UNFIT TO PRINT: GOVERNMENT SPEECH AND THE FIRST AMENDMENT

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Unfit to Print: Government Speech and the First Amendment

Seana Valentine Shiffrin

Each year, the UCLA School of Law hosts the Melville B. Nimmer Memorial Lecture. Since 1986, the lecture series has served as a forum for leading scholars in the fields of copyright and First Amendment law. The UCLA Law Review has regularly published these lectures, and proudly continues that tradition by publishing an Article based on this year's Nimmer Lecture, presented by Professor Seana Valentine Shiffrin.

AUTHOR

Seana Valentine Shiffrin is Pete Kameron Professor of Law and Social Justice at the UCLA School of Law and Professor of Philosophy at UCLA. I am grateful to the Nimmer Committee for the invitation and for comments from the Nimmer Lecture audience, the attendees of the ASU conference on nongovernmental restrictions on free speech, an audience at the Kennedy School of Government and the editors of the UCLA Law Review. Arthur Applbaum, Robert Goldstein, Barbara Herman, Leslie Kendrick, Neil Netanel, David Nimmer, William Rubenstein, Lawrence Sager, Steven Shiffrin, Eugene Volokh, and James Weinstein asked challenging questions and gave excellent advice. Isabella Chestney, Julia D'Errico, and Abigail Smith offered remarkably helpful research assistance.

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INTRODUCTION

On January 8, 2021, the social media company Twitter permanently banned a sitting President from using its platform. Twitter took this action in response to President Trump's use of its platform to incite violent resistance to the peaceful transfer of power after the 2020 election.[1] This exclusion sparked a lawsuit by the former President[2] as well as legislation in Texas that purports to limit the power of social media companies to exclude users and their posts based on the viewpoint of their expressions.[3]

Twitter's legal response has been straightforward. Twitter argues that, as a private online service provider, it not bound by the First Amendment. Further, it claims a First Amendment right to exclude anyone it elects to from its platform or services.[4] While these are respectable legal positions,[5] the invocation of First

1. *Permanent Suspension of @realDonaldTrump*, TWITTER (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension [https://perma.cc/M66Q-9UWB]. Under new ownership, Twitter reinstated Trump's account on November 20, 2022. Ryan Mac & Kellen Browning, *Elon Musk Reinstates Trump's Twitter Account,* N.Y. TIMES (Nov. 19, 2022) https://www.nytimes.com/2022/11/19/technology/trump-twitter-musk.html [https://perma.cc/TZN7-RTHN]. As of the time of this Article's publication, however, Twitter has not altered its legal strategy as described *infra*.
2. Trump v. Twitter Inc., No. 21-CV-08378-JD, 2022 WL 1443233 (N.D. Cal. May 6, 2022) (upholding Twitter's right to exclude on the grounds that it is a private actor, exempt from any First Amendment responsibilities).
3. Tex. H.B. 20, 87th Leg., 2d C.S. (2021) (prohibiting social media platforms with more than 50 million active users from blocking, banning, removing, denying equal access to, or otherwise discriminating against users or their expressions based on the viewpoint of the user or their expression but affirmatively referencing platforms' power to exclude illegal content).
4. *See, e.g.*, Twitter Inc.'s Opposition to Plaintiff Trump's Motion for Preliminary Injunction at 3, Trump v. Twitter, No. 21-cv-08378-JD (N.D. Cal. Dec. 9, 2021) ("In the Terms, Twitter reserves its right to 'suspend or terminate your account . . . at any time for any or no reason.'"); TWITTER INC., TWITTER USER AGREEMENT 9 (effective Aug. 19, 2021) ("We may suspend or terminate your account or cease providing you with all or part of the Services at any time for any or no reason."). This term was in place while President Trump was in office. *See e.g.*, Twitter Inc., *Twitter Terms of Service*, WAYBACK MACHINE (June 14, 2017) https://web.archive.org/web/20170614235456/https://twitter.com/en/tos ("We may suspend or terminate your account or cease providing you with all or part of the Services at any time for any or no reason . . . ").
5. *See* Trump v. Twitter Inc., No. 21-CV-08378-JD, 2022 WL 1443233 (N.D. Cal. May 6, 2022); *See also* NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082 (N.D. Fla. 2021), *aff'd in part, vacated in part, remanded sub nom.* NetChoice, LLC v. Att'y Gen., 34 F.4th 1196 (11th Cir. 2022) (upholding a preliminary injunction against a Florida law that prohibits social

Amendment rights to exclude is proving more controversial with the courts than might have been predicted.[6] In any case, Twitter's blunt legal strategy represents a missed opportunity to defend instead, or in the alternative, on the narrower grounds that Trump's speech as a government official violated its terms of service that disallows the use of the service "for any unlawful purpose or in furtherance of illegal activities."[7] Other major social media platforms have similar terms of service that disallow all postings on their platforms that violate the law.[8]

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media platforms from deplatforming candidates for office, "deprioritizing and 'shadow-banning' content, and censoring 'journalistic enterprises'").

6. The trajectory of the Texas law, H.B. 20, has been tumultuous. At the time of this Article's publication, the argument that H.B. 20 is unconstitutional because social media companies have an absolute First Amendment right to exclude whomever they wish from their platforms has not succeeded. The district court initially granted a preliminary injunction against the Texas law on the grounds that H.B. 20 unconstitutionally violated media platforms' rights to editorial discretion under the First Amendment. The Fifth Circuit Court of Appeals stayed the injunction. The Supreme Court vacated the stay to reinstate the preliminary injunction, but with four justices dissenting. The federal appellate court then reversed the district court's preliminary injunction, holding that, on its face, H.B. 20 does not restrict any First Amendment right of media platforms because they are common carriers, not speakers, and H.B. 20 restricts their conduct to protect the speech of users. *See* NetChoice, LLC v. Paxton, 573 F. Supp. 3d 1092 (W.D. Tex., 2021) (granting a preliminary injunction); NetChoice, LLC v. Paxton, (5th Cir. 2022) 2022 WL 1537249 (staying a district court's preliminary injunction against Texas Law H.B. 20); NetChoice, LLC v. Paxton, 142 S. Ct. 1715 (2022) (vacating the stay on the preliminary injunction but with Justices Alito, Gorsuch, Thomas and Kagan dissenting); NetChoice LLC v. Paxton, (5th Cir. 2022) 2022 WL 428917 (holding H.B. 20 to be constitutional on its face and vacating the district court's preliminary injunction of Texas H.B. 20).

7. *The Twitter Rules*, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-rules [https://perma.cc/Z4SB-9P28] ("You may not use our service for any unlawful purpose or in furtherance of illegal activities."). This term was in place during the time President Trump was in office. *See* Twitter Inc., *The Twitter Rules*, WAYBACK MACHINE (Dec. 6, 2017) https://web.archive.org/web/20171206223936/https://help.twitter.com/en/rules-and-policies/twitter-rules ("You may not use our service for any unlawful purpose or in furtherance of illegal activities.").

8. *Terms of Service*, YOUTUBE (Jan. 5, 2022), https://www.youtube.com/static?template=terms [https://perma.cc/5A9T-6HG4] ("[Y]ou must not submit . . . any Content that does not comply with this Agreement . . . or the law"); *Reddit User Agreement*, REDDIT (last revised Aug. 12, 2021), https://www.redditinc.com/policies/user-agreement [https://perma.cc/4V9E-2ME9] (prohibiting users from using Reddit "to violate applicable law" or infringe on others' intellectual property rights or other proprietary rights); *Legal Terms of Service*, TIKTOK (last updated Feb. 2019), https://www.tiktok.com/legal/terms-of-service?lang=en#terms-us [https://perma.cc/F9FC-2BS6] (prohibiting users from using the service to commit a criminal offense, violate copyright law, etc.); *Terms of Use*, INSTAGRAM (last updated Jan. 4, 2022), https://help.instagram.com/581066165581870 [https://perma.cc/D4AA-2LZQ] ("How You Can't Use Instagram . . . You can't do anything unlawful, misleading, or fraudulent or for an illegal or unauthorized purpose."); *Terms of Service*, FACEBOOK (last updated Jan. 4, 2022), https://www.facebook.com/terms.php [https://perma.c

My purpose here is not to discuss whether Trump's speech surrounding the events of January 6th constituted illegal incitement. Rather, I draw attention to these terms of service to contend that they should have been invoked years earlier to suspend the President's social media activity because he used Twitter to further illegal activities throughout his Presidency, by using Twitter to disseminate unconstitutional government speech. Specifically, his lies about the election, the pandemic, and other matters, as well as his speech attacking the very legitimacy of criticism about him, violated the First Amendment's protections of freedom of speech and freedom of the press.[9]

Even assuming Twitter is right that, as a private media actor, it is not bound by the First Amendment and, further, that it enjoys the First Amendment right to choose to exclude users for arbitrary or content-related reasons, that legal permission alone would not provide an adequate, ethical justification for its exclusion practices. Ethically, its editorial control should be informed by its own regularly voiced commitments to foster a robust and diverse free speech culture—one that supports the constitutional guarantee of freedom of speech, exemplifies the virtues and practices associated with its exercise, and renders the protection meaningful. Appealing to its sheer legal power to exclude content may foster public distrust and cynicism about our free speech culture and its free speech commitments.[10]

c/4X9X-XVCB] ("You may not use our products to do or share anything . . . [t]hat is unlawful, misleading, discriminatory or fraudulent,"; *Snap Inc. Terms of Service*, SNAP INC. (Nov. 15, 2021), https://snap.com/en-US/terms [https://perma.cc/3S2P-HPYW] ("By using the Services, you represent, warrant, and agree that . . . you will comply with these Terms and all applicable local, state, national, and international laws, rules, and regulations."); *Truth Social Terms of Service*, TRUTH SOCIAL (Aug. 24, 2022), https://help.truthsocial.com/legal/terms-of-service [https://perma.cc/4DPY-4EHD] ("By using the Service, you represent and warrant that: . . . you will not use the Service for any illegal or unauthorized purpose; [and] . . . your use of the Service will not violate any applicable law or regulation.")

9. U.S. Const. amend. I.

10. *Compare Defending and Respecting the Rights of People Using Our Service*, TWITTER, https://help.twitter.com/en/rules-and-policies/defending-and-respecting-our-users-voice [https://perma.cc/5KT9-YATK] (articulating a commitment to the "core values" of freedom of expression and privacy) *with* Twitter Inc.'s Opposition to Plaintiff Trump's Motion for Preliminary Injunction at 3, Trump v. Twitter, No. 21-cv-08378-JD (N.D. Cal. Dec. 9, 2021) ("In the Terms, Twitter reserves its right to 'suspend or terminate your account . . . at any time for any or no reason.'"); TWITTER INC., TWITTER USER AGREEMENT 9 (effective Aug. 19, 2021) ("We may suspend or terminate your account or cease providing you with all or part of the Services at any time for any or no reason.").

Citing instead the illegality of the President's speech and his violation of the terms of service would bypass these issues.[11] Further, whether as an alternative legal position or a complementary one, it would offer tailored grounds for media platforms to resist disseminating government lies and government attacks on the legitimacy of dissent and would permit the media to play a role in vitalizing an underenforced First Amendment norm. Taking a more tailored, speaker-sensitive approach might also relieve pressure to commit prematurely to generic policies against inaccurate speech that could sweep too widely, blocking or chilling the sort of private, albeit sometimes misguided, speech that a free speech culture must entertain.

