

THE GOVERNMENT'S MANUFACTURE OF DOUBT

Helen Norton*

“The manufacture of doubt” refers to a speaker’s strategic efforts to undermine factual assertions that threaten its self-interest. This strategy was perhaps most famously employed by the tobacco industry in its longstanding campaign to contest the mounting medical evidence that linked cigarettes to serious health conditions.¹ At its best, the government’s speech can counter such efforts and protect the public interest, as exemplified by the Surgeon General’s groundbreaking 1964 report on the dangers of tobacco, a report that challenged the industry’s preferred narrative.² But the government’s speech is not always so heroic, and governments themselves sometimes seek to manufacture doubt and protect their own interest at the expense of the public’s.³

In this short Essay, I examine how the government as speaker sometimes seeks to manufacture doubt about factual assertions it perceives as inconsistent with its policy or partisan preferences. I start with some background on the history of government speech in the United States, a history that reveals the diversity and complexity of the government’s expressive choices. Drawing from historical and contemporary examples, I then identify at least three strategies through which the government sometimes seeks to manufacture doubt: through its lies and misrepresentations, through its attacks on individuals and institutions that challenge its preferred narrative, and

* Professor and Ira C. Rothgerber, Jr. Chair in Constitutional Law, University of Colorado School of Law. Thanks to Hannah Armentrout and Katherine Struthers for excellent research assistance, and to the participants at the “Distorting the Truth: ‘Fake News’ and Free Speech” symposium at the University of North Carolina School of Law for thoughtful comments.

¹ See NAOMI ORESKES AND ERIK M. CONWAY, *MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING* 33–34 (2010) (“[T]he tobacco industry knew the dangers of smoking as early as 1953 and conspired to suppress the knowledge. They conspired to fight the facts, and to merchandise doubt. . . . The industry defended its primary product—tobacco—by manufacturing something else: doubt about its harm.”).

² See generally, e.g., U.S. DEP’T OF HEALTH, EDUC., & WELFARE, No. 1103, *SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GEN. OF THE PUBLIC HEALTH SERV.* (1964) (describing the adverse health effects of smoking).

³ These strategies are neither new nor unique to American governments. See Amanda Taub, *‘Kompromat’ and the Danger of Doubts*, N.Y. TIMES, Jan. 16, 2017, at A3 (“[K]ompromat is more than an individual piece of damaging information: It is a broader attempt to manufacture public cynicism and confusion in ways that target not just one individual but an entire society. . . . By eroding the very idea of a shared reality, and by spreading apathy and confusion among a public that learns to distrust leaders and institutions alike, kompromat undermines a society’s ability to hold the powerful to account and ensure the proper functioning of government.”).

through its choices to bury or deny access to information that it finds inconvenient or dangerous. I close by briefly considering possible responses to these strategies.

I. SOME BACKGROUND ON THE GOVERNMENT'S EXPRESSIVE CHOICES

In this Part, I very briefly sketch the variety and complexity—as well as the pervasiveness—of the government's expressive choices. For example, when we discuss government speech, we often focus on presidential expression. But legislative and judicial branch speakers—as well as speakers from all levels of federal, state, and local governments—also deserve our attention and, at times, our concern. The government's audiences are similarly diverse: they include not only the American public but also our foreign allies, neutrals, and enemies. They include other government speakers as well; indeed, separation of powers and federalism principles in great part seek to force different government actors to talk with each other.⁴ The full range of the government's expressive choices is also broad, and includes not only its affirmative speech—such as the substance, tone, and delivery of its debates, dialogue, and counterspeech—but also its silences.⁵

Over time, governmental speakers have made very different decisions about how to deploy these expressive possibilities. With respect to presidential speech, for example, historian Jeffrey Tulis explains that “[t]he rhetorical presidency

⁴ See MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 91 (1983) (“In Madisonian fashion, powerful communicators should be played off against one another, preventing any one group or elite from gaining ideological dominance. Governments should be pitted against one another in the wars of words and symbols, and government communications generally should be subject to the counterforce of communications emanating from a healthy, diverse, and pluralistic private sector.”).

⁵ Here I distinguish the government's “silences” from its “secrets.” Governmental secrets generally involve the government's decision not to disclose certain facts. See *infra* notes 81–85 and accompanying text. By governmental silences, in contrast, I mean the government's failure to speak on a contested public policy issue or crisis. For examples of such governmental silences, see NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE 63 (1969) (“Eisenhower was later to state in his memoirs that the Supreme Court's judgment in the desegregation cases was unquestionably correct. During his years in office, however, the President failed to express publicly his approval either of the principle enunciated in the *Brown* decision or of the ruling itself. Since the racial question was the dominant domestic issue of the period, he made many comments on the subject. Yet not once did he endorse the desegregation decision or offer support to those struggling to implement its provisions. ‘I do not believe,’ the President reiterated, ‘it is the function or indeed it is desirable for a President to express his approval or disapproval of any Supreme Court decision.’”); GEOFFREY R. STONE, SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA'S ORIGINS TO THE TWENTY-FIRST CENTURY 259 (2017) (describing President Reagan's reluctance to engage AIDS as a public health crisis).

and the understanding of American politics that it signifies are twentieth-century inventions and discoveries. Our pre-twentieth-century polity proscribed the rhetorical presidency as ardently as we prescribe it.”⁶ Indeed, the Framers feared that charismatic speakers posed grave threats to a democratic state,⁷ and thus sought to limit such speakers’ power and influence through norms of discourse along with structural constraints.⁸ Starting with George Washington and continuing through most of the 19th century, for example, presidents expressed themselves primarily through written communications that offered greater formality and opportunity for reflection; along these lines, Jefferson began a tradition of sending his assessment of the State of the Union to Congress in writing, rather than through an oral address he felt more appropriate for a monarch.⁹ Similarly, Andrew Jackson “made his arguments to the people in the form of official statements such as his annual messages and the Nullification Proclamation, rather than by giving speeches. This formalized process allowed presidential positions on the Constitution to be fully vetted with advisors and crafted for widespread consumption.”¹⁰

Abraham Lincoln serves as the exemplar of thoughtful and restrained presidential rhetoric, largely preferring “to address the people through the press without the intervention of editors”¹¹ Lincoln’s successor, Andrew Johnson, provides the exception that demonstrates the rule, as Johnson routinely engaged in direct and informal appeals to the public that struck

⁶ JEFFREY K. TULLIS, *THE RHETORICAL PRESIDENCY* 5–7 (1987).

⁷ See James W. Ceaser, *Demagoguery, Statesmanship, and Presidential Politics*, in *THE CONSTITUTIONAL PRESIDENCY* 251 (Joseph M. Bessette & Jeffrey K. Tullis eds., 2009) (“*The Federalist* is filled with grave warnings against flattery and against the ‘artful misrepresentations of interested men’ who encourage the people to indulge ‘the tyranny of their own passions.’”); TULLIS, *supra* note 6, at 27 (“The founders worried especially about the danger that a powerful executive might pose to the system if power were derived from the role of popular leader. For most federalists, ‘demagogue’ and ‘popular leader’ were synonyms, and nearly all references to popular leaders in their writings are pejorative.”).

⁸ See Ceaser, *supra* note 7, at 252 (explaining that the Framers sought to channel presidential communication “away from informal popular orations and towards more deliberative forms of rhetoric”).

⁹ See TULLIS, *supra* note 6, at 56.

¹⁰ HAROLD H. BRUFF, *UNTRIPPED GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION* 105 (2015).

