Equally important, a slippery slope need not occur; courts have the capacity to set limiting standards.[349]

One must next ask how a court should go about determining when an official has made a false statement. No doubt many challenged statements would involve not a single verifiable event but rather deductive comments based upon other facts or predictive type statements such as Sarah Palin's death panels statement. They also include statements of knowledge such as Mr. Trump's statement that as vice-president, Mike Pence possessed the authority the to reject the electoral votes in support of President Biden. When addressing deductive or other similar fact-based statements, a standard that provides enough breathing space for speakers is whether any reasonable person could reach the conclusions reached by the speaker based upon the available evidence, which include supporting authority and reasonably verifiable information. This definition draws, to a degree, from criteria for determining immunity under 42 U.S.C. § 1983. Government officials are immune from civil rights suits if it was objectively reasonable to believe that they were not violating the right asserted.[350] If reasonable people can disagree about the accuracy of a statement and its factual underpinnings, then it cannot be said that the statement is false.

347. *See infra* notes 363–69 and accompanying text.

348. *See supra* notes 77–79, 107–13 and accompanying text.

349. *See, e.g.*, *infra* notes 363–69 and accompanying text for suggested standards to guide a court's discretion.

350. *See, e.g.*, Luna v. Pico, 356 F.3d 481, 490 (2d Cir. 2004); Russell v. Coughlin, 910 F.2d 75, 78 (2d Cir. 1990).

There will be times when the court would have to determine what constitutes misleading speech. The dictionary definition of misleading is consistent with principles of self-governance because it is listener based. It is also sufficiently objective in nature. The dictionary defines misleading as leading to mistaken belief, often by deliberate deceit.[351] While determining what constitutes misleading speech may, at times, be a taller task than determining truth and falsity, it is hardly an insurmountable task. The Federal Trade Commission Act prohibits unfair or deceptive practices.[352] Courts have routinely upheld prohibitions against deceptive advertising against First Amendment challenges.[353] Misleading speech is deceptive speech.[354]

One more hypothetical illustrates that, while it may not always be easy to determine whether a statement constitutes fact or opinion and whether it is true or false, this determination does not constitute an insurmountable task. Suppose at a news conference three months after the government began administering COVID-19 vaccines, Anthony Fauci stated that COVID-19 vaccines are safe and the benefits from the vaccine outweigh the risks. Children's Health Defense ("CHD"), an anti-vaccination organization headed by Robert F. Kennedy Jr., sought a retraction on the ground that it could not be said that the vaccinations were safe only three months after its rollout began because it did not go through the usual testing procedures and three months into its administration was too short of a time period to assess possible side-effects.[355] I believe most courts, assessing the statement about the safety of COVID vaccines from the perspective of the listener,[356] would find

351. *See* MERRIAM-WEBSTER, *supra* note 47, at 759.

352. 15 U.S.C. §§ 45(a)(1), 52(A) (cited in Benjamin S. DuVal, Jr., *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO WASH. L. REV. 161, 232 (1972)).

353. *See e.g.*, POM Wonderful, LLC, v. FTC, 777 F.3d 478, 499 (D.C. Cir. 2015); Novartis Corp. v. FTC, 223 F.3d 783, 789 (D.C. Cir. 2000); Warner-Lambert Co. v. FTC, 562 F.2d 749, 758–59 (D.C. Cir. 1977); S.S.S. Co. v. FTC, 416 F.2d 226, 231 (6th Cir. 1969); Murray Space Shoe Corp v. FTC, 304 F.2d 270, 272 (2d Cir. 1962).

354. *See* MERRIAM-WEBSTER, *supra* note 47, at 759.

355. For purposes of this hypothetical, it will be assumed that CHD possesses standing to raise these contentions. For a fuller discussion of organizational standing to challenge speech, *see infra* notes 403–05 and accompanying text.

356. Prioritizing listener interests over those of the speaker would require courts to assess the speech in question from the perspective of the listener.

the statement that the vaccines are safe to constitute a true statement. Most courts would likely find the statement that the benefits of the vaccine outweigh the risk to constitute an opinion that protected by the government speech doctrine.

