DECEPTION AND THE FIRST AMENDMENT: A CENTRAL, COMPLEX, AND SOMEWHAT CURIOUS RELATIONSHIP

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Each year, the UCLA School of Law hosts the Melville B. Nimmer Memorial Lecture. Since 1986, the lecture series has served as a forum for leading scholars in the fields of copyright and First Amendment law. In recent years, the lecture has been presented by such distinguished scholars as Lawrence Lessig, Robert Post, Mark Rose, Kathleen Sullivan, and David Nimmer. The UCLA Law Review *has published each of these lectures and proudly continues that tradition by publishing an Article by this year's presenter, Professor Jonathan D. Varat.*

INTRODUCTION

We live in a world filled with deception. We frequently observe or experience deception in politics, business, religion, education, our personal

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lives, and virtually every other realm of human existence. Human deceptions run the gamut from the seemingly benign practice of convincing children of the existence of Santa Claus, or of lying to make a surprise birthday party successful, to malicious assertions falsely denying that the Holocaust occurred; from intentionally concealing one's identity in order to conduct undercover operations, maintain privacy, ward off retaliation for unpopular belief, or disguise who is really funding a candidate or a ballot measure, to fraudulent statements designed to cheat others of their money or goods; from deceptive commercial advertising in order to promote demand, to deceptive political statements aimed at gaining or exercising government power; from historical fiction like *The Da Vinci Code* that may mislead its readers about the history of the Roman Catholic Church, to filing a false report about police or prison guard misconduct.

Almost as pervasive and varied as deception itself are government efforts to control deception in the interest of protecting from serious harm our people, our institutions, and our very form of self-governing representative democracy. Deception may mislead consumers to financial or medical ruin. It may ravage reputations. It may distort politics and undermine the proper functioning of our representative democracy. It may threaten corruption of our government and the effective functioning of our economy. No wonder our laws contain so many restrictions on false, deceptive, and misleading communications. Imposing sanctions for perjury, false statements under oath, fraud, defamation, deceptive commercial or political advertising, false statements and omissions of material facts in stock offerings or corporate performance generally, withholding or concealing information about financial or other support for causes or candidates, and the like, is almost inevitably the product of a natural and legitimate impulse on the part of government to control the various and significant kinds of havoc that deceptive communications otherwise might wreak.

In many circumstances the First Amendment is no bar to government measures condemning deceptions by statement or concealment, whether government or private parties are the deceivers or the deceived. Mel Nimmer's 1984 *A Treatise on the Theory of the First Amendment* made central "the enlightenment function which constitutes the foundation upon which the First Amendment . . . largely rests."[1] At first glance, restraining deceptive communication furthers rather than disrupts enlightenment of the populace—by promoting truth.[2] Moreover, other theories of the function of free expression—especially

1. MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 1.02[A], at 1-7 (1984).

2. *Id.* § 2.05[C], at 2-45 ("A knowing lie hardly contributes to the enlightenment function."); *id.* § 3.03[B], at 3-22 ("If advertisers, or witnesses under oath, or those engaged in speech which is reputation injuring, could speak without any restraint at all on the truth of their

theories of autonomy—tend to support government restrictions on deception, at least when adopted to preserve the autonomy of those whom deceptive speakers otherwise might manipulate.[3]

But the First Amendment forbids government restriction of some forms of deception. Indeed, accepting unlimited government power to prohibit all deception in all circumstances would invade our rights of free expression and belief to an intolerable degree, including most notably—and however counterintuitively—our rights to personal and political self-rule. A regime of zero tolerance for any form of deception, enforced at will by government officials or random opponents, undoubtedly would curtail unacceptably the willingness of the populace to speak, especially in ways that might anger, or perhaps merely involve, the antideception police. Ironically perhaps, but realistically, policing deception would tend to undermine the enlightenment function of free expression. Such a regime also could interfere with expressive autonomy and tend to inhibit creativity and experimentation, privacy, and the joys and solace that may come from spreading small, private, or otherwise benign delusions. It would not be a regime compatible with a system of free expression. Thus the complexity of the relationship between deception and the First Amendment resides to a significant degree in the fact that the First

statements, the enormous injury which the enlightenment function would suffer by those who would feel free ruthlessly to lie would surely work a greater injury to public enlightenment than would be suffered through the chilling effect of the contrary rule.").

3. Deception is accomplished overwhelmingly by communication and by belief. Literary critic George Steiner once wrote that "[t]he human capacity to utter falsehood, to lie, to negate what is the case, stands at the heart of speech." GEORGE STEINER, AFTER BABEL 214 (1975). The lying to which Steiner refers is usually considered the strongest, and often most egregious, form of deception, conventionally understood as involving an intentional, affirmative assertion designed to produce a belief in the listener that the speaker knows, or at least believes, to be false. Steiner's observation applies equally to other forms of deception, however, such as technically true but incomplete or out of context statements designed to mislead others into inferring false beliefs; careless falsehoods or half-truths that have the effect of misleading the intended audience, even if they are not designed to deceive; and deliberate concealment designed to produce false understandings. The human capacity to deceive in these and other ways also "stands at the heart of speech," for by its nature deception occurs in a communicative relationship between the deceiver and the deceived, the outcome of which is that those deceived will have, or are intended to have, a false belief or understanding. Silence or concealment—omission to speak or withholding of information—may, in context, be deceptive or misleading too, and even in those instances the aim or the result still will involve at least two parties. It is fair to say that the failure to speak either will communicate a false belief itself or at least allow a false belief to be produced and maintained. *See* Jaume Masip, Eugenio Garrido, & Carmen Herrero, *Defining Deception*, 20 ANALES DE PSICOLOGÍA 147, 148 (2004) (synthesizing a "comprehensive definition of lying that pretends to be useful for social scientists" and that purports to include all "deceptive communication," as follows: "*deception* can be understood as *the deliberate attempt, whether successful or not, to conceal, fabricate, and/or manipulate in any other way factual and/or emotional information, by verbal and/or nonverbal means, in order to create or maintain in another or in others a belief that the communicator himself or herself considers false*") (citation omitted).

Amendment values of enlightenment and autonomy sometimes support—and sometimes resist—government attempts to reduce deception.

Comprehensive analysis of deception in all its myriad forms and contexts under the First Amendment obviously is beyond the scope of this, or perhaps any, Article. Variety and complexity are part of the point, of course—they suggest how pervasively connected deception and free speech analysis are. The focus here is on First Amendment limits on government power to control deceptive *assertions* in several different realms, and the much less appreciated First Amendment limits on government speech restrictions that carry out or impose deception *by* the government. Ironically, the most powerful argument in favor of government authority to restrict deception, and the most powerful argument against government-imposed deception, are the same: the manipulative, domineering, and fundamentally disrespectful invasion of autonomy worked by deception. All else being equal, one might think that ought to lead to presumptions in favor of government power when it seeks to curtail deception, and against government power when it seeks to impose deception. It's not that easy, but the two forms of government action are linked closely enough to merit joint consideration and to bolster recognition of a curious relationship between deception and the First Amendment.

I. FIRST AMENDMENT LIMITS ON GOVERNMENT POWER TO CONTROL DECEPTION

A. The Absolute Protection for Statements of Opinion

The most helpful starting point for understanding First Amendment constraints on government power to regulate deception is probably the U.S. Supreme Court's famous declaration of "common ground" in *Gertz v. Robert Welch, Inc.*:[4]

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues.[5]

4. 418 U.S. 323 (1974).
5. *Id.* at 339–40 (citations omitted).

This well-known dichotomy between absolute protection for ideas or opinions,[6] and less protection for false factual statements, has important consequences and is not always easy to administer.[7] If there is such a thing as a deceptive idea or opinion, the First Amendment requires that it be dealt with in the marketplace of ideas, not by government control—not because the marketplace necessarily better separates truth from falsehood, but because we distrust the government to do the separating for us. Who would be so bold, though, to say that ideas are never deceptive, or that they never risk inflicting the kind of harm normally associated with fraud or deceptive advertising? The First Amendment forbids punishing the expression of political or religious opinions, for example, although some might seem just as naturally deceptive as misleading advertising.[8] Moreover, allowing the government to punish those who expressed such opinions without believing in them would not bypass this rule automatically.[9] Conveying to another as an article of true faith what one does not believe may be a lie of sorts, but if it were made an actionable lie, the First Amendment protection for opinion would be gravely endangered. More to the point, liability would then attach for a false statement of fact, not for a false idea. Absolute protection for pure opinions or ideas would remain.

Consider a further example. More than twenty years ago my former colleague Steven Shiffrin suggested that the claim of fortunetellers to free speech protection, even against government claims to protect people from fraud, presented "a significant challenge to the building of first amendment theory."[10]

6. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990) (reading the passage from *Gertz* "to equate the word 'opinion' in the second sentence with the word 'idea' in the first sentence," and consequently rejecting "a wholesale . . . exemption for anything that might be labeled 'opinion'"). Thus, opinions that imply facts are not absolutely protected, whereas opinions that are solely ideas are. Only the express or implied factual statement receives less than full protection, however. *See infra* note 12.

7. *See* Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-12, at 871 (2d ed. 1988); Kathryn Dix Sowle, *A Matter of Opinion:* Milkovich *Four Years Later*, 3 WM. & MARY BILL RTS. J. 467 (1994); Marshall S. Shapo, Editorial, *Fact/Opinion = Evidence/Argument*, 91 NW. U. L. REV. 1108 (1997); Richard H.W. Maloy, *The Odyssey of a Supreme Court Decision About the Sanctity of Opinions Under the First Amendment*, 19 TOURO L. REV. 119 (2002).

8. *See* United States v. Ballard, 322 U.S. 78, 86 (1944) (holding that "the First Amendment precludes" submitting to a jury "the truth . . . of . . . religious doctrines or beliefs"); *id.* at 92–95 (Jackson, J., dissenting) (urging that although misrepresentation of religious experience or belief may lead victims not only to part with money but to receive "mental and spiritual poison," judicial examination of either "religious sincerity" or "religious verity" is forbidden by "our traditional religious freedoms").