¹¹ HAROLD HOLZER, *LINCOLN AND THE POWER OF THE PRESS: THE WAR FOR PUBLIC OPINION* 518 (2014); see also TULLIS, *supra* note 6, at 80 (“Some have suggested that the rhetorical presidency might be a reflection of increased opportunity for popular leadership (development of wire services, mass communications, etc.), rather than a doctrinal change. Lincoln makes clear not only that he did not lack opportunity, but that such opportunities were the problem. Hastily formed statements might engender a course of policy that was unintended. Finally, Lincoln indicates that ‘silence’ will enhance the persuasive power of those speeches that he does deliver.”).

his contemporary observers as inappropriate.¹² Indeed, the House of Representatives' (ultimately unsuccessful) articles of impeachment show how deeply Johnson's expressive choices offended prevailing norms of presidential discourse, in that he was alleged to have made:

with a loud voice certain intemperate, inflammatory and scandalous harangues, and did therein utter loud threats and bitter menaces as well against Congress as the laws of the United States Which said utterances, declarations, threats, and harangues, highly censurable in any, are peculiarly indecent and unbecoming in the Chief Magistrate of the United States, by means whereof Andrew Johnson has brought the high office of the President of the United States into contempt, ridicule, and disgrace, to the great scandal of all good citizens. . . .¹³

Presidents' expressive choices changed dramatically in the 20th century. Teddy Roosevelt started this shift with his strategic decision to advocate for his policies directly to the people rather than to Congress.¹⁴ Woodrow Wilson built on this move by resuscitating the long-dormant presidential tradition of delivering a State of the Union address to Congress in person and by offering important policy statements directly to the citizenry through public speeches.¹⁵ Newer communicative technologies further enabled and emboldened this turn, as Franklin D. Roosevelt "became the first master of the electronic media" with fireside chats broadcast directly to the public,¹⁶ and "Kennedy began the practice of live televised press conferences [because he] wanted to control the news."¹⁷ Professor Tulis summarizes this revolution in the norms of presidential discourse: "Today it is taken for granted that

¹² See TULIS, *supra* note 6, at 89 ("Nothing could be further from the founders' intentions than for presidential power to depend upon the interplay of orator and crowd. This interplay may or may not persuade the immediate audience, but the effect of such activity upon the president's office, upon his dignity, upon his future ability to persuade, and upon the deliberative process as a whole is likely to be deleterious.").

¹³ *Articles of Impeachment of Andrew Johnson*, TEACHINGAMERICANHISTORY.ORG, teachingamericanhistory.org/library/document/articles-of-impeachment-of-andrew-johnson (last visited Mar. 11, 2018).

¹⁴ TULIS, *supra* note 6, at 4 ("The core of [Roosevelt's] argument was that a change in authorized practices was necessary to fulfill the purposes of the underlying founding theory of governance.").

¹⁵ *Id.* at 133.

¹⁶ See BRUFF, *supra* note 10, at 231.

¹⁷ *Id.* at 294.

presidents have a *duty* constantly to defend themselves publicly, to promote policy initiatives nationwide, and to inspire the population. And for many, this presidential ‘function’ is not one duty among many, but rather the heart of the presidency—its essential task.”¹⁸

More recently, President Trump’s expressive choices provide novel departures from traditional norms in their substance, tone, and means of delivery. Trump himself celebrates his expressive innovations, innovations that some find resonant and others repellent: “Trump argued over the weekend that his outsized Twitter presence was part of a calculated redefinition of the presidency: ‘My use of social media is not Presidential—it’s MODERN DAY PRESIDENTIAL.’”¹⁹ As just one example, Trump is unusually combative and eager to engage conflict, rather than defuse it, with his speech—a choice that some attribute to his background in entertainment, media, and reality TV where the norms of discourse are very different from those of traditional politics.²⁰

But presidents are neither the only, nor necessarily the most important of, government speakers. Governmental agencies, for example, are now major expressive players—a development initially inspired in large part by the urgencies of war and implemented by the federal Committee on Public Information, which relied on press releases, movies and newsreels, posters, traveling exhibits, speeches, books, and pamphlets to mobilize public support for the nation’s World War I efforts.²¹ The growth of the administrative state fueled the continued expansion of agencies’ expression. New Deal agencies’ speech, for example, celebrated the work of the Civilian Conservation Corps and explained the terms of the newly enacted Social Security insurance program.²² Federal, state, and local government agencies’ speech is now ubiquitous, with examples that include not only the Surgeon General’s report on the dangers of tobacco, but also the Forest Service’s

¹⁸ TULIS, *supra* note 6, at 4.

¹⁹ Jill Colvin, *Twitter Battle with Press May Come with a Price*, AP NEWS (July 3, 2017) <https://apnews.com/f3838ea7b4c645fb85b61303740cad86>.

²⁰ See Daniel W. Drezner, *Why is Donald Trump so Bad at the Bully Pulpit?*, WASH. POST. (Aug. 14, 2017), http://wapo.st/2w4qic3?tid=ss_mail&utm_term=.2a1de22eb270.

²¹ See WALTER LIPPMANN, PUBLIC OPINION 46–47 (1922) (describing the Committee on Public Information as undertaking “the largest and most intensive effort to carry quickly a fairly uniform set of ideas to all the people of the nation”).

²² JAMES C. MCCAMY, GOVERNMENT PUBLICITY 23, 39 (1939); *see also id.* at 227 (“This expansion [in the administrative state] brought an attendant need for more explanation of the [government’s new] program and more attention to the possible public reaction to administrative practices. Likewise, as more of the public became involved in any way with the new program, more demands for information were created.”).

Smokey Bear wildfire prevention campaign; health alerts from the Center for Disease Control; disaster preparedness warnings from emergency management offices; and many more.

Legislatures also engage in a variety of expressive endeavors. Through resolutions, legislative bodies articulate their views on a particular topic. For instance, “in response to the outbreak of noose incidents in 2007, the entire United States federal legislature voiced its disapprobation. In December of that year, both the House and the Senate passed resolutions citing the history of lynching in America” and condemning the intimidating displays of nooses.²³ Committee reports and related oversight activities also communicate the legislature’s priorities and values.²⁴ As Josh Chafetz explains, “holding hearings and releasing information to the press and the public is an essential means by which houses and members make arguments in the public sphere and attempt to shape the public discourse.”²⁵

The judiciary speaks too. Not only does its power of the pen include the power to write opinions (including concurrences and dissents), but the judiciary also speaks in other settings to other governmental actors and to the public.²⁶ To be sure, the judiciary’s expressive norms vary from those of other government speakers in their greater tendency toward formality and deliberation; relatedly, judges (and government lawyers) are unlike other government speakers in that their speech is constrained by ethics codes that prohibit falsehoods,²⁷ ex parte communications,²⁸ certain commentary on pending matters,²⁹ and sometimes their campaign speech.³⁰ Indeed, judges’ politically expressive efforts met with outcry and opposition very early on: recall that Supreme Court Justice and Federalist party member Samuel Chase faced impeachment proceedings for his expressive use of grand jury charges to

²³ Charlotte H. Taylor, *Hate Speech and Government Speech*, 12 U. PA. J. CONST. L., 1115, 1146 (2010).

²⁴ See, e.g., Note, *Blacklisting Through the Official Publication of Congressional Reports*, 81 YALE L.J. 188 (1971) (discussing the expressive use of congressional reports to shame targeted individuals).

²⁵ JOSH CHAFETZ, CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 152 (2017); see also *id.* at 38 (“[C]ongressional committees can drive the national agenda by holding hearings that draw attention to certain issues, and ‘entrepreneurial’ individual members of Congress, using the platform afforded by their offices (and, if necessary the protection afforded by the Speech or Debate Clause . . .), can play key roles in shaping the national discussion.”).

²⁶ See generally RICHARD DAVIS, JUSTICES AND JOURNALISTS: THE U.S. SUPREME COURT AND THE MEDIA (2011).

²⁷ MODEL CODE OF JUDICIAL CONDUCT r. 1.2 (AM. BAR ASS’N 2011).

²⁸ *Id.* at r. 2.9.

²⁹ *Id.* at r. 2.10.

³⁰ *Id.* at r. 4.1.

attack the Republican party and its policies.³¹ Over time, however, some judicial speakers have shown increasing willingness to engage in public policy debates. Recall, for example, Chief Justice Charles Evan Hughes' letter to the Senate Judiciary Committee refuting FDR's claims that the nine-Justice Court was struggling to handle its workload—a letter many considered to be key in cohering opposition to the president's Court-packing proposal.³² More recent illustrations include judges' growing efforts to educate the public about the judiciary as an institution, and to engage debates about competing approaches to constitutional interpretation.³³ Indeed, some judges now employ social media for these purposes.³⁴

In short, the history of government speech is as long as the history of governments; a history that reveals myriad changes and variations in the substance, tone, and delivery of the government's chosen messages. In contrast, the Supreme Court's government speech doctrine is relatively new. This doctrine permits the government to assert a privilege to control its own speech when defending Free Speech Clause challenges by private parties claiming a constitutional right to shut down the government's expression. As the Court explained:

When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture. Here is a simple example. During the Second World War,

³¹ See Lynn H. Rambo, *When Should the First Amendment Protect Judges From Their Unethical Speech?* 5 (Tex. A&M Univ. Sch. of Law, Working Paper No. 17–56, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3027761 (“Chase’s impeachment (and near conviction) seems to have persuaded the judiciary that its grand jury charges, and other judicial appearances, should no longer include overtly political speeches.”).