First, even though the testing procedures differed from the usual course of testing because of the urgency of the COVID situation, sufficient similarity between the testing that occurred with the COVID vaccines and standardized procedures. Whereas most clinical trials contain the phases that are performed one at a time, with the COVID vaccines, the trials overlapped.[357] Particularly because tens of thousands of people participated in clinical trials,[358] most people, when assessing the efficacy of testing would care less about the whether the clinical trials comported identically with standard testing procedures but instead would want to know if the procedures that were performed had a sufficient indicia of accuracy as to support a reasoned conclusion that the vaccines were safe.

As for the assertion that the benefits from the vaccine outweigh the risks, I suspect that the majority of courts would find that when assessing the risks and benefits of a situation there are so many factors to be weighed, and the weighing of factors so individualized that it cannot be said whether the statement is true or false, which makes the statement protected opinion.[359] Because the speech would not have constituted a false or misleading statement of fact, the government speech doctrine protects it.[360]

To be sure, some other courts might reach a different conclusion. Any such disagreement does not render what is proposed in this article unworkable. Rather, just as illustrated by appellate court reversals, dissenting opinions, and hung juries, any difference of opinion means that people often reach different conclusions when they apply law to fact.

357. *COVID Vaccine Testing and Approval*, University of Maryland Medical System, https://www.umms.org/coronavirus/covid-vaccine/facts/testing (last updated Sept. 29, 2022).

358. *Safety of COVID-19 Vaccines*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/safety-of-vaccines.html (last updated Dec. 22, 2022).

359. *See supra* note 318 and accompanying text.

360. *See supra* notes 301–03, 306 and accompanying text.

As difficult as it may be for a court, at times, to make a determination about the nature of a statement, courts have been parsing statements in the defamation context for many years and making decisions about which reasonable jurists can disagree.[361] All that courts can do is apply principled guidelines that can be used to determine when speech contains false or misleading factual premises and, if so, whether First Amendment considerations warrant remedying the speech. That there will be many difficult cases if citizens were to challenge statements of government officials should not result in the legal system stepping back from its role of helping to check the actions of those who wish to abuse their speaking privilege to subvert the aims of the First Amendment.

Ultimately, once a court has made a determination of falsity or misleading speech, numerous factors impact the appropriateness of judicial intervention, particularly for the purpose of any injunctive relief, which is equitable in nature and hence, requires an exercise of discretion. This is because any decree directing an official to take action begins with the recognition that "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case."[362]

Considerations that must guide a court's discretion in determining whether or not to remedy the speech of government officials must be informed by First Amendment values and other equitable considerations that exist when issues of sanctioning truth and falsity arise. Criteria that inform a court's determination should also relate to whether, from both an objective and subjective perspective, the speaker has, in the words of Justice Story, attempted to subvert the government. Hence, the following criteria are relevant when a court is to determine whether to intervene to limit the adverse impact of false or misleading statements by government officials; no doubt there are others: (1) the frequency of false or misleading statements spoken by either by one

361. *Compare* Ollman v. Evans, 750 F.2d 970, 990, 1008 (D.C. Cir. 1984), *and id.* at 1008 (Bork, J., concurring), *with id.* at 1032 (Wald, J., dissenting) (majority and concurring opinions in libel action characterize statement that professor "has no status within the profession, but is a pure and simple activist" as opinion; dissent characterizes it as a factual statement).

362. Hecht Co. v. Bowles, 321 U.S. 321, 329–30 (1944).

individual or numerous individuals;[363] (2) the potential impact of any false and misleading statement on government action and policy;[364] (3) the degree of certainty as to the falsity of any statement; which requires analysis of criteria four and five; (4) the strength of the factual premises that support the statement; (5) the strength of the factual premises that controvert the statement; (6) attempts made by the speaker to limit the ability of other institutions, *e.g.*, newspapers, to serve as a check upon the false and misleading speech;[365] (7) the importance of the content of the speech to issues of self-governance;[366] (8) whether information relates directly to issues of governance of the day or is more historical in nature; (9) the ability or inability of additional speech to counter the false speech; (10) the degree to which the statement is an evaluative opinion or a deductive statement; (11) whether polls have established that a significant percentage of the population believes the statement to be true; (12) whether the speaker been willing to subject his speech to challenge in debate with others and through discussion with the media;[367] (13) whether the speech appeals to the listeners' intellect and

363. The more false and misleading statements are made, the more likely they are to gain traction. *See* Massaro & Norton, *supra* note 141, at 1645 (citing DANIEL KAHNEMAN, THINKING, FAST AND SLOW 62 (2011)).