9. *See id.* at 92–95 (Jackson, J., dissenting); *see also* Van Schaick v. Church of Scientology of Cal., Inc., 535 F. Supp. 1125, 1142 n.16 (D. Mass. 1982) (correctly noting that *Ballard* never addressed whether religious statements might be grounds for a fraud action if made in bad faith).

10. Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1273 (1983).

He was right, and many courts have since taken heed, invalidating ordinances banning fortunetelling for pay, unless they are confined to fortunetellers who know that they are conveying false information or that they lack the powers they tell others they have.[11] Even such narrowly defined bans surely would risk unacceptable censorship of belief because of the difficulty of preventing the inquiry into what the speaker honestly believed from becoming an inquiry into the validity of the belief itself. In any event, any law limited to the statement the speaker does not believe—if properly and precisely applied—would condemn a false statement of fact about what the beliefs of the speaker were, and leave fully protected what many would consider the core deceptive opinions or predictions expressed.

B. The Presumed Absence of Any Protection for Factual Statements That Are Knowingly or Recklessly False

Moving down a notch from the absolute protection for statements of pure opinion—however deceptive—that in no way imply a false statement of fact,[12] the common doctrinal understanding of the First Amendment is as follows: It does not protect statements of fact (express or implied) that are clearly and convincingly proven in a judicial proceeding subject to independent appellate

11. *See, e.g.*, Argello v. City of Lincoln, 143 F.3d 1152, 1153 (8th Cir. 1998) (holding that the city's fortunetelling ban could not be considered a ban on commercial speech, because telling a fortune is not proposing a commercial transaction but the actual exchange of speech for pay; nor could it be upheld as a fraud prohibition, because it did "not require that fortunetellers *know* that they are conveying false information, or that they have no power of seeing into the future"); Trimble v. City of New Iberia, 73 F. Supp. 2d 659 (W.D. La. 1999); Angeline v. Mahoning County Agric. Soc'y, 993 F. Supp. 627, 633 (N.D. Ohio 1998) (concluding that fortunetelling cannot be banned as "inherently fraudulent") (citation omitted); Rushman v. City of Milwaukee, 959 F. Supp. 1040, 1045 (E.D. Wis. 1997) (invalidating ordinance prohibiting fortunetelling and astrology because it "censors more than fraud (even more than false statements)"); Howell v. City of New Orleans, 844 F. Supp. 292 (E.D. La. 1994); *see also* Spiritual Psychic Sci. Church of Truth, Inc. v. City of Azusa, 703 P.2d 1119, 1124–30 (Cal. 1985) (holding the city's fortunetelling ban in violation of the free speech provision of the California Constitution for failing to limit its coverage to actual, not just potential, fraud).

12. The reason for this formulation stems from *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990), where the Court rejected the claim that the passage from *Gertz*, *see supra* text accompanying note 5, was "intended to create a wholesale defamation exception for anything that might be labeled 'opinion.'" It did so, however, because "expressions of 'opinion' may often imply an assertion of objective fact," and the factual implications arising from a statement asserted in the form of an opinion could be made actionable. *Milkovich*, 497 U.S. at 18. As Justice Brennan wrote in dissent, however, "while the Court today dispels any misimpression that there is a so-called opinion privilege *wholly in addition* to the protections we have already found to be guaranteed by the First Amendment, it determines that a protection for statements of pure opinion is dictated by *existing* First Amendment doctrine." *Id.* at 24 (Brennan, J., dissenting). For a review of the fact/opinion distinction both before and after *Milkovich*, see Martin F. Hansen, *Fact, Opinion, and Consensus: The Verifiability of Allegedly Defamatory Speech*, 62 GEO. WASH. L. REV. 43 (1993).

review to be known by the speaker to be false, or even consciously thought to be probably false but recklessly uttered anyway.[13] If these burdens can be overcome, lies that defame someone (even a high-ranking public official),[14] invade individual privacy by casting a nondefamatory false light,[15] intentionally inflict emotional distress on a particular person,[16] amount to fraud or common law deceit that misleads the listener and causes injury,[17] or constitute perjury or false statements under oath,[18] may all be sanctioned.

Why should this be so? Normally we assume that government may not restrict expression's persuasive power, and it is precisely the communicative impact—the persuasive influence—of deceptive speech that is the source of its potential harm. I certainly agree with my colleague Eugene Volokh that it is wholly insufficient to say that regulating speech that causes harm because of its communicative impact—as deception, even in its most egregious forms, does—is allowable under the First Amendment on the question-begging theory that deceiving is only conduct, not speech.[19] The Latin origin of the word "deceive" may mean "to take . . . from,"[20] but however tempting it might be simply to say that deception is a form of theft by language—conduct no different constitutionally than physical theft—this alone will not justify outlawing all deception, which necessarily operates by persuasion.

Why, then, is this form of persuasion not thought to be entitled to First Amendment protection? Some commentators have borrowed from Immanuel Kant to urge that manipulative lies, at least, are incompatible with the respect for human autonomy underlying the First Amendment. David Strauss, for example, propounds as centrally explaining most of free speech law what he calls the persuasion principle, the idea that "harmful consequences resulting from the persuasive effects of speech may not be any part of the justification

13. *See Milkovich*, 497 U.S. at 14–21. This is not to say that the First Amendment demands such stringent protections against liability for all deceptive statements—only that liability grounded on factual misstatements may be imposed if these requirements are satisfied, even where the First Amendment applies to its fullest extent, such as with defamation of public officials during criticism of their official conduct. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964). With those requirements satisfied, it follows that liability may be imposed in less-protected situations.

14. *See Sullivan*, 376 U.S. at 264.

15. *See* Time, Inc. v. Hill, 385 U.S. 374 (1967).

16. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

17. *See* Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600 (2003).

18. *See* Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (holding that "the knowingly false statement . . . do[es] not enjoy constitutional protection"); Gates v. City of Dallas, 729 F.2d 343, 345 (5th Cir. 1984); United States v. Varani, 435 F.2d 758, 762 (6th Cir. 1970); United States v. Lattimore, 215 F.2d 847, 860 (D.C. Cir. 1954).

19. Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1284 (2005).

20. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 469 (2d ed. 1983).

for restricting speech."[21] Lies properly are excluded from the protection of the persuasion principle, he argues however, because the manipulative liar, like the government that seeks to restrict speech because of its persuasive effect, imposes a form of "mental slavery" on the listener.[22] A liar exerts control in a manner uniquely offensive to human autonomy by interfering with the victim's "control over her own reasoning processes" in pursuit of "the liar's ends, not the victim's own."[23] Edwin Baker similarly suggests that lies are tools to manipulate listeners, treating listeners "purely instrumentally" by "tricking" them, "purposefully undermining [their] capacity for successfully autonomous acts."[24] On this account, the First Amendment's protection against government efforts to prevent persuasion rests on respect for people's autonomy. Lies disrespect autonomy so fundamentally that they can lay no claim to that protection.

This is a powerful explanation, but perhaps not airtight. One can argue that other forms of persuasion resting on, say, charisma or personal charm, or even the overbearing persistence of a used car salesman, also might treat the listener instrumentally. They seek to exert effective control over the listener's reasoning processes in a manner offensive to a Kantian version of respect for another's autonomy, even if not as offensively as knowingly false factual speech. More generally, if the government becomes entitled to restrict speech to correct an imbalance of communicative power between the speaker and the listener, the pillar of support that the persuasion principle provides for the protection of free speech will begin to crumble.

Even assuming the validity of the Kantian account, however, its justification for removing lies from First Amendment protection does not seem to apply equally strongly to each of the contexts recognized by the Court. Lies to defraud someone into parting with something of value might fit the account best: The one-to-one targeting of the deception raises the concern not only about the unique control of the speaker over the listener's reasoning processes, but also about the deceived listener's direct response in giving up something to the deceiver in a manner most akin to theft.

But the analysis is not quite so simple when the deception involves third parties or political speech. For example, lies that defame a person's reputation or otherwise inflict psychic injury involve the creation of false beliefs, not in the mind of the injured victim, but in the minds of others. Lies in the course of official government proceedings risk producing false beliefs in the minds

21. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 335 (1991).

22. *Id.* at 354.

23. *Id.*

24. C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 910 (2002).

of official investigators, risking perversion of the investigative process. Arguably, the deceptions in those instances also interfere with the reasoning processes of—and the respect owed to—the deceived parties, and are likely to influence their behavior. Yet compared to fraud, there is something more diffuse about the impact on the listeners in those cases that might change the assessment of just how vicious the disrespect for the listener's reasoning processes or autonomy is. This may matter if one asks, as I do shortly, whether knowingly false statements of fact always should be subject to sanction no matter how wide or diffuse the audience to whom the statements are addressed, and no matter whether the lie is told in the course of ideologically charged political debate.

The U.S. Supreme Court first refused to protect calculated or reckless falsehoods in the context of libel suits by public officials for criticism of their official conduct, because "the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected."[25] The Court chose to tolerate the risk that judges or juries might punish critics of the government by wrongly finding calculated or reckless falsehoods, thereby effectively imposing punishment for seditious libel.[26]

Taking account of both the autonomy rationale and the enlightenment rationale for excluding deliberate or reckless falsehoods from First Amendment protection, even when deployed as part of criticism of government behavior—the most carefully protected arena for free speech—is there any reason to think that lies ever will or should gain protection under any circumstances? Three highly controversial clashes between potential liability for false statements and First Amendment principles—Holocaust denial, political deception, and misleading tactics by journalists seeking a story—may test whether there is or should be any give in the doctrine allowing punishment of intentional or reckless lies. I consider each in turn.

25. Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

26. Justices Black, Douglas, and Goldberg, however, thought the risk was too great and would have found an unconditional right to criticize government officials. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 293–305 (1964); Garrison v. Louisiana, 379 U.S. 64, 79 (1964) (Black, J., concurring, joined by Douglas, J.); *id.* at 80 (Douglas, J., concurring, joined by Black, J.); *id.* at 88 (Goldberg, J., concurring).