Pursuing this alternative strategy does, however, require that we revisit some standard thinking about government speech. Our free speech jurisprudence and commentary have largely taken the view that the wide dissemination of government speech is always in the public interest. For the purpose of accountability, the public has an interest in knowing what the government and its officials say.[12] Further, it is often thought that although the First Amendment limits governmental discrimination against nongovernment speech, the First Amendment's Free Speech Clause does not constrain government speech. The government must take substantive positions and it need not show neutrality when speaking for itself. Hence, the circumstances in which government speech violates the Free Speech Clause have been considered rare, generally limited to cases in which targeted government speech illicitly harms specific individuals.

As with most of our foundational First Amendment principles, these positions were formulated before massive technological changes transformed our communicative environment to enable speakers, including government speakers, to reach an enormous, dispersed audience nearly instantaneously, without

11. It would also satisfy the standard Elon Musk articulated for Twitter in the buildup to his purchase offer for the platform—namely, that it should apply the First Amendment's standards in deciding what to host and what to deplatform. *See* Jeffrey Rosen, *Elon Musk Is Right That Twitter Should Follow the First Amendment*, ATLANTIC (May 2, 2022), https://www.theatlantic.com/ideas/archive/2022/05/elon-musk-twitter-free-speech-first-amendment/629721 [https://perma.cc/7DL9-CUX3].

12. *See, e.g.*, Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 603–04 (1979). *See also* Joseph Blocher, *Government Property and Government Speech*, 52 WM. & MARY L. REV. 1413, 1465 (2011) [hereinafter Blocher, *Government Property*]; Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. Rev. 695, 750–51 (2011) [hereinafter Blocher, *Viewpoint Neutrality*]; Helen Norton, *Campaign Speech Law With a Twist: When the Government Is the Speaker, Not the Regulator*, 61 EMORY L.J. 209, 245 (2012) [hereinafter Norton, *Campaign Speech Law*]; Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 590 (2008) [hereinafter Norton, *Measure of Government Speech*]; THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 698 (1970).

preliminary editorial or institutional mediation, commentary, or fact-checking. As we are now discovering, the prior natural limitations of size, time, and the judgments and feedback of others may have indirectly restrained some of the dangers of misinformation, invasions of privacy, incendiary speech, and hate speech.

Although usually not cited as factors, those background constraints may have implicitly influenced our articulation of our free speech legal principles and our framing of our extra-legal, *social* free speech principles and practices. The background sense that a mistake could only do so much damage may have influenced the direction of our attention and the arguments that shape our doctrinal and cultural line-drawing. The recent technological (and cultural) circumventions of these natural brakes on direct, unmediated, mass distribution, however, provide reason to reexamine some of our convictions about First Amendment doctrine and free speech culture, consciously and in light of these developments—whether to reject or to reaffirm them.

On this occasion, I will focus only on a single corner of our free speech doctrine that these technological and cultural changes have made especially salient.[13] Specifically, the unmediated, mass disseminated speech of our last president should prompt us to reexamine the government speech doctrine.[14] That reexamination should yield the conclusion that a wider range of government speech than we have previously acknowledged violates the Free Speech Clause—specifically, government lies, culpable misrepresentations by government officials, and government attacks on the legitimacy of criticism.

My position is not that the First Amendment violations I identify are all subject to judicial review and enforcement. There are undeniable, difficult issues associated with the prospect of judicial oversight of recurring government speech, and these may make some of the government's violations of the First

13. Assessing the free speech implications of the communications revolution represents a large methodological project that should be undertaken slowly and piecemeal. I am suspicious of any fast, wholesale overhaul of principles that, for the most part, have served us well. There are ample reasons to doubt that government officials could implement more powerful speech regulations to address these dangers without unacceptable discrimination and illicit suppression. Further, many changes may have a common cause but do not generate problems with similar structures or solutions. For example, the problem and the (partial) solution to government misinformation significantly differs from that of private misinformation sown by lay citizens, even if new technology disseminates them equally widely.

14. I will be using the term "government speech" in a narrow way just to cover explicit messages issued by government officials in their capacity as officials, and not in the important, broader sense that includes government-subsidized and government-guided speech. *See, e.g.*, Shiffrin, *supra* note 12, at 565 (canvassing the broad array of options about what counts as government speech in different contexts).

Amendment through its speech nonjusticiable. But, I deny that constitutional content tracks justiciability or that the nonjusticiable aspects of the U.S. Constitution are merely aspirational. Traditionally, the separation between what the Constitution demands and what can be judicially enforced has always been important for articulating the legal ethical standards to which we should hold officials accountable. The technological and cultural shifts I mentioned should also trigger greater attention to private mechanisms of constitutional enforcement. As government officials increasingly use private media platforms to disseminate their messages unburdened by editorial hurdles, fact-checking, or commentary, private media should play a role in voluntarily enforcing constitutional standards by refusing to disseminate unconstitutional (even if nonjusticiable) government speech.

Part I lays out two major arguments. First, blunt government attacks on the legitimacy of criticism violate the First Amendment's Free Speech Clause, irrespective of whether such attacks harm any particular individual or group. By denying the very content of the First Amendment's protection, attacks on the legitimacy of criticism are inconsistent with the duties of officials to uphold the law and the Constitution. Government officials may criticize the law, the rights it protects, and how citizens use those rights, but that criticism must make clear that the activity is nonetheless legally protected. Second, lies and culpable misrepresentations by government officials about public affairs violate the Free Speech Clause, whether or not those misrepresentations are believed or cause harm to particular individuals or groups.

Assuming many, if not all, of these violations would be nonjusticiable, Part II explores the idea of private enforcement of nonjusticiable constitutional norms through a refusal to host unconstitutional speech. It pays special attention to the potential opportunities and hazards occasioned by the development of nonjusticiable constitutional law by private social media actors.

Part III considers further questions about our social, nonlegal principles of freedom of speech, including whether the permanent exclusion of former government officials from social media sites is consistent with the social value of free speech and whether the imperative to preserve the social value of free speech culture recommends that media platforms should adopt policies to exclude all misinformation, whether by lay citizens or officials. I argue against a blanket approach to these questions. It is crucial to provide substantial breathing room in free speech culture for citizens both to attack the Constitution and to consider and discuss mistaken views and facts. By virtue of their roles and their special access to information, government officials should be subject to different legal and social standards when they speak as government officials rather than

ordinary citizens on matters of public affairs. Perhaps other experts should also be held to similarly high standards of accuracy on matters related to their actual or asserted expertise. But, tackling the issue of misinformation introduced by private citizens is a complex and delicate problem that can be evaluated separately from the discrete question of whether private companies should offer a platform to government officials who engage in unmediated mass distribution of unconstitutional speech.

I. UNCONSTITUTIONAL GOVERNMENT SPEECH

I will focus my argument on the previously unimaginable pattern of attacks on the press by a sitting president, as well as the patent lies and misrepresentations to the public that President Trump made his signature method of communicative provocation. President Trump's speech offered a variety of examples of unconstitutional speech that violated the Free Speech Clause, but not by virtue of inflicting specific harm on particular individuals.[15] A few examples: (1) calling the press "the enemy of the American people;"[16] (2) labeling unwanted reporting,

15. Caroline Mala Corbin reaches some similar conclusions in her article, *The Unconstitutionality of Government Propaganda*, 81 OHIO ST. L.J. 815 (2020), although she seems more sanguine about the prospects of judicial enforcement. She and I concur that the First Amendment condemns many of the President's misrepresentations. On the other hand, she regards generalized attacks on the press as potentially protected opinion. *Id.* at 842. I do not agree for the reasons I describe *infra* pp. 1007–1010. How we reach our shared conclusions also significantly differs. First, I do not think it helps to conceptualize the problem as one concerning "propaganda," both because it is a loaded term and because it connotes a purpose associated with the offending speech that seems irrelevant to the First Amendment violation. Notably, although Corbin discusses narrow, self-serving, power-aggrandizing manipulation as a key aspect of propaganda, her own working definition does not include reference to the purpose or effect of the offending speech. *Id.* at 826–29. This generates a mismatch between the arguments she offers, which stress the harms of propaganda understood in its fuller aggrandizing, manipulative sense, and the speech her more neutral definition picks out. Second, although Corbin and I both stress the way in which government lies and misrepresentations confound the democratic accountability function of the First Amendment, her argument emphasizes the harms associated with the persuasive impact of lies, whereas my argument does not depend upon their persuasive effect and hence, does not depend upon the production or evaluation of evidence of harmful effects. *See infra* pp. 999, 1000–1003, 1010–1014; *see also* SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 118, 135–38, 155–56 (2014) [hereinafter SHIFFRIN, SPEECH MATTERS].

16. Michael M. Grynbaum, *Trump Calls the News Media the 'Enemy of the American People'*, N.Y. TIMES (Feb. 17, 2017), https://www.nytimes.com/2017/02/17/business/trump-calls-the-news-media-the-enemy-of-the-people.html [https://perma.cc/4J34-7QB8].

anonymous editorials, and the failure to applaud him as forms of "treason;"[17] (3) lying about the 2020 election results;[18] and, (4) misrepresenting the severity of the pandemic.[19] I claim that all of this speech in his capacity as a government official was unconstitutional. It is not only unprotected by the First Amendment, but it violates the First Amendment. Government officials, including the President, have special legal obligations to uphold, and therefore not to contradict, constitutional guarantees, including in their speech. Importantly, government officials can violate these legal obligations by issuing certain content, including opinions, irrespective of the intended, likely, or actual effects of the speech on any particular persons.

At first, this may seem like a surprising claim because of the general notion that the First Amendment's Free Speech Clause limits how government can respond to others' speech, but does not limit its own speech. It is sometimes said, even by the U.S. Supreme Court, that the First Amendment does not apply to government speech, by which it is meant that the First Amendment's restrictions on government do not apply to its own speech production.[20] Roughly put, in

17. Ryan Teague Beckwith, *What Makes Trump's 'Treason' Talk Different*, TIME (June 3, 2019), https://time.com/5599958/donald-trump-treason-investigations [https://perma.cc/BJ7K-JNPU].

18. Daniel Dale, *10 Trump Election Lies His Own Officials Called False*, CNN (June 16, 2022), https://www.cnn.com/2022/06/16/politics/fact-check-trump-officials-testimony-debunking-election-lies/index.html [https://perma.cc/FNA4-YKGP] (detailing many false claims President Trump made while President about the 2020 Presidential election and alleged fraud that he was advised were false by senior advisors); Amy B. Wang, John Wagner, Eugene Scott, and Mariana Alfaro, *Trump Pushed 'Big Lie' Despite Being Told Election Fraud Claims Were False, Aides Testify*, WASH. POST (June 13, 2022), https://www.washingtonpost.com/national-security/2022/06/13/jan-6-committee-hearings-live [https://perma.cc/8UGN-U4LS].

19. Christian Paz, *All the President's Lies About the Coronavirus*, ATLANTIC (Nov. 2, 2020), https://www.theatlantic.com/politics/archive/2020/11/trumps-lies-about-coronavirus/608647 [https://perma.cc/Y6M8-LYMD]; H. Holden Thorp, *Trump Lied About Science*, 369 SCIENCE 1409 (Sept. 18, 2020), https://www.science.org/doi/10.1126/science.abe7391 [https://perma.cc/RJB8-F5FR] (commenting on Trump's admission to reporter Bob Woodward that Trump knew the virus was severe and airborne, but represented it otherwise to the public because he wanted to "play it down.").