364. The passage of election laws that will disenfranchise many under the guise of the need to ensure confidence in the election system is an example of governmental action resulting from false speech that would militate toward judicial intervention.

365. One can argue that this criterion appears to be targeted at Mr. Trump and set forth to reach a result that this author advocates: enjoining false speech by Mr. Trump. However, it is Mr. Trump who has manifested an ability rarely, if ever, seen before to insulate his alarmingly anti-democratic, anti-First Amendment speech from scrutiny by a substantial part of the population, due in no small part from four years of attacking the press of purveyors of fake news. The Framers envisioned the press as a check on the government. Blasi, *supra* note 139, at 536. If an official's actions have adversely affected the press' ability to serve as a check on abusive conduct by government officials, a different mechanism must be found to help achieve constitutional balance.

366. To illustrate, statements by the former vice-presidential candidate that the Affordable Care Act will produce death panels is of far greater significance to the development of an informed citizenry than is a statement by a local councilman that a local merchant, who made a sizable contribution to the candidate also made a $500.00 contribution to the local Little League when he contributed only $100.00.

367. This does not mean going on programs with hosts sympathetic to the speaker and his content who will toss creampuff questions that will serve as an

reason, or it appeal to listeners' visceral impulses;[368] and (14) any other harmful effects produced by the speech on First Amendment or other considerations.[369]

Admittedly, criteria three, four, and five are built into the determination of truth or falsity and/or misleading speech that a court must make. However, just like in every other area of law, *e.g.,* search and seizure, copyright, and medical malpractice, there are going to be some cases where the proof is so overwhelming that they are an "easy call" while there will be other cases where proof is far less overwhelming, which results in determinations about which reasonable jurists can disagree. The stronger the proof of falsity, the more judicial intervention is warranted.

V. ISSUES OF STANDING TO SUE FOR FALSE OR MISLEADING SPEECH AND THE REMEDIES FOR THIS CONDUCT

One of the questions raised by an interpretation of the First Amendment suggested by this article is who would possess standing to challenge false or misleading statements of fact by government officials. Furthermore, one must ask what remedies are available for a violation of this putative First Amendment right. These issues are related because an examination of standing necessarily includes the issue of redressability for a violation of the right in question. A detailed examination of these issues is beyond the scope of this article and may raise enough questions to warrant a separate article or articles. However, at least a cursory assessment of this and other issues that will arise when a citizen challenges false or misleading speech by a government official is in order.

As in any case, well-settled principles of standing will determine who may initiate litigation to remedy false or misleading speech by

additional soapbox for the allegedly false speech. It means the speaker subjecting herself to scrutiny by media that is not sympathetic generally to her and her political positions.

368. Speech aimed at the visceral impulses of listeners is inconsistent with rational deliberation that the First Amendment aims to promote.

369. In *Brandenburg v. Ohio*, 394 U.S. 444 (1969), the Court held that the First Amendment does not protect speech that "is directed to inciting or producing imminent lawless action is likely to incite or produce such action." *Id.* at 447. Hence, imminent harm is a consideration that impacts on the scope of a speaker's First Amendment rights.

government officials. Article III of the Constitution limits federal judicial power to "cases" and "controversies."[370] To satisfy the case and controversy requirement, a plaintiff must first establish that he or she has suffered an injury that is concrete, particularized, and actual or imminent.[371] Accordingly, "generalized grievances . . . [that are] more appropriately addressed in the representative branches" do not amount to an injury-in-fact that will satisfy the Article III requirements.[372] The prohibition on seeking to remedy generalized grievances applies when a plaintiff suffers harm of an "abstract and indefinite nature—for example, 'common concern for obedience to law.'"[373] On the other hand, "where a harm is concrete, though widely shared, the [Supreme] Court has found 'injury-in-fact.'"[374] An example of widely shared concrete harm consists of a situation "where large numbers of voters suffer interference with voting rights conferred by law."[375]

In order to determine whether a plaintiff has suffered harm that is concrete, a court must examine history and tradition because they "'offer a meaningful guide to the types of cases that Article III empowers federal courts to consider.'"[376] More specifically, a court should determine "whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts."[377] Harms that readily qualify as concrete

370. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021).