1. Lying About the Holocaust

May liability attach to those who spread the lie that the Holocaust never happened?[27] Consider the following arguments why even such a despicable lie might claim free speech shelter. Some simply might try avoidance and say that Holocaust denial is an expression of opinion in the form of an historical interpretation and thus absolutely protected from punishment for that reason, without the need to address the exclusion of knowingly false statements of fact from First Amendment protection. That is not adequately responsive, however. In many versions, Holocaust denial is asserted as fact that can be proven false, the criterion the Court has adopted to determine whether a statement will be denied the absolute protection afforded opinion.[28] More important, there is something monstrous about protecting Holocaust denial on the view that it expresses merely a matter of historical opinion, rather than fact. If there is to be any protection at all, it would be better to find that the lie is protected speech that is not opinion, but a knowingly false assertion of fact.

A more directly responsive line of argument would consider how diffuse or individualized the injury of Holocaust denial is, and in what sort of proceeding the issue of liability for its expression is raised. There is good reason to believe that today the First Amendment would bar an action for group libel, as distinct from individual libel.[29] Why? Addressing false speech to a wide

27. For a sampling of debate on this question, see Gerald Tishler et al., Debate, *Freedom of Speech and Holocaust Denial*, 8 CARDOZO L. REV. 559 (1987); Kenneth Lasson, *Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society*, 6 GEO. MASON L. REV. 35 (1997); Robert A. Kahn, *Informal Censorship of Holocaust Revisionism in the United States and Germany*, 9 GEO. MASON U. CIV. RTS. L.J. 125 (1998); Winfried Brugger, *Ban On or Protection of Hate Speech? Some Observations Based on German and American Law*, 17 TUL. EUR. & CIV. L.F. 1 (2002); Vicki C. Jackson, *Holistic Interpretation, Comparative Constitutionalism, and Fiss-ian Freedoms*, 58 U. MIAMI L. REV. 265, 289–92 (2003); Michelle L. Picheny, *A Fertile Ground: The Expansion of Holocaust Denial Into the Arab World*, 23 B.C. THIRD WORLD L.J. 331, 340–43 (2003).

28. *See supra* note 12.

29. Although the Court narrowly upheld a group libel law in *Beauharnais v. Illinois*, 343 U.S. 250 (1952), and that decision never has been formally overruled, *see* Smith v. Collin, 436 U.S. 953, 953 (1978) (Blackmun, J., dissenting) (noting in his dissent from denial of certiorari that "*Beauharnais* has never been overruled or formally limited in any way"), a number of lower courts and commentators have concluded, in light of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and later *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), that *Beauharnais* is no longer good law. *See, e.g.*, Am. Booksellers Ass'n Inc. v. Hudnut, 771 F.2d 323, 331 n.3 (7th Cir. 1985) (invalidating an antipornography ordinance premised, in part, on a group libel rationale, and observing that in *Collin v. Smith*, 578 F.2d 1197, 1205 (1978), the same court had "concluded that cases such as *New York Times v. Sullivan* had so washed away the foundations of *Beauharnais* that it could not be considered authoritative"), *aff'd*, 475 U.S. 1001 (1986); Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1200 (9th Cir. 1989) (agreeing "with the Seventh Circuit that the permissibility of group libel claims is highly questionable at best" in light of decisions

audience about a broad historical, social, or political issue heightens the danger that the majority will suppress despised speakers for their point of view, not just their lies, even when, in theory, only the lies are actionable. Suppressing the lie thus may be excessively dangerous to the enlightenment value of the First Amendment, particularly the value of speech that checks government abuse.[30] Moreover, the opportunities "to expose through discussion the falsehood and fallacies"[31] are greater when a group may be moved to respond than when speech targets an individual. Finally, the assault on the autonomy of listeners seems much less likely to enslave the mental processes of the listeners and bend them to the speaker's will than in the case of, say, fraud—at a minimum because direct self-interest of the listeners is likely to make them less immediately receptive to false claims about the Holocaust than to false claims about a seemingly attractive personal opportunity, and because false claims about the Holocaust are so contrary to current conventional understandings of history that listener skepticism is likely to be quite pronounced.

Is Holocaust denial enough like group libel such that the First Amendment forbids the suppression of the lie? Each time the Supreme Court has applied the knowing or reckless falsity exception in the past, it has done so in the context of a lie focused on targeted instances of injury to individuals or in a specific judicial proceeding with a very focused aim. Even those who believe that Holocaust deniers should be held liable for their lie have tended to support liability only in the context of something like a tort action for intentional infliction of emotional distress to redress the psychic injury that the lie inflicts on Holocaust victims.[32] Suppose, instead, that a federal statute were passed to create a new agency, the Federal Truth in History Commission, to detect and fine those who knowingly or recklessly speak falsely about an

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subsequent to *Beauharnais*); Sambo's Restaurants, Inc. v. City of Ann Arbor, 663 F.2d 686, 694 n.7 (6th Cir. 1981); Anti-Defamation League of B'nai B'rith v. FCC, 403 F.2d 169, 174 n.5 (D.C. Cir. 1968) (Wright, J., concurring) (noting that "far from spawning progeny, *Beauharnais* has been left more and more barren by subsequent First Amendment decisions, to the point where it is now doubtful that the decision still represents the views of the Court"), *cert. denied*, 394 U.S. 930 (1969). As for commentators, see, for example, Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297, 329–33 (1988); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 518; Toni M. Massaro, *Equality, and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 219 (1991); Lee Bollinger, *Rethinking Group Libel*, *in* GROUP DEFAMATION AND FREEDOM OF SPEECH 243 (Monroe H. Freedman & Eric M. Freedman eds., 1995) (asserting that "it has become a commonplace of constitutional law discussions that the [*Beauharnais*] case is no longer good law").

30. The classic article urging the centrality of this value in First Amendment theory is Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

31. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

32. *See, e.g.*, Tishler et al., *supra* note 27, at 572–78, 591–93 (comments of Arthur Berney and Gerald Tishler).

historical event. Would that form of regulation, with such a broad mission, trigger enough concerns about government control of speech to provoke a loosening of the categorical exclusion of such false statements from First Amendment protection? I believe that it might—and should—the implication being that the categorical exclusion may not be as categorical as it first appears. Moreover, the nature of the lie, the degree to which its suppression poses greater or lesser concern about government misbehavior, the private interest invaded by the lie, and the nature of the enforcement mechanism for imposing accountability for its utterance, are all relevant to whether the lie is or is not protected speech.

Narrowing the category of lies so that only some (only the denial of the occurrence of the Holocaust, for example) are prohibited will not solve the problem. This is so because a different principle forbids drawing distinctions—even within an unprotected category of speech—when the distinction favors one subject, much less one point of view, over another.[33] Singling out one or a small group of lies for government condemnation, while leaving others unregulated, signifies a "realistic possibility that official suppression of ideas is afoot."[34] The Ninth Circuit Court of Appeals recently accepted that knowingly false speech regarding a public official is not constitutionally protected speech. Nonetheless, it held that a California statute making it a misdemeanor to file a knowingly false complaint of peace officer *misconduct* violated the First Amendment. The court based its ruling on the fact that no equivalent California law imposed liability for knowingly false statements asserted by a peace officer or witness *in support of* a peace officer during the course of a misconduct investigation.[35] A selective restriction that punishes only lies about the existence of the Holocaust, in the name of historical accuracy, likely would pose similar problems.

Finally, in further support of the position that knowing or reckless Holocaust denial can lay some claim to First Amendment protection, consider whether false statements can ever be "deemed to make a valuable contribution to public debate," as Justice Brennan wrote in a famous footnote in the *Sullivan* case.[36] As First Amendment aficionados know, Justice Brennan drew on the suggestion of John Stuart Mill that false statements may bring

33. *See* R.A.V., 505 U.S. at 391.

34. *Id.* at 390.

35. *See* Chaker v. Crogan, 428 F.3d 1215, 1228 (9th Cir. 2005).

36. New York Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964) (quoting JOHN STUART MILL, ON LIBERTY 15 (Ronald Buchanan McCallum ed., Basil Blackwell 1947) (1859), and citing John Milton, *Areopagitica*, *reprinted in* 2 COMPLETE PROSE WORKS 561 (Don M. Wolfe gen. ed., Yale Univ. Press 1959) (1643)).

about "the clearer perception and livelier impression of truth, produced by its collision with error"—a view shared by John Milton.[37] The idea that false statement might have enlightenment value because its encounter with truth may make truth clearer and more robust has largely been ignored by the Court since *Sullivan*; in the marketplace of ideas (or facts) where imbalances in speaker participation and dominance are routine and not difficult to identify, it is uncertain that people actually will buy more truth than falsity. It is one thing to defend the First Amendment's presumptive deregulation of the marketplace of ideas on the ground that it is too dangerous to allow the government to define truth. But it is quite another to assume that falsity should be valued because of an actual contribution to the sharpened perception of truth. Still, it is worth considering that some of the most stalwart opponents of Holocaust denial believe it better to challenge Holocaust deniers in the court of public opinion than in a court of law.[38] One reason may be that confronting the lie in the arena of public discussion may increase the likelihood that the truth will be clearer and more long-lived, so that the truth is not forgotten. How many people are motivated more strongly to remember and solidify the true history of the Holocaust because they live in an unfortunate world with some who deny it?[39]

2. Deceptive Political Statements

A second instance testing whether some lies should be protected comes from the growing practice of attempting to rid political campaigns of lies in a more wholesale fashion than traditionally has been done. Are laws that broadly forbid lies in political debate, enforceable by a government Political Fairness or Disclosure Commission, consistent with the First Amendment? Perhaps not,

37. *Id.*

38. *See, e.g.*, Frederick M. Lawrence, *The Protocols of the Elders of Zion: Group Defamation Trials in Civil Courts and the "Court" of Public Opinion*, in FROM THE PROTOCOLS OF ZION TO HOLOCAUST DENIAL TRIALS: CHALLENGING THE MEDIA, THE LAW AND THE ACADEMY (forthcoming), *available at* http://ssrn.com/abstract=799024.

