

## CONSPIRACY THEORIES AND THE MARKETPLACE OF FACTS

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The world is awash in conspiracy theories. Some are relatively benign, with stakes rarely rising above idle barroom chatter; for example, the NBA rigged the 1985 draft lottery via a “frozen envelope” to ensure that the New York Knicks would draft superstar center Patrick Ewing.<sup>1</sup> Some, on the other hand, can lead to staggering social harm; for example, some have estimated that the South African government’s embrace of AIDS denialism theories in the early 2000s led to the preventable deaths of over 300,000 people.<sup>2</sup> And some are simply bewildering, such as assertions that the earth is flat<sup>3</sup> or that the fluoridation of water was part of a sinister Communist plot.<sup>4</sup>

These sorts of conspiracy theories—which can broadly be described as patently false statements of empirical fact regarding issues of public concern—raise interesting questions regarding First Amendment theory and doctrine. As Frederick Schauer has observed, free speech theory has traditionally centered around ideological speech—questions of opinion, advocacy, and broad

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<sup>1</sup> See Chris Ballard, *The Ewing Conspiracy*, SPORTS ILLUSTRATED, <https://www.si.com/longform/2015/1985/ewing/index.html> (last visited Oct. 16, 2017).

<sup>2</sup> See Celia W. Dugger, *Study Cites Toll of AIDS Policy in South Africa*, N.Y. TIMES (Nov. 25, 2008), <http://www.nytimes.com/2008/11/26/world/africa/26aids.html> (discussing “President Thabo Mbeki’s denial of the well-established scientific consensus about the viral cause of AIDS and the essential role of antiretroviral drugs in treating it” and citing a Harvard study noting that “the South African government would have prevented the premature deaths of 365,000 people earlier this decade if it had provided antiretroviral drugs to AIDS patients and widely administered drugs to help prevent pregnant women from infecting their babies”).

<sup>3</sup> See THE FLAT EARTH WIKI, [https://wiki.tfes.org/The\\_Flat\\_Earth\\_Wiki](https://wiki.tfes.org/The_Flat_Earth_Wiki) (last modified Aug. 16, 2017) (“This website is dedicated to unraveling the true mysteries of the universe and demonstrating that the earth is flat and that Round Earth doctrine is little more than an elaborate hoax.”). The first question on the Flat Earth Society’s frequently asked questions page is: “Is this site a joke?” See *Frequently Asked Questions*, FLAT EARTH SOC’Y [https://wiki.tfes.org/Frequently\\_Asked\\_Questions](https://wiki.tfes.org/Frequently_Asked_Questions) (last modified Sept. 7, 2017) (answering the question: “This site is not a joke. We are actively promoting the Flat Earth Movement worldwide. There are, admittedly, several non-serious flat earth posters, but they are fairly easy to identify.”).

<sup>4</sup> See Jesse Hicks, *Pipe Dreams: America’s Fluoride Controversy*, SCI. HISTORY INST.: DISTILLATIONS (2011), <https://www.chemheritage.org/distillations/magazine/pipe-dreams-americas-fluoride-controversy> (describing conspiracy theories that fluoridation of water is “known to Communists as a method of Red Warfare” and observing that such theories were sufficiently well-known to be parodied by the figure of General Jack Ripper in the 1964 film *Dr. Strangelove*).

political, religious, and social “truths” not readily subject to empirical verification—but has relatively little to say regarding these sorts of factual assertions.<sup>5</sup> On the one hand, there is a strong common-sense intuition that the government should have significantly more leeway to regulate, for example, a patently false statement that antiretrovirals are useless in treating AIDS patients as compared to, say, ideological advocacy of capitalism or proletarian revolution. On the other hand, even socially worthless false statements of fact can carry strong ideological undercurrents or associations, such that regulation would raise significant concerns regarding government abuse and manipulation of public discourse.

In this Essay, I examine the constitutional boundaries surrounding such speech. As I observe, a significant aspect of this inquiry is the recognition that *any* patently false statement of fact on an issue of public concern—even matters as apparently mundane and ideologically neutral as the shape of the Earth—can take on an ideological resonance, such that direct regulation of the speech would raise substantial concerns regarding government abuse. This strongly suggests that the government’s capacity to regulate any such speech—whether overtly ideological on its face or not—is highly limited, given the strongly anti-paternalist nature of the American free speech tradition.

It goes too far, however, to say that such falsehoods are therefore completely indistinguishable from purely ideological advocacy for constitutional purposes. Although any patently false statement of fact on an issue of public concern is *capable* of becoming the subject of an ideologically inflected conspiracy theory, this does not mean that all such falsehoods are therefore subject to full First Amendment protection in all circumstances. There are limits to such protection, as indicated by the Court’s recognition of particular contexts—such as defamation, perjury, and lying to government officials—within which such falsehoods can clearly be regulated. Thus, where the potential for government abuse has been significantly circumscribed and the social harms produced by such falsehoods are particularly acute, the government may retain some constitutional latitude to regulate such speech. I survey a few potential factors that might be relevant to this inquiry—the type and degree of harm associated with the speech, the means by which the speech is disseminated, and the type of patent falsity in question—before offering a few closing observations.

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<sup>5</sup> See Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 901–08 (2010).

## I. CONSPIRACY THEORIES AND THEIR PLACE WITHIN FIRST AMENDMENT THEORY AND DOCTRINE

### A. Patently False Statements of Fact Regarding Issues of Public Concern

Conspiracy theories abound as to all sorts of different subjects, whether politics, sports, religion, or science. Some of these theories are relatively mundane, like the theory that the spectacular failure of “New Coke” in the 1980s was in fact an intentional strategy by the Coca Cola Company to rekindle interest in the original formulation.<sup>6</sup> Some are highly politicized in nature—for example, assertions that Barack Obama was born in Kenya,<sup>7</sup> or that 9/11 was an inside job,<sup>8</sup> or that the Clintons are surreptitiously dispatching those who hold damaging information about them.<sup>9</sup> Some are downright bizarre—for example, theories that airplane contrails contain chemicals used for nefarious purposes,<sup>10</sup> or that many prominent world figures are shapeshifting reptilians.<sup>11</sup>

Many of these theories can cause significant social harm. This harm might take the form of systemic discrimination or dignitary harm to a particular group, such as that produced by Holocaust denialism or the lies contained in the fabricated

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<sup>6</sup> See *New Coke Origins*, SNOPEs, <http://www.snopes.com/cokelore/newcoke.asp> (last updated May 19, 2011).

<sup>7</sup> See, e.g., Anthony Zurcher, *The Birth of the Obama “Birther” Conspiracy*, BBC NEWS (Sept. 16, 2016), <http://www.bbc.com/news/election-us-2016-37391652> (describing the origins of the conspiracy theory).

<sup>8</sup> See, e.g., Michael Powell, *The Disbelievers*, WASH. POST (Sept. 8, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/07/AR2006090701669.html> (describing a Scripps Howard/Ohio University poll of 1010 Americans in which 36% “suspect[ed] the U.S. government promoted the attacks or intentionally sat on its hands, while 16% “believe[d] explosives brought down the towers”).