371. *Id.*

372. Allen v. Wright, 468 U.S. 737, 751 (1984).

373. Fed. Election Com'n v. Akins, 524 U.S. 11, 23 (1998) (quoting L. Singer & Sons v. Union Pac. R. Co., 311 U.S. 295, 303 (1940)).

374. *Fed. Election Com'n*, 524 U.S. at 24.

375. *Id.*

376. *TransUnion*, 141 S. Ct. at 2204 (quoting Sprint Commc'n Co. v. APPC Serv., Inc., 554 U.S. 269, 274 (2008)).

377. *Id.* at 2204 (quoting Spokeo, Inc. v. Robbins, 578 U.S. 330, 341 (2016)). Someone attempting to limit challenges to false speech might attempt to argue that voting for a candidate one would have not voted for if one had more information is not the kind of traditional harm that warrants standing. A court should reject any such argument. It is well-settled that the right to vote is fundamental. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966). Indeed, the right to vote is sufficiently fundamental that a certain "dignity" must attach to the voting process. *See* Bush v. Gore, 531 U.S. 98, 104 (2000). Voting for a candidate one would not have voted for if not provided with false or misleading information is harm for which a "close relationship" exists to the right to

include physical and monetary harm.[378] Intangible harms that are sufficiently concrete to satisfy the Article III requirement are those with close relationships to traditionally recognized harms, including reputational harm, the disclosure of private information, intrusion upon seclusion, and harms specified by the Constitution itself.[379] Hence, while a violation of a First Amendment right satisfies Supreme Court harm requirements, it is worth noting that at common law, liability attached for misrepresentations of fact.[380]

Suffering an injury-in-fact, without more, does not satisfy the Article III threshold. Rather, a plaintiff must also establish that the defendant likely caused the injury, and judicial relief would likely redress the injury.[381] A violation of a First Amendment right that produces nominal damages is redressable under Article III. This is because the common law permitted a plaintiff to seek nominal damages in the absence of any other available relief.[382] In so holding, the Supreme Court has concluded that nominal damages are not a "consolation prize" for a plaintiff who pleads, but fails to prove, compensatory damages. Rather, they are "the damages awarded by default until the plaintiff establishes entitlement to some other form of damages."[383] Accordingly, a violation of a First Amendment right, without more, renders a case cognizable for Article III purposes, although the absence of additional harm will impact on the available remedy.[384]

The difficulty in assessing standing issues arises in no small part because of the Supreme Court's treatment of what it has characterized as informational injuries that plaintiffs suffered, although these cases arose in the context of statutory violations. The Supreme Court has recognized that a plaintiff may suffer an "informational injury" that

vote. Inducing an incorrect vote by providing false information further amounts to stripping the citizen of the dignity that must attach to the voting process.

378. *TransUnion*, 141 S. Ct. at 2204.

379. *Id.*

380. *See* Paula J. Dalley, *The Law of Deceit, 1790-1860: Continuity Amidst Change*, 39 J. AM. LEGAL HISTORY 413–14 (1995); *see also* OLIVER WENDELL HOLMES, COMMON LAW 130–38 (1923).

381. *TransUnion*, 141 S. Ct. at 2203.

382. Uzuegbunam v. Preczewski, 141 S. Ct. 792, 798–800 (2021).

383. *Id.* at 800.

384. *See infra* notes 385–94 and accompanying text.

confers standing.[385] However, in *TransUnion LLC v. Ramirez*,[386] the Court recently held the placement of inaccurate information in one's credit file in contravention of the defendant's obligations under the Fair Credit Reporting Act, without a showing of additional harm, does not constitute an injury for Article III purposes. Rather, a plaintiff who alleges what the Court characterized as an informational injury must establish the existence of "downstream consequences" from the informational failure.[387] In other words, a plaintiff must establish the information failure resulted in more concrete harm because "[a]n 'asserted informational injury that causes no adverse effect cannot satisfy Article III.'"[388]