39. In the question-and-answer period following the delivery of the Lecture from which this Article is adapted, my colleague Seana Shiffrin asked whether my resurrection of *Sullivan*'s footnote 19 reflected some dissatisfaction with the Court in *Sullivan* having stopped short of recognizing the absolute privilege that the dissenters would have adopted. I long have thought that in the specific context of individually targeted defamation the majority was right to decline to immunize calculated falsehoods completely, but the very real risks of censorship articulated by the dissenters also persuade me that in other, less readily focused contexts (such as those discussed in this part of the Article) a complete privilege is appropriate. Part of the reason is that the battle over certain grand truths is best left to the public clash of perspectives, even if some of those perspectives contain damnable lies.

as scholars as diverse as Geoffrey Stone[40] and Charles Fried[41] apparently agree. Stone's formulation is the closest to my own. Because it risks "partisanship affecting the process at every level," he considers "the danger of putting government in the position routinely to decide the truth or falsity of all statements in public debate" too great to comply with the demands of the First Amendment, even with respect to knowingly false statements.[42] Fried agrees, asserting that while "[d]efamation and deception are actionable wrongs," because "they vindicate private rights invoked by, or at least on behalf of, private individuals[,] the First Amendment precludes punishment for generalized 'public' frauds, deceptions, and defamation."[43]

The issue has not reached the Supreme Court squarely yet, although it likely will before long. In 1976, the Court summarily affirmed a three-judge district court judgment that facially invalidated a Fair Campaign Code promulgated by the New York State Board of Elections, which prohibited candidates for political office—during the period of the campaign—from misrepresenting a candidate's qualifications, positions, party affiliations, or party endorsements.[44] The primary defect the lower court found was that the Code condemned not only misrepresentations shown by clear and convincing evidence to be knowing or reckless falsehoods, but those made with less awareness as well. This created a high danger of deterring candidates from making protected statements because of the risk of being subjected to, and possibly fined as a result of, an administrative Board proceeding that also did not require readily available judicial review.[45] The court expressed sensitivity to the special harms of an administrative body overseeing candidate misrepresentations during a political campaign,[46] but it did not suggest protecting knowingly or recklessly false statements.[47]

In 1998, however, the Washington State Supreme Court, in a 5–4 decision, became "the first court in the history of the Republic to declare First Amendment protection for calculated lies," according to one of the objecting

40. Geoffrey R. Stone, *The Rules of Evidence and the Rules of Public Debate*, 1993 U. CHI. LEGAL F. 127.

41. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225 (1992).

42. Stone, *supra* note 40, at 140.

43. Fried, *supra* note 41, at 238.

44. Schwartz v. Vanasco, 423 U.S. 1041 (1976), *aff'g* Vanasco v. Schwartz, 401 F. Supp. 87 (E.D.N.Y. 1975).

45. *Vanasco*, 401 F. Supp. at 94–100.

46. *Id.* at 98–100.

47. *Id.* at 93 (agreeing—perhaps too categorically—"with the Board's argument that calculated falsehoods are of such slight social value that no matter what the context in which they are made, they are not constitutionally protected").

justices, who concurred on other grounds.[48] The case involved an initiative measure, the Death with Dignity Act.[49] The state Public Disclosure Commission sought fines under the state's False Political Advertising statute[50] against the ultimately successful opponents who had distributed campaign statements alleged to be knowingly or recklessly false, claiming that the measure would allow doctor-assisted suicide without specifically mentioned safeguards. Three justices embraced Mill's idea that false statements may sharpen the perception of truth in public debates.[51] They also endorsed Fried's position that authorizing the state to separate the true from the false for the citizenry is anathema to the First Amendment, especially in suits to enforce a cause of action created for the government against a private person where there was no competing state interest in vindicating private reputation or other injury.[52] They found "patronizing and paternalistic" the claim of an independent right of the state "to shield the public from falsehoods during a political campaign"—especially where the "truth of the assertion[s might] be readily tested against the text of the initiative."[53] The First Amendment required more speech to bring forth truth, not silencing false political speech; thus the statute violated the First Amendment. The two justices who concurred in that view wrote specifically to suggest that perhaps lies about a *candidate*, rather than an *initiative*, might be subjected to regulation—even under this statute—because the attacked candidate's reputation would be implicated.[54] But with respect to initiatives, "there is no competing interest sufficient to override our precious freedom to vigorously debate the wisdom of enacting a measure, even if that debate contains falsehoods as well as truths."[55] The objecting justices maintained that deliberate deceptions remain categorically excluded from First Amendment protection because the category is well established, is limited in its deterrent effect on legitimate speakers, and allows protection against perversion of the electoral process that may all too likely interfere with voter understanding.[56] Nonetheless, they generously construed the statements to find that they were protected opinion using a strong presumption

48. State *ex rel.* Pub. Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691, 701 (Wash. 1998) (en banc) (Talmadge, J., concurring, joined by Johnson, J.).

49. Death with Dignity Act, Initiative Measure Proposition 119 (Wash. defeated Nov. 5, 1991).

50. WASH. REV. CODE § 42.17.530(1)(a) (West 2006).

51. *Id.* at 695 (Sanders, J., joined by Dolliver and Smith, JJ.).

52. *Id.* at 696–97.

53. *Id.* at 698–99.

54. *Id.* at 699–701 (Madsen, J., concurring, joined by Alexander, J.).

55. *Id.* at 700.

56. *Id.* at 701–10 (Talmadge, J., concurring, joined by Johnson, J.); *id.* at 699 (Guy, J., concurring, joined by Durham, C.J.) (taking the view that the "elected representatives of the people have a right to pass laws which make malicious lying illegal in political campaigns").

that if a statement can in any way be understood as opinion or factually correct, it should not be understood as a false factual statement.[57]

An intermediate appellate court in Washington recently extended that decision to cover a Public Disclosure Commission action pursuant to the False Political Advertising statute involving a false statement made by one *candidate* about another, because no requirement of damage to the opposing candidate had to be shown; the statute's reach was not limited in time to lies uttered during campaign periods; and, given the assertion of bare administrative authority, perhaps any exception should be limited to knowing falsehoods, not extended to reckless ones.[58] These cases reflect a sensitivity to the nuance of how First Amendment interests are affected by different enforcement schemes, different government interests implicated, and a number of other variables. That is nothing new, except insofar as the nuanced approach is being applied to suggest that even the knowing lie occasionally deserves consideration under the First Amendment.

3. Lies Designed to Procure Truth

Finally, is the use of calculated lies to uncover factual truth ever protected by the First Amendment? The most difficult cases involve news reporters acquiring otherwise unobtainable information by asserting a false identity or a false commitment to respect confidentiality, or the like.[59] It is now settled that the First Amendment will permit the imposition of criminal and civil liability (including punitive damages) based on dissemination of a knowingly false and defamatory statement.[60] Less certain is whether the First Amendment might impose limits on the imposition of any of those forms of liability for lies used to secure publishable information that is both true and potentially of great public importance.

Two related questions need to be distinguished in analyzing this problem. The one of primary interest here is whether the First Amendment should offer any protection from liability for the psychological or pecuniary harm, if any, that the lie caused directly and independently when consciously employed

57. *Id.* at 710–11 (Talmudge, J., concurring, joined by Johnson, J.); *id.* at 699 (Guy, J., concurring, joined by Durham, C.J.).

58. Rickert v. Pub. Disclosure Comm'n, 119 P.3d 379, 380 (Wash. Ct. App. 2005).

59. For an introduction to these problems, see, for example, Diane Leenheer Zimmerman, *I Spy: The Newsgatherer Under Cover*, 33 U. RICH. L. REV. 1185 (2000); Randall P. Bezanson, *Means and Ends and* Food Lion: *The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895 (1998); David A. Logan, *"Stunt Journalism," Professional Norms, and Public Mistrust of the Media*, 9 U. FLA. J.L. & PUB. POL'Y 151 (1998).

60. *See supra* text accompanying notes 12–14.

to secure accurate information that might be of great public interest. The other is whether the First Amendment ever may immunize from liability the harm caused more indirectly—and usually more substantially—by the subsequent publication of the accurate information obtained as the result of the lie.

The Supreme Court has not provided a clear answer to either question, but it has issued rulings relevant to both. In *Bartnicki v. Vopper*,[61] the Court bestowed First Amendment protection on those disclosing the contents of an illegally intercepted phone conversation about a matter of public concern where they had reason to know of the illegal interception but were not complicit in their source's unlawful acquisition. The Court followed its general approach "that 'if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order.'"[62] It also emphasized, however, its "repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment,"[63] once again reserving "the question 'whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well.'"[64] One implication of the Court's unwillingness to decide that question—taken together with its consistent extension of First Amendment protection absent a publisher's directly unlawful acquisition—appears to be that the First Amendment enlightenment interest in truthful publication is sufficiently strong to require careful consideration before removing protection from the "ensuing publication"—even from a newspaper that acquired the information unlawfully or (a fortiori one would think) by deliberate misrepresentation. Of course another (possibly underexamined) assumption appears to be that the government constitutionally may punish the unlawful acquisition itself, although it still remains unclear whether the Court had in mind only criminal acquisition, potentially allowing some form of First Amendment immunity for tortious acquisition—such as fraudulent misrepresentation—especially if the enlightenment value of the tortiously acquired information is exceedingly high. The Court's narrowly focused, contextually sensitive approach to issues of publication damages in these cases certainly cuts against the notion of a categorical repudiation of

61. 532 U.S. 514 (2001).

62. *Id.* at 528 (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)).

63. *Id.* at 529.

64. *Id.* at 528. The question had been reserved earlier in *New York Times Co. v. United States*, 403 U.S. 713 (1971), in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 (1978) (per curiam), and in *Florida Star v. B.J.F.*, 491 U.S. 524, 535 n.8 (1989).

First Amendment protection. Moreover, the same attachment to the value of accurate public information in some instances also might persuade the Court to avoid categorical repudiation of First Amendment protection for the lies used to discover the truth to be published.

