

# Election Lies

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*How should the First Amendment treat lies about the factual results of elections? Conventional wisdom holds that it ties the hands of government officials and counsels private actors, such as media companies, against combating lies about the outcome and integrity of elections.*

*This Article argues that this conventional understanding is incorrect. While the First Amendment protects many forms of political falsity and deception, this Article argues that lies made with actual malice about the results of elections fall outside of that First Amendment protection. These two points are not in conflict: the basis for both is the First Amendment's foundational commitment to democratic governance—that We the People govern through constitutional democracy.*

*Democracies require a limited form of shared political reality. They depend, at minimum, on a shared reality of election results and trust in elections as the legitimate arbiter of governmental power. When listeners are dependent on speakers, knowing lies about election outcomes threaten democratic legitimacy and are therefore constitutionally exceptional. The combination of hyperpolarization, an attention-based media ecosystem that incentivizes identity-affirming news, and a global wave of antidemocratic politics demands that lawmakers and private actors do more to shore up democratic institutions—including fighting election lies. To do so is not only consistent with the First Amendment but also in furtherance of its most fundamental values.*

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## INTRODUCTION

No lie has captured recent national attention as dramatically as the “Big Lie”—the false allegation that the 2020 election was stolen from then-President Trump.<sup>1</sup> That lie fueled the storming of the U.S. Capitol on January 6, 2021, and has raised serious concerns about future political violence.<sup>2</sup> On August 1, 2023, President Trump was indicted on federal conspiracy and obstruction charges for his attempts to remain in power after losing the 2020 election.<sup>3</sup> His criminal actions, the indictment asserts, built off of his “pervasive and destabilizing lies about election fraud.”<sup>4</sup> Trump’s counsel has argued that the indictment is “an attack on ‘free speech.’”<sup>5</sup>

1. See Jill Colvin & Steve Peoples, *Whose ‘Big Lie’? Trump’s Proclamation a New GOP Litmus Test*, ASSOCIATED PRESS (May 3, 2021, 4:12 PM), <https://apnews.com/article/campaign-2016-election-2020-government-and-politics-3e0aaf0b8a5dfc825dc0ae1f3d30d4dc> [https://perma.cc/7WTF-JTK7]. Trump asserted that “[t]he Fraudulent Presidential Election of 2020 will be, from this day forth, known as THE BIG LIE!” *Id.*

2. See *id.*

3. Indictment, *United States v. Trump*, 704 F. Supp. 3d 196 (D.D.C. 2023) (No. 23-cr-257), [https://www.justice.gov/storage/US\\_v\\_Trupm\\_23\\_cr\\_257.pdf](https://www.justice.gov/storage/US_v_Trupm_23_cr_257.pdf); see also *Trump v. United States*, 603 U.S. 593, 606 (2024) (holding that former presidents are absolutely or presumptively immune from prosecution for official acts taken while in office). On August 27, 2024, following the Supreme Court’s ruling on presidential immunity, special counsel Jack Smith filed a superseding indictment. Superseding Indictment, *Trump*, 704 F. Supp. 3d 196 (No. 23-cr-257), <https://www.justice.gov/sco-smith/media/1366521/dl> [https://perma.cc/5C5Z-ZVH6]. Shortly before this Article’s publication, Smith dropped these charges in response to Trump’s victory in the 2024 presidential election. Perry Stein & Spencer S. Hsu, *With D.C. Case Dismissed, Trump Is No Longer Under Federal Indictment*, WASH. POST (Nov. 25, 2024), <https://www.washingtonpost.com/national-security/2024/11/25/trump-cases-motion-to-dismiss-jack-smith>.