20. *See, e.g.*, Matal v. Tam, 137 S. Ct. 1744, 1757 (2017) ("[T]he First Amendment does not say that Congress and other governmental entities must abridge their own ability to speak freely."); Walker v. Tex. Div. Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015) ("When government speaks it is not barred by the Free Speech Clause from determining the content of what it says."); Reed v. Town of Gilbert, 576 U.S. 155, 178 (2015) (Breyer, J., concurring) ("The Court has also said that 'government speech' escapes First Amendment strictures.") (citing Rust v. Sullivan, 500 U.S. 173, 193–94 (1991)); Pleasant Grove City v.

regulating speech, the government cannot discriminate on the basis of the speaker's content. In contrast, for government to function, it must articulate its own viewpoints and so, with respect to its own speech, by choosing topics and positions, it must discriminate between different potential contents.[21]

True enough. But, as courts and other scholars have noted, the First Amendment does not protect all government speech no matter what its content. It does not protect speech that orders an independently illegal act, such as an order to falsify election results. Further, the First Amendment does not immunize government officials who directly threaten or defame someone.[22] Moreover, it is fairly clear that the First Amendment itself bars government officials from using speech to threaten or intimidate other speakers from exercising their free speech rights.

As Helen Norton has argued, the judicially recognized cases of government speech abridging the Free Speech Clause turn on whether there is an actual, demonstrable harm to speakers whose speech is suppressed, punished or targeted.[23] The cases involve direct or indirect credible threats of coercive state action,[24] or retaliatory speech (such as defamatory lies or embarrassing disclosures) to inhibit, punish, or silence specific nongovernmental speakers for

Summum, 555 U.S. 460, 467 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.").

21. *See, e.g.*, Shiffrin, *supra* note 12; Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1 (2000); Blocher, *Viewpoint Neutrality*, *supra* note 12, at 750–67; Norton, *Campaign Speech Law*, *supra* note 12, at 245; Norton, *Measure of Government Speech*, *supra* note 12, at 590 (2008); RODNEY A. SMOLLA, 2 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 19.2 (2022).

22. *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 139 (1951) (finding public officials are not immune from declaratory and injunctive relief for defamatory statements); Expeditions Unlimited Aquatic Enters., Inc. v. Smithsonian Inst., 566 F.2d 289, 294 n.16 (D.C. Cir., 1977) (en banc) ("Under certain circumstances, declaratory and injunctive relief may be obtained against defamatory statements by government officials"); *see also* Cmty. for Creative Non–Violence v. Pierce, 814 F.2d 663, 671–73 (1987) (remanding claim of slander brought against federal officer under D.C. common law). Officials will gain sanctuary from monetary damages, however, from the doctrine of sovereign immunity and the defamation carve-out for employees in the Federal Torts Claims Act and the Westfall Act, or, in the case of the President, from the absolute immunity that office-holder enjoys. *See* Nixon v. Fitzgerald, 457 U.S. 731 (1982); *see also* Carroll v. Trump, 498 F. Supp. 3d 422 (S.D.N.Y. 2020). Other cases may be deemed nonjusticiable. *See, e.g.*, El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 840 (D.C. Cir. 2010) (implying that a defamation claim concerning whether a pharmaceutical plant was connected to chemical weapons and Osama Bin Laden fell under the political question doctrine).

23. HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION 156–82 (2019).

24. *See, e.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Backpage.com, LLC v. Dart, 807 F.3d 229 (7th Cir. 2015); Okwedy v. Molinari, 333 F.3d 339 (2d Cir. 2003); NORTON, *supra* note 23, at 160–62.

disfavored speech.[25] President Trump's controversial speech did not have these features for the most part. Often, his targets were diffuse. In other cases, it would be difficult to prove his speech was the proximate cause of any specific harm, given the paradoxical combination of his threadbare credibility and the cadre of other sources willing to echo his lies. Thus, to many, this speech seemed beyond the reach of the law.

I disagree. We should recognize two further categories of government speech that violate the First Amendment's speech clause, independent of the speech's purpose, effect, or intended effect, and irrespective of whether the speech is directed at a particular person: first, government speech that denies the protections of the Free Speech Clause and second, lies and culpable misrepresentations by government speakers.

I suspect that the judicial and academic focus on directed speech and intended or actual effects on particular speakers may reflect sensitivity to standard concerns about standing or other forms of judicial reluctance to interfere with other branches of government, rather than issuing from a thorough analysis of what the First Amendment requires.[26] The perimeter of justiciability, however, does not limit the reach of the Constitution, nor should it limit our analysis of the Constitution. Government officials are bound by the Constitution, even if their violations could not be remedied by a court.[27] Implementation of those nether

25. *See* NORTON, *supra* note 23, at 162–73.

26. Nelson Tebbe also explores whether putting aside justiciability concerns would reshape our perception of the government speech doctrine. Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648 (2013). He considers cases of government speech that disparage or favor some groups (such as racist speech or electioneering). He argues such speech would, in virtue of its content, violate equal protection, due process, and free speech by abridging "full and equal citizenship in a free society." *Id.* at 650. *See also* Abner B. Greene, *Government Endorsement: A Reply to Nelson Tebbe's* Government Nonendorsement, 98 MINN. L. REV. HEADNOTES 87 (2013) (discussing Tebbe's theory). My analysis is not incompatible with Tebbe's, but it does not depend upon it either. My approach has the advantage of using more theoretically modest and direct tools and has different coverage. Tebbe's position requires a theory of when a government official's speech *denigrates* specific people or groups, such that it "*constitutes* citizens as disrespected or disparaged participants in political life," which in turn officially diminishes them as worthy speakers. *Id.* at 706 (emphasis added). These judgments require assessing the "social salience of the denigrated individual or group," the social meaning of disfavoring them, and the significance of the message. *Id.* at 708. My analysis, by focusing on whether the speech implicitly or explicitly denies a free speech protection or is an insincere or culpable misrepresentation, does not require such theoretically rich and controversial judgments. It articulates a clear statement rule that permits a readily identifiable distinction between impermissible government speech and permissible government speech. It also has the resources to address speech that does not target specific individuals or groups of individuals, such as cases involving attacks on the press or cases of lies about climate change, the pandemic, or election results.

27. LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES 84–128 (2004).

reaches of the Constitution rests upon the good faith of officials, reputational pressures, and other methods of private observance and enforcement.

Before addressing the issues and opportunities presented by extrajudicial interpretation and enforcement, however, the case needs to be made that, as I contend, government speech may violate the Free Speech Clause, independent of its actual or intended effect.

A. Attacks on Critics and the Press

Government attacks on commentators and on the press for criticizing the government represent easy cases for my thesis because they involve a flat denial of the contents of the First Amendment. Some simplified, only barely hypothetical, examples make the point evident. Suppose a president were to tweet "In light of my enemies' unfair attacks and their false news *hoaxes*, the First Amendment has been suspended. Sad! ☹," "Criticism of POTUS is treason," or "The Constitution provides no refuge for Communist speech." Leaving aside whether the examples are unrealistic, the content of the statements directly deny the freedom protected by the First Amendment. Although there are disputes about the scope of the First Amendment's coverage when it comes to difficult cases, like nondiscursive performance art, there is rock-solid consensus that the First Amendment protects purely discursive criticism as well as the (mere) advocacy of Communism.[28] To claim that criticism (or the absence of adulation) is treason is flatly inconsistent with the First Amendment's guarantee that criticism of government is a legally protected activity.

Such examples would contravene the First Amendment by denying its continued legal livelihood in the first case and by denying its settled, clear applications in the others for three reasons.

First, these attacks violate the First Amendment's duties for government officials by violating the constitutionally mandated oath of office. The

28. *See* Noto v. United States, 367 U.S. 290, 297–98 (1961) (holding that "the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action" and is thus protected speech); Yates v. United States, 354 U.S. 298, 320, 329 (1957) (mere "advocacy in the realm of ideas" is protected by the First Amendment); Dennis v. United States, 341 U.S. 494, 511 (1951) (distinguishing between "abstract doctrine of overthrowing . . . [the] government," which is protected by the First Amendment, and "the advocacy of action for the accomplishment of that purpose, by language . . . calculated to incite . . . such action," which is not protected).

presidential oath of office, itself required by the Constitution, commits the President to preserving, protecting, and defending the Constitution.[29] Other federal and state governmental officials must take oaths to support and defend the Constitution.[30] Denial of the First Amendment's validity and its central applications is antithetical to the First Amendment's protection and defense.

Second, denial of the First Amendment's validity and its central applications violates a more fundamental obligation inherent in the public aspect of the rule of law, textually grounded in the due process clauses of the Fifth and Fourteenth Amendments as well as the Guarantee Clause.[31] As a general matter, the rule of law requires that public officials not deny the existence of public laws, especially ones that are foundational to the functioning of the republic. Indeed, the rule of law requires that officials recognize and follow the law. These points hold especially true for systems of self-administration, by which I mean systems in which the government (and not some external party) polices itself. Hence, they hold especially true for democracies, which are meant to be paragons of self-governance. Fulfillment of these requirements is incompatible with the public denial of the law, both because denial is the antithesis of recognition, and also because such denials hint at the potential intent not to comply with other requirements of the law. Such hints give reason for public uncertainty about whether accountability measures that require cooperation by government officials are operative, which in turn may erode confidence and reasons of reciprocity for citizen and official compliance. Although the moral and legal imperative to comply with the law does not formally depend upon reciprocity (in most cases),[32] there are sociological reasons to think that practices of reciprocity bolster compliance and that they buttress resolve to engage in compliance where compliance is costly or where the boundaries of the law seem grey.[33] Generating

29. U.S. CONST. art. II, § 1, cl. 8.
30. *See generally* Richard M. Re, *Promising the Constitution*, 110 NW. UNIV. L. REV. 299 (2016).
31. For a more expansive picture of the relationship between a republican form of government and virtuous behavior by officials, see generally Steven H. Shiffrin, *Morality and the First Amendment*, 18 FIRST AMEND. L. REV. 65 (2020).
32. *Cf.* Robert C. Hughes, *Breaking the Law Under Competitive Pressure*, 38 L. & PHIL. 169, 169–93 (2019) (arguing that, generally, businesses must obey the law even when their rivals disobey and even when obedience puts one at a competitive disadvantage).
33. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW 161–65 (2006) (discussing the significant role perceived procedural fairness plays in legal compliance with the law and the degree to which people afford legal authorities and the legal system more legitimacy when they feel legal procedures are carried out fairly and legal authorities seem to care about acting fairly); *see also* Jason Sunshine & Tom Tyler, *Moral Solidarity, Identification With the Community, and the Importance of Procedural Justice: The Police as Prototypical Representatives of a Group's Moral Values*, 66 SOC. PSYCH. Q. 153 (2003) (demonstrating that cooperation with the police is

uncertainty by signaling the willingness not to comply may be especially worrisome when officials operate within deliberate but labor-intensive structures of checking, competition, and rivalry.

Third, where the relevant legal provision is, like the First Amendment, one designed in large part to provide citizens with a mechanism to check governmental abuse, the denial of the legal provision's content directly subverts its specific purposes. The First Amendment is not supposed to operate in the background, administered by government but capable of fulfilling its function without being known, observed, or invoked by ordinary citizens. There are such background laws, such as the laws that regulate the precise shape and color of pavement markers like Botts' dots, which are those clever installations that haptically alert drivers when they cross highway lanes.[34] Official denial of pavement marker laws, if coupled with actual state compliance with those laws, would not erode their effectiveness, in the sense that appropriately shaped, placed, and colored pavement markers will fulfill their function of alerting sleepy drivers to inadvertent lane crossings whether or not those drivers know the markers are there and how they should be shaped and placed. By contrast, achieving the purpose of most constitutional protections depends upon them being known and freely used by the public. The affirmation of these protections by officials is also crucial. Public affirmation serves to define our civic and national democratic identity and to assure citizens of the government's values and trustworthiness. The problem posed by speech-based denial of First Amendment protections is related to the problems associated with 'secret law,'[35] such as classified government rules and operative 'legal' opinions, but more pronounced because the law at issue is a constitutional protection. It is especially important that constitutional protections be publicly affirmed by the officials they restrain.

motivated in part by assessing the fairness of the procedures used by police to exercise their authority); Lorenzo Sacconi & Marco Faillo, *Conformity, Reciprocity and the Sense of Justice. How Social Contract-Based Preferences and Beliefs Explain Norm Compliance: The Experimental Evidence*, 21 CONST. POL. ECON. 171, 192–95 (2010) (showing that people are more likely to comply with social norms when other participants reciprocally adhere to the same norms).