At first glance, the Court's earlier 5–4 decision in *Cohen v. Cowles Media Co.*[65] might seem to undermine this conclusion. There the Court rejected a newspaper's contention that the First Amendment shielded it from liability for compensatory damages for breach of a promise not to reveal the identity of a source that resulted in the source losing his job. The majority declined to apply the approach of *Bartnicki* and the decisions on which it had relied, at least in part because "by making a promise that they did not honor" it was "not at all clear that [they] obtained Cohen's name 'lawfully[,]' . . . at least for purposes of publishing it."[66] Instead, the majority invoked another "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[67] Because the state law of promissory estoppel was a law of general applicability, the First Amendment did not preclude the possibility of compensatory damages. Moreover, the damages stemmed from the publication of true information about a source who relied on a promise of confidentiality; the Court did not even hint at the possibility that it might distinguish between criminally unlawful acquisition of news and civilly unlawful acquisition of news in allowing such an award to stand. Given that the law of fraudulent misrepresentation is also a law of general applicability, *Cohen* might be understood to suggest that a First Amendment claim would be no more successful in that case.

Yet *Cohen* still might not be an insuperable barrier to recognizing First Amendment protection. The four dissenters were unpersuaded—at least with respect to a damages award based on the publication of true information of considerable public interest—that the balance between application of a law of general applicability and the impact on public enlightenment should favor the former and not the latter.[68] One cannot be certain how the current Court might rule in a case where the revealed information had even greater significance. Furthermore, part of the reason that Justice White's majority opinion rejected Justice Blackmun's dissenting suggestion "that applying . . . promissory

65. 501 U.S. 663 (1991).
66. *Id.* at 671.
67. *Id.* at 669.
68. *Id.* at 672–76 (Blackmun, J., dissenting, joined by Marshall and Souter, JJ.); *id.* at 676–79 (Souter, J., dissenting, joined by Marshall, Blackmun, and O'Connor, JJ.).

estoppel doctrine . . . will 'punish' respondents for publishing truthful information that was lawfully obtained" was that "compensatory damages are not a form of punishment, as [are] criminal sanctions."[69] Rather, the "payment of compensatory damages in this case is constitutionally indistinguishable from a generous bonus paid to a confidential news source."[70] The possibility remains, therefore, that in a similar case the First Amendment might limit punitive damages, or criminal punishment, or perhaps even some forms of pecuniary damages, even where it might allow recovery for compensatory damages with less-inhibiting effect. To say, as the Court did, that the First Amendment does not grant the press "limitless protection" from "any law . . . which in any fashion or to any degree limits or restricts the press' right to report truthful information"[71] is not the same as saying that the First Amendment might not provide *limited* protection from undeniably punitive criminal or civil punishment, particularly for truthful information of overriding importance to public affairs.

It would require a further step, of course, to suggest that even such limited protection might be afforded to whatever psychological or other harm might flow directly from the lie itself, independent of the truthful publication. But it is not an impossible step if the First Amendment interest in truthful publication is sufficiently compelling. Thus far, in a few cases the lower courts have assumed that *Cohen* allows recovery of pecuniary injury proximately caused by a reporter's knowing misrepresentation, but interestingly they have done so only after careful, not categorical analysis, and they have not confronted (perhaps, more strongly, they have managed to avoid deciding) whether a punitive damages award, much less a criminal sanction, might be imposed.[72] Ultimately, with respect to lies that may lead to truth, especially truth

69. *Id.* at 670.

70. *Id.*

71. *Id.* at 671.

72. *See, e.g.*, Veilleux v. Nat'l Broad. Co., 206 F.3d 92, 126–29 (1st Cir. 2000). The *Veilleux* court recognized that "[t]he Supreme Court has not yet addressed the relevant constitutional implications of a common law misrepresentation action against a media defendant." After a careful consideration of a number of factors—including that the plaintiffs were not public officials or figures—the court allowed recovery for a deliberate misrepresentation only for pecuniary losses proven to result directly from reliance on the false promise itself. *Id.* at 126. Similarly, in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), the court relied on state law to overturn a punitive damages (as well as a compensatory damages) award pursuant to a jury verdict for fraud based on undercover reporters' falsification of resumes to secure a job with plaintiffs in order to expose improper food handling practices. The court overturned the award because plaintiffs' injury did not stem from reasonable reliance on the misrepresentations as state law required, but it specifically upheld as consistent with the First Amendment a $2 damage award for breach of loyalty and trespass. *Id.* at 522. In *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 30 F. Supp. 2d 1182 (D. Ariz. 1998), undercover reporters deliberately misrepresented their

that exposes government wrongdoing, First Amendment interests are arrayed on both sides. On one side is the government's interest in protecting against invasions of the listener's autonomy; on the other side is the checking function served by investigative reporting involving some deception of sources. The idea of categorically excluding any First Amendment protection under any such circumstances is unsatisfying and seemingly inconsistent with the approach that courts have taken.

* * *

The point of examining whether Holocaust deniers, those who lie in political campaigns, and reporters who lie to uncover wrongdoing, are ever entitled to First Amendment protection is certainly not to build a case for generous, presumptive, or even regularly available constitutional protection for calculated falsehood. Rather, it is to demonstrate that the general exclusion of calculated falsity from First Amendment protection may need to yield in exceptional cases, forcing recognition that on occasion there may be even more compelling issues to consider than the insult to autonomy, the spread of distrust that might undermine the free flow of information,[73] and the general harm to truth that lies often produce. Perhaps on rare occasions the risks of censorship inherent in particular forms of policing lies are sufficiently elevated, or their instrumental value in sharpening or uncovering truth are of sufficient weight, or both, that even deliberate misrepresentation should find First Amendment shelter.

C. The Partial Protection of Deceptions That Fall Short of Knowing or Reckless Falsehoods

Once we recognize that government inhibition of speech is so great a danger that even some lies might claim First Amendment protection, we might expect that government power to control deceptions short of deliberate lies would be even more limited. All else being equal, that might be true—surely lower levels of speaker culpability in deceiving are more likely to

identities to gain access to plaintiffs' laboratory. The court dismissed under state law the portion of the fraud claims asking for damages for lost business, because defendants' negative broadcast about plaintiffs' business practices was not proximately caused by the misrepresentation. *Id.* at 1199. However, the court denied summary judgment with respect to the portion of the fraud claims seeking reimbursement for the costs of medical treatment and psychological counseling for heart problems and depression allegedly caused by the deception itself. *Id.* at 1200–01.

73. *See* Jerome A. Barron, Cohen v. Cowles Media *and Its Significance for First Amendment Law and Journalism*, 3 WM. & MARY BILL RTS. J. 419, 462 (1994) (arguing that "First Amendment values were served, rather than denied, by enforcing the reporters' promises to Cohen for two reasons—protection of the flow of information and protection of the integrity of journalism").

warrant First Amendment protection. But because many other variables affect the government's power to regulate deception, all else is not equal and the analysis is inevitably more complex. The calculus used to maximally protect speech, while protecting people from predatory deception, should include at least these factors: (1) the nature and intensity of the speaker's interest; (2) the nature and intensity of the listener's interest; (3) the degree to which the speech involved implicates the ideological or political speech whose protection is at the heart of the First Amendment; (4) the degree to which the speech is intertwined with other sensitive or specially valued speech, so that regulation of one cannot be easily separated from regulation of the other; (5) the extent to which these interests are adversely affected by the particular form of regulation challenged; (6) the risk of government suppression of dissent posed in the circumstances; (7) the nature and importance of the particular government interests asserted in support of the need to control the deception; (8) how targeted the speech is to individuals or the public; (9) how targeted the speech's harm may be to individuals; (10) how likely and how effective further corrective speech might be, without the need for government intervention; (11) what expectations of truthfulness the listener reasonably might have of the speaker, and what means of self-defense the listener might have in the face of deceptive statements; and (12) what alternative means of preventing the harm from deception exist that would sacrifice less First Amendment value. This list of factors may be exhausting, but undoubtedly it is not exhaustive.

Without venturing further into that thicket generally, it is essential to emphasize that the First Amendment usually mandates government precision to target at most only the deceptive factual statement that legitimately can ground legal liability. Take charitable solicitation, for example. Only actual fraud, not the potential for misleading speech, may be controlled.[74]

The rule is different for commercial speech regulation, where regulatory authority extends—supposedly categorically—beyond the control of factually

74. *See* Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 619–21 (2003) (distinguishing Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980), Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984), and Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988)). Each of the cases distinguished by *Madigan* invalidated broad prophylactic laws too loosely designed to prevent fraud by "prohibit[ing] charitable organizations or fundraisers from engaging in charitable solicitation if they spent high percentages of donated funds on fundraising—whether or not any fraudulent representations were made to potential donors." *Id.* at 619. The Court held in *Madigan* that "in a properly tailored fraud action," requiring proof by clear and convincing evidence of a knowingly false representation of a material fact intended to mislead and successful in doing so, the First Amendment "do[es] not require . . . a blanket exemption from fraud liability for a fundraiser who intentionally misleads in calls for donations." *Id.* at 620–21.

false statements to those that are deceptive or misleading.[75] Commercial speech, most narrowly defined as speech that "does 'no more than propose a commercial transaction,'" has received any constitutional protection at all only in the last three decades.[76] It has received that protection only to provide truthful, nonmisleading, noncoercive information to listeners, the Court has said, and thus may be regulated to a much greater degree than other forms of speech.[77] There is less need to be concerned about inhibiting commercial speech than, say, political speech, the Court has reasoned, because commercial speech is hardier (meaning less likely to be deterred) and more verifiable.[78] Accordingly, forms of regulation that would be offensive if applied to other kinds of speech (like requirements that ads be reviewed before they are published or aired, or that warnings, disclaimers, or other information be added to ensure accuracy) have been accepted in the case of commercial speech.[79] Perhaps most centrally, the First Amendment has been held to allow the complete prohibition of false, deceptive, and misleading commercial speech—a wide scope of regulatory power that emphatically would not be permitted with respect to noncommercial speech on matters of public concern.[80]

Archibald Cox famously wrote that "[o]nce loosed, the idea of Equality is not easily cabined."[81] It might also be said that the idea of free speech, in general, once loosed, is not easily cabined, and in particular the idea that protection is warranted for commercial speech, once loosed, is not easily cabined either.

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75. *See, e.g.*, Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 142 (1994) (declaring that "false, deceptive, or misleading commercial speech may be banned"); *In re* R.M.J., 455 U.S. 191, 203 (1982) (noting that although "[m]isleading advertising may be prohibited entirely[,] the States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive"); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980) (explaining that the "First Amendment's concern for commercial speech is based on the informational function of advertising" and "[c]onsequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity"). For a thoughtful critique of *Central Hudson*'s "threshold requirement that commercial speech cannot receive First Amendment protection if it is 'misleading,'" see the analysis of a former Nimmer Lecturer, Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 35 (2000).

76. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc. 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).

77. *Id.* at 770–72.

78. *Id.* at 771 n.24. For a sample of the many trenchant critiques leveled at this distinction, see Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 385–86 (1979); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 634–38 (1990); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 633 (1982).

79. *See* Post, *supra* note 75, at 26–28, 32–33.

80. *See* sources cited *supra* note 75.

81. Archibald Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1966).

Maybe the walls are strong enough to contain just misleading commercial speech, but only if the enlarged power to regulate deceptive commercial speech is not extended to the regulation of ideological speech, which represents free speech values other than listener autonomy. In cases of mixed commercial and noncommercial speech, the Court sometimes has allowed lesser protection for the whole hybrid communication where the noncommercial elements are easily separable and their inclusion reasonably may be perceived to be a pretext for claiming a higher degree of protection for the commercial element.[82] But in close cases—to preserve the "breathing space"[83] for "uninhibited, robust, and wide-open"[84] "debate on public issues"[85] where "erroneous statement is inevitable"[86]—a wise rule would be one that says something like: "Ties go to the protection of the noncommercial elements of the hybrid speech."

That is just one reason why the problem posed by the California Supreme Court's troubling decision in *Kasky v. Nike, Inc.*[87] is so important to decide correctly. That case involved allegations by the media and a variety of advocacy organizations that workers in Nike's manufacturing operations in China, Vietnam, and Indonesia were paid slave wages, subjected to abuse, and made to function in dangerous, sweatshop conditions. Nike responded with press releases, letters to newspaper editors, university presidents and athletic directors, and a commissioned report by former U.N. Ambassador Andrew Young all indicating that the charges were not true. Kasky, a California resident, sued Nike under California unfair competition and false advertising statutes, on behalf of the public and without claiming personal injury, alleging that—for the purpose of maintaining and increasing its sales—Nike's communications contained false statements or omissions of fact about the disputed working conditions. In part, he asked for "an injunction requiring Nike to 'undertake a Court-approved public information campaign' to correct any false or misleading statement and to cease misrepresenting the working conditions" where its shoes were manufactured.[88] Eventually, a sharply divided California Supreme Court rejected Nike's claim that the First Amendment prevented the action from going forward. The bare majority of four justices

82. *E.g.*, Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 473–75 (1989); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67–68 (1983); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562 n.5 (1980).

83. New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964).

84. *Id.* at 270.

85. *Id.*

86. *Id.* at 271.

87. 45 P.3d 243 (Cal. 2002), *cert. dismissed as improvidently granted*, 539 U.S. 654 (2003) (per curiam).

88. *Id.* at 248 (quoting plaintiffs' first amended complaint).

held that Nike's speech was commercial speech subject to regulation to prevent deception rather than speech on a matter of public concern that could not be regulated at all or only on a showing of a high level of fault for any false or misleading factual statements.[89] The U.S. Supreme Court granted review but eventually decided the case was not yet properly before it.[90]

Volumes already have been devoted to analyzing what the proper result should be in such a case,[91] and I offer here no more than a few sentences, but they are key to demonstrating the centrality and the complexity of the relationship between deception and the First Amendment. From the beginning, the commercial speech doctrine has threatened to unravel free speech theory because of the gulf that separates the substantial power to control deceptive commercial speech and the limited power allowed for controlling deception in other sorts of persuasive speech. If the gulf is to be maintained, at least it should not allow the compromise of "[i]deological expression . . . integrally related to the exposition of thought"—to borrow Justice Stewart's phrase.[92] Holding corporate speakers like Nike liable for factual errors much more readily than those who challenge their business practices, in the context of a controversial issue of public concern initiated by its critics to which it responded, seems dubious enough. Enforcing that outcome through a legal regime that permits any citizen to sue on behalf of the public and without any claim of personal injury, under broadly construed false advertising laws that prohibit even true statements that have "a tendency to

89. *Id.* at 247 (Kennard, J., joined by George, C.J., and Werdegar and Moreno, JJ.). The views expressed in the two dissenting opinions, one by Justice Chin, joined by Justice Baxter, and the other by Justice Brown, are in accord with much of the analysis I present below.

90. Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (per curiam). Justice Kennedy dissented without explanation from the Court's dismissal of the writ of certiorari as improvidently granted. *Id.* at 665. Justice Breyer, joined by Justice O'Connor, also dissented, with a lengthy explanation as to why Nike presented a "case or controversy," the California Supreme Court's decision was a reviewable "final judgment," there were "no strong prudential argument[s] against deciding the questions presented," and there were strong reasons not to postpone "a decision . . . given the importance of the First Amendment concerns at stake." *Id.* at 665–86. Justice Stevens authored an opinion concurring in the dismissal, fully joined by Justice Ginsburg in arguing that appellate jurisdiction was lacking because the California Supreme Court's judgment was not "final," neither party had standing, and "the reasons for avoiding the premature adjudication of novel constitutional questions apply with special force to this case"—and joined by Justice Souter with respect to the last point. *Id.* at 656–65.

91. See, for example, the many articles published in *Symposium:* Nike v. Kasky *and the Modern Commercial Speech Doctrine*, 54 CASE W. RES. L. REV. 965 (2004).

92. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc. 425 U.S. 748, 779 (1976) (Stewart, J., concurring).

deceive or defraud the public," disrespects the compelling need to protect speech on matters of public concern.[93]

No doubt Nike was in large part seeking to salvage or preserve its corporate reputation in the interest of maintaining its business, but its global labor practices were made the issue, and that is an issue of public importance far beyond the commercial elements of Nike's speech. Moreover, there is more speaker autonomy infringed in such a case than in communication that advertises price or availability of products. Nor does it seem reasonable to conclude that Nike was using its communications as a pretext for false advertising, given that Nike was not initiating an advertising campaign but responding to critics and that everything it said almost certainly would be scrutinized carefully. To the extent that its communications were hybrid speech, it also is difficult to accept that Nike could have stripped away the commercial elements and defended itself without making specific reference to its own business practices. In such situations we must choose between default rules that favor freedom of speech or default rules that favor speech regulation to protect consumers. When core speech on controversial matters of public concern is implicated in this way, there is great danger in leaving the ascertainment of truth so readily to judicial rather than public determination. Even more than broad regimes of speech regulation that make the correction of historical or political fact a matter for routine, roving exercises of authority

93. *Id.* at 750 n.2. Justice Breyer seems to be leaning in this direction. *See Nike*, 539 U.S. at 679–81 (Breyer, J., dissenting) (rejecting the Court's dismissal of writ of certiorari). One of the reasons that Justice Stevens concurred in the dismissal was the novelty of the constitutional questions. In particular, he specifically observed that "[w]hether the scope of protection afforded to Nike's speech should differ depending on whether the speech is challenged in a public or a private enforcement action . . . is a difficult and important question" that he believed would benefit from further lower-court development. *Id.* at 664 n.5. Perhaps when it finally comes time to resolve that open, "difficult and important question," Justice Stevens also will favor extending First Amendment protection to broad-ranging public enforcement actions.

For a comprehensive analysis rejecting the idea "that the First Amendment should distinguish between private and public enforcement of laws implicating speech," see Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 646 (2005). Morrison fears that the Court will adopt a *categorical* distinction between a public enforcement regime and a private attorney general enforcement regime, despite what he perceives to be no meaningfully greater First Amendment danger posed by the latter than the former. Even if comparable to each other, however, both the public and the private attorney general enforcement regimes could be overly dangerous to First Amendment values when compared to traditional private suits limited to seeking redress of individualized injuries. Whether Morrison's argument "simply that the constitutionality of a statute's substance should not depend on the identity of the party enforcing it," *id.*, is intended to deny any relevance of that distinction at all is not wholly clear. In any event, when seeking a proper First Amendment resolution by weighing free speech concerns against the prevention or redress of particular harms that government seeks to achieve by its speech regulation, the structure of the enforcement regime, if not categorically dispositive, at least seems to be a relevant consideration.

by government bodies—doubtful enough even in the case of calculated lies—a regime that empowers any citizen to act routinely as a private attorney general to seek judicial correction of factual errors made in the course of disputes on matters of public concern, and which requires little or no showing of fault for committing the error, leaves inadequate breathing space for freedom of speech.

II. FIRST AMENDMENT LIMITS ON DECEPTIONS PERPETRATED BY THE GOVERNMENT

When government acts to control deceptive speech by private parties or government employees, it is easy to see that the First Amendment might limit a particular restriction for abridging the freedom of speech. But the government also may violate the First Amendment because its regulatory actions are themselves deceptive, rather than impermissibly restrictive of deceptive speech. Government restrictions or mandates aimed at silencing or compelling speech, respectively, may themselves deceive. The government may deny information to listeners that willing private speakers wish to provide in a way that masks the truth about government objectives, or it may compel people to present themselves or their expression falsely. This second form of First Amendment issue has appeared more prominently in judicial opinions in recent years, though too often in dissent. Those appearances reflect sensitivity to instances of government deception through arguably underhanded or covert forms of especially intrusive regulation. The principle is that government manipulation of information, either through speech restrictions imposed on private speakers that misrepresent or obscure the government's purposes, or through regulations that compel private individuals to hold themselves out falsely, is a particularly harmful form of government-compelled deception. Such manipulation is at war, not only with the informing purposes of the First Amendment, but also with some threshold combination of the autonomy of those speakers and listeners subjected to the impact of such restraints.