4. Superseding Indictment, *supra* note 3, at 2.

5. Andrew Zhang, *Trump Lawyer Blasts Indictment as Attack on Free Speech*, POLITICO (Aug. 2, 2023, 9:52 AM), <https://www.politico.com/news/2023/08/02/trump-indictment-lawyer-00109360> [https://perma.cc/2CN8-TWDT] (statement of John Lauro). Professors Jonathan Turley and Alan Dershowitz, who previously represented Donald Trump, have made similar assertions. See Jonathan Turley, *Even Lies Are Protected Speech: New Trump Indictment Bulldozes the First Amendment*, HILL (Aug. 5, 2023, 10:30 AM), <https://thehill.com/opinion/criminal-justice/4137650-even-lies-are-protected-speech-new-trump-indictment-bulldozes-the-first-amendment> [https://perma.cc/VYL6-YLQB]; see also Alan Dershowitz *Pushes Back on New Trump Charges, Says They Don’t Meet ‘Nixon Standard,’* FOX NEWS (Aug. 3, 2023, 2:00 PM), <https://www.foxnews.com/media/alan-dershowitz-pushes-back-bill-barr-defense-trump-indictment-dead-wrong> [https://perma.cc/NC76-VTJH]. The District Court rejected the argument that the indictment violated the First Amendment on the grounds that “it is well established that the First Amendment does not protect speech that is used as an instrument of a crime” and found the indictment was constitutional because it

alleges that Defendant used specific statements as instruments of the criminal offenses with which he is charged: conspiring to fraudulently obstruct the

The Big Lie raises important constitutional and institutional questions: how should the First Amendment treat lies about the factual results of elections? And why haven't lawmakers, prosecutors, or private actors done more to stop the spread of lies about election results? Trump's indictment, for example, is explicit that he is being charged for conduct attempting to stay in power, rather than his lies.<sup>6</sup> It even acknowledges that President Trump "had a right, like every American, to speak publicly about the election and even to claim, falsely, that there had been outcome-determinative fraud during the election and that he had won."<sup>7</sup> There are many shrewd reasons why special counsel Jack Smith might take that approach, including that the conduct charges are sufficiently strong that a speech-based charge—such as incitement—could have been seen as unnecessary or likely to cause distraction.

At least part of why officials and private actors have shied away from dealing, or dealing more directly, with these sorts of lies may be a misconception about the First Amendment. Conventional wisdom holds that the First Amendment ties the hands of government officials against combating lies about the outcome and integrity of elections—such as claims that an election was stolen, that voting machines pervasively switched votes, that unnamed election officials engaged in ballot-box stuffing, or that

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federal function for collecting, counting, and certifying the results of the Presidential election, in violation of 18 U.S.C. § 371 (Count I); corruptly obstructing and conspiring to obstruct Congress's certification of the election results, in violation of 18 U.S.C. §§ 1512(c)(2) and (k) (Counts II and III); and conspiring to deprive citizens of their constitutional right to have their votes counted, in violation of 18 U.S.C. § 241 (Count IV).

*Trump*, 704 F. Supp. 3d at 220–21. The Court is correct that "the First Amendment does not protect speech that is used as an instrument of a crime" or "integral to criminal conduct," such as "fraud, bribery, perjury, extortion, threats, incitement, solicitation, and blackmail" or "conspiring, directing, and aiding and abetting." *Id.*; see also *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."). However, the underlying caselaw on speech integral to crime is circular; it does not answer the deeper question, addressed in part here, of what activities carried out through speech, in part or in whole, can constitutionally be made a crime. See generally Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1314 (2005) ("[T]he logic of *Giboney* itself is puzzling."). President Trump did not challenge the District Court's First Amendment holding in his interlocutory appeal on immunity that reached the Supreme Court. *Trump v. United States*, 91 F.4th 1173, 1183 n.3 (D.C. Cir. 2024).

6. Superseding Indictment, *supra* note 3, at 1–2.

7. *Id.* at 2.

thousands of dead people or undocumented immigrants voted.<sup>8</sup> Private actors, including the leaders of media companies—many of whom seek to reflect free speech values in their policies—may be shaping our media environment under a similarly incorrect view of First Amendment principles.

This Article argues that this conventional understanding is incorrect. It is true, of course, that the First Amendment protects many forms of political falsity and deception.<sup>9</sup> The justifications for tolerating false statements in the political realm are both normative (stringent protection of political speech respects people as equal citizens and gives vital public debate needed breathing space to thrive) and institutional (any attempts to protect against political lies would be vulnerable to abuse).