34. *Centerline Botts Dots*, SACRAMENTO CTY. DEP'T OF TRANS., https://sacdot.saccounty.net/Pages/NTMP-CenterlineBottsDots.aspx [https://perma.cc/24JM-5WSY].

35. Jonathan Manes, *Secret Law*, 106 GEO. L.J. 803, 814 (2018) (detailing the threats posed to individual liberty, democratic accountability, and separation of powers by secret law); Dakota S. Rudesill, *Coming to Terms With Secret Law*, 7 HARV. NAT'L SEC. J. 241, 332 (2015) (discussing argument that secret law should be abolished because it "disrupts the feedback loop that allows review of the law and therefore full functioning of separation of powers, checks and balances, and public accountability").

None of these arguments depends on the actual effects of the speech on an audience. Even if the audience were confident that the government official would be unsuccessful at further attempts at suppression or persecution, whether because he is all bluster or because other officials serve as a bulwark, the speech would still violate the Constitution. The speech would represent a failure by that government official to do their part in upholding the Constitution, a fundamental part of the role of office. True, part of what is troubling about this speech is that it might inspire fear in its audience or hint at a threat, and therefore chill speech. These potential effects loom on the horizon, however, because the content of the government speech under scrutiny renders it rational for an audience to harbor uncertainty about the safety of exercising one's freedom of speech, say by criticizing the President. My modest contention is the First Amendment prohibits officials from giving the public rational grounds for uncertainty about whether the officials affirm the legal free speech protections that they are responsible to uphold.

B. The Legitimacy of Government Criticism of the Constitution

1. A First Amendment Objection to the Supposed 'Easy Cases'

An objection might be raised to the foregoing treatment of what I have, perhaps tendentiously, labelled 'easy cases.' Surely, it might be objected, government officials may legitimately criticize Constitutional guarantees and may criticize judicial interpretations of the Constitution. To avoid constitutional fetishization, citizens and officials must be able to reflect upon the Constitution's flaws and propose reforms. Indeed, given their intimate, working familiarity with the Constitutional framework, government officials may be especially well situated to recognize where criticism and adjustments are due or when the judiciary has lost its tether to the true spirit of the Constitution. Liberals engage in such criticism regularly with respect to the Second Amendment's contemporary judicial interpretation that purports to locate constitutional protection for individual gun ownership.[36] Likewise, one hears a steady stream of attack against the Supreme Court's interpretation of the First Amendment in *Citizens United*.[37] Yet, no howls of protest are issued when liberal government officials join their academic and activist colleagues in these onslaughts.

36. N.Y.S. Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022), 2022 WL 2251305; Dist. of Columbia v. Heller, 554 U.S. 570 (2008).
37. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

Furthermore, officials, like anyone else, may criticize how citizens elect to exercise their rights. Such criticism may build a case for legal reform or serve to react to the discretionary use of freedom, perhaps in an effort to shift the culture, if not the law. For instance, many conservatives and liberals alike believe some forms of hate speech are protected by the First Amendment but should never be voiced. The articulation of hate speech is morally reprehensible and politically disqualifying. Underlying this criticism is the philosophical position that the protection of a right does not necessarily connote endorsement of how it is exercised. After all, the rationale for some right (or its scope) may not always be grounded in an appeal to the value of all forms of its exercise. The rationale for a right's protection (or its scope) may instead be grounded in other reasons such as: concerns about government abuse or overreach; the difficulty of delineating the boundaries between valuable and vicious forms of exercise; or, the need to preserve meritless options when the valuable instances of a right's exercise depend, in large part, on their free election by the performer and the exercise of the performer's discretion, judgment, or recognizable sincerity. If the scope of protection stretches beyond the perimeter of valuable exercise, then, cultivated judgment by citizens about how to exercise their rights is an important moral complement to the legal protection of those rights. Public evaluation of how citizens exercise their rights is the mechanism by which to encourage and hone such judgment.

It might, therefore, be suggested that we should view presidential attacks on the press as "the enemy of the American people" as an example of such public evaluation, invoking the hallowed tradition of heightened rhetoric to criticize how journalists exercise their protected freedoms. The specific criticism may well be misguided, but normative mistakes in criticism are not excluded from First Amendment protection.

2. Answering the Objection

I agree with the premise that officials must have the freedom to criticize laws, including the Constitution, judicial interpretations of those laws, and how citizens exercise their own discretion protected by the law. The premise seems intimately tied with at least one of the major justifications of the First Amendment, namely that the legitimacy of all state action depends upon the ability to question and reconsider its bona fides. This opportunity matters not only because our judgments may be fallible. Even with respect to fundamental, unrevisable tenets of democratic government, full legitimacy depends upon our understanding the underlying reasons for our actions, stances, and

commitments. And, the accessibility of the full range of reasons for an action, stance, or commitment requires the ability to consider, discuss, and evaluate the considerations against it.

Hence, the legal defect in President Trump's speech is not that he is critical of the First Amendment or of how particular speakers exercise it. The problem is in the delivery, in saying both too much and too little. By attaching terms like 'enemy' and 'treason' to examples of clearly protected free speech, his criticism is packaged as a denial of the First Amendment and its applications. Although these terms are often invoked metaphorically and hyperbolically, they also have legal significance, which renders their invocation without qualification by a hostile and powerful government official both ambiguous and ominous. For instance, during war, under the Trading with the Enemy Act, the President has the power to proclaim a non-U.S. citizen "an enemy" if the President deems that person a threat to the safety of the U.S.[38] Trading and written communication with "the enemy" or an ally of an enemy during wartime are "unlawful" activities.[39] Giving "aid or comfort" to the "enemies" of the United States constitutes treason, punishable by fines, imprisonment, ineligibility for public office, and perhaps death.[40]

The First Amendment codifies the free press as an explicit and integral part of our constitutional structure. The press's critical activity is thus not the activity of a criminal, military adversary, enemy, or traitor.[41] Government officials have,

38. *See* 50 U.S.C.A. § 4302(c) (West).
39. 50 U.S.C.A. § 4303 (West).
40. U.S. CONST. art. III, § 3, cl. 1; 18 U.S.C.A. § 2381 (West).
41. This view does not depend upon thinking that the press is special; one may think the Constitution's spotlight on the press identifies a floor of guaranteed protection, but that does not exclude its having peers. For conflicting views, compare Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1070 (2011) ("The Constitution gives the press explicit protection. . . . because the press has always played an exceptional and important role in our society and our democracy. "), and C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 958 (2007) (arguing for press exceptionalism), and Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 633–34 (1975) ("If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy. . . . The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches."), with Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 UNIV. PA. L. REV. 459, 538–39 (2012) (concluding that historical evidence and case law both "[point] towards equal treatment for all speakers . . . whether or not they are members of the press-as-industry"), and Erwin Chemerinsky, *Tucker Lecture, Law and Media Symposium*, 66 WASH. & LEE L. REV. 1449, 1452 (2009) ("If special protections were given to the institutional press, how would lines ever be drawn in light of the democratization of access to the media?").

as I have outlined, a special legal duty to uphold and affirm the Constitution. That duty does not preclude criticism, but it does require that the criticism be unambiguous. It cannot flirt with the illicit suggestion that citizens' First Amendment activity is illegal. Such a suggestion may have a compelling rhetorical appeal, but the sacrifice of the opportunity for such hyperbolic flourishes is a price of legitimate power.

To avoid giving the public rational grounds for uncertainty about their respect for the First Amendment, governmental officials must operate under a clear statement rule in their speech as well as in some of their legislation. They may criticize how citizens exercise their speech rights, but they cannot suggest or declare that the exercise itself is illegitimate as a matter of positive law. To avoid speech that constitutes an unconstitutional denial of a constitutional protection, public criticism of an established constitutional right or a citizen's clearly protected legal exercise of a right by a government official must make credible and clear either: (1) that they do not speak in their capacity as a governmental official;[42] or, (2) if they do speak in their capacity as a governmental official, their speech must make clear what the extant protection is and that they must honor it in the contemporary circumstances. At most, the government official can advocate for change, but cannot describe a reigning state of legal affairs. If the latter route is taken, an additional, prominent, and sincere clarification is required. It cannot be the sort of eye-rolling, inadequate disclaimer that cynical retailers use of "the government makes us remind you that" variety or the equivalent of unreadable fine print or rubber-stamped bureaucratese.[43] To be sure, this requirement does burden the speech of

42. This, of course, will be a fact-specific, contextual inquiry. See discussion in Knight First Amend. Inst. at Colum. Univ. v. Trump, 928 F.3d 226, 236–37 (2nd Cir. 2019), *vacated as moot sub. nom.* Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220 (2021) (describing the factors as including "how the official describes and uses the account; to whom features of the account are made available; and how others, including government officials and agencies, regard and treat the account" and finding that President Trump utilized his Twitter account to speak as a government official, using it as "an official vehicle for governance"). *See also* Garnier v. O'Connor-Ratcliff, 41 F.4th 1158, 1171–73 (9th Cir. 2022) (analyzing similar factors to determine that school board trustees' use of their social media pages constituted state action, emphasizing their use of the pages to disseminate school board information and their invocation of the trustees' governmental status, and noting the absence of a disclaimer).

43. *See* FTC Policy Statement on Deception, (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [https://perma.cc/S4MD-3NFK] ("Pro forma statements or disclaimers may not cure otherwise deceptive messages or practices."). For a finding that a disclaimer reciting what "the FTC requires us to tell you" may still be inadequate to counteract otherwise

government officials with higher standards than lay citizens, but that heightened burden is consistent with the special role of governmental officials.

When officials do not comply with this standard, and instead issue blunt attacks on the legality of a constitutional right (or its exercise), that governmental attack itself violates the First Amendment— whether it singles individuals out or not, whether it is believed or not, whether it chills and deters the exercise of the constitutional right or not. To be sure, adherence to a clear statement rule may chafe against a 280-character stricture. The idea, however, that important messages must be conveyable within the space of a bumper sticker is not a constitutional given, but another intellectual travesty originally wrought by Madison Avenue and fueled by Silicon Valley.

3. Governmental Opinion Speech

One might further object that these statements are opinions and the First Amendment protection for opinions is a bedrock constitutional right, even with respect to government speech.[44] Two lines of response are available.

First, in many (if not all) of these cases, these statements of opinion are impure in the sense that they are not exclusively opinion statements. They either presuppose or connote false factual claims about the legal status of citizens' activity. It is well understood that when defamatory, underlying false presuppositions do not fall under the First Amendment's protective umbrella and are not shielded by a cloak of opinion speech.[45] If government officials have special responsibilities to represent the law accurately, then we should take an analogous view about governmental misrepresentations of the law embedded within statements of opinion.