<sup>9</sup> See, e.g., *Clinton Body Bags*, SNOPEs (July 7, 2016), <http://www.snopes.com/politics/clintons/bodycount.asp>; *‘Clinton Death List’: 33 Spine-Tingling Cases*, WORLDNETDAILY (Aug. 21, 2016), <http://www.wnd.com/2016/08/clinton-death-list-33-most-intriguing-cases/> (cataloguing the “33 people associated with the Clintons who have died the most mysterious and often violent deaths”).

<sup>10</sup> See, e.g., *Democrats and Republicans Differ on Conspiracy Theory Beliefs*, PUB. POLICY POLLING (April 2, 2013), [http://www.publicpolicypolling.com/pdf/2011/PPP\\_Release\\_National\\_Conspiracy\\_Theories\\_040213.pdf](http://www.publicpolicypolling.com/pdf/2011/PPP_Release_National_Conspiracy_Theories_040213.pdf) (finding, in a poll of 1247 Americans, that 5% “believe that the exhaust seen in the sky behind airplanes is actually chemicals sprayed by the government for sinister reasons”).

<sup>11</sup> See, e.g., *Conspiracy Theories: The Reptilian Elite*, TIME, [http://content.time.com/time/specials/packages/article/0,28804,1860871\\_1860876\\_1861029,00.html](http://content.time.com/time/specials/packages/article/0,28804,1860871_1860876_1861029,00.html) (describing the theory, set forth by David Icke, that major world figures, including Queen Elizabeth, the Clintons, and Bob Hope, are actually shapeshifting reptilian humanoids that “have controlled humankind since ancient times”).

*Protocols of the Elders of Zion*.<sup>12</sup> Conspiracy theories might also cause concrete, physical harm on a broad scale—for example, as noted above, the South African government’s endorsement of the theory that AIDS is not caused by the HIV virus is estimated to have led to 300,000 preventable deaths.<sup>13</sup> Or such theories may cause targeted physical or dignitary harm to specific individuals or businesses. For example, the “Pizzagate” conspiracy theory—that Democratic operatives were running a child sex ring out of the Comet Ping Pong pizzeria<sup>14</sup>—ultimately led to a self-styled “investigator” firing a gun inside of the restaurant,<sup>15</sup> and Sandy Hook denialists<sup>16</sup> have harassed and threatened parents of the shooting victims based on their belief that the incident was a “false flag” operation planned by the government.<sup>17</sup> There are thus often strong reasons for the government to regulate such speech.

These sorts of assertions share a number of characteristics. First, they are purely factual in nature. These statements are not direct ideological advocacy arguing for or against various political, religious, or social views—rather, they are simply assertions of empirical fact.

Second, these are assertions regarding issues of public concern—the sort of speech that the Court has broadly deemed to garner the most stringent First Amendment protection.<sup>18</sup>

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<sup>12</sup> See, e.g., Lyrrisa Barnett Lidsky, *Where’s the Harm? Free Speech and the Regulation of Lies*, 65 WASH. & LEE L. REV. 1091, 1093–94 (2008); Brian Handwerk, *Anti-Semitic “Protocols of Zion” Endure Despite Debunking*, NAT’L GEOGRAPHIC (Sept. 11, 2006), <http://news.nationalgeographic.com/news/2006/09/060911-zion.html>.

<sup>13</sup> Dugger, *supra* note 2.

<sup>14</sup> See generally Gregor Aisch, Jon Huang, & Cecilia Kang, *Dissecting the #PizzaGate Conspiracy Theories*, N.Y. TIMES (Dec. 10, 2016), <https://www.nytimes.com/interactive/2016/12/10/business/media/pizzagate.html?mcubz=0>.

<sup>15</sup> See Faiz Siddiqui & Susan Svrluga, *N.C. Man Told Police He Went to D.C. Pizzeria with Gun to Investigate Conspiracy Theory*, WASH. POST (Dec. 5, 2016), [https://www.washingtonpost.com/news/local/wp/2016/12/04/d-c-police-respond-to-report-of-a-man-with-a-gun-at-comet-ping-pong-restaurant/?utm\\_term=.dd1423421939](https://www.washingtonpost.com/news/local/wp/2016/12/04/d-c-police-respond-to-report-of-a-man-with-a-gun-at-comet-ping-pong-restaurant/?utm_term=.dd1423421939).

<sup>16</sup> See Hunter Stuart, *Sandy Hook Hoax Theories Explained: Why Newtown “Truther” Arguments Don’t Hold Up*, HUFFPOST (Feb. 11, 2013, 10:25 AM), [http://www.huffingtonpost.com/2013/02/11/sandy-hook-hoax-theories-explained-debunking-newtown-truther\\_n\\_2627233.html](http://www.huffingtonpost.com/2013/02/11/sandy-hook-hoax-theories-explained-debunking-newtown-truther_n_2627233.html) (discussing the conspiracy theories surrounding the 2012 school shooting at Sandy Hook Elementary School, including the theory that the shootings were “a joint government-media operation to shore up support for a federal assault weapons ban”).

<sup>17</sup> See Frances Robles, *Florida Woman Is Charged with Threatening Sandy Hook Parent*, N.Y. TIMES (Dec. 7, 2016), <https://www.nytimes.com/2016/12/07/us/florida-woman-is-charged-with-threatening-sandy-hook-parent.html?mcubz=0> (reporting that “a Tampa woman who thinks the Sandy Hook school massacre in Newtown, Conn., was staged has been charged with threatening a parent of one of the slain children”).

<sup>18</sup> See *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (observing that “where matters of purely private significance are at issue, First Amendment protections are often less

Although the Court has observed that “the boundaries of the public concern test are not well defined,”<sup>19</sup> it has stated that “[s]peech deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’ or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’”<sup>20</sup> It is certainly of legitimate public concern whether, for example, political operatives are running a child sex ring out of a pizza parlor, or Barack Obama was born in Kenya, or 9/11 was an inside job. And the same can be said for less overtly political conspiracy theories: it is of clear public concern whether the earth is round, or whether the NBA rigged the 1985 draft lottery, or whether the world is governed by shape-shifting reptilians.

Third, the sorts of factual assertions that I focus on here can be described as patently false—that is, they are easily and objectively provable as false under whatever practical standard a reasonable person can demand.<sup>21</sup> This is therefore not the realm of factual assertions that are empirical in nature but difficult (or impossible) to prove, like the exact number of civilian casualties in the Iraq War, or whether Lee Harvey Oswald acted alone in assassinating John F. Kennedy, or the validity of string theory.<sup>22</sup> This is the realm of easily demonstrable falsity—statements that, for all practical purposes, are clearly and objectively false.<sup>23</sup>

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rigorous, . . . because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest”).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 453.

<sup>21</sup> See Mark Tushnet, “*Telling Me Lies*”: *The Constitutionality of Regulating False Statements of Fact* 17 (Harv. L. Sch. Pub. Law & Legal Theory, Working Paper No. 11-02, 2011), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1737930](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737930) (describing facts “established through the application of however high a standard of assurance a reasonable person can demand”). This is of course a purely practical judgment; on a metaphysical level, philosophers have long debated the extent to which *anything* is truly knowable with certainty. See, e.g., Thomas Edmund Jessop & Maurice Cranston, *David Hume: Scottish Philosopher*, ENCYC. BRITANNICA (July 26, 1999), <https://www.britannica.com/biography/David-Hume> (describing David Hume’s argument that “natural beliefs are not obtained from, and cannot be demonstrated by, either empirical observation or reason, whether intuitive or inferential”).