Lies made with actual malice about the results of elections, I argue, fall outside of First Amendment protection. Indeed, the First Amendment permits laws outlawing false statements about the *inputs* of elections, such as voting places and times.<sup>10</sup> Defamatory political lies about public figures are also actionable if made with actual malice.<sup>11</sup> And in contexts of reliance, the First Amendment commonly permits regulation of falsity. First Amendment principles, I maintain, likewise permit liability for lies about the *outputs* of elections. This analysis is informed by the First Amendment’s preeminent commitment to democracy, voter reliance on lies in an evolving media environment in which news sources cannot be trusted with ensuring public belief in valid election outcomes, new forms of politics that seek to undermine democracy and constitutionalism, and a recognition of the

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8. See Naomi Nix, *In New Election, Big Tech Uses Old Strategies to Stop the ‘Big Lie,’* WASH. POST (Aug. 20, 2022, 7:00 AM), <https://www.washingtonpost.com/technology/2022/08/20/facebook-twitter-2022-midterms/> (“[S]ocial media giants are pushing forward with a familiar playbook to police misinformation [in the 2022] electoral cycle, even as false claims that the last presidential election was fraudulent continue to plague their platforms.”); see also *id.* (noting that Facebook announced plans to label 2020 election fraud claims and link to accurate information, as well as remove posts that otherwise violate its rules—including inciting violence—while YouTube and TikTok outright ban and take down 2020 election fraud claims).

9. See VALERIE C. BRANNON, CONG. RSCH. SERV., IF12180, FALSE SPEECH AND THE FIRST AMENDMENT: CONSTITUTIONAL LIMITS ON REGULATING MISINFORMATION (2022).

10. See *Minn. Voters All. v. Mansky*, 585 U.S. 1, 18 n.4 (2018) (“We do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures.”); see also Matt Ford, *Is Lying About an Election Free Speech or Fraud?*, NEW REPUBLIC (July 27, 2018), <https://newrepublic.com/article/150265/lying-election-free-speech-fraud> [<https://perma.cc/9BGF-KJMM>] (illustrating the push to criminalize deliberately false and misleading election tactics); *Protections Against Election Disinformation*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/democracy-maps/protections\\_against\\_election\\_disinformation](https://www.lgbtmap.org/democracy-maps/protections_against_election_disinformation) [<https://perma.cc/GV6R-5LM>] (demonstrating that numerous states have legislation prohibiting the dissemination of false information regarding the time, place, and manner of conducting elections).

11. See *infra* note 45 and accompanying text.

powerful interest in the public perception of election results and electoral integrity to democratic legitimacy.

### I. THE FIRST AMENDMENT AND FALSE CLAIMS ABOUT ELECTIONS

There is a widespread belief that the First Amendment prohibits government actors from regulating lies about election outcomes and that free speech values counsel private actors against doing so as well.<sup>12</sup> This assumption arises from the robust protections, unparalleled in the other countries, that the U.S. Constitution extends to political speech, or what we sometimes call *speech in public discourse*.

Political speech, the Supreme Court has long recognized, “is at the heart of the First Amendment’s protections”<sup>13</sup> and “at the core of what the First Amendment is designed to protect.”<sup>14</sup> Since its earliest speech opinions, the Supreme Court has explained that robust protection of political speech is justified by and necessary for democracy: “The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a

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12. See, e.g., Lynn Greenky, Opinion, *There’s No ‘Disinformation’ Exception to the First Amendment*, HILL (Sept. 22, 2023, 7:30 AM), <https://thehill.com/opinion/judiciary/4214044-theres-no-disinformation-exception-to-the-first-amendment> [<https://perma.cc/72NK-358H>].

13. *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 776 (1978); see also, e.g., *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring); THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION \*421–22; Cass R. Sunstein, *Free Speech Now*, in *THE BILL OF RIGHTS IN THE MODERN STATE* 255, 304–07 (Geoffrey R. Stone et al. eds., 1992); *McCutcheon v. FEC*, 572 U.S. 185, 228 (2014) (Thomas, J., concurring) (“Political speech is ‘the primary object of First Amendment protection’ and ‘the lifeblood of a self-governing people.’” (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465–66 (2001) (Thomas J., dissenting))); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346 (1995) (“[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, of course including discussions of [campaigns on a ballot issue]. This no more than reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”). See generally ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* (1941) (exploring the sociopolitical necessity of free speech during the early twentieth century).