Second, it is not at all clear that the First Amendment's coverage extends to the opinion speech of government officials, representing themselves as officials,

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deceptive advertising, see Opinion of the Fed. Trade Comm'n, *In the Matter of California Naturel*, 4–5, Docket No. 9370 (Dec. 5, 2016), https://www.ftc.gov/system/files/documents/cases/161212_docket_no_9370_california_naturel_opinion_of_the_commission.pdf. [https://perma.cc/KKV2-7KP6]

44. *Cf.* Corbin, *supra* note 15, at 831, 842 (noting that "opinions alone" fall outside of her definition of government propaganda that violates the First Amendment).

45. *See, e.g.*, ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 4, at 53–55 (5th ed. 2017) ("[E]ven when a statement of opinion is not explicitly defamatory, especially if it lacks an accurate statement of the facts upon which it is based, it may be understood to imply inaccurate allegations of fact that are defamatory and may therefore be actionable.").

in the same way that it extends to individual citizens. Is it obvious that government officials are protected by the First Amendment to spout the opinion, qua officials, that gender discrimination is laudable because it reinforces the appropriate subordinate status of women or that 'due process' should only be afforded to the rich? Why not, instead, affirm the position that qua government official, officials are bound not to voice opinions that indisputably contradict fundamental Constitutional commitments? Or to riff on one of Professor Nimmer's landmark achievements,[46] isn't there an obvious First Amendment difference between a citizen wearing a jacket to a courthouse that reads "Fuck Advise and Consent" and the President wearing that same jacket to a press conference in the Rose Garden?

This position on government opinion speech that I am floating has its roots in the First Amendment's doctrine about state employees that, roughly speaking, permits discipline of state employee speech that either falls within the employee's sphere of employment or does not pertain to a matter of public concern. To be sure, there's a lot to hate about this doctrine as it was articulated in *Connick v. Myers* and *Garcetti v. Ceballos*.[47] The doctrine goes too far in denying First Amendment protection to a great deal of employee speech that is central to democratic functioning. The cases betray a crabbed understanding of what a matter of public concern is and an underappreciation of the salutary democratic role of dissenting factual and strategic assessments of a superior official's decisions.[48] These mistakes, in turn, are driven by an interpersonal authority frame—that the First Amendment allows state employee speech (including opinions) to be disciplined by a superior official—and by treating the driving value as one of maintaining a clear chain of managerial command,[49] even at the expense of precluding an employee's ability to speak about her own work conditions.

46. Melville Nimmer successfully argued that Paul Cohen was protected by the First Amendment when he wore a jacket sporting his protest message "Fuck the Draft" in a courthouse corridor. *See* Cohen v. California, 403 U.S. 15 (1971).

47. Connick v. Myers, 461 U.S. 138 (1983) (finding that on-duty speech by a public employee about the internal politics of a district attorney's office was not a matter of public concern and fell outside First Amendment protection); Garcetti v. Ceballos, 547 U.S. 410 (2006) (holding that a public employee's on-duty speech about a matter of public concern fell outside the First Amendment when the speech was inside the speaker's employment).

48. *See* SHIFFRIN, SPEECH MATTERS, *supra* note 15, at 204, 204 n.28, 206–14 (2014). An extensive critique of *Myers* appears in STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 74–80 (1990).

49. *See, e.g.*, Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1273 (1995) (citing *Connick* for the proposition that "the workplace is ordinarily regarded as a site of production rather than self-fulfillment, and speech there is justifiably restricted accordingly.").

There is an insight in *Garcetti*, however, even if it was taken too far and distorted by the frame of an overly hierarchical model of interpersonal authority relations. The insight might be better understood as follows: When an official speaks within her bailiwick about matters within her official jurisdiction, she has the capacity to disrupt the effective functioning of government by garbling its message. And there is no reason to think the First Amendment is dedicated to the idea that government officials, qua government officials, have unrestricted liberty to hobble government and scramble its message, even in their opinion speech.

The Constitution embodies messages and opinions to which the state has made fundamental commitments. My contention is that government officials, qua government officials, do not enjoy First Amendment protection to broadcast opinions that garble the transmission of those fundamental commitments to the public, especially the message and opinion of the First Amendment, given its unique role in securing the conditions of legitimacy and accountability in government as well as the imaginative conditions for reform and change.

This constraint holds even of those officials, such as the President, who preside at the top of the chain of managerial command. Their speech denying the First Amendment's protection does not defy a superior official's directive, but the speech does defy the commitments of the Constitution itself.

What about contested cases where the government official sincerely believes that the courts have incorrectly interpreted the Constitution and that the true law is other than what the judiciary declares? Suppose the government official sincerely believes that *New York Times v. Sullivan* was a travesty of interpretation that should be overturned (and that some negligently inaccurate criticism of her is, therefore, by legal rights, actionable libel). As a member of an equal government branch, should she not be able to voice her own, sincere interpretation of the First Amendment?

Of course. Still, that articulation must be sufficiently elaborate to convey the complexity of the judicial role in interpretation. That is, the official's statement of the law must convey that, however correct, it is not the governing interpretation. This requirement does not stem from any implicit positivism but from both a recognition of judicial supremacy with respect to what interpretation will be applied and the importance of notice and clarity, particularly in the First Amendment context.[50] For what it is worth, the requirement is not asymmetrical,

50. A similar account may be offered with respect to cases in which the official believes the Constitution contradicts itself.

as, after all, judicial opinions also articulate the positions of both sides of a conflict, including those positions they ultimately reject.

C. Lies and Culpable Misrepresentations

Thus far, I have defended the claim that some of the President's attacks on critics and the press violated the First Amendment because they essentially denied the First Amendment's content and status as governing law. What about his lies and his embedded deliberate misrepresentations about other (nonlegal) matters, such as when he castigated widespread election fraud in 2016 and again in 2020 that he knew had not occurred?[51] Or, if you prefer to think of another government official for a while, Representative Marjorie Taylor Greene and her false claims about Covid-19 and vaccines can serve as an example.[52] The case here is different.

In prior work, I have argued that the Supreme Court erred in *United States v. Alvarez*[53] by holding that the First Amendment protected pure lies, by which I mean those knowing and direct misreports of one's beliefs that do not also deceive an audience and cause concrete harm through that deception.[54] Briefly, I argued there that pure lies fall entirely outside of the range of values the First Amendment protects, but not because they often involve an inaccurate representation of the world. Many sincere but inaccurate statements should be protected by the First Amendment because they express a speaker's suspicions, beliefs, or convictions. They, therefore, have expressive value and they also have communicative value. To understand each other as individuals and to engage in democratic self-governance, we have to know each other's beliefs, including the inaccurate ones. Sincere, but inaccurate, statements may also have educational value since revealing our mistaken understandings is often the first step to enabling their correction.

51. *See e.g.*, Chris Cillizza, *Here's Even *More* Evidence That Widespread Election Fraud Isn't a Thing*, CNN (Feb. 2, 2022), https://www.cnn.com/2022/02/02/politics/voter-election-fraud-trump/index.html [https://perma.cc/6QH6-63KD]; David Leonhardt & Stuart A. Thompson, *Trump's Lies*, N.Y. TIMES (Dec. 14, 2017), https://www.nytimes.com/interactive/2017/06/23/opinion/trumps-lies.html [https://perma.cc/V5VM-5QQP].

52. Davey Alba, *Twitter Permanently Suspends Marjorie Taylor Greene's Account*, N.Y. TIMES (Jan. 2, 2022), https://www.nytimes.com/2022/01/02/technology/marjorie-taylor-greene-twitter.html [https://perma.cc/Y6ED-YNC4] (detailing Greene's many misrepresentations about Covid-19 and vaccine safety).

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

54. SHIFFRIN, SPEECH MATTERS, *supra* note 15, at ch. 4.

These considerations represent default reasons legally to permit others' sincere—but inaccurate—speech; these considerations do not hold true of lies, however, because lies are insincere. The liar does not reveal his true beliefs and values through his speech, so the speech does not demand respectful engagement; nor does his speech reveal where our educational efforts might profitably be directed. By misrepresenting his beliefs, the liar enacts contempt for his audience by soliciting respectful attention for an empty target and by falsely presenting himself as a participant in the speaker-listener relationship. All the while, his speech isolates himself and presents a dummy in his place like those drivers who try to game the carpool lane.[55] These abuses of communicative discourse fall outside of the range of values protected by the First Amendment. Notably, the defects do not inhere in the specific content of what is said, but rather in the relationship of (concealed) repudiation between the speaker and the content.

For these reasons, the Court should have held that pure lies, alongside defamation, land outside of the scope of First Amendment protection, whether or not they are believed, likely to have been believed, or have other deleterious effects on identifiable individuals—although, of course, these potential effects also represent threats to First Amendment values. Specific efforts to regulate lies may, of course, run into First Amendment problems because of issues in tailoring, whether because the regulations do not require reliable proof to distinguish sincerity from insincerity or because particular enforcement mechanisms can act as a significant deterrent to sincere speech. These potential First Amendment problems relate to the means of enforcement, though, and are not intrinsically tied to denying First Amendment protection to lies.

Taking *Alvarez* as a given, however, let us bracket the general question about pure lies to focus more closely on the discrete issue of government lies regarding public affairs. Although Mr. Alvarez was a government official when he lied about his own biography, his lies were personal and did not represent an account of public business in his capacity as a government official.[56] The Court in *Alvarez* did not squarely face the question of whether

55. Alex Wigglesworth, *Driver Used Realistic Mannequin to Sneak Into Carpool Lane, CHP Says*, L.A. TIMES (Feb. 26, 2021), https://www.latimes.com/california/story/2021-02-26/driver-used-realistic-mannequin-to-sneak-into-carpool-lane-chp-says [https://perma.cc/6XJL-72AC].

56. *See Alvarez*, 567 U.S. 709, 713–14 (2012) (describing local water board member's false introductory biographical remarks at initial meeting of the water board).

the First Amendment protects pure government lies about public affairs.[57] I contend that such lies do not merely lie outside the scope of the First Amendment's protection in the way that volleyball spikes lie outside the scope of the First Amendment. Instead, as I will elaborate, lies by government officials about public affairs obstruct the operation of the preconditions for achieving the First Amendment's core purposes and, in that way, violate the First Amendment.[58]

First, a diverse array of competing First Amendment theories converge in agreement that a major function of the First Amendment is to facilitate self-governance and democratic accountability by allowing information about government and policy to flow freely. Lies by government officials about law, government, and public issues subvert the ability of citizens to use speech to realize those functions.[59] Deceptive lies directly shift the focus of citizens' attention onto the wrong content. Even when they are not deceptive because they are not believed, lies distract from or obscure, rather than reveal, the appropriate target of citizens' attention. The audience may not believe the content of the lie, but by presenting the lie as true, the speaker substitutes inaccurate information for the truth (or for what the speaker believes) as the official account. Because, unlike mistakes, lies involve deliberate misrepresentation, the liar's intention inherently manifests a resistance by the liar to updating the official account to serve the values of accuracy and accountability. Thus, although lies and mistakes both misdirect attention, lies exacerbate the obstructive power of inaccurate speech by resisting correction.

57. In *Paul v. Davis*, 424 U.S. 693 (1976), the Court found no constitutional violation associated with defamation by a political official in a case involving a police department that mistakenly and culpably characterized a news reporter as a shoplifter. The Court did not, however, consider a First Amendment claim, but rather considered the question of whether there is a due process liberty interest in reputation. *Id.*

58. *But see* Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1133–34 (2006):

> Deceptive factual statements by a president or any other government official in the course of political discussion may have absolute First Amendment immunity . . . certainly if they fall short of conscious lying, and probably even if they do not . . . even though intentionally deceptive statements misinform and do so in a way that affirmatively disrespects the autonomy of the listeners.