³² See *Reorganization of the Federal Judiciary: Hearings on S. 1392 Before the Senate Comm. on the Judiciary*, 75th Cong. 488–92 (1937) (statement of Senator Burton K. Wheeler) (reading from Chief Justice Hughes’s letter: “An increase in the number of justices of the Supreme Court, apart from any question of policy, which I do not discuss, would not promote the efficiency of the Court. It is believed that it would impair that efficiency so long as the Court acts as a unit. There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide. The present number of justices is thought to be large enough so far as the prompt, adequate, and efficient conduct of the work of the Court is concerned.”).

³³ See DAVIS, *supra* note 26, at 184–85.

³⁴ See generally Elizabeth G. Thornburg, *Twitter and the #So-Called Judge* (S. Methodist Univ. Sch. of Law, Working Paper No. 365, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3013241 (documenting some judges’ use of social media to respond to other speakers’ attacks on judicial legitimacy, to educate citizens about the legal system, and to address proposals for changes to the legal system).

the Federal Government produced and distributed millions of posters to promote the war effort. There were posters urging enlistment, the purchase of war bonds, and the conservation of scarce resources. These posters expressed a viewpoint, but the First Amendment did not demand that the Government balance the message of these posters by producing and distributing posters encouraging Americans to refrain from engaging in these activities.³⁵

The government speech doctrine thus explains why tobacco companies do not have a First Amendment right to force the Surgeon General to deliver their views on the benefits of cigarettes, and why the Administration's political critics do not have a First Amendment right to share the podium at the President's State of the Union address. Instead, the First Amendment protects those dissenting speakers' right to present their own views in their own reports and at their own press conferences.

The Court's government speech doctrine appropriately recognizes the value—and, indeed, the inevitability—of the government's expressive choices.³⁶ I believe, however, that its doctrine remains incomplete in at least two respects. First, the Court to date has failed to insist that the government affirmatively identify itself as the source of expression as a condition of claiming the government speech defense, even though meaningful political accountability requires such transparency.³⁷ Second, the Court has yet to grapple with the ways in which the government's speech sometimes affirmatively threatens specific constitutional values (apart from whether and when the government's religious speech violates the Establishment Clause). By failing to address these issues, the Court has missed opportunities to check the government's destructive expressive choices, including the government's expressive efforts to manufacture doubt.

To be sure, the government's expressive choices are neither inevitably good nor bad. Through its speech, the government can educate, shame, empower, challenge, distress, comfort, or distract. While this Essay focuses primarily on a

³⁵ *Matal v. Tam*, 137 S. Ct. 1744, 1757–58 (2017).

³⁶ *See id.* at 1758 (characterizing the Supreme Court's government speech doctrine as “important—indeed, essential”).

³⁷ *See* Helen Norton, *Government Speech and Political Courage*, 68 STAN. L. REV. ONLINE 61, 66 (2015).

dark side of the government's expression,³⁸ the government's speech can, and often does, serve important constitutional values. For example, presidents' expressive use of their bully pulpit to advocate for everything from tax reform to child nutrition can generate important public conversations and inform the public's political choices. Through its speech, the government can also assert moral and political leadership in the nation's ongoing struggle to achieve equality. Recall, for example, President Lyndon Johnson's nationally televised presidential exhortation that "We Shall Overcome" in the midst of the 1960s' civil rights battles,³⁹ President George W. Bush's repudiation of anti-Muslim bigotry in a speech at a mosque immediately after the 9/11 attacks,⁴⁰ and, more recently, New Orleans Mayor Mitch Landrieu's explanation of his city's expressive choice to remove its Confederate monuments from public property.⁴¹

But the government's speech sometimes excludes and divides in ways repugnant to equal protection values, as illustrated by the lies told by governmental officials to justify the World War II internment of thousands of Japanese-American citizens.⁴² As another example, in the aftermath of the Supreme Court's decision in *Brown v. Board of Education*, many Southern governors and members of Congress, along with other state and local officials, engaged in an expressive campaign of "massive resistance" to undermine the Court's credibility and legitimacy.⁴³ For instance, at his inauguration as

³⁸ See Seth Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 13 (1991) ("The landmarks by which we guide ourselves in constitutional law are usually not positive ideals but the dangers we have identified and seek to avoid.").

³⁹ President Lyndon B. Johnson, "We Shall Overcome" Speech to Congress, (Mar. 15, 1965) (transcript available at http://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202011-2012/Johnson_WeShallOvercome.pdf).

⁴⁰ President George W. Bush, Remarks by the President at Islamic Center of Washington, D.C. (Sept. 17, 2001) (transcript available at <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010917-11.html>). For related examples, see Helen Norton, *Government Speech and the War on Terror*, 86 FORDHAM L. REV. 543, 545–46 (2017).

⁴¹ See Katherine Sayers, *Read Mayor Mitch Landrieu's Speech on Removing New Orleans's Confederate Monuments*, NOLA (May 22, 2017, 2:18 PM), http://www.nola.com/politics/index.ssf/2017/05/mayor_landrieu_speech_confeder.html ("Surely we are far enough removed from this dark time to acknowledge that the cause of the Confederacy was wrong.").

⁴² See *Korematsu v. United States*, 323 U.S. 214, 235–40 (1942) (Murphy, J., dissenting) (describing the government's many lies); *Korematsu v. United States*, 584 F. Supp. 1406, 1418–22 (N.D. Cal. 1984) (describing evidence of the government's lies in earlier proceedings). For additional examples, see Norton, *supra* note 40, at 547–52.

⁴³ See BARTLEY, *supra* note 5, at 117 (describing the objective of the Southern manifesto as to "confuse legal and moral issues and to undermine any sense of inevitability a Supreme Court decision normally commands").

governor of Alabama, George Wallace climbed the state capitol's steps to declare:

Today I have stood, where once Jefferson Davis stood, and took an oath to my people. It is very appropriate then that from this Cradle of the Confederacy, this very Heart of the Great Anglo-Saxon Southland, that today we sound the drum for freedom as have our generations of forebears before us done, time and time again through history. Let us rise to the call of freedom-loving blood that is in us and send our answer to the tyranny that clanks its chains upon the South. In the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny . . . and I say . . . segregation today . . . segregation tomorrow . . . segregation forever.⁴⁴

(As an example of governmental counterspeech, contrast Jimmy Carter's inaugural address as Georgia's governor just eight years later: "The time for racial discrimination is over."⁴⁵) The government's expressive choices have undermined equality in other ways as well. At around the same time as the campaign for massive resistance, for example, a Senate subcommittee charged with investigating "The Employment of Homosexuals and Other Sex Perverts in Government" asserted that "[o]ne homosexual can pollute a Government office."⁴⁶ More recently, numerous state laws insist that public schools' sex education curricula include anti-gay expression; Alabama, for example, requires "[a]n emphasis, in a factual manner and from a public

⁴⁴ George Wallace, Former Governor of Alabama, Inaugural Address (1963) (Jan. 14, 1963) (transcript available at https://web.utk.edu/~mfitzge1/docs/374/wallace_seg63.pdf).

⁴⁵ Jimmy Carter, Former Governor of Georgia, Inaugural Address (Jan. 12, 1971) (transcript available at https://web.archive.org/web/20161201224225/https://www.jimmycarterlibrary.gov/documents/inaugural_address.pdf).

⁴⁶ S. REP. NO. 81-241, at 4 (1950); *see also id.* ("[I]t is generally believed that those who engage in overt acts of perversion lack the emotional stability of normal persons. In addition there is an abundance of evidence to sustain the conclusion that indulgence in acts of sex perversion weakens the moral fiber of an individual to a degree that he is not suitable for a position of responsibility. Most of the authorities agree and our investigation has shown that the presence of a sex pervert in a Government agency tends to have a corrosive influence upon his fellow employees. These perverts will frequently attempt to entice normal individuals to engage in perverted practices. . . .").

health perspective, that homosexuality is not a lifestyle acceptable to the general public.”⁴⁷

The government’s speech can frustrate other constitutional values too. In the next Part, I draw from both historical and contemporary examples to identify ways in which the government’s expressive choices may manufacture doubt and distort the truth.