14. *Virginia v. Black*, 538 U.S. 343, 365 (2003); see also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (“[E]xpression on public issues ‘has always rested on the highest rung of the hierarchy of First Amendment values’” (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980))); *FCC v. League of Women Voters*, 468 U.S. 364, 381 (1984); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) (asserting that “[c]ore political speech occupies the highest, most protected position” in our constitutional order).

fundamental principle of our constitutional system.”<sup>15</sup> The First Amendment’s robust protection for speech in public discourse, then, reflects the idea that the Constitution entrusts the people with the power to change the direction of our political order.<sup>16</sup> Political speech is therefore protected as an autonomy right of the *speaker* to speak.

At the same time, there is not one First Amendment rule, but many. In many common contexts lies and false statements of fact are not protected by the Constitution. As Frederick Schauer explains, “Traditional first amendment theory has distinguished between statements of belief and opinion and statements of fact.”<sup>17</sup> The Court famously stated that “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism,

15. *Stromberg v. California*, 283 U.S. 359, 369 (1931); *see also, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (“The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard . . . ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’” (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957))); *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (“Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”).

16. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 24 (1971) (“The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”); *Sullivan*, 376 U.S. at 270 (“The First Amendment, said Judge Learned Hand, ‘presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many, this is, and always will be, folly; but we have staked upon it our all.’” (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943))); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Masses Publ’g Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917) (noting that at the core of the First Amendment is the people’s right to engage in the formation of “that public opinion which is the final source of government in a democratic state”); *Stromberg*, 283 U.S. at 369; *see also, e.g.*, Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601 (1990) (articulating a theory of the First Amendment grounded in democratic participation and public discourse); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 3–4 (2004) (contending that the First Amendment aims to promote a democratic culture); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22–23 (1971) (arguing that freedom of speech is meant to aid the process of representative government); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 263 (arguing that free speech is necessary because the people “have decided . . . to govern themselves”).

17. Frederick F. Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263, 268 (1978).

religion, or other matters of opinion.”<sup>18</sup> By contrast, false statements of fact in advertising, taxes, and contracts get no First Amendment protection, nor does the First Amendment prevent prosecution for perjury or fraud.<sup>19</sup>

How do we make sense of these two competing strains of First Amendment theory? And what is the First Amendment status of *false statements of fact* in political life?<sup>20</sup> Many forms of false statements of fact are robustly protected by the First Amendment—but certainly not all. Lies about election outcomes, like lies about election inputs, should fall into the latter category. To understand why requires an examination of the purpose of the First Amendment and the constitutional reasons for protecting certain types of lies but not others.

The justifications for protecting lies and false statements in public discourse are both normative and institutional. Normatively, stringent protection of false political speech respects individuals’ autonomy as equal citizens with equal dignity—a core reason for protecting speech in public discourse in the first place. The commitment to treating individuals as equal and autonomous is pervasive in First Amendment caselaw and theory about political speech, though it raises deep questions about the nature and basis of that equality.<sup>21</sup> Why must citizens be treated as equal if they are manifestly

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18. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

19. See BRANNON, *supra* note 9, at 1–2.

20. This is an issue with which scholars are beginning to wrestle. See, e.g., Richard L. Hasen, *Drawing the Line Between False Election Speech and False Campaign Speech*, KNIGHT FIRST AMEND. INST. COLUM. UNIV. (Oct. 12, 2021), <https://knightcolumbia.org/blog/drawing-the-line-between-false-election-speech-and-false-campaign-speech> [<https://perma.cc/25AQ-ZP2V>] (“[O]ne of the most difficult questions concerns Trump’s post-election conduct: Is falsely claiming an election was stolen or rigged something that the government may prohibit? The question is a close one, and it is one with which I continue to wrestle.”). Hasen has since questioned whether such statements could be constitutionally regulated:

Given Trump’s statements after the 2020 election, one can imagine an extension of this law to bar a candidate’s false *postelection* statements that an election was rigged or stolen. But such statements about how an election was conducted, while damaging to American democracy, do not directly interfere with people’s ability to exercise their franchise. Sometimes candidates’ *postelection* speech will be about legitimately contested elections, and a broader speech ban could deter important debate about the conduct of an election. An extension to *postelection* false election speech is perhaps justified to preserve the integrity of *future* elections.