<sup>22</sup> See Ethan Siegel, *What Every Layperson Should Know About String Theory*, FORBES (Nov. 25, 2016), <https://www.forbes.com/sites/startswithabang/2016/11/25/what-every-layperson-should-know-about-string-theory/#4eaf41935a53>.

<sup>23</sup> Of course, what exactly counts as a patent falsehood may be disputed. Some may argue, for example, that an assertion that the CIA played an active role in the Kennedy assassination is a patent falsehood, while others may argue that it is reasonably plausible. And some conspiracy theories may turn out to be true; for example, the CIA did indeed conduct clandestine experiments on unwitting human subjects by dosing them with mind-altering drugs such as LSD. See, e.g., Tim Weiner, *Sidney Gottlieb, 80, Dies: Took LSD to C.I.A.*, N.Y. TIMES (March 10, 1999), <http://www.nytimes.com/1999/03/10/us/sidney-gottlieb-80-dies-took-lsd-to-cia.html>. My focus here, however, is not on these line-drawing issues, but rather on

### B. Theoretical Considerations

Why might we want to protect these sorts of patently false statements of fact regarding issues of public concern? Among the standard litany of First Amendment theories, the “pursuit of truth” rationale for protecting speech—that is, that unfettered speech is necessary because the truth is best revealed through an open marketplace of ideas<sup>24</sup>—provides the most direct instrumental justification for protecting such statements.<sup>25</sup> Under this rationale, even patently false factual assertions may be protected because, as John Stuart Mill put it, allowing such speech may produce “the clearer perception and livelier impression of truth, produced by its collision with error.”<sup>26</sup> In other words, the marketplace of ideas would weed out such false statements of fact, and in doing so, reinforce the truth of the matter asserted.

As Schauer has observed, however, the most notable expositors of the “pursuit of truth” theory of free speech—from Mill to John Milton to Oliver Wendell Holmes—were primarily concerned with the *ideological* “truth” produced by the marketplace of ideas rather than factual truth.<sup>27</sup> That is, they were primarily concerned with “debatable matters of religious, moral, and political truth”—like the merits of Communism or the ways in which one should live one’s life—rather than assertions of hard fact.<sup>28</sup>

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the treatment of clear patent falsehoods like, for example, assertions that the earth is flat.

<sup>24</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”); JOHN STUART MILL, *ON LIBERTY* 87 (David Bromwich & George Kateb eds., 2003).

<sup>25</sup> See Schauer, *supra* note 5, at 911. As Steven Gey has noted, democracy-based arguments “would not logically encompass the protection of those seeking to disseminate empirically disprovable falsehoods,” as disseminators of such falsehoods “can in no way be viewed as acting in good faith with their fellow citizens.” Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 10 (2008). Furthermore, there would be no justification for protecting such lies under an autonomy-based argument for protecting speech, at least under the traditional Kantian account of autonomy. See David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 355 (1991) (“If the capacity to decide upon a plan of life and to determine one’s own objectives is integral to human nature, lies that are designed to manipulate people are a uniquely severe offense against human autonomy.”). That being said, such theories might justify some protection of false speech on the margins “as a price worth paying in order that people may express themselves or in order that democratic decisionmaking may remain unfettered.” Schauer, *supra* note 5, at 911.

<sup>26</sup> MILL, *supra* note 24, at 87.

<sup>27</sup> Schauer, *supra* note 5, at 902–08.

<sup>28</sup> *Id.*; see also MILL, *supra* note 24, at 104 (distinguishing debatable subjects from mathematical truths, for which there is generally no room for debate).

With respect to such matters, “truth” is generally a matter of personal conviction or social consensus, and speech broadly operates by persuasion and advocacy. And as David Strauss has observed, the First Amendment offers its strongest protection to speech that operates in this manner.<sup>29</sup> Patent falsehoods regarding empirical facts, however, are intuitively different. Because the truth of such matters is both clear and objectively identifiable, such speech produces harm not by persuading listeners as to how the world ought to be, but rather by providing an empirically false impression of the state of objective reality.<sup>30</sup> Thus, as Steven Gey noted, “The marketplace of ideas justification for free speech provides a much weaker footing for protecting expression that can be readily disproved than it does for normative advocacy.”<sup>31</sup>

Furthermore, in most situations where the truth of a factual matter is patently clear, false statements produce little or no social value.<sup>32</sup> Outside of the realm of abstract philosophy, there is little value in asserting that one plus one equals three rather than two. Nor is there any value in a patently false factual statement that political operatives are operating a child sex ring out of a pizza parlor. Although these sorts of false statements may produce attempts to reveal the actual truth of the matter asserted,<sup>33</sup> we would be better off if such statements were never made in the first place, given the time and resources wasted in dispelling a patent falsehood. There is thus a strong intuition that given the associated costs and benefits, the government should have greater freedom to regulate, for example, the patently false

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<sup>29</sup> Strauss, *supra* note 25, at 334 (1991) (“Except, perhaps, in extraordinary circumstances, the government may not restrict speech because it fears, however justifiably, that the speech will persuade those who hear it to do something of which the government disapproves.”); *see also* *Whitney v. California*, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring) (“[E]ven advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.”).

<sup>30</sup> *See* Gey, *supra* note 25, at 8–9 (“Disputes about facts do not involve interminable discussions about irreconcilable and unprovable normative judgments; rather, disputes about facts can be resolved through the use of ordinary resources available to assess objective reality.”).

<sup>31</sup> *Id.* at 9; *see also* Geoffrey R. Stone, *The Rules of Evidence and the Rules of Public Debate*, 1993 U. CHI. LEGAL F. 127, 139–40 (“[T]he counter-speech/marketplace of ideas notion is far more compelling when we deal with ideas and opinions than when we deal with facts than can objectively be proved true or false.”).

<sup>32</sup> *See* Gey, *supra* note 25, at 2 (describing patent falsehoods like Holocaust denial as “socially worthless and dysfunctional nonsense”). This is not to say that all patent falsehoods, in all contexts, are devoid of meaningful value. In the realm of scientific research, for example, efforts to dispel even patently false or absurd factual claims might lead to deeper understanding of the truth. *See infra* note 37.

<sup>33</sup> *See, e.g.*, Aisch, Huang, & Kang, *supra* note 14.

factual statements underlying the Pizzagate scandal<sup>34</sup> as opposed to broad ideological advocacy of capitalism or proletarian revolution.