II. THE GOVERNMENT’S CAPACITY TO MANUFACTURE DOUBT THROUGH ITS EXPRESSIVE CHOICES

The government is unusually well-positioned to manufacture doubt through its expressive choices because it generally enjoys advantages of power and information over its listeners.⁴⁸ Not only does the government exert coercive power over the public as sovereign, but it also speaks in a number of other roles in which it asserts power over its audience in various ways—for example, as employer, educator, property owner, and more. Indeed, the government sometimes holds its listeners “captive”—i.e., with limited possibilities for voice or exit⁴⁹—as is the case of those in government custody, young people in public schools, and patients in certain public health care settings.⁵⁰ The government’s often-privileged access to key information further empowers its ability to manufacture doubt about certain matters.⁵¹

⁴⁷ ALA. CODE § 16-40A-2(c)(8) (1975); see also Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1463 (2017) (describing a variety of state laws regulating public school teaching and curricula).

⁴⁸ The government’s observers and critics have long objected to its efforts to exploit these advantages to “weaponize” its speech. See, e.g., *News as a Weapon*, CHI. DAILY TRIB., Nov. 2, 1962, at 16 (criticizing the Kennedy Administration’s “admitted effort to convert news of government into a propaganda weapon”).

⁴⁹ See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970) (explaining that individuals can change organizational behavior through voice (i.e., counterspeech objecting to the group’s behavior) or exit (i.e., demonstrating their unhappiness by leaving the group altogether).

⁵⁰ See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 699 (1970) (expressing concern about the government’s speech addressed to a captive audience and other “government expression that monopolizes or otherwise distorts the system of freedom of expression”).

⁵¹ See LIPPMANN, *supra* note 21, at 247 (“The established leaders of any organization have great natural advantages. They are believed to have better sources of information. The books and papers are in their offices. They took part in the important conferences. They met the important people. They have responsibility. It is, therefore, easier for them to secure attention and to speak in a convincing tone. But also they have a very great deal of control over the access to the facts. Every official is in some degree a censor.”); David Pozen, *The Rhetorical Presidency Meets the Drone Presidency* (Columbia Pub. Law Research Paper No. 14-484, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id= (“The Obama administration’s speeches are admirably low on demagoguery. Yet like all governmental presentations in public venues, they have a tendency to obscure or

The government's ability to manufacture doubt through its expressive choices is greater still because its identity and substantial resources enable it, relatively easily, to attract the attention of a large audience.⁵² Newer expressive technologies enhance these opportunities by empowering the government to reach its listeners immediately and without intermediation from the press or other skeptical third parties. During the Obama Administration, for example, the White House's Office of Digital Services increasingly chose to break presidential news directly to the public through Obama's social media accounts rather than wait for traditional print media to do so.⁵³ That office also relied on analytics to "track what United States senators and the people who worked for them, and influenced them, were seeing online—and make sure that no potential negative comment passed without a tweet."⁵⁴ To be sure, the government's reliance on such technologies can facilitate democratic accountability, free expression, and related constitutional interests by expanding public access to government information and enabling citizens' participation in governmental processes.⁵⁵ On the other hand, some expressive technologies can also mask the government's authorship of,

omit significant facts, complications, and objections, a tendency that is exacerbated in the national security field by the ready-made excuse of protecting classified information.").

⁵² See Jenna Johnson, *This is What Happens When Donald Trump Attacks a Private Citizen on Twitter*, WASH. POST (Dec. 8, 2016), https://www.washingtonpost.com/politics/this-is-what-happens-when-donald-trump-attacks-a-private-citizen-on-twitter/2016/12/08/a1380ece-bd62-11e6-91ee-1adddfe36cbe_story.html?utm_term=.54f42bcc1b13 ("With one tweet, Trump can change headlines on cable news, move financial markets or cause world leaders to worry. With one tweet last week, Trump inflamed a conflict with China. With another tweet on Tuesday, Trump caused Boeing stock to plummet. With a third on Wednesday night, Trump prompted a series of threatening calls to the home of a union leader who had called him a liar."); see also Michael D. Shear, *Trump as Cyberbully in Chief? Twitter Attack on Union Boss Draws Fire*, N.Y. TIMES (Dec. 8, 2016), <https://www.nytimes.com/2016/12/08/us/politics/donald-trump-twitter-carrier-chuck-jones.html> ("David Axelrod, who was a senior adviser to President Obama, said he always advised the current occupant of the Oval Office to be mindful of the extra power that his words carried once they were amplified by the most powerful megaphone in the world. 'What you may think is a light tap is a howitzer,' Mr. Axelrod said. 'When you have the man in the most powerful office, for whom there is no target too small, that is a chilling prospect. He has the ability to destroy people in 140 characters.'").

⁵³ See Julie Hirschfeld Davis, *A Digital Team Is Helping Obama Find His Voice Online*, N.Y. TIMES (Nov. 8, 2015), <https://www.nytimes.com/2015/11/09/us/politics/a-digital-team-is-helping-obama-find-his-voice-online.html>.

⁵⁴ David Samuels, *The Storyteller and the President*, N.Y. TIMES MAG., May 8, 2016, at MM44.

⁵⁵ See *Davison v. Loudon Cty. Bd. Of Supervisors*, 227 F. Supp. 3d 605, 609 (E.D. Va. 2017) (holding that the plaintiff had adequately alleged that a public official's Facebook page was a limited public forum for First Amendment purposes).

and thus its political accountability for, various messages.⁵⁶ Moreover, the ever-increasing speed and reach of the government's communication can exacerbate the harms of its hateful or deceitful speech.⁵⁷ Indeed, changes in the means by which the government speaks can lead to changes in the substance of its speech as well. For example, Twitter requires brevity and rewards outrageousness; President Trump often excels at both.⁵⁸

The remainder of this Part explores three strategies through which government sometimes exploits these power and information advantages to manufacture doubt about factual assertions that it perceives to be inconsistent with its policy or partisan preferences: through its lies and misrepresentations, through its attacks on individuals and institutions that challenge its preferred narrative, and through its choices to bury or deny access to information that it finds inconvenient or dangerous. To be sure, this is not an exhaustive list, nor are these strategies mutually exclusive.

A. Lies and Misrepresentations

First, and perhaps most obviously, the government can manufacture doubt through its lies and factual misrepresentations.⁵⁹ As I have detailed elsewhere, the

⁵⁶ See Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899 (2010) (describing the government's transparent and opaque uses of newer expressive technologies).

⁵⁷ See YUDOF, *supra* note 4, at 11 ("The political significance of technology lies in the enhanced capacity of government officials to preserve their positions of power, to gain support for themselves and their policies, and to dominate discussion of public issues. Technology is ethically neutral, but unethical leaders seize upon it to advance their interests.").

⁵⁸ See Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 212 (2018) ("Trump is the first 'Twitter president,' not only in the volume of tweets that he sent out to his millions of followers but also in their incendiary nature. Trump was able to attract free (traditional) media attention through his social media program and communicate in ways that did not depend upon political parties, journalists, or other intermediaries to filter his message. And he was able to do so in short, angry bursts which would not be possible if directly addressing voters in a weekly radio address or a speech from the Oval Office. . . . Trump hurled insults and also used his Twitter account to spread false claims, for instance, that there was massive voter fraud in the 2016 election. He offered a variety of false, exaggerated, and incendiary claims many of which would not have been spread as widely and in an unmediated way before the era of cheap speech.") (footnotes omitted).