RICHARD HASEN, *CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS—AND HOW TO CURE IT* 111 (2022). Catherine Ross has also published a book on lies in politics. CATHERINE ROSS, *A RIGHT TO LIE?: PRESIDENTS, OTHER LIARS, AND THE FIRST AMENDMENT* (2022).

21. Leslie Kendrick analyzes this question in the context of First Amendment autonomy theories. See Leslie Kendrick, *Free Speech and Guilty Minds*, 114 COLUM. L. REV. 1255 (2014).

not equal across a range of characteristics such as wealth or status?<sup>22</sup> What is the theoretical basis of that commitment? The idea that each citizen is politically equal because they equally possess one vote? A conception of democracy as a social practice of rational debate (though social science demonstrates humans are, in fact, predictably irrational)?<sup>23</sup> Or is it that citizens possess broad speech rights as if they are equals so that they come to *believe*, as Robert Post has argued, that they are “engaged in the process of governing themselves” such that they view U.S. democracy as legitimate?<sup>24</sup> Whatever the basis, a wide range of First Amendment cases and theories cite respect for autonomy as equal citizens as a core basis for robust speech rights in public discourse.

As an institutional matter, protecting some falsity in the public sphere gives vital public debate needed breathing space to thrive. As the Supreme Court expressed in *New York Times v. Sullivan*, “A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable ‘self-censorship.’ . . . [Not] only false speech will be deterred.”<sup>25</sup>

Protecting false statements in public discourse also guards against the problem of the fox guarding the hen house—namely, the abuse that could occur if governmental officials had the power to regulate false political speech. As Professor Helen Norton explains, First Amendment law and theory reflect a “tradition of distrust” in which speech is protected “not so much because it is so valuable, but instead because the government is so dangerous in its capacity to abuse its regulatory power.”<sup>26</sup> Extreme polarization and the politicization of state election oversight positions, especially in light of broader democratic backsliding in the U.S., evidence

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22. This prompts an important related question: might the Constitution support efforts to make them more substantively equal on political economy or other grounds? *See generally* JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION* (2022).

23. *See generally, e.g.*, Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477–78 (1998) (demonstrating that, in behavioral economics, humans are not always rational actors).

24. Robert Post, *Democracy and Equality*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 2006, at 24, 26.

25. 376 U.S. 254, 279 (1964).

26. Helen Norton, *Distrust, Negative First Amendment Theory, and the Regulation of Lies*, KNIGHT FIRST AMEND. INST. COLUM. U. (Oct. 19, 2022), <https://knightcolumbia.org/content/distrust-negative-first-amendment-theory-and-the-regulation-of-lies> [https://perma.cc/5N6U-6MH4].

ample basis for distrust and the real threat of abuse of direct regulation in our current political climate.<sup>27</sup>

Justice Alito has trenchantly elaborated the relationship between these two concerns:

[T]here are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat. The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth.<sup>28</sup>

Pursuant to these principles—respect for the autonomy of equal (or treated as if equal) citizens to speak as they wish, and practical concerns around self-censorship and the potential of abuse—the First Amendment protects some forms of falsity and deception in public discourse, even if the falsehoods are deliberate.<sup>29</sup> The leading case in this regard is *United States v. Alvarez*, a case in which the defendant Xavier Alvarez falsely claimed that he had been awarded the Congressional Medal of Honor in violation of the Stolen Valor Act of 2005.<sup>30</sup> The Supreme Court overruled Alvarez’s conviction and rejected the government’s argument that “false statements, as a general rule, are beyond constitutional protection.”<sup>31</sup>

That rule, however, is not a trans-substantive one. In many situations of informational reliance, the First Amendment not only permits but supports regulation for truth. The government may outright ban false or misleading commercial speech, without triggering the First Amendment at all.<sup>32</sup> For example, the government can constitutionally prohibit me from making claims that my tonic cures cancer when it does not. Similarly, if I enter into a contract to sell my car to you, I can’t then refuse to give you the car and say, “Too bad for you! The First Amendment means I can lie in contracts if I

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27. The severe threat of such abuse is obvious in more firmly authoritarian contexts, such as contemporary Russia. See, e.g., Adi Robertson, *Russian ‘Fake News’ Law Could Get Offenders 15 Years in Prison*, VERGE (Mar. 4, 2022, 8:28 AM), <https://www.theverge.com/2022/3/4/22961472/russia-fake-news-law-military-ukraine-invasion-casualties-jail-time> [https://perma.cc/6BFW-7HDC].