59. *See, e.g.*, *id.* at 1132 ("By its nature, government 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."). Varat, however, draws a different conclusion, adding that "[y]et that is not enough to justify First Amendment protection as if it were a freestanding constitutional ban on false and deceptive government speech . . . ." *Id.*

Second, lies introduce insincerity into the testimonial channel, the function of which depends upon its exclusive use as a medium for conveying sincere beliefs. This noise makes it more difficult to discern which content conforms to the channel's purpose, namely content that is sincere and worth consideration, and which is distortion. Apart from the risks of deception, the introduction of testimonial insincerity risks the rational deterioration of trust in the signals emitted by the speaker, by similarly situated speakers (such as other governmental officials), and by speakers more generally. Yet, rationally secured trust is essential for the polity to engage in reliable epistemic cooperation and robust self-governance through communicative exchange, particularly where government officials have privileged access to facts so that the public must rely on their reports.[60] At a minimum, the noise introduces high additional filtering costs to identify sincere speech and differentiate it from the insincere. Higher filtering costs weaken the morale of audiences to invest in communicative exchanges, especially with a wide and diverse circle of thinkers who fall outside of one's small network of strong relationships of particularized trust and familiar positions.[61]

Injecting static into testimonial, communicative channels threatens to hamper the channel's function. The use of lies by government officials is comparable to the government introducing counterfeit currency into the stream of commerce alongside valid currency. The valid currency may remain in circulation and citizens can invest in the technology to distinguish the valid from the counterfeit, but the introduction of counterfeit currency by those entrusted with ensuring the value and validity of money would rationally diminish confidence in the mechanism of exchange. Freedom of speech depends upon thriving communicative fora and meaningful exchanges and is thus compromised when those fora are damaged and the easy ability to communicate (that is, to transmit and receive sincere thoughts and to have them registered as such) is hindered. By undermining rational confidence in the free mechanisms of exchange and meaningful speech, government lies abridge our freedom of speech, even if no particular lie deleteriously generates any particular false beliefs.

60. Given the epistemic dependence of the public on the government for information, it is imperative that integrity be venerated. So, it is particularly problematic that the distortion that lies introduce is wielded by an authority whose charge includes upholding the social norms and standards integral to maintaining the rule of law in a democratic republic. When those whose special charge it is to champion and model integrity refuse to do so, and especially when they defy the norms of integrity for no public purpose, it gives the public reasons to worry that the mutual expectations of government officials on each other to be forthright may falter, further weakening systems of reciprocity.

61. *See also* Corbin, *supra* note 15, at 864.

Like charges may be mounted against culpable factual misrepresentations issued by government officials concerning governmental affairs—topics about which those officials serve as experts. Culpable factual misrepresentations are false statements on a topic about which the speaker has a special responsibility to speak accurately, but culpably derelicts his duty. Some culpable factual misrepresentations involve a reckless indifference to the truth and a stubborn avoidance of correction, such as cases where experts make inaccurate or misleading declarations about their subject of expertise without reading relevant briefings or studies that refute their declarations. Such culpable, reckless factual misrepresentations are sometimes believed by the wishful thinker who disregards evidence to sustain a fantasy. Issuing such misrepresentations may be an acceptable, if regrettable, practice for the everyday citizen, but it is unacceptable for an expert in their area of expertise. When issued by experts, the misrepresentations are not the types of mistakes that free speech culture is designed to air and correct.

Misrepresentations by experts can exert special influence because experts have rare access to information and uncommon interpretative skills and resources to analyze and contextualize that information. Government misrepresentations can thus shift the target of public attention about matters relevant to self-government. Government misrepresentations may also insinuate unreliable information into the record that is truth- and dialogue-resistant because the statements are issued under the mantle of reliance-soliciting and deference-warranting expertise. When exposed, the fact that experts are willing to issue meritless claims justifies a rational devaluation of expert opinion, which is regrettable because reliable expert opinion is an essential epistemic resource for self-government in complex societies. The misrepresenting official's contribution to a climate of rational distrust is inconsistent with their duty to protect a meaningful communicative culture in which First Amendment values can be realized. At the same time, because reckless misrepresentations do not reflect a sincere assessment of what the speaker judges as worthy of consideration, they serve no colorable free speech interests of the speaker or audience.

If government lies and culpable factual misrepresentations have parallel defects, then we do not need proof of the speakers' mental states to identify what government speech is unconstitutional. Demonstrations that the government speaker was or should have been aware of decisive evidence showing the speech to be false, that the speech concerned matters within the officials' area of expertise or jurisdiction, and that the speaker failed to correct the error would suffice to show that the speech was either a lie or a culpable factual misrepresentation that violates the First Amendment.

II. NONJUSTICIABILITY AND PRIVATE ACTORS

Suppose the case is convincing that, irrespective of direct, specific harm, government lies and culpable misrepresentations violate the First Amendment, as do those broadsides on critics that are unqualified by convincing, rather than cynically covering, First Amendment-affirming speech. Recalling the official who inspired this lecture (then-President Trump) and the other officials inspired by his mendacious techniques, the potential volume of violations is overwhelming and may outstrip the capacity of courts to adjudicate. General, nontargeted speech generates problems of standing, but such problems pale in comparison to the mind-boggling prospect of courts issuing hourly injunctions against a president who taps through the wee hours of the night. Even critics of the extent of the political question doctrine might concede that the separation of powers problem here is weighty. A democratic system is unlikely to survive if courts second-guess and censor the President's speech on a daily basis, especially one who enjoys strong currents of popular support. Whether courts fine or enjoin the President for his speech, if the oversight is regular and constant, they would risk causing governmental paralysis as well as distrust of the independent judiciary.

These obstacles to justiciability do not entail that the First Amendment is silent about this type of speech, however. Rather, the difficulties with judicial enforcement leave an open field for agents other than the courts to assume responsibility for implementing measures of accountability. Obviously, government actors should hold themselves accountable, laughable as that may be in the instant case. Legislators and other government officials may also have roles to play in articulating expectations, identifying violations, and seeking censure or impeachment where the violations are substantial.[62] Some of the administrability issues that undergird judgments of nonjusticiability also apply to legislators, however. In the former President's case, it was a full-time job to document the transgressions, one that detracted from legislators' ability to minister to their other substantial responsibilities. Indeed, such distraction may be the aim of officials who resort to patterns of persistent provocation and prevarication. Further, legislators not only have limited staff and time to investigate transgressions, but they also have a limited and disjointed, rather than continuous, arsenal of remedies. The remedies of investigation, exposure, and vocal condemnation of those aiming to provoke and distract can be both too weak and partly counterproductive because it is so time absorbing; whereas,

62. *Id.*

impeachment is an extreme remedy that is difficult to implement and understandably invoked only with reluctance.

Adherence to the constitutional requirements I have been discussing may largely depend upon the good faith of officials and informal means of enforcement. With respect to the latter, we are at a juncture where we should revisit the social culture of freedom of speech and the potential role of private actors in keeping under-enforced Constitutional norms relevant. In the case of social media, there are substantive actions private parties can take to support or withhold support from official action that violates the Constitution. Some of that potential support (or its notable refusal) comes in the form of commentary and reactive protests, whether supportive or critical. Some support is more material, however. I have in mind the access that media companies—like Facebook and Twitter—provide to officials to the means of widespread distribution of speech without the simultaneous mediation of press commentary, fact-checking, and editing. Such access facilitates the mass distribution of unconstitutional speech. Concomitantly, the refusal to offer such access represents an opportunity for the press and social media to uphold the Constitution.

Every major social media outlet has, in its terms of service, a requirement that users not use the platform for illegal or unlawful activity. Facebook's terms of service, for instance, specify that their products may not be used to do anything "[t]hat is unlawful, misleading, discriminatory or fraudulent," or "[t]hat infringes or violates someone else's rights, including their intellectual property rights."[63] Other social media channels have similar terms.[64] Furthermore, many social media channels articulate the aspiration of (voluntarily) applying the First Amendment to themselves or developing free speech policies of their own. If the sorts of government speech exemplified by the posts of the former President to which I have called attention are, in fact, illegal and violate the First Amendment, then these private companies should refuse to distribute them on those grounds.

The stipulated nonjusticiability of this speech raises some distinctive, interesting issues. It would require private companies to make their own assessments about what the First Amendment requires in these cases, since, by hypothesis, this First Amendment requirement or its application is nonjusticiable in this context.[65]

63. *Terms of Service*, FACEBOOK (last updated Jan. 4, 2022), https://www.facebook.com/terms.php [https://perma.cc/4X9X-XVCB].

64. See sources listed *supra* note 8.

65. This is a simplification of what may be a complicated matter. One reason to think that the general assaults on the press are nonjusticiable is that no particular party has standing to

Of course, private social media companies could take the view that behavior is only illegal once a court finds it so.[66] That view, however, is not compelled by a commitment to judicial supremacy, which only implies that a behavior is not illegal if an apex court has deemed it legal. If private companies were to articulate and enforce First Amendment expectations when the judiciary declines to do so, for reasons unique to its status as a branch of government, that articulation would complement extant jurisprudence, not conflict with it. That does not mean that such active interpretation and private enforcement would serve the republic well. There are two related issues to confront: first, whether private companies should develop and enforce (within the bounds of their jurisdiction) their own understanding of the Constitution where there are gaps and, second, how they should go about doing so.

With respect to the first issue, there are good reasons for companies like Facebook to come to their own determinations about the (nonjusticiable) constitutionality of government speech. Because these companies profess a commitment to legal compliance and freedom of speech, they have a particular interest in ensuring they do not provide a platform for speech that violates the First Amendment or that otherwise damages our free speech culture. Further, elaborating on the substance of underenforced constitutional norms helps to keep those norms vital by fleshing out their interpretation and articulating expectations of compliance.[67] Absent such elaboration, there is the risk that

challenge them. One might imagine extending taxpayer standing from Establishment Clause contexts but, given the heightened separation of powers issues in this context, that extension is unlikely. Were a private company to bar a government official from using its services on the grounds that the official's speech is illegal, an official who contests that ban would have standing to sue for breach of contract. But a court (or an arbitrator) might still decline to adjudicate the matter on separation of powers grounds. Assuming that the legality of the speech must be established for a plaintiff to mount a prima facie complaint, should a court decline to rule on a dispute about the speech's legality, the complaint should fail to meet the burden of proof. *See also* Serbian E. Orthodox Diocese for U.S. & Can. V. Milivojevich, 426 U.S. 696 (1976) (holding that a court could not rule on whether a bishop's defrockment was properly conducted according to the church's constitution and penal code because these questions delved into matters of ecclesiastical cognizance); Hutchison v. Thomas, 789 F.2d 392, 393 (6th Cir. 1986) (dismissing minister's claim that the church had violated his contract by improperly applying the Book of Discipline in discharging him because this involved "subjective judgments made by religious officials and bodies"); Minker v. Balt. Ann. Conf. of United Methodist Church, 894 F.2d 1354, 1359 (D.C. Cir. 1990) (court could not rule on minister's claim that church constitution created enforceable agreement barring age discrimination because it would require them to answer ecclesiastical questions).

66. The position is inadvisable from a pragmatic point of view. For their own protection and to avoid unnecessary liability, companies should anticipate what courts will find illegal, as when new statutes are issued by a legislature but their application has not yet made it to a court. For nonjusticiable matters, however, there's little risk of liability exposure.