⁵⁹ See David Leonhardt, Ian Prasad Philbrick, & Stuart A. Thompson, *Trump's Lies v. Obama's*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/interactive/2017/12/14/opinion/sunday/trump-lies-obama-who-is-worse.html> ("We applied the same conservative standard to Obama and Trump, counting only demonstrably and substantially false statements. The result: Trump is unlike any other modern president. He seems virtually indifferent to reality, often saying whatever helps him make the case he's trying to make. . . . We have used the word 'lies' again here, as we did in our original piece. If anything, though, the word is unfair to Obama and Bush. When they became aware that they

government's lies can take many forms.⁶⁰ For example, the government's lies and misrepresentations include those that conceal itself as the source of a message to improve its reception in situations where the public might otherwise doubt the government's credibility.⁶¹ In terms of motive, the government's lies include those to avoid political accountability, silence dissent, and manipulate public policy, as well as those that seek to create skepticism and cynicism and distrust more generally.⁶² The government can also manufacture doubt through falsehoods that seek to divert and distract the public from efforts to discover the truth. For example, in response to growing concerns about his campaign's connections to Russia, President Trump claimed, without evidence, that President Obama had wiretapped him during the campaign;⁶³ the Department of Justice later acknowledged that no such evidence existed.⁶⁴

B. Expressive Attacks on Critics and Dissenters

Next, the government can manufacture doubt by seeking to silence or discredit those who speak about matters that threaten the government's perceived self-interest.⁶⁵ These tactics have a long pedigree. Queen Elizabeth forbade Parliament from discussing who might succeed her to the throne,⁶⁶ for example,

had been saying something untrue, they stopped doing it. . . . Trump is different. When he is caught lying, he will often try to discredit people telling the truth, be they judges, scientists, F.B.I. or C.I.A. officials, journalists or members of Congress.”).

⁶⁰ Helen Norton, *The Government's Lies and the Constitution*, 91 IND. L.J. 73 (2015).

⁶¹ See Helen Norton, *Government Lies and the Press Clause*, 89 U. COLO. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2998909 (offering examples of the government's lies that conceal itself as the source of contested speech).

⁶² This strategy is far from new. See RICHARD HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 100 (1967) (“[A]n essential part in the pseudo-conservative world view is that our recent Presidents [FDR, Truman, and Eisenhower], being men of wholly evil intent, have conspired against the public good. This does more than discredit them: it calls into question the validity of the political system that keeps putting such men into office.”).

⁶³ See David Shepardson, *Trump Claims Obama Wiretapped Him During Campaign; Obama Refutes It*, REUTERS (Mar. 4, 2017, 8:05AM), <https://www.reuters.com/article/us-usa-trump-obama/trump-claims-obama-wiretapped-him-during-campaign-obama-refutes-it-idUSKBN16B0CC>.

⁶⁴ See Deirdre Walsh, *Justice Department: No Evidence Trump Tower was Wiretapped*, CNN (Sept. 3, 2017, 5:50PM), <http://www.cnn.com/2017/09/02/politics/justice-department-trump-tower-wiretap/index.html>; Nina Burleigh, *Trump's Claim that Obama Wiretapped His Campaign is False: U.S. Department of Justice*, NEWSWEEK (Sept. 2, 2017 12:49 PM), <http://www.newsweek.com/trump-russia-investigation-wiretap-fbi-obama-658888>.

⁶⁵ See EMERSON, *supra* note 50, at 699 (expressing concern about “government expression used as a sanction against private expression”).

⁶⁶ See CHAFETZ, *supra* note 25, at 190, 245–46.

and the antebellum House of Representatives forbade the discussion of anti-slavery petitions on its floor.⁶⁷

More specifically, through its speech, the government can try to position itself as the authoritative source of information by attacking those who contest its preferred narrative.⁶⁸ The government's expressive attacks can be particularly effective when its targets are limited in their ability to engage in counterspeech—perhaps because they cannot attract the same media and public attention, or where they are politically or otherwise vulnerable.⁶⁹ The government's use of social media and related expressive technologies that encourage social and political polarization can additionally improve its ability to discredit and undermine those who challenge its preferred narrative.⁷⁰

The targets of the government's expressive attacks can include institutions, like the press, the judiciary, or intelligence agencies. Indeed, the government's lies are even more likely to succeed in deceiving the public if the government has already undercut truth-seeking institutions' ability to offer counter-narratives.⁷¹ The government's expressive targets can include individuals: examples include the FBI's defamatory falsehoods about the government's critics to friends, family members,

⁶⁷ See WILLIAM LEE MILLER, *ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS* (1996).

⁶⁸ See David Nakamura, John Wagner, & Aaron Gregg, *President Trump Locks Heads with News Media in a Social-Media First*, WASH. POST (July 2, 2017), https://www.washingtonpost.com/politics/president-trump-locks-heads-with-news-media-in-a-social-media-first/2017/07/02/313e1dd6-5f40-11e7-84a1-a26b75ad39fe_story.html (“Presidential historians suggested that Trump’s social media attacks are lowering the bar on what constitutes appropriate presidential conduct in fighting perceived media enemies.”); see also *id.* (quoting Trump: “The fake media is trying to silence us, but we will not let them. The people know the truth.”).

⁶⁹ See Susan Collins, *GOP Senator Susan Collins: Why I Cannot Support Trump*, WASH. POST (August 8, 2016), <http://wpo.st/MpAr1>. Recounting candidate Trump’s verbal attacks on those who disagreed with him, including a reporter with disability, the Gold Star parents of Muslim soldier, and a federal judge engaged in ongoing litigation, Republican Senator Susan Collins concluded, “[I]t was his attacks directed at people who could not respond on an equal footing—either because they do not share his power or stature or because professional responsibility precluded them from engaging at such a level—that revealed Mr. Trump as unworthy of being our president.” *Id.*

⁷⁰ See CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 90 (2017) (“In the 2016 campaign for the presidency, Donald Trump showed a keen working knowledge of social influences and group polarization, constantly emphasizing how popular he was, and pointing constantly to the polls as evidence.”).

⁷¹ See Ronnell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press* (Brigham Young Univ. Law Research Paper No. 17–23, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929708 (explaining that the government sometimes engages in “enemy construction” in which it seeks to instill or exacerbate public fear of certain individuals, communities, or institutions—like the press, immigrants, or racial and religious minorities).

employers, and the media during the 1950s and 1960s.⁷² The government's targets can include organizations: as Justice Black explained during the Cold War era, "In the present climate of public opinion it appears certain that the Attorney General's much publicized findings [that an organization should be designated to be 'subversive'], regardless of their truth or falsity are the practical equivalents of confiscation and death sentences for any blacklisted organization not possessing extraordinary financial, political, religious prestige and influence."⁷³ The government's targets can include its own employees: indeed, the Supreme Court's decision in *Garcetti v. Ceballos*⁷⁴ empowered the government to punish public employees who report the government's lies and other misconduct when it held that the First Amendment does not protect public employees' speech pursuant to their jobs.⁷⁵

Legislatures as well as executive branch speakers can manufacture doubt by attacking those who challenge the government's "truth."⁷⁶ Senator McCarthy, among others, demonstrated how to capture media attention and partisan gain through outrageous and often unfounded charges.⁷⁷ Seth

⁷² See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 490 (2004). The government sometimes urges private employers to punish governmental critics for their speech. See David Nakamura, *White House: ESPN's Jemele Hill Should Be Fired for Calling Trump a 'White Supremacist'*, WASH. POST. (Sept. 13, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/09/13/white-house-espn-jemele-hill-should-be-fired-for-calling-trump-a-white-supremacist/?utm_term=.90e752b39a80 (quoting White House press secretary Sarah Huckabee Sanders as saying that a sportscaster's Tweet describing Trump's election as "the direct result of white supremacy" was "certainly something that I think is a fireable offense by ESPN"); Ken Belson and Julie Hirschfeld Davis, *Trump Attacks Warriors' Curry. LeBron James's Retort: 'U Bum.'* N.Y. TIMES (Sept. 23, 2017), <https://nyti.ms/2ykBBKX> (quoting Trump as saying, "Wouldn't you love to see one of those N.F.L. owners, when somebody disrespects our flag, to say, 'Get that son of a bitch off the field right now, he's fired.'").

⁷³ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 142 (1951) (Black, J., concurring).

⁷⁴ 547 U.S. 410 (2006).

⁷⁵ *Id.* at 421. Lower courts have since applied *Garcetti* to reject the First Amendment claims of numerous government workers who truthfully sought to expose governmental misconduct. See Helen Norton, *Constraining Public Employee Speech: Government's Efforts to Claim Its Workers Speech as Its Own*, 59 DUKE L.J. 1, 14–15 (2009) (listing examples).

⁷⁶ See EMERSON, *supra* note 50, at 250–51 ("The resulting exposure, in which the witness is cast in the role of a disloyal or even traitorous citizen, multiplies the effect and extends it over an indefinite period of time. The witness may lose his job, even his career; he may suffer other forms of economic reprisal, such as inability to obtain insurance or a mortgage; he is subject to great social pressures, which operate also against his entire family [The committee] conducted hearings in a manner that tended to stimulate hysteria. It issued reports, with or without prior hearings, that condemned certain conduct as disloyal. It functioned, in short, as a sort of modern Inquisition, attempting to stamp out heresy in the nation.")