28. *United States v. Alvarez*, 567 U.S. 709, 751–52 (2012) (Alito, J., dissenting).

29. *Id.*; see also *List v. Ohio Elections Comm’n*, 45 F. Supp. 3d 765, 770 (S.D. Ohio 2014), *aff’d sub nom*, *Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016).

30. 567 U.S. at 713–14 (plurality opinion).

31. *Id.* at 718; see also *id.* at 730 (striking down the Stolen Valor Act of 2005).

32. See BRANNON, *supra* note 9, at 1–2.

want.” Why? Because the public depends on truthful commercial information to make decisions not only about how to govern the marketplace, but also to live freely in it.<sup>33</sup>

The First Amendment also permits regulation for truth in a range of contexts, such as fiduciary duties, fraud, malpractice, contracts, and perjury.<sup>34</sup> Each of these examples involve relationships of reliance and informational dependence. And the First Amendment has long permitted each to be regulated for truth and liable for falsehood. A plurality of the court recognized as much in *Alvarez* when it emphasized that its decision did not reach prohibitions on false statements to a government official, perjury, or the false representation that one is speaking as a government official.<sup>35</sup> It similarly underscored that *Alvarez*’s statements were not “made to secure employment or financial benefits or admission to privileges reserved for those who had earned the Medal.”<sup>36</sup> In other words, no one relied on his lie.

Nor does the First Amendment protect false statements of fact made about governmental officials and other public figures (including about a presidential candidate during a presidential campaign) if made with actual malice—that is, if clear and convincing evidence shows that the statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>37</sup> This is a heightened standard, but not an insurmountable one.<sup>38</sup>

Lies about the facts of voting—including the time, date, or place of an election, which we can understand as the *inputs* of elections, and on which their free and fair operation depends—can be constitutionally banned. While no federal statute explicitly prohibits lying to voters about these facts, the Department of Justice handbook on Federal Prosecution of Election Offenses

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33. See *Va. State Bd. Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976); Amanda Shanor & Sarah Light, *Greenwashing & the First Amendment*, 122 COLUM. L. REV. 2033, 2039 (2022).

34. See Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 320–21 (2018); *United States v. Grayson*, 438 U.S. 41, 54 (1978); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 51 n.10 (1961). Jack Balkin’s argument that some companies should be treated as information fiduciaries leverages this insight. See Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1209 (2016); Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011, 2048 (2018).

35. *Alvarez*, 567 U.S. at 719–21, 723 (plurality opinion) (“Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.” (citation omitted)).

36. *Id.* at 714.

37. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

38. See, e.g., *infra* notes 155–65 and accompanying text (discussing the Dominion Voting Systems case).

states that the Conspiracy Against Rights statute,<sup>39</sup> which has been successfully used to prosecute conspiracies to destroy valid voter registrations<sup>40</sup> or ballots,<sup>41</sup> prohibits trying to prevent qualified voters from voting by lying about the time, date, or place of an election as a form of voter-suppressing election fraud.<sup>42</sup> The FBI’s website likewise states that “[i]ntentionally deceiving qualified voters to prevent them from voting is voter suppression—and it is a federal crime.”<sup>43</sup>

In 2018, the Supreme Court acknowledged that such laws are constitutional, observing: “We do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures.”<sup>44</sup> Scholars from across the ideological spectrum likewise agree that laws banning false statements about election inputs, such as voter qualifications or the time and place of voting, are constitutional—even if certain other laws prohibiting political lies might not be after *Alvarez*.<sup>45</sup> In

39. The statute provides:

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . . They shall be fined under this title or imprisoned not more than ten years, or both . . . .