On the other hand, in *Federal Election Commission v. Akins*,[389] the Supreme Court held that the failure to receive information that the Federal Election Campaign Act entitled individuals to receive, which would have helped them "evaluate candidates for public office," constituted an injury-in-fact.[390] The failure to receive such information did not amount to abstract harm but rather concrete harm, even though the harm was likely shared.[391] It is noteworthy that the Court in *Akins* concluded that there was "no reason to doubt" the plaintiffs' assertion that the failure to receive information about the candidates adversely affected their ability to assess the candidates.[392] One can argue that *Akens* stands for the principle that the failure to receive information on an important matter necessarily makes the decision-making process to which the information relates less informed. Therefore, the failure to

385. *TransUnion*, 141 S. Ct. at 2214. While the informational failure alluded to by the Court in *TransUnion* involved the failure to provide information, which was also the basis for standing in other cases, *see, e.g.*, Fed. Election Comm'n v. Akins, 524 U.S. 11, 21 (1998), which shows that little basis exists to differentiate the failure to provide information from the failure to provide truthful information.

386. 141 S. Ct. 2190 (2021).

387. *Id.* at 2214.

388. *Id.* (quoting Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990, 1004 (11th Cir. 2020)).

389. 524 U.S. 11 (1998).

390. *Id.* at 24–25. The Court simply found that there no reason to doubt the plaintiffs claim that the failure to receive information would impact their ability to assess candidates for office. *Id*

391. *Id.*

392. *Id.* at 21.

receive such information constitutes an injury-in-fact as a matter of law.

One can argue that *TransUnion* and *Akins* involved violations of statutory rights, which for standing purposes, would require a showing of harm that traditionally provided a basis for standing in American courts.[393] However, if a violation of the First Amendment is the kind of harm that provides standing to assert, if nothing else, nominal damages, then simply hearing false or misleading statements confers standing to seek this form of relief.

While a person who has suffered only nominal damages might have the standing to sue, she would not be in a position to seek some sort of retraction or correction in the form of an injunction. This is because one must have standing for the particular relief that one seeks.[394] On the other hand, a finding that a government official has made a false or misleading statement could possibly produce collateral estoppel consequences for future litigation involving one or more plaintiffs who have suffered actual harm.[395]

One can argue that even nominal damages could have an excessively chilling effect on government officials. First, the making of a false statement might subject a government official to millions of lawsuits. However, an official could eliminate this possibility by responding to the lawsuit by certifying a plaintiff class action, with the class consisting of anyone who has learned of the false or misleading speech. This should foreclose the possibility of an infinite amount of lawsuits seeking nominal damages. It is fair to ask how many people would take the time and effort to join a lawsuit where the payoff consisted of one dollar.

One could further respond by asserting that in a country of over three hundred and twenty million people, even a fraction of the population seeking one dollar in damages could expose the official to liability unheard of to date. However, the qualified immunity defense should adequately protect the official. The qualified immunity defense protects government officials for whom an objectively reasonable basis

393. *See TransUnion*, 141 S. Ct. at 2204.

394. *See, e.g.*, Lyons v. City of Los Angeles, 461 U.S. 95, 105 (1983).

395. However, litigation will not produce collateral estoppel consequences if the litigant lacked incentive to challenge the factual issues at hand. *See, e.g.*, Sec. Exch. Comm'n v. Monarch Funding, 192 F.3d 295, 304 (2d Cir. 1999); Hicks v. Quaker Oats Co., 662 F.2d 1158, 1171 (5th Cir. 1981).

exists for believing he was not violating the constitutional right sought to be vindicated in litigation.[396] Hence, if an objectively reasonable basis existed for the official to believe that he spoke truthfully or not in a misleading fashion, then he would not face liability.

Another basis exists to limit any excessive chilling effect of a mass nominal damages award. Judges retain the ability to lower any jury verdict that the judge has deemed excessive as a matter of law. The potential chilling impact of a mass nominal damages award on not only the speech of the government official defendant but on the speech of other government officials could constitute a consideration of what would constitute the maximum allowable recovery.