67. *See* SAGER, *supra* note 27, at 86–128.

nonjusticiable norms may become empty—not only by virtue of their non-enforcement, but because the absence of discussion breeds lapses of attention. Further, the failure to grapple with their application to difficult cases permits our understanding of them to languish at a superficial, purely symbolic level; whereas, new applications and interpretations may stimulate public discussion about the permissible bounds of government speech. Because government officials have their own official communication channels, the withdrawal of private platforms of distribution would not constitute full enforcement. At the same time, the high-profile withdrawal of private distribution channels could impede the normalization of such speech, stimulate deliberative attention to free speech norms, and render unmediated mass dissemination more cumbersome.

On the other hand, encouraging powerful private companies to chart unclaimed constitutional territory carries its own substantial hazards. First, unlike the role of the government, private companies do not serve the public as an end in itself. Their dedication to the public interest is instrumental and contingent at best. They are not directly accountable to the public-at-large, but only directly to their shareholders and indirectly to consumers. Structural pressures create the risk that their interpretations will be self-serving, influenced by corporate needs, and not exclusively determined by First Amendment values.

Second, their constitutional interpretations may lack stability and continuity. Companies may change their nonjusticiable legal interpretations for self-serving reasons as the political winds change or as the brand's identity changes.

Third, different media companies may produce competing interpretations of the First Amendment's nonjusticiable requirements. One might welcome rivalrous interpretations because difference garners the attention that keeps a constitutional norm salient and because debate may expose craven interpretations driven by self-serving interests. On the other hand, the absence of an authoritative interpretation may encourage cynicism as well as constitutional flight, as rebuked government officials shift to more accommodating platforms.[68] The success of such circumvention efforts and the

68. *See* Cristiano Lima, *GOP Officials Flock to Parler Social Network. So Do Their Trolls and Imposters*, POLITICO (July 2, 2020), https://www.politico.com/news/2020/07/02/republicans-parler-trolls-347737 [https://perma.cc/J8EB-ZVAH] (discussing how many conservative politicians joined the social media platform Parler, which bills itself as an "unbiased" substitute for other social media companies like Facebook and Twitter); Dana Farrington, *What We Know So Far About Trump's Planned Social Media Platform*, NPR (Oct. 21, 2021), https://www.npr.org/2021/10/21/1048040544/what-we-know-so-far-about-trumps-planned-social-media-platform [https://perma.cc/Y7N9-YKXU] (discussing former

concomitant risk of a race to the bottom may depend on whether the platforms with higher standards have other amenities and features that command consumer loyalty. Whether Twitter has a better interface seems like a poor reason for a constitutional interpretation to gain a foothold in the cultural understanding.

Finally, and perhaps most importantly, withdrawing a platform from certain speech must be justified in a way that bolsters public confidence that the social free speech culture remains robust and open. Naturally, any speech regulation, whether public or private, will raise concerns, but these concerns may be compounded when the private invocation of law is not subject to judicial review, whether because private actors insist on private arbitration or when the law itself is nonjusticiable.[69]

These hazards are serious, even if partly allayed by the ability of government officials to continue to speak directly through the channels of government. Nonetheless, given the significance of the constitutional transgressions under discussion and their influence on our communicative environment, it seems worth considering whether these hazards could be further mitigated through: (1) the ability of government officials to continue to speak directly through the channels of government; (2) the articulation of a principled line that distinguishes excluded speech from distasteful, unpopular, challenging, or critical speech; and (3) a commitment to articulating, justifying, and implementing that line through

President Donald Trump's plans to create new social media platform, TRUTH Social, that "encourages an open, free, and honest global conversation without discriminating against political ideology."). *But see* Mike Isaac & Kellen Browning, *Fact-Checked on Facebook and Twitter, Conservatives Switch Their Apps*, N.Y. TIMES, (Nov. 18, 2020), https://www.nytimes.com/2020/11/11/technology/parler-rumble-newsmax.html [https://perma.cc/U6F5-THF3] (noting that conservative threats of mass migration away from mainstream apps and news to platforms like Parler, Gab, and Rumble have occurred periodically but many of those users return to larger platforms).

69. Greater consideration of how to insulate private legal interpretation from these hazards is overdue. As private companies increasingly demand that consumers and employees sign arbitration agreements that shelter their behavior from judicial scrutiny, legal interpretation is left in private hands. Given the deterrents to pursuing arbitration, often those private hands will be the very actors the law is supposed to oversee; when cases do go to arbitration, there is a substantial risk that these 'independent' overseers have the incentive to side with the repeat customers, rather than with consumers or employees. And many consumers and employees will yield to the disincentives to initiate arbitration, making how private companies interpret their legal obligations especially important as, alarmingly, they will be increasingly self-governed. *See, e.g.*, SEANA VALENTINE SHIFFRIN, DEMOCRATIC LAW 69 (2021); Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371 (2016); MARGARET J. RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 33–46 (2013); Judith Resnik, Comment, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Walmart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 114 (2011).

transparent mechanisms that operate independently from corporate interests and that issue independent, binding, reasoned legal judgments that reflect serious and sincere engagement with free speech values.

With respect to the latter two mitigation mechanisms, something like Facebook's Oversight Board will naturally jump to mind. The Oversight Board delivers public decisions that bind the company with respect to the instant case and also presents reasons for its decisions. Its members have strong academic and intellectual credentials. Because its members are not employees of Facebook, but instead are term-appointed, part-time consultants with other full-time careers, their issuance of decisions that are critical of the company should not jeopardize their careers. At the same time, however, the Oversight Board's structure has some drawbacks that would need to be addressed to underwrite greater confidence in the process.[70]

The most salient limitations of Facebook's Oversight Board for my purposes are:

> (1) Apart from consulting international law, the Facebook Oversight Board abjures from interpreting or applying the law of the relevant local jurisdiction.[71]
>
> (2) The Facebook Oversight Board's decisions on cases do not create binding precedent for the company.
>
> (3) The board makes policy recommendations that the company is obliged to acknowledge, but not to follow.

The rationale for some of these decisions is obvious and the broad outlines of the solutions necessary to ensure greater deliberative quality and independence from private interests may be obvious as well.[72] For instance, were it serious about excluding illegal speech from its platform, Facebook could revisit

70. Evelyn Douek, *"What Kind of Oversight Board Have You Given Us?"*, U. CHI. L. REV. ONLINE 1 (May 11, 2020).

71. *Id.* at 5–7; Michael Martin & Jamal Greene, *Facebook Oversight Board Co-Chair on Future of Trump's Account*, NPR (Jan. 23, 2021), https://www.npr.org/2021/01/23/959985616/facebook-oversight-board-co-chair-on-future-of-trumps-account [https://perma.cc/6D2E-JKME]; *Oversight Board Bylaws*, OVERSIGHT BOARD (Jan. 2022), https://www.oversightboard.com/sr/governance/bylaws [https://perma.cc/H6AD-BXFB].

72. To be sure, working out the details may be a delicate matter, given corporate interests in self-governance and in avoiding overwhelming an external board with complaints from all comers. The design challenges loom larger when one considers the full range of issues the Facebook board is tackling (in other words, all the implications of free speech values for private agents on the global stage). The scope of the challenge becomes more manageable if the inquiry is limited to assessing nonjusticiable legal issues in discrete national contexts such as the U.S.

its first limitation and empower its board to interpret local law (here, the First Amendment) and to make binding decisions about nonjusticiable constitutional issues that would govern future Facebook decisions going forward.[73] Considering the First Amendment would also dovetail with Facebook's professed aim to respect philosophical principles of freedom of speech.[74] There is a great deal to learn from our Supreme Court's jurisprudence on free speech. Its strengths and flaws may inform the moral (extralegal) interpretation of the cultural values of freedom of speech, whether to make the moral interpretation continuous with the legal interpretation, to have it serve as a counterbalance, or to have it serve, consciously, as an alternative. Forswearing local legal interpretation, by contrast, risks the emergence of accidental and haphazard, rather than deliberately chosen, divisions between the local legal culture and the social-moral free speech culture that the company is attempting to develop and support. Considering how the legal culture and social-moral culture complement each other may demand a fair degree of conscious attention, to smooth the continuities or to be explicit about the intentional discontinuities. It may also be apt for a powerful company trying to vindicate free speech values to consider the sorts of arguments that governments grapple with about their potential abuse of power.

It may seem utopian to expect large social media companies to do this work authentically and impartially. While these concerns should propel our discussion, there are measures that could address them. If social media companies are sincere about establishing a healthy free speech culture and using outside boards to set standards, certain measures might insulate such boards from corporate vices. Independent counsel could be appointed to represent the public's general interest and to bring cases to the board on their own initiative. Independent counsel could also be appointed to represent the government's position. Perhaps independent nonprofit groups dedicated to the rule of law and freedom of speech could develop protocols and certifications for companies committed to earning those certifications. Despite the warranted skepticism about the good faith of Facebook and other major social media companies, some combination of structured independence, rivalry, public criticism, and genuine commitment may produce a more robust set of socially enforced, First

73. Although my focus here is on when government speech violates the First Amendment free speech clause in a nonjusticiable way, parallel arguments might be mounted about government speech that violates the religion clauses or speech used to execute other constitutional violations, such as overstepping Article Two authority.

74. *See Mark Zuckerberg Stands for Voice and Free Expression*, FACEBOOK, (Oct. 17, 2019), https://about.fb.com/news/2019/10/mark-zuckerberg-stands-for-voice-and-free-expression. [https://perma.cc/SV8F-38WD].

Amendment norms on government speech than we endured during the Trump Administration.

I have sketched a principled way of delineating problematic government speech on social media and suggested a role for private agents in vitalizing the aspects of the First Amendment that the doctrine of nonjusticiability threatens to muffle. I will set aside any further exploration of the design details in the interest of discussing a final set of philosophical issues associated with private enforcement of constitutional norms.

III. LEAVING OFFICE AND BROADER MEASURES

I have made an argument that the speech of government officials is subject to different legal standards than the speech of private citizens. Specifically, speech of government officials that denies, whether directly or indirectly, the protections of the First Amendment or generates reasonable uncertainty about the official's commitment to settled First Amendment protections, violates the First Amendment. Moreover, officials' lies and culpable misrepresentations undermine the conditions necessary for the rational realization of the First Amendment's purposes. In so doing, they violate the First Amendment, given the special responsibilities to the Constitution generated by their oaths of office.

The argument thus far has been about the exclusion of particular speech acts by government speakers, but not about their complete exclusion from media platforms, whether in office or after leaving office. Is a commitment to freedom of speech morally consistent with the former President's permanent exclusion from social media outlets now that he is no longer a government official? I think this question is best divided into two parts, one about exclusion as a remedial measure for past acts as an official and the other about enacting broader exclusions that encompass nongovernmental speakers.

1. Exclusion of the Person

First, is the permanent exclusion of a person from speech fora, such as those imposed on Representative Marjorie Taylor Greene and President Trump,[75] a reasonable remedial response for past abuses? If we think of social

75. *See, e.g.*, Davey Alba, *Twitter Permanently Suspends Marjorie Taylor Greene's Account*, N.Y. TIMES (Jan. 2, 2022), https://www.nytimes.com/2022/01/02/technology/marjorie-taylor-greene-twitter.html [https://perma.cc/KY4Y-ZCKW] (discussing Twitter's

media as analogous to government action, permanent removal of someone from a platform would be a disproportionate and overbroad response, exceeding even the draconian speech restrictions for convicted felons. Recall that in *Packingham v. North Carolina*, a unanimous Supreme Court held that North Carolina violated the First Amendment rights of convicted sex offenders by banning them from accessing social media.[76]

Of course, social media exclusions and government bans are dissimilar in important ways. A government ban is comprehensive, whereas exclusion from many social media sites does not preclude self-publication and access to alternative media. Further, social media sites have their own self-regarding reasons to prevent their platforms from being used as a vehicle for speech-based abuses. The social meaning of a private ban is also quite different from the public condemnation of a government ban.