18 U.S.C. § 241.

40. See *United States v. Haynes*, Nos. 91-5979, 91-6076, 1992 WL 296782, at \*1 (6th Cir. Oct. 15, 1992).

41. See *Ex parte Coy*, 127 U.S. 731 (1888); *United States v. Townsley*, 843 F.2d 1070, 1079–80, 1086 (8th Cir. 1988).

42. FEDERAL PROSECUTION OF ELECTION OFFENSES 56–58 (Richard C. Pilger ed., 8th ed. 2017).

43. *Election Crimes and Security*, FBI, <https://www.fbi.gov/scams-and-safety/common-scams-and-crimes/election-crimes-and-security> [<https://perma.cc/5HQ7-3L5W>].

44. *Minn. Voters All. v. Mansky*, 585 U.S. 1, 18 n.4 (2018).

45. See, e.g., *HASEN*, *supra* note 20, at 109–15; Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 57 (2013) (observing that “under an actual malice/clear and convincing evidence standard, [laws that] (1) bar false (though not misleading) election speech about the mechanics of voting, such as false statements about the date and time of voting; (2) give a government election authority the power to reject false campaign speech submitted for official ballot materials; and (3) allow a jury to punish defamatory speech about candidates made with actual malice” are constitutional, even after *Alvarez*); *id.* at 71 (“The strongest case for constitutionality is a narrow law targeted at false election speech aimed at disenfranchising voters.”); Eugene Volokh, *Freedom of Speech and Knowing Falsehoods*, VOLOKH CONSPIRACY (June 28, 2012, 5:19 PM), <http://www.volokh.com/2012/06/28/freedom-of-speech-and-knowing-falsehoods> [<https://perma.cc/8U79-UUJW>] (noting that, after *Alvarez*, “narrower bans on . . . knowingly false statements about when or where people should vote,

keeping with that principle, Douglass Mackey, a social media influencer, was convicted in 2023 for a scheme to deprive individuals of their right to vote in the 2016 presidential election by disseminating fraudulent messages encouraging Hillary Clinton voters to “vote” via text message or social media.<sup>46</sup>

State laws outlawing false statements in the context of elections and campaigns are common. One recent review found that forty-eight states and the District of Columbia have laws regulating false election-related statements.<sup>47</sup> Many prohibit not only lies about the factual inputs of elections, such as where or when to vote, but also false statements in the context of elections and campaigns more broadly.<sup>48</sup> Although several of these broader state laws have been struck down or limited since *Alvarez*, each of those cases involved speech about a candidate or a candidate’s platform in the election.<sup>49</sup> For example, one involved a lie about whether a candidate had supported federally funded abortion.<sup>50</sup> None involved lies about the factual inputs of time, place, or manner of voting. Several recent cases note that “[a]ccording to *United States v. Alvarez* and its progeny, false speech is not protected when made ‘for the purpose of material gain’ or ‘material advantage,’ or if such

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knowingly false claims that some person or organization has endorsed you, knowingly false claims that you are the incumbent, knowingly false claims about your own job [or military] experience . . . might be constitutional”); see also James Weinstein, *Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibitions of Lies in Political Campaigns*, 71 OKLA. L. REV. 167, 223 (2018) (“[I]f government were powerless to stop such deception [about when to vote], the integrity of the election process might be badly compromised.”).

46. Press Release, U.S. Att’y’s Off., E. Dist. N.Y., Social Media Influencer Douglass Mackey Convicted of Election Interference in 2016 Presidential Race (Mar. 31, 2023), <https://www.justice.gov/usao-edny/pr/social-media-influencer-douglass-mackey-convicted-election-interference-2016> [<https://perma.cc/SL4V-ALAF>].

47. David S. Ardia & Evan Ringel, *First Amendment Limits on State Laws Targeting Election Misinformation*, 20 FIRST AMEND. L. REV. 291, 292–93 (2022); see also Lyle Denniston, *Opinion Analysis: False Politicking Law Open to Challenge*, SCOTUSBLOG (June 16, 2014, 3:24 PM), <https://www.scotusblog.com/2014/06/opinion-analysis-false-politicking-law-open-to-challenge> [<https://perma.cc/D248-GBQY>]; Joshua S. Sellers, *Legislating Against Lying in Campaigns and Elections*, 71 OKLA. L. REV. 141, 149–50 nn.53–56 (2018) (collecting statutes).