While the threat of a mass nominal damages might serve to appropriately deter government officials and provide some basis for "setting the record straight," the ideal remedy for false or misleading speech consists of requiring the false speaking government official to issue a retraction. One typical plaintiff who would possess standing to seek this relief would be someone who could plead and prove that the speech truly confused her. Standing requirements would further require her to plead and prove that her decision-making processes about an important issue of governance were impaired by the speech of the government official.[397] This would not necessarily be particularly easy as the Supreme Court has carefully scrutinized allegations and attempted proof relating to the issue of harm in the context of standing.[398]

Notwithstanding the prohibition against abstract, generalized grievances serving as a basis for standing, wrongful statements of fact by government officials will often cause much of the general population to suffer injury-in-fact. This is because, under the First

396. *See, e.g.*, Luna v. Pico, 356 F.3d 481, 490 (2d Cir. 2004); Russell v. Coughlin, 910 F.2d 75, 78 (2d Cir. 1990).

397. A lawyer representing the allegedly false speaking defendant official might claim that if a plaintiff is seeking a decree that involves a retraction of what amounts to a false statement of fact then the statement has no longer harmed the plaintiff because he has decided that the statement is false. This would require a plaintiff to seek a declaration judgment seeking a determination of whether the statement was true or false and an injunction consistent with the court's determination of the truth or falsity of the statement.

398. *See* Carney v. Adams, 141 S. Ct. 493 (2020) (looking at plaintiff's answers to interrogatories and other actions to determine if plaintiff was truly ready and able to apply for judgeship when he alleged that state law impermissibly violated the First Amendment rights of those who sought judgeships).

Amendment, individuals possess either a First Amendment interest in banding, or perhaps even a right to band, with other like-minded individuals "to further their political beliefs."[399]

What if I, a New York resident, want the government to pass stronger climate protection legislation, and a government official from South Dakota asserts that global warming is a hoax? Must I make unsuccessful attempts to band together with others and then establish that the false speech harmed our group efforts to effectuate change? Supreme Court precedent suggests the answer is no.

In *Regents of University of California v. Bakke*,[400] the Court held that a medical school applicant who alleged that an affirmative action policy violated his equal protection rights suffered harm even though he could not establish that he would have been accepted under procedures that comported with the Fourteenth Amendment. This is because the allegedly unconstitutional procedures impacted his ability to compete fairly for one of the limited number of placements in the admitting class.[401] *Bakke's* lesson is that the process relating to the resolution of constitutional interests must comport with constitutional guidelines, and those who participate in a process that does not comport with constitutional norms have been harmed. False speech by a government official can impact the political views of citizens in a way that weakens the political strength of some because it lessens the likelihood of those who have been confused by the speech of joining together with those whose political views differ from that of the false speaker. Under *Bakke,* this means that those who have taken political positions antithetical to that of the false-speaking official and have lost potential allies regarding a particular political position have suffered harm.

399. Gill v. Whitford, 138 S. Ct. 1916, 1940 (2018) (Kagen, J., concurring); *see also* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 357 (1997) ("The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas."); Norman v. Reed, 502 U.S. 279, 288 (1992) (recognizing First and Fourteenth Amendment *right* to create new political parties, which arises out of constitutional interest of like-minded voters in pursuit of common political ends); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295–96 (1981) (First Amendment right to band together with others to further political aims).

400. Regents of Univ. of Ca. v. Bakke, 438 U.S. 265 (1978).

401. *Id.* at 380 n.14.

In addition to individual citizens suffering injury-in-fact, some government officials might suffer an injury-in-fact from the false speech of another government official. For instance, former Environmental Protection Agency Administrator, Scott Pruitt, has asserted that he does not believe that carbon dioxide created by human activity is a primary contributor to global warming. However, ninety-seven percent of climate scientists believe that human activity has caused global warming.[402] Might a court find that this speech has harmed those officials whose job is to combat global warming because it lessens the ability of the official to obtain societal consensus on an issue about which consensus is probably necessary to move forward as a nation? Can it be said that Mr. Pruitt's statements harmed government officials who must use their offices' resources to educate the public in ways they would not have had to do in order to combat the statement by Mr. Pruitt?