By its nature, government deception impairs the enlightenment function of the First Amendment, limiting the citizenry's capacity to check government abuse and participate in self-governance to the maximum extent. Yet that is not enough to justify First Amendment protection as if it were a freestanding constitutional ban on false and deceptive government speech, or a requirement that the government share with the public all that it

knows.[94] Public rights of access to government information generally are not guaranteed by the First Amendment—although there are important exceptions primarily involving access to many, but not all, aspects of court proceedings.[95] It takes Congress to enact laws like the Freedom of Information Act[96] to provide broader access to government information.[97] Nor, for example, if President Bush used erroneous information in making the case for going to war in Iraq, misleading those who were asked to support his policy, is it likely that a court would hold that the First Amendment itself required the president to issue a correction, or to be held liable for damages, even if it were proved that he knew he was making a false statement at the time. One can much more easily imagine a court holding that the First Amendment bars Congress from imposing normal legal sanctions on the president (or his subordinates) for deceiving the public through public statements, not made under oath in a formal legal proceeding, urging the adoption of a particular government policy—even if the statements were knowingly false when made.[98] Deceptive factual statements by a president or any other government

94. *See* Strauss, *supra* note 21, at 357–59 (noting that, like his persuasion principle, "[m]any theories of the First Amendment are unable fully to explain why the government's false statements and failures to disclose information pose less of a threat to first amendment values than the government's suppression of private speech," and suggesting that this might be an example "of a principle of free expression that is underenforced by the courts" for institutional reasons involving the difficulty of having "to make a delicate and complex inquiry into precisely what information was in the government's possession . . . [and] the government's reasons for the nondisclosure or false statements"); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1040 (2005) (arguing that although transparency in government communications is a constitutional ideal premised on constitutional concerns about democratic and political accountability, "recognizing a judicially enforceable right . . . could overwhelm the work of the courts" quantitatively and qualitatively insofar as it would involve "identifying who speaks for the government and when[,] . . . delicate inter-branch tensions," and possible chilling effects on the speech of government employees who might wish to speak "as private citizens under conditions of anonymity"). *But see* Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1.

95. *See* TRIBE, *supra* note 7, § 12-20, at 955.

96. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966).

97. *Id.* § 12-4, at 813–14 & n.36 (positing "that informed debate is not possible if government reveals only selected, and sometimes distorted or even falsified, bits of information"; that the "resulting need is to impose pressure on government to speak—and truthfully—through judicially recognizing and enforcing rights of access to certain governmental institutions and proceedings, *legislatively enacting suitably designed freedom of information statutes*, and undertaking both legislative and executive declassification of documents needlessly deemed secret"; but also acknowledging that "[t]he first amendment itself is, of course, neither a substitute for such legislative and executive openness nor a source of judicial doctrine mandating whatever degree of openness wisdom might dictate") (emphasis added).

98. Perhaps the president might be impeached for lying to the public under circumstances where Congress concluded that the lies, though not criminal, constituted "high Crimes and Misdemeanors," U.S. CONST. art. II, § 4, involving serious abuse of government power or breach of public trust, but it seems likely that such an action by Congress would be a "political question" that the courts would not review. *See* PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW: CASES AND MATERIALS 229 (2d ed. 2005).

official in the course of political discussion may have absolute First Amendment immunity, as we have seen, certainly if they fall short of conscious lying, and probably even if they do not. This is likely—absent individualized injury at least—even though intentionally deceptive statements misinform and do so in a way that affirmatively disrespects the autonomy of the listeners.

Video news releases produced by government officials that report favorably on administration policies and are made to appear as products of independent journalists are certainly deceptive. So too are the favorable articles written by a real journalist, Armstrong Williams, under circumstances where neither he nor administration officials revealed that he was under paid contract to produce them.[99] Yet it is unlikely that the First Amendment itself would forbid these practices. To avoid this sort of "covert propaganda," Congress has banned the use of federal funds to pay for the production and distribution of such news releases or articles absent clear disclosure by the responsible federal agency of who prepared and funded them.[100] Such control of the use of federal money in the interest of full disclosure does not aim to limit speech and does not compel private speech; it should withstand First Amendment review as a legitimate control to prevent deception. But the First Amendment does not itself require the disclosure to prevent the government deception.

Then what kinds of government intervention might constitute deception that does violate the First Amendment? Five free speech problems, not all conventionally thought to involve government deception as a strong element, illustrate the thread. The first stems from the First Amendment rule

99. For some details of these practices, see Lee, *supra* note 94, at 983–84 & nn.2 & 5. More recently, at the request of Senators Frank R. Lautenberg and Edward M. Kennedy, the General Accounting Office (GAO), through its General Counsel, Anthony H. Gamboa, issued opinion letters B-304228 and B-305368, dated September 30, 2005, detailing and analyzing the Department of Education's use of federal funds to produce and distribute a prepackaged video news release promoting programs under the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) through seemingly independent private reporters without revealing the Department's role and the Department's contract with Williams. *See* U.S. Gen. Accounting Office Gen. Couns. Op. B-304228 (Sept. 30, 2005); U.S. Gen. Accounting Office Gen. Couns. Op. B-305368 (Sept. 30, 2005). In both cases the GAO concluded that the failure to disclose the Department's authorship or sponsorship of the favorable commentary constituted "covert propaganda" in violation of the "publicity or propaganda" prohibition that Congress has been appending to many appropriations bills since 1951, and, in particular, § 6076 of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 6076, 119 Stat. 231, 301 (2005), which provides that no appropriations "may be used by an executive branch agency to produce any prepackaged news story intended for broadcast or distribution in the United States unless the story includes a clear notification within the text or audio of the prepackaged news story that [it] was prepared or funded by that executive branch agency." *See also* Robert Pear, *Buying of News by Bush's Aides Is Ruled Illegal*, N.Y. TIMES, Oct. 1, 2005, at A1.

100. *See supra* note 99.

that the government may not compel its citizens to profess the government's message as though it were the citizens' own. In striking down West Virginia's requirement that all teachers and students participate in the flag salute, the Supreme Court found the compelled "affirmation of a belief and an attitude of mind" even more invasive of free speech than a law silencing speech.[101] The "individual's right to speak his own mind" meant that public authorities could not "compel him to utter what is not in his mind."[102] It may be possible to interpret this ruling, and this language, as outlawing a particularly egregious assault on autonomy that does not rely on a compulsory government deception; but the depth of the Court's revulsion seems at least partly to reflect the sense that the government required the person to speak falsely, and to present himself to the world as though he supported—or at least acquiesced in—the statement forced upon him. Is the conscription of the unwilling soldier to play a personal part in the government's ideological army not a form of government compelled deception?[103] Applying the same principle later to forbid New Hampshire from requiring a Jehovah's Witness couple—over their conscientious objection—to leave uncovered on their license plate the state motto "Live Free or Die," the Court noted that they had to display the message "to hundreds of people each day" and held that the "First Amendment protects the right of individuals to . . . refuse to foster, in [that] way . . . an idea they find morally objectionable."[104] Being personally associated with the government message conveyed was the crux of the problem because it seemingly required misrepresentation of the couple's views. The result has been criticized often for not realistically involving an instance in which anyone would think the couple endorsed the message on their license plate.[105]

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101. W.V. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943).

102. *Id.* at 634.

103. Although I originally intended this question in a wholly metaphorical fashion, my colleague William Rubenstein thoughtfully reminded me that it has literal application to the military's "Don't Ask, Don't Tell" policy for homosexual soldiers, and he helpfully pointed me to articles of direct relevance, namely Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOK. L. REV. 1141 (1997); Tobias Barrington Wolff, *Political Representation and Accountability Under Don't Ask, Don't Tell*, 89 IOWA L. REV. 1633, 1637–38 (2004) (observing "that the policy imposes upon gay soldiers . . . the requirement that they proclaim a false straight identity to the world, either by remaining silent in the face of a persistent 'heterosexual presumption' or by actively claiming a heterosexual identity as the only realistic method of complying with the policy," and noting that "[t]his dynamic implicates the First Amendment in its role as a protector of individual autonomy, violating the principle that government may not invade the 'individual freedom of mind' by compelling a person to affirm a false identity, faith, or belief").

104. Wooley v. Maynard, 430 U.S. 705, 715 (1977).

105. *Id.* at 720–22 (Rehnquist, J., dissenting); *see also* NIMMER, *supra* note 1, § 4.10[A], at 4-142 to -143; TRIBE, *supra* note 7, § 15-5, at 1317.

Perhaps, however, it was precisely the strength of the principle that the government should not be able to compel people to misrepresent their own views that led the Court to resolve all doubts in favor of finding that the requirement did compel the couple to convey the government's message as if it were their own.

Second, consider one of the Supreme Court's arguably most clearly erroneous free speech rulings. In *Meese v. Keene*,[106] the Court rejected a First Amendment claim by then California State Senator Barry Keene, who wanted to exhibit three Canadian films about nuclear war and acid rain without the designation they had been given under the federal Foreign Agents Registration Act[107] as "political propaganda." The Court recognized that Keene's reelection chances and reputation were at some risk because his exhibition of the films might be perceived as "political propaganda" in the common, pejorative sense of that phrase.[108] But the Court emphasized that the *statute* more neutrally classified the films as "political propaganda" because they contained "political material intended to influence the foreign policies of the United States."[109] Justice Stevens argued for the majority that the classification as political propaganda did not prohibit distribution of the films; that the law was actually an antideception measure intended to inform viewers and listeners of Congress's views of the material so they would not be deceived into believing that the films were produced by a disinterested source; that the law allowed exhibitors to say what they wanted thereafter; and that after four decades on the books there was no evidence "that the public's perceptions about the word 'propaganda' have actually had any adverse impact on the distribution of foreign advocacy materials subject to the statutory scheme."[110] Justice Blackmun's dissent cut to the heart of the problem, however. The mandated disclosure was designed "to control the spread of propaganda by foreign agents";[111] the practical effect of the "all-pervasive Federal Government"[112] classifying the films as "political propaganda" was to taint their message by "lessening [their] credence with viewers" and thus effectively, if indirectly, restrict their distribution;[113] and the government did "more than simply provide additional information"—it placed "the power of the Federal Government, with

106. 481 U.S. 465 (1987).
107. Foreign Agents Registration Act, ch. 327, 52 Stat. 631 (1938).
108. That was the alleged cognizable injury that convinced the Court that Keene had standing to bring his challenge. *See id.* at 473–77.
109. *Id.* at 470.
110. *Id.* at 484.
111. *Id.* at 487 (Blackmun, J., dissenting).
112. *Id.* at 489.
113. *Id.* at 492.

its authority, presumed neutrality, and assumed access to all the facts, behind an appellation *designed* to reduce the effectiveness of the speech in the eyes of the public."[114]

Focusing directly on the harms of government-imposed deception would suggest even more clearly why Justice Stevens was wrong to characterize the mandatory "political propaganda" designation as a measure designed to reduce—rather than facilitate—deception. Realistically, the government's intervention seemed more likely to misinform than to inform the public. It also seemed to intrude into Keene's autonomy to present the materials as he wanted them to be presented, not as the government wanted them to be presented.