In addition, as many have observed, there are strong reasons to doubt that the marketplace of ideas actually works to identify “truth,” whether ideological or empirical in nature. “Winning” ideas or facts are often determined by factors independent of their truth value, such as the pervasiveness of the speaker’s message; the “charisma, authority, or persuasiveness” of the speaker; the extent to which listeners may want to believe the statement; and so forth.<sup>35</sup> And in the modern era of the internet and social media, the open marketplace may be compromised to the extent that people seek out and glean information solely from an echo chamber of like-minded media sources.<sup>36</sup> The marketplace of ideas theory broadly assumes a degree of rational detachment on the part of speakers and listeners that is often not reflected in the real world.<sup>37</sup>

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<sup>34</sup> See Gey, *supra* note 25, at 2 (“If this type of speech is judged by a clear-minded measure of costs and benefits, the costs of allowing the speech to occur seem to far outweigh the benefits of adding a small quantum of total nonsense to public discourse.”).

<sup>35</sup> Schauer, *supra* note 5, at 908–10; see also Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 17 (“Due to developed legal doctrine and the inevitable effects of socialization processes, mass communication technology, and unequal allocations of resources, ideas that support an entrenched power structure or ideology are most likely to gain acceptance within our current market.”); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1281 (1983) (observing that the marketplace of ideas theory “calls up the picture of a rational individual making informed choices, and downplays the extent to which the inputs in a culture influence the beliefs of the persons within that culture”); Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1041 (describing the theory’s failure to account for “the different access speakers have to means for influencing truth seeking discourse”).

<sup>36</sup> See Farhad Manjoo, *How the Internet is Loosening Our Grip on the Truth*, N.Y. TIMES (Nov. 2, 2016), <https://www.nytimes.com/2016/11/03/technology/how-the-internet-is-loosening-our-grip-on-the-truth.html> (describing the echo chamber effect and its dangers).

<sup>37</sup> This is not to say that the marketplace of ideas theory is completely incapable of doing any work in the area of facts. As is often seen within academic discourse, false speech might serve as a mechanism for revealing truth: speech that initially appears to be false can unsettle longstanding truths, and truthful propositions may sometimes be strengthened by false assertions. See, e.g., Matt Simon, *Fantastically Wrong: Why People Once Thought Mice Grew Out of Wheat and Sweaty Shirts*, WIRED (June 4, 2014, 6:30 AM), <https://www.wired.com/2014/06/fantastically-wrong-how-to-grow-a-mouse-out-of-wheat-and-sweaty-shirts/> (describing how a series of scientific experiments eventually disproved the widely accepted and long-held “truth” that life could arise spontaneously from non-living materials); see also Aziz Huq, *Easterbrook on Academic Freedom*, 77 U. CHI. L. REV. 1055, 1071 (2010) (arguing that although “the conditions necessary for . . . successful operation” of the “marketplace of ideas” theory “are absent for most of society[,] [t]he academy does manifest the necessary properties to permit a functioning ‘marketplace’ of the kind valued by the First Amendment”). But in most contexts, this direct value is generally limited when it comes to patently false statements. At the very least, mere invocation of the

Why, then, extend constitutional protection to this sort of speech? As many have noted, the most compelling basis for extending such protection is the strong principle of government anti-paternalism and distrust within the American free speech tradition.<sup>38</sup> That is, regardless of whether the speech itself produces any instrumental benefits, the government should not interfere with the marketplace of ideas because such intervention raises the risk of government abuse and manipulation of public discourse. This broad anti-paternalism principle is uniquely strong within the American free speech tradition, and it has served as the basis for tolerating unquestionably harmful speech that other Western democracies have freely regulated.<sup>39</sup>

Any constitutional protection afforded to patently false statements of fact on issues of public concern would therefore be rooted primarily in the principle of government distrust rather than any broad sense of the speech's instrumental value. As Geoffrey Stone has argued, although false statements "have no constitutional value" and are "destructive of public debate," prohibiting these statements would be "invalid because of the danger of putting government in the position routinely to decide the truth or falsity of all statements in public debate."<sup>40</sup> To afford the government such power would raise a profound risk of partisan abuse that would be highly damaging to public discourse.<sup>41</sup> Thus, as Gey observed, "[i]t is up to individual citizens alone to sort out truth from falsehood," because we must "instinctively assume that the government does everything for a political reason."<sup>42</sup>

### C. Doctrinal Considerations

It is an overstatement, however, to say that the government is categorically prohibited from acting as an arbiter of factual truth. As the Court has recognized, the government constitutionally acts in this capacity in a wide range of contexts, such as in cases dealing with false commercial speech,<sup>43</sup> fraud,<sup>44</sup>

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marketplace of ideas principle is insufficient to broadly justify the protection of patently false statements of fact, as there are strong reasons to doubt the truth of this principle in practice and it produces limited utility in most cases where the truth of the matter asserted is beyond reasonable dispute.

<sup>38</sup> See, e.g., Gey, *supra* note 25, at 20; Lidsky, *supra* note 12, at 1097; Schauer, *supra* note 5, at 917.

<sup>39</sup> See Gey, *supra* note 25, at 2–3; Schauer, *supra* note 5, at 916.

<sup>40</sup> Stone, *supra* note 31, at 140.

<sup>41</sup> See *id.*

<sup>42</sup> Gey, *supra* note 25, at 21.

<sup>43</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

<sup>44</sup> See *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612 (2003) ("[T]he First Amendment does not shield fraud.").

perjury,<sup>45</sup> and defamation.<sup>46</sup> And there is little reason to doubt the constitutionality of, for example, prohibitions of false or misleading speech in marketing securities,<sup>47</sup> or lies told to federal officials,<sup>48</sup> or false claims about being a government official.<sup>49</sup>

In *United States v. Alvarez*,<sup>50</sup> however, the Court made clear that false statements of fact are broadly entitled to some degree of First Amendment protection. In *Alvarez*, the Court struck down the Stolen Valor Act, which criminally punished anyone who “falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States.”<sup>51</sup> In striking down the Act, the Court broadly deemed these sorts of false statements to be protected speech, at least where the government sought to punish such speech based solely on its falsity.<sup>52</sup>

The splintered opinions in *Alvarez*, however, provided only limited doctrinal guidance. Regarding the standard of review, the four-Justice plurality—purporting to apply the purely historical *Stevens* test for identifying categories of low-value speech<sup>53</sup>—deemed the speech in question to be fully protected and thus applied “exacting scrutiny” in striking down the Act.<sup>54</sup> By contrast, Justice Breyer’s concurrence in the judgment, which was joined by Justice Kagan, argued that intermediate scrutiny was the appropriate standard.<sup>55</sup> Both the plurality and the concurrence did appear to agree, however, that the Act’s lack of

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<sup>45</sup> See *United States v. Grayson*, 438 U.S. 41, 54 (1978) (noting “the unquestioned constitutionality of perjury statutes”).

<sup>46</sup> With respect to defamation, the Court has produced a set of rules allocating different degrees of protection to different types of defamatory statements. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342–48 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757–61 (1985).

<sup>47</sup> See *SEC v. Wall St. Publ’g Inst., Inc.*, 851 F.2d 365, 373 (D.C. Cir. 1988) (“If speech employed directly or indirectly to sell securities were totally protected, any regulation of the securities market would be infeasible—and that result has long since been rejected.”).

<sup>48</sup> See 18 U.S.C. § 1001 (2012) (prohibiting the making of false statements “in any matter within the jurisdiction of the executive, legislative, or judicial branch”).