Organizational standing can also serve as a basis to challenge false speech by government officials. Like individuals, organizations may sue when they have suffered an injury-in-fact as a result of a defendant's conduct.[403] Harm to an organization includes a perceptible impairment in an organization's ability to achieve its goals with a consequent drain on the organization's resources.[404] When an organization expends resources to address a problem that is the subject of litigation when it could have used the resources for other purposes, the organization has suffered an injury-in-fact because the expenditure of resources in this manner constitutes more than a setback to the organization's abstract social interests.[405]

It is also worth noting that a president will be immune from any civil damages action.[406] However, while 42 U.S.C. § 1983 would subject state officials to damages liability,[407] this provision does not

402. Inazu, *supra* note 287, at 1650 (quoting *Scientific Consensus: Earth's Climate Is Warming*, NASA, https://climate.nasa.gov/scientific-consensus).

403. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982).

404. *Id.*

405. *See, e.g.*, Nnebe v. Daus, 644 F.3d 147, 157 (2d Cir. 2011).

406. *See* Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).

407. 42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of

subject federal officials to this form of liability and the Supreme Court has recently held that no implied cause of action for damages exists against federal officials for First Amendment violations.[408] However, the Supreme Court clearly this decision to First Amendment claims seeking damages.[409]

On the other hand, federal legislators could be subject to injunctive or declaratory relief for speaking falsely. First, the Supreme Court has often accepted the principle that federal officials are subject to equitable restraint when they violate the Constitution, at least when a plaintiff satisfies other relevant justiciability rules.[410]

Members of Congress might attempt to assert that Article I, § 6, cl. 1 of the Constitution, the Speech and Debate Clause, insulates their speech from any liability. This contention lacks merit. The Speech and Debate Clause protects members of Congress from criminal, but not civil, liability.[411]

Both federal and state legislators might attempt to argue that the common law defense of legislative immunity insulates any false speech. Admittedly, when applicable, legislative immunity protects legislators from both damages and equitable relief.[412] However, legislative immunity protects legislators from only actions that were "both (1) substantively legislative, *i.e.*, acts that involve policy making, and (2) procedurally legislative, *i.e.*, passed by means of established

> Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

408. *See* Egbert v. Boule, 142 S. Ct. 1793, 1807 (2022).

409. *See id.* at 1803–05 (recognizing that issue of case involved availability of damages claim).

410. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2407–08 (2018); Mathews v. Eldridge, 424 U.S. 319, 326–32 (1975); Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 224 (1974); Laird v. Tatum, 408 U.S. 1, 4–16 (1972).

411. Gravel v. United States, 408 U.S. 606, 614 (1972) (holding that freedom from arrest conferred by the Speech and Debate Clause does not "confer immunity on a Member from service of process as a defendant in civil matters").

412. Supreme Court of Va. v. Consumers Union, 446 U.S, 719, 733–34 (1980).

legislative procedures."[413] I would think that speaking to the public about any issues of the day, as opposed to speaking to other legislators, does not amount to either substantive or procedural legislative activity.[414] Next, any court-ordered decree would not raise issues of impermissible compelled speech. Admittedly, compelling speech, particularly of a political nature, generally raises questions of constitutional validity.[415] However, actions that might otherwise violate the Constitution can constitute an acceptable remedy to redress constitutional violations as long as the scope of the remedy does not "exceed the extent of the violation."[416]

Nor would such a decree constitute an impermissible prior restraint on speech. First, actions that may constitute a violation of a constitutional provision may nevertheless serve as a permissible remedy to redress a separate constitutional violation.[417] Next, the prior restraint doctrine serves to protect the press in its function as a checker of the government under the Free Press Clause.[418] In the present case, any limitation imposed by a court would not constitute a restraint that could adversely affect a check on government authority. Rather it would amount to restraint on a government official who has attempted to interfere with a potential check on his authority by speaking falsely and thereby interfering with honest discourse. The restraint would have been initiated by a citizen who, or organization that, has sought to hold the government official accountable. Hence, a restraint on additional false speech does not diminish, but rather furthers, First Amendment values. This justifies the restraint on the government official's speech.[419]

413. State Employees Bargaining Agent v. Rowland, 494 F.3d 71, 89–90 (2d Cir. 2007) (internal quotes omitted).

414. Admittedly, this is a conclusory assertion, and this issue alone might warrant a separate law review article.

415. *See, e.g.*, Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 797 (1988); Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 256 (1974).