⁷⁷ See JAMES RESTON, *DEADLINE: A MEMOIR* 220 (1991) ("Even with a superb staff, we were, I'm sorry to say, intimidated much of the time by the popularity of McCarthy's lies and his charges that his opponents were 'soft on communism.'"); see

Kreimer notes the power of the government's speech in this regard:

[T]he striking thing about the enterprise which Senator McCarthy embodied was that it achieved, strictly through the use of information, a substantial impact on citizens' lives, the discourse of the republic, and the exercise of the First Amendment rights of speech, belief, and association The sanctions at the command of Senator McCarthy, and his precursors and imitators, were primarily the ability to obtain and publish information The legacy of the McCarthy era was illuminated by the potential for private suppression manifest in the civil rights struggles of the 1950s and 1960s. The two combined to fix in the judicial consciousness the destructive power of exposure as a sanction. Courts have realized that words lead to sticks and stones; both physical and social sanctions form legal reality.⁷⁸

The consequences of government speakers' expressive attacks included targets' job loss, property destruction, physical violence, and even loss of life. Many of these stories are well-known, some less so. For example, shortly after Senators associated with McCarthy's efforts threatened to disclose that Wyoming Senator Lester Hunt's son had been arrested for soliciting a male police officer, Senator Hunt shot himself in his Capitol Hill office.⁷⁹ And the day after the Attorney General announced in 1966 that he would seek to require the W.E.B. DuBois Club to register as a communist front organization, the club's San Francisco office was bombed and its Brooklyn office attacked by a mob.⁸⁰

also id. at 216 ("His charges may not have made sense, but they made headlines and they sold a lot of papers. McCarthy knew how to take advantage of this 'cult of objectivity.' He made the front pages by announcing his discovery one day and embellishing it a few days later, and each time he still hit the front pages.").

⁷⁸ Kreimer, *supra* note 38, at 21, 28–29.

⁷⁹ See Drew Pearson, *Washington Merry-Go-Round*, MADERA DAILY NEWS-TRIB. (Cal.), June 23, 1954, at 9 (describing the incident as "one of the lowest types of political pressure this writer has seen in many years" and an example of "the new technique used by McCarthyites to pressure other senators").

⁸⁰ See Ted Finman & Stewart Macauley, *Freedom to Dissent: The Vietnam Protests and the Words of Public Officials*, 1966 WIS. L. REV. 632, 633 (1966).

C. Information Control

The government can also manufacture doubt through its control of information. Here too its options are many and varied. A democratic government ideally makes expressive choices through which it shares information and encourages counterspeech.⁸¹ But the government sometimes instead manufactures doubt by depriving the public of access to key information.⁸² As Mark Yudof observed, “government expression and secrecy can sometimes” be the functional equivalent of censorship.⁸³ Secrecy, in turn, breeds further doubt.⁸⁴

The government can control information not only through secret-keeping and selective disclosures,⁸⁵ but also by abandoning efforts to collect or report factual information and by refusing to make its experts available for public discussion.⁸⁶ For instance, Robert Lopresti recounts that in 2004 the Bureau

⁸¹ See Jack M. Balkin, *The First Amendment is an Information Policy*, 41 HOFSTRA L. REV. 1, 4 (2012) (“Authoritarian information states are information gluttons, information misers, and information monopolists. They try to collect as much information as they can, but they do not share it with their people. They try to monopolize control over information in order to serve the interests of those in power. Democratic information states, by contrast, are information gourmets, information philanthropists, and information decentralizers.”).

⁸² See Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 885 (2008) (describing the dangers of certain government secrets). Mary Graham recounts that governmental norms of secrecy, like those of affirmative discourse, have also changed with time and leadership. For example, George Washington tried to champion a culture of openness, while Woodrow Wilson sought “new levels of government secrecy.” MARY GRAHAM, *PRESIDENTS’ SECRETS: THE USE AND ABUSE OF HIDDEN POWER* 48–49, 78–79 (2017).

⁸³ YUDOF, *supra* note 4, at 158.

⁸⁴ See Richard G. Powers, *Introduction to DANIEL PATRICK MOYNIHAN, SECRECY: THE AMERICAN EXPERIENCE* 19 (1998) (“McCarthyism would probably have been impossible except for the claim that official secrecy was keeping the American people from the truth about Communists.”); *see also id.* at 58 (“What secrecy grants in the short run — public support for government policies — in the long run it takes away, as official secrecy gives rise to fantasies that corrode belief in the possibilities of democratic government.”).

⁸⁵ For example, the government can leak information strategically and selectively in ways that support its preferred narrative. *See generally* David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013). My thanks to Joseph Blocher for suggesting this connection.

⁸⁶ See Juliet Eilperin & Brady Dennis, *EPA Yanks Scientists’ Conference Presentation, Including on Climate Change*, WASH. POST (Oct. 22, 2017), https://www.washingtonpost.com/national/health-science/epa-yanks-scientists-presentations-at-conference-on-narragansett-bay/2017/10/22/7429e65c-b76a-11e7-a908-a3470754bbb9_story.html?utm_term=.9321d2d484df (reporting that the EPA “instructed two of its scientists and one contractor not to speak as planned at a scientific conference” on the climate change challenges affecting Narragansett Bay); *but see* Lisa Friedman, *Scott Pruitt, E.P.A. Chief, Says Agency Scientists Are Free to Discuss Their Work*, N.Y. TIMES (Dec. 6, 2017), <https://www.nytimes.com/2017/12/06/climate/scott-pruitt-epa.html> (quoting EPA head Scott Pruitt as saying that “[p]rocedures have been put in place to prevent such an occurrence in the future”).

of Labor Statistics “became involved in a controversy related to what some interpreted as a deliberate attempt by George W. Bush’s administration to conceal information of which it disapproved. Specifically, the Bureau announced its plan to make major changes in the Current Employment Statistics (CES) survey” and to stop collecting separate data by sex in major industries.⁸⁷ Lopresti characterizes these decisions as contributing to the government’s longstanding underestimation of women’s role in the American workforce.⁸⁸ More recent illustrations include the Trump Administration’s decision to remove scientific information about climate change from federal agencies’ websites such that some estimate that it has cut available public data sets by 25 percent.⁸⁹ Legislatures can similarly choose to deprive the public of information that might threaten a preferred factual narrative; for example, “[a]t the request of the National Rifle Association, Congress forbade the Centers for Disease Control and Prevention from gathering statistics on gun violence.”⁹⁰

The government can also hide, and thus dilute the power of, counterspeech by burying it in other government speech. For example, Julie Cohen describes “infoglut” as a way in which the government (and other speakers) can create confusion and undermine certainty by overloading the public with speech:

The political and epistemological dilemmas of infoglut flow instead from abundance [rather than scarcity]. Techniques of critique and deconstruction increasingly become tools of the powerful, and sophisticated appeals to emotion and ingrained instinct readily overshadow reasoned argument. For example, “the rejoinder to critique is not the attempt to reassert a counter-narrative about, say, the scientific consensus around global warning, but to cast doubt on any

⁸⁷ ROBERT LOPRESTI, WHEN WOMEN DIDN’T COUNT: THE CHRONIC MISMEASURE AND MARGINALIZATION OF AMERICAN WOMEN IN FEDERAL STATISTICS 102 (2017).

⁸⁸ *Id.* at 252 (“This book contains multiple examples, over many decades, of government authors expressing astonishment that so many women were working for a living.”).

⁸⁹ See Juliet Eilperin, *Under Trump, Inconvenient Data is Being Sidelined*, WASH. POST (May 14, 2017), https://www.washingtonpost.com/politics/under-trump-inconvenient-data-is-being-sidelined/2017/05/14/3ae22c28-3106-11e7-8674-437ddb6e813e_story.html?utm_term=.56f9b71efcfa; see also Susan Nevelow Mart, *Disappearing Government Information and the Internet’s Public Domain*, 36 ADMIN. & REG. L. NEWS 5, 7 (2011) (describing the government’s removal of information from public websites and the concerns that arise when we don’t know what was removed as well as what is no longer being reported).