<sup>49</sup> See, e.g., 18 U.S.C. § 912 (2012) (criminally sanctioning anyone who “falsely assumes or pretends to be an officer or employee acting under the authority of the United States”).

<sup>50</sup> 567 U.S. 709 (2012).

<sup>51</sup> *Id.* at 715–16 (plurality opinion).

<sup>52</sup> *Id.* at 729–30.

<sup>53</sup> *Id.* at 717–22. Under this test, a category of speech is deemed to be low-value if it was amongst the “historic and traditional categories [of low-value expression] long familiar to the bar,” *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring)), or if regulation of such speech was “part of a long (if heretofore unrecognized) tradition of proscription,” *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 792 (2011).

<sup>54</sup> 567 U.S. at 724 (plurality opinion).

<sup>55</sup> *Id.* at 731 (Breyer, J., concurring).

a requirement for “material,”<sup>56</sup> “tangible,”<sup>57</sup> or “legally cognizable”<sup>58</sup> harm was particularly problematic. There also appeared to be some consensus across all of the opinions, including the dissent, that falsehoods regarding the most valuable speech—such as falsehoods regarding “philosophy, religion, history, the social sciences, the arts, and other matters of public concern”<sup>59</sup>—are broadly entitled to substantial protection.<sup>60</sup> As I have discussed elsewhere, this general principle—which has since been embraced in post-*Alvarez* lower court decisions<sup>61</sup>—directly follows from the Court’s longstanding concern with chilling effects on the most valuable speech and the potential for government abuse.<sup>62</sup>

## II. IDEOLOGICALLY INFLECTED FACTUAL FALSEHOODS

If, as discussed above, the primary theoretical concern with the government regulating false statements of fact is not the value produced by such speech, but rather the extent to which such regulation might be the basis for government abuse, then one might argue that *patently false* factual statements regarding issues of public concern can be distinguished from other lies implicating high-value speech. It is one thing to regulate false statements of empirical fact that are difficult or impossible to prove (like the exact number of civilian casualties in the Iraq War). Any such regulation would surely chill speakers and provide the government with a powerful and far-reaching tool to manipulate public discourse.<sup>63</sup>

But within the realm of patently false assertions like “The world is flat” or “Anti-retrovirals provide no medical benefit to AIDS patients,” such concerns may be more limited in scope, at least in the abstract.<sup>64</sup> Truthful speech is less likely to be chilled if speakers need only steer clear of *patent* falsehoods in order to avoid any risk of liability. Furthermore, any fear of government abuse would be diminished, as there is broadly less reason to suspect government mischief when patently false statements—which are particularly worthless as compared to truthful speech or difficult-to-prove falsehoods—are the sole focus of the

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<sup>56</sup> *Id.* at 738.

<sup>57</sup> *Id.* at 734.

<sup>58</sup> *Id.* at 718–19 (plurality opinion).

<sup>59</sup> *Id.* at 751 (Alito, J., dissenting).

<sup>60</sup> See David S. Han, *Categorizing Lies*, 89 U. COLO. L. REV. (forthcoming 2018).

<sup>61</sup> See *id.*

<sup>62</sup> See *id.*

<sup>63</sup> See *id.*

<sup>64</sup> Cf. Lidsky, *supra* note 12, at 1098 (“If the State were only to punish the most obvious and egregious forms of Holocaust denial, very little valuable speech would be chilled.”).

regulation in question. And although there may be slippery slope concerns in play any time the government seeks to regulate patent falsehoods, it is by no means a foregone conclusion that careful and narrow regulation of such falsehoods will inevitably lead to wholesale government commandeering of all determinations of factual truth.<sup>65</sup>

As Mark Tushnet has observed, however, this is all complicated to the extent that even valueless, patently false statements of fact can be deemed “ideologically inflected.”<sup>66</sup> That is, certain patent falsehoods are strongly associated with particular ideological viewpoints. Holocaust deniers, for example, will tend to be on the extreme right wing of the political spectrum,<sup>67</sup> while those asserting that George W. Bush had foreknowledge of the 9/11 attacks are unlikely to be Republicans.<sup>68</sup>

The significant dangers of permitting government regulation of these sorts of ideologically inflected patent falsehoods are readily apparent. When the government decides which patent falsehoods to regulate, it can effectively filter out from public discourse particular political points of view or particular sets of cultural or religious beliefs. Indeed, even if the government is acting in good faith, any intervention into ideologically inflected falsehoods risks altering the balance within public discourse. There are, of course, compelling independent reasons, apart from ideological bias, to regulate patently false speech like Holocaust denialism, Obama birtherism, or Pizzagate-like fake news. But this does not change the fact that doing so gives the government a powerful tool to shape the ideological balance of public discourse to its own ends.

Thus, although the Court has never opined on this specific question, most scholars agree that these sorts of inherently political false statements of fact would be entitled to full First Amendment protection.<sup>69</sup> Even if such statements are

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<sup>65</sup> See *id.* at 1099 (“[T]he European experience provides little evidence that punishment of Holocaust denial is the first step on the slippery slope to tyranny, though perhaps it is simply too early to tell where the path of punishing denial will lead.”).

<sup>66</sup> Tushnet, *supra* note 21, at 18.

<sup>67</sup> See *id.* (explaining that some false beliefs are “associated with wider [political] views”).

<sup>68</sup> See Alfred Moore, Joseph Parent, & Joseph Uscinski, *Conspiracy Theories Aren't Just for Conservatives*, WASH. POST (Aug. 21, 2014), [https://www.washingtonpost.com/news/monkey-cage/wp/2014/08/21/conspiracy-theories-arent-just-for-conservatives/?utm\\_term=.c8483e8a82d0](https://www.washingtonpost.com/news/monkey-cage/wp/2014/08/21/conspiracy-theories-arent-just-for-conservatives/?utm_term=.c8483e8a82d0) (“Republicans were just as likely to believe that President Obama was born abroad as Democrats were likely to believe that 9/11 was an inside job.”).

<sup>69</sup> See, e.g., Gey, *supra* note 25, at 3 (“In the United States, . . . the nearly absolute protection of political speech under the First Amendment prevents the government

patently false and completely worthless, they are nevertheless so strongly and clearly associated with specific ideological points of view that direct government regulation would be particularly troublesome, as such regulation would effectively open the door to viewpoint-based targeting.<sup>70</sup>

But how far does this reach? Conspiracy theories like Holocaust denialism, 9/11 truther theories, or Obama birtherism are quite clearly ideologically inflected: each is strongly associated with a particular political viewpoint, and this association is broadly understood by both the public and the government. But what about other types of patently false factual assertions? Take, for example, the assertion that the Earth is flat. One might reasonably view this assertion, in the abstract, as both patently false and independent of any ideological inflection—it is simply a clearly false statement regarding an ideologically neutral fact.