416. Regents of Univ. of Ca. v. Bakke, 438 U.S. 265, 300–01 (1978).

417. *See supra* note 416 and accompanying text.

418. *See* Near v. Minnesota, 283 U.S. 697, 713–20 (1931).

419. *See* Seattle Times Co. v. Rhinehardt, 467 U.S. 20, 38 (1984) (Brennan, J., concurring) (recognizing validity of prior restraint on newspaper speech to protect privacy and First Amendment rights of subject of the speech).

It is reasonable to ask whether people would believe a court-ordered retraction. This is a particularly good question because empirical data exists to support the principle that correcting false statements can produce a backfire effect of solidifying the false belief in the minds of those who heard the false statement in the first place.[420] However, evidence exists that this backfire effect is not as great as originally thought.[421] Moreover, reason exists to believe that perhaps a corrective retraction by the official who spoke falsely could produce a change in the minds of some of the people who heard and believed the false statement in the first place. Empirical data establishes that when information that challenges individuals' beliefs comes from a source the individuals deem credible, such information has the potential to result in a change in the beliefs of those who heard the original statement and the correction.[422] Finally, even if some listeners refused to believe any retraction on the ground that a court directed the retraction and instead believed the retraction was a false statement, the law often serves as a symbol. In this case, a court decree would constitute a societal factual starting point from which other discussion could be based.

CONCLUSION

Events over the last few years have taught us that what has been assumed to constitute speakers' First Amendment rights creates an opportunity for government officials, particularly a president with autocratic and authoritarian desires, to use speech in the same way totalitarian rulers do. Mr. Trump's false speech has created an alternative universe that has democracy careening towards the brink, if it is not already there.

420. *See, e.g.*, Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32(2) POL. BEHAV. 303 (2010).

421. *See* Thomas Wood & Ethan Porter, *The Elusive Backfire Effect: Mass Attitudes' Steadfast Factual Adherence*, 41 POL. BEHAV. 135, 135 (2018); Ullrich K.H. Ecker et al., *Can Corrections Spread Misinformation to New Audiences? Testing for the Elusive Familiarity Backfire Effect*, 5 COGNITIVE RSCH.: PRINCIPLES & IMPLICATIONS 41 (2020); Briony Swire-Thompson et al., *Searching for the Backfire Effect: Measurement and Design Considerations*, 9 J. APPLIED RSCH. MEMORY & COGNITION 286, 286 (2020).

422. *See* Edward Glaeser & Cass R. Sunstein, *Does More Speech Correct Falsehoods?*, 43 J. LEGAL STUD. 65, 69 (2014).

Requiring government officials to speak more carefully would facilitate substantial changes in how our government officials speak. However, it is a change that is long overdue. If it is well-recognized, as it is, that the American voter is ignorant and profoundly uninformed,[423] then it must be recognized that the present system of free speech is not working the way it should and requires change.

One can argue that there is no more important vocation than government service, particularly those at the upper levels of the state and federal governments. However, government officials have had carte blanche to say anything at any time to further their own ambitions, to protect themselves from short-sighted or incompetent decisions, and to mislead the public for the purpose of gaining support for unpopular decisions. They can do so because of the exalted role of freedom of speech in our constitutional structure. However, speech has been so valued because of its contribution to society. False speech does not contribute to society. All too often government officials speak falsely or misleadingly for the sole purpose of gaining a partisan advantage by deceiving listeners, particularly those susceptible to false or misleading speech.

Mr. Trump and those who have failed to challenge him and his incessant falsehoods have turned the First Amendment on its head. The right to free speech is a means to an end: to produce a more informed citizenry that self-governs while furthering individual autonomy. Particularly since the First Amendment is a mechanism to help combat a distrust of government, we should be particularly careful about not giving those in government the opportunity to produce a less informed citizenry through the dissemination of false information. The failure to formally challenge the incessant lying by Mr. Trump and his allies is, at the very least, self-destructive. It has been said that the Constitution "is not a suicide pact."[424] That being the case, speech rights of government officials cannot leave the country defenseless against those in government who wish to subvert democracy. First Amendment jurisprudence should recognize this.

423. *See supra* note 183 and accompanying text.

424. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159–60 (1963).