⁹⁰ LOPRESTI, *supra* note 87, at 3–4.

narrative's attempt to claim dominance: all so-called experts are biased, any account partial, all conclusions that result of an arbitrary and premature closure of the debate." Information abundance also enables new types of power asymmetries that revolve around differential access to data and to the ability to capture, store, and process it on a massive scale.⁹¹

Finally, the government can manufacture doubt by resisting oversight that might otherwise produce information that could challenge its preferred narrative—that is, by refusing to engage in dialogue with other government speakers.⁹² The government can achieve similar results by limiting access to the results of such oversight.⁹³

III. WHAT NEXT?

As the preceding Part explained, a variety of expressive strategies enable the government to manufacture doubt to protect its own interest at the expense of the public's. This problem is a tough nut indeed, and I do not pretend to crack it here.⁹⁴ Instead, I seek to invite additional thinking and discussion.

⁹¹ Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369, 384 (2016).

⁹² See Burgess Everett & Josh Dawsey, *White House Orders Agencies to Ignore Democrats' Oversight Requests; Trump's Aides are Trying to Shut Down the Release of Information that Could be Used to Attack the President*, POLITICO, (June 2, 2017, 5:11 AM), <http://www.politico.com/story/2017/06/02/federal-agencies-oversight-requests-democrats-white-house-239034> ("The idea, Republicans said, is to choke off the Democratic congressional minorities from gaining new information that could be used to attack the president.").

⁹³ See Mark Mazzetti & Matthew Rosenberg, *Trump Administration Returns Copies of C.I.A. Torture Report to Congress*, (June 2, 2017), <https://www.nytimes.com/2017/06/02/us/politics/cia-torture-report-trump.html> ("Congressional officials said on Friday that the administration had begun returning to Congress copies of a 6,700-page Senate report from 2014 about the C.I.A. program. The move raises the possibility that most of the copies could be locked in Senate vaults indefinitely or even destroyed—and increases the risk that future government officials, unable to read the report, will never learn its lessons. . . . The central conclusion of the report is that the spy agency's interrogation methods—including waterboarding, sleep deprivation and other kinds of torture—were far more brutal and less effective than the C.I.A. described to policy makers, Congress and the public.").

⁹⁴ See LIPPMANN, *supra* note 21, at 76 ("[T]he environment with which our public opinions deal is refracted in many ways, by censorship and privacy at the source, by physical and social barriers at the other end, by scanty attention, by the poverty of language, by distraction, by unconscious constellations of feeling, by wear and tear, violence, monotony. These limitations upon our access to that environment combine with the obscurity and complexity of the facts themselves to thwart clearness and

To start, we might draw from Lawrence Lessig's taxonomy of regulation and consider various responses that take the form of markets, architecture, law, and norms.⁹⁵ A number of thoughtful commentators have started to discuss how market-based approaches might encourage social media platforms to address related challenges.⁹⁶ And others have begun to suggest various architectural solutions, such as nudges to empower audiences' ability to evaluate and counter expressive pathologies both public and private.⁹⁷

In terms of law, elsewhere I have discussed possible doctrinal responses to the problems of government speech. For example, we can understand government lies as a violation of the Free Speech Clause when they are sufficiently coercive of their targets' beliefs or speech to constitute the functional equivalent of the government's direct regulation of that expressive activity.⁹⁸ Relatedly, the Court can adopt a more

justice of perception, to substitute misleading fictions for workable ideas, and to deprive us of adequate checks upon those who consciously strive to mislead.”).

⁹⁵ See Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662–64 (1998) (describing how law, social norms, markets, and architecture all can regulate human behavior in different ways). In other words, we need to think about law, but not only about law.

⁹⁶ See, e.g., Lili Levi, *Real “Fake News” and Fake “Fake News”*, 16 FIRST AMEND. L. REV. 285-290 (2018) (recommending self-regulation by information intermediaries to discourage the dissemination of fake news and to require disclosure of the source of such communications); Mark Verstraete, Derek E. Bambauer, & Jane R. Bambauer, *Identifying and Countering Fake News* (Ariz. Legal Stud. Discussion Paper No. 17–15, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007971 (suggesting possibilities that include “creating new platforms that do not rely on online advertising” and “encouraging existing platforms to experiment with technical solutions to identify and flag fake news”).

⁹⁷ See Levi, *supra* note 96 (urging greater investment in listeners' information literacy); see also JONATHAN HAIDT, *THE RIGHTeous MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 79–80 (2013) (“The main way that we change our minds on moral issues is by interacting with other people. We are terrible at seeking evidence that challenges our own beliefs, but other people do us this favor, just as we are quite good at finding errors in other people's beliefs. When discussions are hostile, the odds of change are slight. The elephant leans away from the opponent, and the rider works frantically to rebut the opponent's charges. But if there is affection, admiration, or a desire to please the other person, then the elephant leans toward the person and the rider tries to find the truth in the other person's arguments.”); *id.* at 105 (“[E]ach individual reasoner is really good at one thing: finding evidence to support the position he or she already holds, usually for intuitive reasons. We should not expect individuals to produce good, open-minded, truth-seeking reasoning, particularly when self-interest or reputational concerns are in play. But if you put individuals together in the right way, such that some individuals can use their reasoning powers to disconfirm the claims of others, and all individuals feel some common bond or shared fate that allows them to act civilly, you can create a group that ends up producing good reasoning as an emergent property of the social system.”).

⁹⁸ See Norton, *supra* note 60, at 100–07. Examples include the government's lies to or about its critics intended to deter or otherwise retaliate against them for their speech (through, for example, false threats about legal consequences or lies that inflict reputational or economic injury), or the government's lies to captive or otherwise vulnerable audiences intended to manipulate their expressive choices. *Id.*

muscular Press Clause doctrine to empower the press to check the government's destructive expressive choices.⁹⁹ Moreover, to enable greater transparency and accountability, the Court should refine its government speech doctrine to require that the government identify itself as the source of a message as a condition of claiming the government speech defense to Free Speech Clause challenges.¹⁰⁰ Legislatures can enact statutory responses to the government's expressive manufacture of doubt requiring the government to make certain affirmative disclosures and to otherwise constrain its lies and misrepresentations, and enforcement officials can more vigorously enforce existing laws that prohibit government agencies from engaging in covert propaganda or that require the government to make certain information public.¹⁰¹

But as Thomas Emerson observed, "[T]he judicial structure is not capable, by itself, of fully protecting in practice the theoretical rights guaranteed under our system of freedom of expression. Full realization of those rights must depend ultimately upon attitudes ingrained in the public mind and support extended by the body politic as a whole."¹⁰² This reality invites a turn to norms as an additional source of constraint on the government's destructive expressive choices.

Robert McAdams explains that "norms" refer "to informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both."¹⁰³ Norms can effectively constrain behavior when those who violate them pay

⁹⁹ See Levi, *supra* note 96 (urging that the Court revitalize press freedoms); Norton, *supra* note 61 (proposing that we "understand the Press Clause to protect certain negative rights by prohibiting press-related lies by the government that undermine the press's watchdog and educator functions. For example, governmental lies of misappropriation—that is, its lies about being the press—can blur the line between the government and the press in the public's mind in ways that undermine public trust in the independence of the press and thus damage the effectiveness of its news-gathering functions. The government's lies of misattribution—i.e., its lies about not being the press—can similarly interfere with Press Clause functions by misleading the public about the source of press publications in ways that not only threaten to skew the public's decision-making, but also breach the public's trust in the press.").

¹⁰⁰ See Norton, *supra* note 37.

¹⁰¹ See Norton, *supra* note 40, at 560–61 (discussing possible statutory and enforcement responses); Norton, *supra* note 60, at 108–13 (discussing same); Norton, *supra* note 61 (discussing same).

¹⁰² Thomas Emerson, *Freedom of Expression in Wartime*, 116 U. PA. L. REV. 975, 1007 (1968); see also *id.* ("There is no effective legal remedy for much of [the government's harassment of political dissenters through its own speech]. Statements of public officials or warnings of investigation, for instance, are not subject to judicial redress. Nor is it possible to obtain court review of most activities of legislative committees, apart from citations for contempt. . . ."); Norton, *supra* note 60, at 10–11 (describing limitations of legal responses to the government's constitutionally harmful speech).