In the realm of conspiracy theories, however, nothing is ideologically neutral. There is ideological import in the very act of rejecting something that is so clearly and obviously deemed to be true by the general population. In other words, *all* conspiracy theories—even those that do not appear overtly ideological on their face—broadly share a singular ideological premise at their core: that the public is being manipulated by nefarious powers-that-be, whether the government, or the vast right-wing conspiracy, or the liberal media, or any other shadowy “they.”<sup>71</sup> Thus, even purely factual assertions that, to most people, appear ideologically neutral and objectively provable as true or false—like the roundness of the Earth—carry a strong ideological tinge to conspiracy theorists. Whether the Earth is round becomes, in

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from imposing . . . punishments on Holocaust deniers.”); Schauer, *supra* note 5, at 915 (“Whatever the harms of public noncommercial factual falsity (and it seems hard to deny that they are many and substantial), there is, in the United States, little basis for arguing that dealing with these harms through government restriction is constitutionally permissible.”).

<sup>70</sup> See Stone, *supra* note 31, at 140; see also Gey, *supra* note 25, at 21–22 (“If the government punishes the expression of factual falsehoods—such as Holocaust denial—it does so because the statement of such facts are bound up with political perspectives that the government seeks to undermine.”).

<sup>71</sup> This is reflected in dictionary definitions of “conspiracy theory.” See *Conspiracy Theory*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/conspiracy%20theory> (last updated Mar. 4, 2018) (defining “conspiracy theory” as “a theory that explains an event or set of circumstances as the result of a secret plot by usually powerful conspirators”); *Conspiracy Theory*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/39766?redirectedFrom=conspiracy+theory#eid8383475> (last visited Oct. 16, 2017) (defining “conspiracy theory” as “a belief that some covert but influential agency (typically political in motivation and oppressive in intent) is responsible for an unexplained event”).

effect, a referendum on how much one should trust the powers-that-be.<sup>72</sup>

These sorts of conspiracy theories thus tend to be attractive to the politically powerless—those seeking “an explanation for the hidden and seemingly mysterious workings of political power.”<sup>73</sup> To such adherents, patent falsity is, in fact, the central *allure* of these theories: the fact that the theories so directly reject what is obviously true to society at large fits an underlying ideological belief that society must wake up and challenge all of our trusted authorities—including any “truths” pronounced from such authorities—lest our apathy relegate us to the role of helpless and manipulable pawns. Indeed, as Lyrissa Lidsky noted, “denial of a conspiracy theory can often become proof that it exists, at least for its adherents,” such that government regulation of the patent falsehood in question may in fact lend it legitimacy in adherents’ eyes.<sup>74</sup>

As a result, *any* patent falsehood on an issue of public concern can potentially be deemed ideologically inflected, no matter how ideologically neutral it may appear to be on its face. An assertion that the Earth revolves around the moon, that one plus one equals three, or that New York City does not actually exist is a purposeful departure from conventional and obvious truths held by society at large. As such, these sorts of assertions can be viewed as shorthand for an implicit ideological position that authorities cannot be trusted, that the public is inherently naïve and manipulable, and that even the most seemingly straightforward truths are actually the product of nefarious agendas and machinations. In essence, the marketplace of facts is inextricably linked to the marketplace of ideas: even if, on the surface, the matter in question is purely empirical in nature, any factual debate can effectively act as a stand-in for broader debates regarding ideological truth.

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<sup>72</sup> See Lidsky, *supra* note 12, at 1100 (“Conspiracy theories provide an explanation for the hidden and seemingly mysterious workings of political power, and they represent a populist response to government secrecy.”).

<sup>73</sup> *Id.*; see also MARK FENSTER, CONSPIRACY THEORIES: SECRECY AND POWER IN AMERICAN CULTURE 68–74 (1999); Cass R. Sunstein & Adrian Vermeule, *Conspiracy Theories: Causes and Cures*, 17 J. POL. PHIL. 202, 204 (2009) (“When civil rights and civil liberties are absent, people lack multiple information sources, and they are more likely to have reason to accept conspiracy theories.”).

<sup>74</sup> Lidsky, *supra* note 12, at 1100; see also Sunstein & Vermuele, *supra* note 73, at 210 (“[A] central feature of conspiracy theories is that they are extremely resistant to correction, certainly through direct denials or counterspeech by government officials; apparently contrary evidence can usually be shown to be a product of the conspiracy itself.”); Tushnet, *supra* note 21, at 19 (observing that counter-speech demonstrating the falsity of a conspiracy theory “will often be ineffective” because “[p]eople with [ideological] commitments may resist counter-evidence, come up with explanations for why the proffered counter-evidence is itself false, and the like”).

### III. SOME THOUGHTS ON THE CONTOURS OF PERMISSIBLE REGULATION

All of this suggests that even patently false factual statements on matters of public concern—including assertions that are not overtly political or ideological on their face—are entitled to the same stringent protection afforded to direct ideological advocacy. In the abstract, this determination comes down to a judgment as to what represents the lesser evil: a public discourse infected by patent falsehoods that create substantial social harm, or a public discourse policed and “sanitized” by a likely self-interested government actor.<sup>75</sup> And the uniquely strong aversion to any government management of public discourse that is inherent to the American free speech tradition—even if it is well-intentioned and might produce substantial benefits—creates a strong baseline presumption of full constitutional protection with respect to any factual falsehoods regarding issues of public concern.<sup>76</sup>

This presumption would likely hold true in most cases where the patent falsehood is disseminated by one who genuinely believes it to be true—that is, the person who truly believes the Pizzagate allegations, or that the Earth is flat, or that 9/11 was an inside job. As the Court recognized in the defamation context, concerns regarding government abuse and chilling effects increase as the degree of fault required by the regulation in question decreases.<sup>77</sup> Regulating patent falsehoods under a negligence or strict liability standard—that is, extending liability to falsehoods made without knowledge of their falsity—would expand the scope of potential liability, thus increasing chilling effects on speakers and opening the door for government abuse through selective enforcement or biased decision making. Conversely, regulating such assertions through an intent standard<sup>78</sup> would significantly limit the scope of liability,

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<sup>75</sup> See Han, *supra* note 60.

<sup>76</sup> See *id.* (“[L]ies regarding the highest-value core speech . . . should carry a heavy presumption of full constitutional protection, such that any content-based restrictions of such lies are evaluated under strict scrutiny.”).

<sup>77</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334–37 (1974) (instituting a stringent “actual malice” standard in defamation cases regarding public figures on issues of public concern due to the dangers of chilling effects and government abuse).

<sup>78</sup> In certain defamation cases, the Court has instituted the actual malice standard, which it defined as “knowledge that [the statement] was false or . . . reckless disregard of whether it was false or not.” *Sullivan*, 376 U.S. at 279–80. For present purposes, however, I put aside the issue of recklessness, as that concept does not really fit within situations where the speaker genuinely believes in *patently false* statements of fact. See Tushnet, *supra* note 21, at 20 n.91 (“Reckless disregard suggests inattention to the issue of truth, yet those who make ideologically inflected

reducing chilling effects on speakers and limiting the potential for government abuse.<sup>79</sup> Thus, the absence of a requirement that the falsehood be a knowing one would cut heavily in favor of unconstitutionality.<sup>80</sup>

Furthermore, as Tushnet observed, when speakers genuinely believe their patently false assertions, presenting them with counter-evidence might lead them to abandon their views.<sup>81</sup> And to the extent that—as discussed above—these sorts of patent falsehoods can be conceptualized as manifestations of a particular ideological mindset, confronting speakers with such counter-evidence might ultimately lead them to rethink their fundamental ideological commitments, in a direct application of the traditional marketplace-of-ideas theory.<sup>82</sup>

What about intentional patent falsehoods on matters of public concern—that is, falsehoods made by one who knows of their falsity? Let's say, for example, that I intentionally fabricate fake news—like the Pizzagate scandal—in an attempt to sell more newspapers or drive traffic to my website. Or I tell someone that antiretrovirals are worthless in fighting AIDS and that it is better for him to forego all treatment, knowing this to be false. Or I knowingly make false assertions that the United States was actually founded in 1850, and that the “official history” we have learned in school was the product of a vast government cover-up, simply because I know that these statements will draw interest (and donations) from conspiracy enthusiasts. To what extent should these sorts of intentional, patent falsehoods be regulable?