Third, consider the still unsettled dispute within the Court that has afflicted commercial speech doctrine since 1980, when a majority adopted a First Amendment test that seemed to permit restriction of truthful, nonmisleading, noncoercive commercial speech without demanding the highest level of justification.[115] Justice Blackmun, again, doubted that suppressing accurate information about "availability and price of a legally offered product is ever a permissible way for the State to 'dampen' demand for or use of the product," because doing so "is a *covert* attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice."[116] Although no Court majority has formally adopted that view yet, the Court has applied its earlier test more stringently to effectuate nearly the same result. Later opinions involving bans on truthful advertising of the alcohol content of malt beverages[117] and the retail price of alcohol generally,[118] reasoned that speech restrictions designed to deceive the public about legally available choices, and to obscure what the government is really doing—in these cases allowing alcohol to be sold legally but trying covertly to keep sales down—are particularly offensive forms of paternalism. Not only do they suppress information that the public is entitled to know, but they do so against the wishes of a willing speaker and by disrespecting listener autonomy. These First Amendment concerns all point in the same direction, and, even though the context is commercial—not political—speech, the resistance to the government's deceptive regulation is quite understandable. It also suggests why at least four members of the Court—an interesting cross-section of Justices Stevens, Kennedy, Thomas and Ginsburg—are convinced of the fallacy of

114. *Id.* at 493.
115. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).
116. *Id.* at 574–75 (Blackmun, J., concurring) (emphasis added).
117. Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).
118. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

the argument that a greater power to ban sales of a product completely should be understood to include a supposedly lesser power to allow the sales but ban advertising for it.[119] The power to enact a straightforward ban on availability of the product is not greater than a purported power to mislead consumers in a way that denies them truthful information and impairs both speaker and listener autonomy. Government deception by regulation—which is a claim for a much more significant power than a power to control economic activity honestly—is at odds with fundamental First Amendment values in these cases.

The fourth illustration of government deception by regulation grows out of the Court's decisions that compulsory fees that lawyers must pay to be members of the state bar[120] or that teachers must pay for union representation,[121] cannot be used—if individual lawyers or teachers object—to fund speech for ideological purposes not germane to the professional purposes that justify compulsory membership in the bar or union. Those cases originated in the compulsory flag salute and compulsory license plate cases, except that instead of resting on a principle that the government may not compel a person to convey a *government* message in some personal form, they rested on the notion that the government may not compel a person to subsidize a *private* message with which they disagree.

The Court recently concluded, however, that federally mandated contributions from beef producers to fund generic advertising of the sort "Beef . . . It's What's for Dinner!" did not violate the First Amendment because the funded speech was not private speech, but the government's own speech, and citizens "have no First Amendment right not to fund government speech."[122] The majority concluded that it was faced with government speech, largely because government officials were responsible for the message's contents, and the secretary of agriculture had final approval authority over every word in every promotional campaign.[123] The three dissenting justices thought that the First Amendment was violated because the government was not entitled to rely on the government speech exemption from the compelled subsidy principle unless the government "explicitly label[ed] the speech as its own."[124] The principle that the dissenters would apply is that "[u]nless the putative government speech appears to be coming from the government, its governmental origin cannot possibly justify the burden on the First

119. *Id.* at 510–13.
120. Keller v. State Bar of Cal., 496 U.S. 1 (1990).
121. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).
122. Johanns v. Livestock Mktg. Ass'n, 125 S. Ct. 2055, 2063 (2005).
123. *Id.* at 2062–63.
124. *Id.* at 2069 (Souter, J., dissenting, joined by Stevens and Kennedy, JJ.).

Amendment interests of the dissenters targeted to pay for it."[125] In sum, as Justice Souter wrote, "the First Amendment cannot be implemented by sanctioning government deception by omission (or by misleading statement) of the sort the Court today condones."[126]

Interestingly, the majority did not reject in principle the idea that false or deceptive attribution of a government message to private speakers might violate the First Amendment.[127] They just thought it unnecessary to address the question.[128] In fact, the majority observed—in potential agreement with the dissent—that "there might be a valid objection if 'those singled out to pay the tax are closely linked with the expression' . . . in a way that makes them appear to endorse the government message."[129] This is perhaps the most explicit case to date recognizing that government deception may violate the First Amendment when it compels speech, or the support of speech, falsely attributed to a private speaker. In such a case, not only would the public be misinformed, but the additional intrusion into speaker autonomy would implicate serious First Amendment concerns.

Finally, consider the vexing problem of selective government subsidies that fund speech conditioned on the funded speaker refraining from communicating certain messages that the government does not want conveyed. In *Rust v. Sullivan*,[130] the Court upheld a federal funding scheme for support of family-planning services that required grantees to refrain from counseling or advocating abortion as a method of family planning. The Court left open, however, the issue of whether such selective government funding, "even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project," might violate the First Amendment if the regulations "significantly impinge upon the doctor-patient relationship."[131] The question did not need to be addressed because nothing in

125. *Id.* at 2073.

126. *Id.* My colleague, Gia Lee, agrees with the dissenters in *Johanns*, emphasizing "that the concerns counseling against recognizing a judicially enforceable right to transparent government communications provide no reason not to consider transparency when evaluating the government speech defense." Lee, *supra* note 94, at 1049. *See generally id.* at 1041–48 (arguing that "the Court was wrong to reject a transparency requirement" in *Johanns*, *id.* at 1042, and that considering "the larger structural interests . . . of enhancing the government's accountability for its messages, and the relatively limited costs of an identification requirement, this Article maintains that the appropriate standard should be even more speech-protective: require the government to show that viewers or listeners understand that the message comes from the government," *id.* at 1048).

127. *Johanns*, 125 S. Ct. at 2065.

128. *Id.*

129. *Id.* at 2065 n.8.

130. 500 U.S. 173 (1991).

131. *Id.* at 199–200.

the challenged regulations "require[d] a doctor to represent as his own any opinion that he does not in fact hold."[132] Because the program did "not provide post conception medical care, . . . a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her."[133] One might dispute that conclusion, of course, but at least the Court left open the idea that selective government funding, if it induced deceptive communication between a doctor and a patient could violate the First Amendment.

Later, a different Court majority held that a condition attached to funding for legal services for the poor that prohibited legal representation of challenges to existing welfare law did violate the First Amendment.[134] In part that was because the government sought "to use an existing medium of expression"—the lawyer's speech on behalf of the client—"and to control it, in a class of cases, in ways which distort its usual functioning."[135] In both of these cases it is difficult to ignore the attention that the Court pays to the risk that the private speaker funded by the government might alter the professional advice that the patient or client has reason to expect. The inducement provided by the government funding would misrepresent the real views of the doctor or lawyer and mislead the patient or client—a form of government-induced deception that invades both the speaker's and the listener's autonomy. Perhaps *Rust* should have paid more attention to this issue, but at least there may be growing recognition that government deception through speech restrictions is, in severe enough circumstances, reason to find a First Amendment violation.[136]

CONCLUSION

More than enough has been said to suggest why the relationship between deception and free speech may be central to our understanding of the First Amendment. On other occasions there will be more to say. The right to free exercise of one's religion protects against inhibitions of religious belief, even when expressed in what the government might think is a factually deceptive way.[137] The prohibition against government establishment of religion prevents government from deceiving insofar as it is not permitted to promote a

132. *Id.* at 200.
133. *Id.*
134. Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).
135. *Id.* at 543.
136. *See also* Lee, *supra* note 94, at 1049–52.
137. *See supra* note 8.

religious purpose in public schools through a false pretense that what it is doing is secular, as, for example, by claiming that a requirement that if evolution is taught as a scientific theory so must creation science—or intelligent design—be taught as a *scientific* theory.[138] Intentionally concealing one's identity is sometimes protected as a constitutional right of anonymity.[139] At least one evolutionary biologist makes the case not only that natural selection has hardwired us to deceive, but that self-deception is instrumentally adaptive in making our capacity to deceive others more effective.[140] If true, this may have complex implications for the protection against government intrusion into human belief and its expression. All of these issues, and many more, involve questions of how the First Amendment should be understood to constrain government authority to control or impose deception.

For now, if we understand that much of the time the First Amendment permits carefully crafted and applied legal controls of predatory deception; that some of the time the First Amendment guarantees a constitutional right to deceive, or at least a constitutional right not to have the government punish us for many forms of deception; and that the First Amendment itself forbids certain forms of government-imposed deception, we will have gone a long way toward understanding the central, complex, and somewhat curious relationship between deception, its regulation, and the protections afforded by the First Amendment.

138. As for evolution, see *Edwards v. Aguillard*, 482 U.S. 578, 586–87 (1987) (invalidating a Louisiana statute requiring that "creation science" be taught if evolution is taught, after putting aside the Court's "normally deferential" stance regarding "a State's articulation of a secular purpose, [because] it is required that the statement of such purpose be sincere and *not a sham*") (emphasis added). As for intelligent design, see *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707, 763 (M.D. Pa. 2005) (finding, after a five- to six-week trial, that intelligent design is not a scientific theory, that its proponents' arguments that it is were not sincere, and "that the secular purposes claimed by the Board amount to a pretext for the Board's real purpose, which was to promote religion in the public school classroom, in violation of the Establishment Clause").

139. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); Talley v. California, 362 U.S. 60 (1960). For an interesting exploration of the complexities involved in comparing the anonymity rights of private individuals with claims to anonymity on the part of government officials, some of whom may be whistleblowers who may serve to increase government accountability even as they conceal their identity, see Lee, *supra* note 94, at 1023–33.

140. DAVID LIVINGSTONE SMITH, WHY WE LIE (2004).

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