¹⁰³ Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997).

a price for their choice. Counterspeech can thus shape norms through, for example, praise and criticism, and attendant reputational and political rewards and punishment.¹⁰⁴ To these ends, governmental and nongovernmental actors' counterspeech can enforce constructive norms of public discourse by challenging the government's lies and misrepresentations, its expressive attacks on truth-seeking individuals and institutions, and other destructive expressive choices.¹⁰⁵ Private and public counterspeakers' tools for enforcing norms of governmental discourse include not only voice but also exit—i.e., their noisy withdrawal.¹⁰⁶

Note that law can sometimes support and embolden counterspeakers' ability to enforce such norms.¹⁰⁷ For example, Josh Chafetz explains how the protections of the Speech or Debate Clause at times enabled crucial disclosures by members of Congress in the face of executive branch secrecy and lies. As an illustration, Senator Mike Gravel read portions of the

¹⁰⁴ See Cass R. Sunstein, *Unleashed* (Aug. 22, 2017) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3025749) (“Norm entrepreneurs draw attention to what they see as the stupidity, unnaturalness, or ugliness of current norms . . .”).

¹⁰⁵ See Finman & Macaulay, *supra* note 80, at 696–97 (suggesting that government speakers “should behave in a manner calculated to promote rationality rather than error;” should exercise “more than ordinary care” to avoid misstatements; and should couple “criticism of dissent with a reminder that protest and dissent are a vital part of the American tradition.”); see also Lawrence Summers, *After 75 Years of Progress, Was Last Week a Hinge in History?*, WASH. POST (June 4, 2017), https://www.washingtonpost.com/opinions/after-75-years-of-progress-was-last-week-a-hinge-in-history/2017/06/04/2085b91e-47cf-11e7-bcde-624ad94170ab_story.html?utm_term=.e2943d576b75 (“It is essential that leaders in U.S. society signal clearly their disapproval of the course the administration is taking. . . . The more that leading figures in U.S. society can signal their continuing commitment to reason, to common purpose with other nations, and to addressing global challenges, the more the damage can be contained.”); Naureen Shah, *What U.S. Muslims fear from Trump*, WASH. POST. (Dec. 30, 2016), https://www.washingtonpost.com/opinions/gen-kelly-has-talked-about-human-rights-will-trump-listen/2016/12/30/ebabbcea-c928-11e6-bf4b-2c064d32a4bf_story.html?utm_term=.1cd0bfaa41d2 (“Dialogue and decency: In today’s hyper-polarized political climate, these are as rare as unicorns.”).

¹⁰⁶ See Powers, *supra* note 84, at 3 (describing Senator Moynihan’s resignation from the Senate Select Committee on Intelligence in response to then-CIA Director William Casey’s lies about the mining of Nicaraguan harbors during the Iran-Contra affair; Moynihan returned to the Committee when Casey apologized); Jena McGregor, *Trump Fires Back After the CEO of Merck Resigned From His Manufacturing Council*, WASH. POST (Aug. 14, 2017), <https://www.washingtonpost.com/news/on-leadership/wp/2017/08/14/trump-fires-back-after-the-ceo-of-merck-resigned-from-his-manufacturing-council/> (quoting Merck CEO Kenneth C. Frazier’s resignation from Trump’s American Manufacturing Council “as a matter of personal conscience” because “America’s leaders must honor our fundamental values by clearly rejecting expressions of hatred, bigotry, and group supremacy”).

¹⁰⁷ See Richard A. Posner, *Social Norms, Social Meaning, and Economic Analysis of Law: A Comment*, 27 J. LEGAL STUD. 553, 564 (1998) (“[N]orms and laws are substitutes and complements, and sometimes norms are sources or even targets of law. . .”).

Pentagon Papers on the Senate floor.¹⁰⁸ More recently, Senators Wyden and Udall “announced on the Senate floor that the Obama administration had adopted a secret, implausible interpretation” of federal domestic surveillance law; this disclosure, in turn, led to further investigations and further disclosures by public and private actors alike.¹⁰⁹ Indeed, federalism and separation of powers principles offer structural opportunities and incentives for counterspeech by some governmental actors.¹¹⁰

Finally, the government’s own workforce is another precious source of counterspeech challenging governmental efforts to manufacture doubt.¹¹¹ Sometimes this counterspeech takes the form of government workers’ public protests, sometimes their internal resistance, and sometimes their more innovative forms of counterspeech. For example, in response to the Trump Administration’s takedown of climate change data from government websites, some National Park Service employees created a new Twitter feed, @AltNatParkSer, to repost key information.¹¹²

As puny as these efforts to challenge the government’s manufacture of doubt may sometimes feel, the alternative—doing nothing—is doomed to failure. McCarthy—to name a particularly notorious government speaker—defied the norms of governmental discourse of his time, yet lasted nearly six years, at least in part due to the acquiescence of governmental and nongovernmental actors alike.¹¹³ As Kathleen Hall

¹⁰⁸ See CHAFETZ, *supra* note 25, at 216.

¹⁰⁹ *Id.* at 221.

¹¹⁰ See YUDOF, *supra* note 4, at 47 (“The greatest threat of government domination and distortion of majoritarian processes emanates from executive bodies and officers. The greatest hope of restraining that power lies with the legislative branches of government.”).

¹¹¹ See Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 301 (2015) (explaining how public employees’ speech can offer unique insights into governmental workings).

¹¹² See Abby Ohlheiser, *A Running List of All the Possible Subtweets of President Trump from Government Twitter Accounts*, WASH. POST (Jan. 27, 2017), https://www.washingtonpost.com/news/the-intersect/wp/2017/01/25/a-running-list-of-all-the-possible-sbtweets-of-president-trump-from-government-twitter-accounts/?utm_term=.9964bd35383c.

¹¹³ See RESTON, *supra* note 77, at 216–17 (“[M]ost news going to the papers and to the radio and television stations was comparatively free of analysis or even explanation. It was a sound enough theory and took into account everything but the arts of political deception. For example, putting quotation marks around McCarthy’s false charges did not relieve us of complicity in McCarthy’s campaign. Many newspapers condemned him on their editorial pages but gave him plenty of space on the front pages, which had more effect on public opinion. . . . [T]he trouble with [Eisenhower’s] technique of judicious leaving-alone was that McCarthy destroyed a lot of other people before Eisenhower finally had enough.”). Geof Stone recounts that “[d]uring a speech on the [Senate] floor, McCarthy piled hundreds of documents in front of himself, supposedly substantiating charges of Communist infiltration. He defiantly dared any senator to inspect them.” Geoffrey R. Stone, *Free Speech in the*

Jamieson recalls, “The demise of Joe McCarthy demonstrates that a sustained form of rebuttal is required to dispel an entrenched form of guilt by association.”¹¹⁴ In other words, we can find no substitute for persistent pushback, on all fronts, to the government’s efforts to manufacture doubt.¹¹⁵

IV. CONCLUSION

The government’s expressive choices can serve, or instead threaten, deliberative democracy. At its best, the government’s voice speaks truth to power both public and private, and supports or amplifies the voices of the powerless. But government is not always at its best. Our history and continuing experience reveal a variety of ways in which the government’s expressive choices can manufacture doubt, distort the truth, and frustrate key constitutional values. In this Essay, I’ve sought to identify some of these patterns, both longstanding and new, in hopes of helping to recognize and challenge their deployment.

Age of McCarthy: A Cautionary Tale, 93 CALIF. L. REV. 1387, 1398-99 (2005). When Senator Herbert Lehman “walked to McCarthy’s desk and held out his hand for the documents . . . [h]is fellow senators lowered their eyes or looked away. McCarthy snarled under his breath, ‘Go back to your seat, old man.’” Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CALIF. L. REV. 1387, 1398-99 (2005). *Id.*

¹¹⁴ See KATHLEEN HALL JAMIESON, *DIRTY POLITICS: DECEPTION, DISTRACTION AND DEMOCRACY* 71 (1992).

¹¹⁵ See Molly K. McKew, *The Gerasimov Doctrine*, POLITICO: MAGAZINE (Sept./Oct. 2017), <http://www.politico.com/magazine/story/2017/09/05/gerasimov-doctrine-russia-foreign-policy-215538> (predicting that foreign governments’ efforts to manufacture doubt “begin to fail when light is thrown onto how they work and what they aim to achieve. This requires leadership and clarity about the threat—which we saw briefly in France, when the government rallied to warn voters about Russian info ops in advance of the presidential election.”).