On the one hand, an intent requirement, as discussed above, drastically reduces the potential for chilling effects and government abuse, given the reduced scope of liability associated with a more stringent fault standard. And on an instrumental level, there are few arguments that can be made for the inherent value of such speech. There is no issue of counter-evidence working to persuade the speaker if the speaker is already well aware of the falsity of the speech. And it is difficult to identify any meaningful value if the speaker's ultimate goal is to

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statements are ordinarily quite conscious of the evidence against the assertions they make but disagree with its import.”).

<sup>79</sup> Han, *supra* note 60.

<sup>80</sup> See *United States v. Alvarez*, 567 U.S. 709, 719 (plurality opinion) (“Even when considering some instances of defamation and fraud, . . . the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood.”); *id.* at 732 (Breyer, J., concurring) (“I would read the [Stolen Valor Act] favorably to the Government as criminalizing only false factual statements made with knowledge of their falsity and with the intent that they be taken as true.”).

<sup>81</sup> Tushnet, *supra* note 21, at 18.

<sup>82</sup> *Id.* at 19–20.

accomplish social harm through the mechanism of deception. There are thus strong reasons to characterize intentional patent falsehoods on matters of public concern as truly worthless, such that society would always be better off if they were never made.

On the other hand, if our primary concern with regulating such speech is distrust of the government, then it perhaps should not matter what the *source* of the falsehood is. Perhaps all that matters is that the false assertion has been introduced into public discourse, and that it is strongly associated with a particular ideological point of view. Whether Pizzagate or reptilian conspiracy theories were introduced intentionally by speakers seeking to profit from knowing lies or in good faith by true believers, once they enter the public discourse, they take on a life of their own: they acquire adherents, whose belief in what seems to the general public to be patent absurdity represents a particular ideological position regarding the role and motives of various “trusted authorities” within public life. Thus, although an intent requirement might broadly limit the *scope* of potential government intervention, it does not eliminate the fundamental problem of the government affirmatively managing ideologically inflected facts within public discourse.

There is, I think, much to be said about this issue—far more than can be addressed in this brief Essay. But I will close with a few thoughts as to what sorts of theoretical and practical considerations might come into play in determining the constitutional scope of the government’s regulatory power here.

As a starting point, it is clearly an overstatement to say that there is *no* constitutional distinction between intentional factual falsehoods on issues of public concern and pure ideological advocacy. There are undoubtedly situations in which such falsehoods can be sanctioned while abstract advocacy cannot. For example, the Court has made clear that fraud, perjury, defamation, false advertising, and lies to government officials can be constitutionally regulated.<sup>83</sup> So an intentional, patently false statement on an issue of public concern could still be punished as perjury if made under oath, and the Court’s defamation jurisprudence makes clear that knowingly false defamatory statements on a matter of public concern can be constitutionally subject to liability.<sup>84</sup>

So how might we distinguish the sorts of intentional patent falsehoods that the government can constitutionally

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<sup>83</sup> See, e.g., *Alvarez*, 567 U.S. at 717, 720 (plurality opinion).

<sup>84</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347–48 (1974).

regulate from those that it cannot?<sup>85</sup> Again, this broad issue can be conceptualized as choosing the lesser evil between the substantial social harms produced by intentional patent falsehoods and the dangers associated with a public discourse policed by a likely self-interested government actor. It therefore follows that government regulation is more likely to be permissible where the evils produced by intentional patent falsehoods are particularly acute and where the risk of government abuse is significantly limited in some manner.

Thus, as both the plurality and the concurrence in *Alvarez* strongly suggested, the type and degree of social harm associated with the falsehoods in question would play a significant role in the inquiry.<sup>86</sup> As Helen Norton has observed, “The more generalized and less tangible the harms threatened by the targeted lies, . . . the greater the concerns about selective or partisan enforcement.”<sup>87</sup> If the government seeks to regulate lies—even intentional, obvious lies—untethered to any sort of material harm requirement, its freedom to control public discourse on this basis would be effectively unchecked, thus raising significant suspicion of improper government motives.<sup>88</sup> On the other hand, if the regulation is explicitly limited to contexts where, say, concrete monetary or physical harm has been suffered (as opposed to abstract or *de minimis* harms), there would be less reason to fear government abuse, as the regulation would be tied to particularly compelling circumstances where

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<sup>85</sup> As I noted above, as a purely doctrinal matter, the Court has purported to apply the purely historical *Stevens* test in identifying low-value categories of speech. *See supra* note 53 and accompanying text. As I have argued at length elsewhere, however, the idea of a meaningfully objective, purely historical test in this context is illusory. Because courts have substantial latitude to analogize the speech in question to historically excluded categories of speech at varying levels of generality, any “purely historical” determination is inevitably driven by the sorts of underlying value judgments that the *Stevens* Court purported to reject. *See* David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 383–91 (2015). Thus, the *Stevens* test would not likely serve as a meaningful obstacle if courts were inclined to recognize additional subsets of low-value speech. *See id.* at 392 (observing that “savvy courts can easily translate strongly held value judgments regarding the speech in question into facially neutral historical analysis by framing the speech in a particular manner, selecting one particular historical narrative over others, and/or drawing analogies broadly or narrowly”).

<sup>86</sup> *See Alvarez*, 567 U.S. at 718–19 (plurality opinion) (distinguishing the lies covered by the Stolen Valor Act from historically unprotected lies like fraud and perjury based largely on the absence of a “legally cognizable harm” associated with the lies prohibited by the Act); *id.* at 734, 738 (Breyer, J., concurring) (focusing on the Act’s lack of a “material” or “tangible” harm requirement).

<sup>87</sup> Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 187 (2013).

<sup>88</sup> *Cf. Alvarez*, 567 U.S. at 723 (“Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition.”).

tangible social harm is actually produced.<sup>89</sup> This explains the relative flexibility afforded to the government in regulating falsehoods that constitute fraud, defamation, or perjury: each is associated with direct, concrete, and material harms, whether to individuals or to the day-to-day functioning of government institutions.<sup>90</sup>

Also relevant to the inquiry might be the manner by which the speech is disseminated. Let's take, for example, a patently and intentionally false assertion that antiretrovirals do nothing to alleviate the symptoms of AIDS and that any statements to the contrary are the product of a conspiracy between the government and pharmaceutical companies. If this assertion were made via a public pronouncement at a rally or in a widely distributed book or article, it would tend to take on the quality of an ideological assertion, even if the speaker is well aware of its falsity. In effect, the speaker is injecting the patently false assertion directly into public discourse, where, as discussed above, the assertion might take on a life of its own, standing in for a set of particular ideological beliefs.