Nevertheless, permanent exclusion from dialogic interaction about any subject whatsoever is a response in tension with the underlying aspirations that animate a free speech culture, namely that debate, discussion, and contemplation have the potential to change people's minds and behavior, that every mind matters, and that every thinker is an equal member of the intellectual community.[77] So while limited suspensions and conditioned reactivations may make sense in response to repeated rule violations, a permanent, irreversible ban, even one imposed by private actors, seems inconsistent with a professed deep commitment to free speech values.

2. Why Focus on Government Officials and Government Speech?

Second, assuming the former President does not occupy another public office and remains a private citizen, should the terms of his participation be restricted? Does it really matter whether attacks on the press, lies, and misrepresentations issue from officials or from private citizens? Do they not all belie a commitment to free speech and do they not equally undermine the rational conditions for meaningful dialogic exchange?

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permanent ban of Marjorie Taylor Greene after she earned her fifth 'strike' on the platform by violating Twitter's COVID-19 misinformation policy).

76. Packingham v. North Carolina, 137 S. Ct. 1730, 1737–38 (2017) ("In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.").

77. Seana Valentine Shiffrin, *Protecting Minors and the First Amendment*, 129(5) L.A. DAILY J. (June 1, 2016); SHIFFRIN, SPEECH MATTERS, *supra* note 15, at ch. 1.

Yes and no. Private citizens do not represent the government and they take no oath (voluntary and hortatory pledge of allegiance aside) to uphold the Constitution or the rule of law. Their speech assailing the press or dissenters is not subject to the demands of the First Amendment. A free speech culture must allow for both criticism of specific exercises of freedom of speech and criticism of freedom of speech by private citizens.[78] While government officials have special obligations not to denigrate the law or garble its communication to citizens, it is crucial that free speech culture allow citizens to question everything, even democracy, free speech, and the rule of law.

It may not seem clear, however, that free speech culture should tolerate demonstrable factual misrepresentations by anyone. Although government officials have special obligations to support a meaningful communicative environment and to be accurate, given their social power, lies issued by private citizens can also damage the rational foundations of a speech culture. Since private media platforms are not bound by First Amendment constraints on content-restriction (or by *Alvarez*), why not urge them to frame broader policies to exclude other sources of misinformation that are equally or more influential and corrosive to the rational foundations of a free speech culture? Why focus on the unconstitutionality of government lies and misrepresentations rather than on the general corrosiveness of lies and culpable misrepresentations, irrespective of their source?

There are three reasons to single out culpable government misrepresentations and attacks on the press as illegal. First, as noted in the Introduction, focusing on the distinctive legal issues raised by government speech provides a principled ground for social media companies to justify their exclusions of some posts by officials without appealing to a blunt principle of absolute editorial discretion, a principle in tension with the companies' other free speech commitments. Second, denying platform access on the grounds of unconstitutionality marks the special dereliction of duty these violations involve. Registering misrepresentations as violations of legal norms calls attention to these under-enforced corners of constitutional discourse. Third, government officials offer a straightforward case in rather complicated terrain. Focusing on the distinctive epistemic obligations of government officials may lay the groundwork for a more nuanced policy about inaccurate speech, one that is sensitive to the

78. Further, although their speech may contribute to predictions about the likelihood that the government will protect free speech, private citizens' attacks on others' exercise of free speech cannot constitutionally fray government adherence to free speech in the way that a government official's speech can. The role distinction makes all the difference.

identity, responsibilities, and asserted expertise of the speaker, rather than just on the inaccuracy of the speech.

With respect to socially imposed restrictions on speech fora for nongovernmental speakers, there is reason to tread carefully and explore alternatives to blanket bans or warning labels on all false speech. Our free speech culture must make ample room for questioning authority, including scientific consensus, and for the average citizen to make sincere mistakes as part of the process of learning and self-presentation. Although in my view, insincere testimonial speech has not one iota of free speech value legally or socially and so a surgically neat exclusion of lies would be unproblematic, a surgically neat exclusion is hard to achieve. Were the government or social media platforms to try to exclude all lies, the free speech environment could be adversely affected by whatever standards we use to assess whether a speaker is lying.

Substantial care would have to be taken to ensure those procedures and standards make ample room for the distinction between lies and sincere, innocent errors. Making this distinction in practice is a delicate matter, especially given the difficulty of assessing the sincerity of the speaker. It is surely part of the point of freedom of speech to allow such sincere mistakes and errors to be voiced, if only so they may be persuasively answered and the truth better understood. With nonexperts, repetition of an inaccuracy after exposure to decisive evidence is not always a sign of a lie (or a culpable misrepresentation). A free speech culture sensitive to the diversity of its participants must recognize that not all answers, no matter how cogent in content, persuade all listeners on the first or subsequent attempt. Not every speaker is a fit for every listener; just as not every teacher is the right fit for every student. Many mistakes will be sincerely repeated, in the face of heaps of contrary evidence, until the right counter-explanation, or the right counter-explainer, or the right time for revising one's judgment, comes along. Efforts to uncover lies or to label false information may also chill speech by hesitant, discretionary speakers concerned about being misunderstood.[79]

The evidentiary problem, as I indicated earlier, may be more tractable with respect to government speakers, however. By virtue of their status or role, they have both heightened access to information and heightened responsibilities to

79. *See also* Varat, *supra* note 58, at 1109:

> A regime of zero tolerance for any form of deception, enforced at will by government officials . . . undoubtedly would curtail unacceptably the willingness of the populace to speak . . . [and] undermine the enlightenment function of free expression. Such a regime also could interfere with expressive autonomy and tend to inhibit creativity and experimentation, privacy, and the joys and solace that may come from spreading small, private, or otherwise benign delusions.

speak accurately, given their authoritative position or their publicly proclaimed expertise. Government officials and some experts, for instance, have special access to sources of information that create special obligations to speak sincerely and accurately about matters of public concern. Prior government officials may be viewed as experts about their actions, policies, and information bases during their time of service. Morally, their special epistemic access and role-based duties render it substantially easier to demand that officials (and perhaps also licensed experts, commercial agents, and prominent pundits) get it right early (or correct it quickly) than to demand that of ordinary citizens. For such speakers, some of their false speech may be more easily classified as a lie or a culpable factual misrepresentation, rather than a mistake. Neither, I submit, has intrinsic social free speech value. Notably, with respect to officials, experts, and perhaps other figures and organizations with similar role-based obligations, the determination that they have issued culpable factual misrepresentations does not require elusive information about mental states. The determination may be made in terms of what information an expert or an official had responsibility for knowing, given their official or privileged access, but persisted in ignoring, flatly denying, or misrepresenting.

At the same time, free speech values demand that experts be permitted to question the conclusions of their professional peers. Scientific consensus cannot become a straitjacket that prevents criticism and the progressive evolution of knowledge. In speech fora, we must accommodate apparently false dissenting expert perspectives on the interpretation of evidence, so long as those perspectives are presented as dissent. They do not, however, suggest the accommodation of culpably false misrepresentations about the descriptive consensus of an expert discipline (however misguided) or about the contents of documents and briefings, independent of their interpretation, to which experts have privileged access.

These considerations suggest a potential, somewhat broader approach for social media platforms to take with respect to culpably false speech that may apply to both government officials and other experts. Given the special power and special epistemic responsibilities of licensed experts, government officials, and former government officials, it is reasonable to refuse to host and to take down their expertise-related lies and misrepresentations. Doing so does not intrinsically abridge freedom of speech and does not require impossibly specific, fact-intensive determinations about their mental states. If crafted and implemented sensitively, such a policy may protect the culture of mutual trust and sensitivity to each other's speech that is essential to a meaningful climate of communicative exchange.

An expert-centered approach of this kind, whether implemented through removing offending speech or labeling widespread and significant false claims, may be preferable to a blanket policy of barring or removing false speech by all citizens. Such blanket policies foreclose the free speech function of giving everyday people who are subject to quotidian errors the resources to understand whether they are mistaken. Blanket policies of removing all inaccurate speech may also fuel suspicion of viewpoint-based censorship.

In the alternative, a social media platform could attach contested or discredited labels to all known inaccurate speech and direct the curious to further information. This alternative strategy may seem like the most risk-averse from a free speech perspective, but there are two reasons for hesitation, at least in those cases where the falsehoods are not widespread and do not pose a danger to public health and safety. First, blanket cautionary labeling may chill some of the sincere from discussing their beliefs for fear of being labeled and this may deter salutary educative exchanges. Second, blanket cautionary labeling of false speech also treats mere mistakes as on a par with culpable mistakes that involve dereliction of the duties associated with social positions of power. This equivalence may diminish the expressive significance of calling out experts and officials for malfeasant exercise of their epistemic power. Blanket labeling may also disincentivize the development of a critical eye and the assumption of personal responsibility for the management of our own beliefs. I have been contending that there are important reasons for lay citizens to have the opportunity to make mistakes and learn from one another. Should we preserve such exchanges, though, it will also be essential to our intellectual vitality and integrity that we maintain our intellectual vigilance and resist becoming dependent upon computer algorithms and corporate judges to assess the truth of all assertions for us.

CONCLUSION

Cultural and technological shifts have altered the landscape for our free speech decisions. The prior natural limits on unmediated mass distribution of speech may have reasonably focused our attention on tractable cases in which individual speech acts caused specific harm to specific individuals. Technological innovations challenge that narrow focus. The potential for unmediated mass distribution of government misrepresentation should stimulate a reconsideration of our free speech assumptions about government speech.

I have argued that government speech that attacks the legitimacy of dissent or that disseminates lies or culpable misrepresentations is incompatible

with the distinctive First Amendment duties of government officials. Because these First Amendment violations may not be justiciable, especially when they have diffuse targets, private parties could play a key role in maintaining the vitality of nonjusticiable constitutional norms. By refusing to host unmediated illegal government speech, for example, social media platforms can fill a legal void regarding the constitutional responsibilities of government speakers and generate greater cultural deliberation about the constitutional responsibilities of government speakers.

I have also been arguing for a nuanced, careful approach to the general problem of misinformation. Although insincere testimonial speech has not an iota of free speech value, our free speech culture must make room for questioning authority, including scientific consensus, and for the average citizen to make sincere mistakes as part of the process of learning and self-presentation. Rather than discussing solutions to fake news or misinformation in a generic, broad way, it would behoove us to distinguish between average citizens on the one hand and speakers such as government officials and licensed experts on the other. The latter have heightened responsibilities, given their roles, of both sincerity and accuracy and often have special access to sources of information, thereby reducing opportunities for external verification and rebuttal. A speaker-sensitive approach may help to protect the norms of truth-telling, accuracy, and the rationality of testimonial trust while leaving breathing room for everyday human error and intellectual experimentation.

Even drawing the line with respect to experts involves making difficult calls about what counts as expertise and whether actual expertise or the social status of an expert should burden one with an expert's responsibilities. Should influencers and media pundits without cultivated or licensed expertise, but who wield the de facto social power of experts, be treated as experts? How to make those judgments demands further deliberation beyond the scope of this Article. What seems more straightforward, though, is the judgment that government officials have special legal responsibilities, as elected and appointed experts about the law and public affairs, to speak sincerely and accurately about matters of public concern. Holding them to these standards not only serves our interests in accurate information and good government, but our fundamental interest in a meaningful communicative culture.