By contrast, let's say that I privately make the exact same patently false assertion to only one other person—someone who I know is particularly impressionable—for the express purpose of causing him harm (that is, I know it will cause him to reject his antiretroviral treatment). Although the assertion regards an issue of public concern, any concerns regarding government abuse would be more limited in this one-on-one context, as the assertion is not directly injected into public discourse.<sup>91</sup> Furthermore, when the assertion is made within this context—particularly given the specifically targeted intent of the speaker—it more closely resembles a purely mechanical means of bringing about the specified harm, like hiding the person's medication, rather than an abstract ideological assertion.<sup>92</sup> And, of course, where there is an indication of this sort of highly particularized intent to do direct harm on a particular target, there is less concern with government abuse in general, given the compelling regulatory interests associated with punishing or deterring such

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<sup>89</sup> See Han, *supra* note 60; Alvarez, 567 U.S. at 719–23.

<sup>90</sup> See Han, *supra* note 60.

<sup>91</sup> Cf. RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a (stating that the violation of a particular privacy right occurs only when one “gives publicity” to certain matters and defining “publicity” to mean “that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge”).

<sup>92</sup> It might perhaps make sense to put this in the language of proximate cause: here, the patent falsehood—although it regards an issue of public concern—seems to connect very closely, directly, and foreseeably to a highly particularized material harm. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 104–05 (N.Y. 1928) (Andrews, J., dissenting).

conduct. Thus, where private rather than public dissemination is involved, and where the falsehood is specifically intended to directly harm particular individuals, the risks of government abuse may be reduced, thus allowing for more regulatory flexibility.

Finally, one might consider the extent to which the type of false assertion and the conditions under which the assertion is made short-circuit listeners' ability to rationally evaluate its veracity. Certain false factual statements on issues of public concern might be clearly and objectively provable as false, but may not be easily or practically identifiable as such by listeners under the particular circumstances. Take, for example, an intentional and patently false statement that a child sex ring is operating within a certain house in the neighborhood. If the assertion is made in a situation where, say, time appears to be of the essence (for example, the perpetrators might flee at any moment and never be found), then a listener may not have any opportunity to evaluate the veracity of the statement before intervening. Thus, a rational listener might simply assume the truth of the statement—even if he actually harbors doubts as to the statement's accuracy<sup>93</sup>—and social harm may therefore result from the listener's actions.

This is, in essence, an incitement-like scenario,<sup>94</sup> although this context is somewhat different from the paradigmatic incitement case.<sup>95</sup> And similar to the incitement context, the government may be entitled to greater regulatory flexibility here simply because any harm produced by the falsehoods in question would not be brought about by persuasion or the listener's unadulterated rational processes.<sup>96</sup> Rather, the harm is produced by pure misinformation that the listener cannot independently evaluate,<sup>97</sup> akin to telling a blind pedestrian that the light is red

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<sup>93</sup> For example, if the listener thinks the statement has only a 20% chance of being true, he may nevertheless rationally intervene under a judgment that the high risk of error is outweighed by the massive social benefit that would result should the assertion prove to be truthful.

<sup>94</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (observing that the First Amendment “do[es] not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

<sup>95</sup> That is, the harm here may not be produced by directly inflaming the passions of listeners to take lawless action. See, e.g., *Hess v. Indiana*, 414 U.S. 105, 105–09 (1973) (per curiam). Rather, the harm may be produced by influencing sober-minded listeners to act rationally under the circumstances based on false information.

<sup>96</sup> See Strauss, *supra* note 25, at 339 (“[T]he risk of law violation can justify suppression of speech only if the speech brings about the violation by bypassing the rational processes of deliberation.”).

<sup>97</sup> Cf. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”).

when it is actually green.<sup>98</sup> In this context, factual falsehoods—even those that may relate to matters of public concern—are not operating as ideologically inflected assertions, and any regulation would therefore present a relatively lower risk of government abuse.

This is only a brief survey of factors that might influence this theoretical inquiry; it is certainly not meant to be exhaustive. Furthermore, to say that these factors may be theoretically relevant to the analysis is not necessarily to say that any of them is dispositive, or even that they must be integrated into the doctrine. Structural and practical considerations must always be taken into account in crafting doctrine, and there are many standard reasons—such as concerns with chilling effects and excessive judicial discretion—to prefer blunt and administrable rule-like approaches as opposed to more tailored and comprehensive standard-like approaches.<sup>99</sup> These sorts of considerations would ultimately influence any determination as to which doctrinal factors should be used to distinguish between different types of falsehoods.

In the end, however, it is worth reemphasizing that anytime the government seeks to regulate factual falsehoods regarding issues of public concern—whether characterized as conspiracy theories, fake news, or anything else—the strong presumption, which would hold true in most cases, is that the speech is fully protected, such that any content-based regulation would almost certainly be unconstitutional. Although, as I have discussed above, the government may retain some flexibility to directly regulate intentional patent falsehoods under certain circumstances, any such regulatory freedom would be narrow in nature, limited to particular contexts where the potential for government abuse has been significantly limited and the social harm produced by such falsehoods is particularly acute.

#### IV. CONCLUSION

As a purely intuitive matter, it seems somewhat strange to say that the Constitution offers any protection to patently false factual statements on issues of public concern, including those that may cause grievous social harm. But when such falsehoods take the form of a conspiracy theory, they are inextricably linked to a singular ideological position: a radical skepticism of authority that assumes we are all being clandestinely

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<sup>98</sup> Cf. Strauss, *supra* note 25, at 335 (“The clearest example of speech that might induce action by nonrational means is a false statement of fact. A rational person never wants to act on the basis of false information.”).

<sup>99</sup> Han, *supra* note 85, at 367–70.

manipulated for nefarious ends by the various powers-that-be. Thus, to allow the government unchecked freedom to regulate such speech is to give it a powerful tool to control public discourse—a result that is highly dissonant with the fiercely anti-paternalistic posture of American free speech jurisprudence.

It is an oversimplification, however, to say that such patent falsehoods are therefore always entitled to the same broad constitutional protection afforded to abstract ideological advocacy. Although I have made some broad observations as to how courts might navigate and shape the constitutional contours of such speech, we may ultimately never get very much doctrinal clarity as to this issue. Few cases addressing this issue have reached the courts,<sup>100</sup> and even amidst all of the current hand-wringing regarding the dangers of fake news, little legislative action has been taken to address the issue. Thus, in the end, the issue may simply be settled by broad cultural consensus rather than constitutional adjudication—a consensus that within the American free speech tradition, considerable skepticism regarding the intentions of the powers-that-be is, in fact, a good thing, despite its costs.

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<sup>100</sup> See Schauer, *supra* note 5, at 916 (“As is well known and frequently analyzed, the willingness to sanction Holocaust denial in numerous liberal and open democratic societies is in stark contrast to American practice, but what is perhaps most interesting is the absence of anything even close to a Supreme Court case directly on point.”) (footnote omitted).