48. See Ardia & Ringel, *supra* note 47, at 299–307.

49. See, e.g., 281 Care Comm. v. Arneson, 766 F.3d 774, 796 (8th Cir. 2014) (ballot initiative); Commonwealth v. Lucas, 34 N.E.3d 1242, 1245, 1257 (Mass. 2015) (candidate’s past defense work and stance on sex offenders).

50. See List v. Ohio Elections Comm’n, 45 F. Supp. 3d 765, 769–70 (S.D. Ohio, 2014), *aff’d sub nom*, Susan B. Anthony List v. Driehaus, 814 F.3d 466 (6th Cir. 2016).

speech inflicts a ‘legally cognizable harm,’”<sup>51</sup> or if circumstances indicate that the false statements are made for material advantage in a campaign.<sup>52</sup>

Why can lies about the facts of voting—including the time, date, or place of an election—be constitutionally prohibited, although many other false statements in political life are strongly protected? Potential voters may rely on the false statements and may be tricked into losing the opportunity to vote. Lies about the inputs of voting threaten election integrity, and more deeply imperil the possibility of democratic legitimacy.

## II. LIES ABOUT ELECTION OUTPUTS

This Article argues that similar reasons justify why the government can—and private actors should—prohibit the spread of false statements of fact about the factual *outcomes* of elections. Several reasons lead to this conclusion and make such lies constitutionally distinctive.

First, like regulation of election inputs, the regulation of intentionally false statements about election results furthers the First Amendment’s deepest commitment: safeguarding democracy. The First Amendment has long been described as “the guardian of our democracy.”<sup>53</sup> The public’s need for the factual truth of election outcomes stems from bedrock principles of democratic governance, the core goal of the First Amendment. Democracies require a limited form of shared political reality. They depend on facts about

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51. *Make Liberty Win v. Cegavske*, 570 F. Supp. 3d 936, 942 (D. Nev. 2021) (quoting *United States v. Alvarez*, 567 U.S. 709, 719, 722); *see also* *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1194 (9th Cir. 2018) (“[N]either the plurality nor the concurrence in *Alvarez* held that false statements are *always* protected under the First Amendment. Instead, as the plurality outlines, false speech may be criminalized if made ‘for the purpose of material gain’ or ‘material advantage,’ or if such speech inflicts a ‘legally cognizable harm.’ . . . The concurring justices agreed: statutes that criminalize falsities typically require proof of specific or tangible harm.” (quoting *Alvarez*, 567 U.S. at 719, 723, 734–36)); *Project Veritas v. Ohio Election Comm’n*, 418 F. Supp. 3d 232, 236, 239–40 (S.D. Ohio 2019) (holding that a First Amendment challenge to a state law that prohibited undercover infiltration of political campaigns was unlikely to succeed on the merits).

52. *See* *Winter v. Wolnitzek*, 834 F.3d 681, 693 (6th Cir. 2016); *Animal Legal Def. Fund*, 878 F.3d at 1194. Several courts have also upheld laws against false statements in judicial races. *See, e.g.,* *Winter*, 834 F.3d at 693; *Myers v. Cotter*, CV 16-45-H, 2017 WL 9324781, at \*1 (D. Mont. Aug. 30, 2017); *Disciplinary Couns. v. Tamburrino*, 87 N.E.3d 158, 160–61 (Ohio 2016); *Matter of Callaghan*, 796 S.E.2d 604, 611–12 (W. Va. 2017); *In re Shephard*, 217 So. 3d 71, 74 (Fla. 2017); *In re* *Jud. Campaign Complaint Against Falter*, 173 N.E.3d 484, 485 (Ohio 2021). Courts were indeed split on the constitutionality of false campaign speech laws before *Alvarez*. *See, e.g.,* *State ex rel. Pub. Disclosure Comm’n v. 119 Vote No! Comm.*, 957 P.2d 691, 693 (Wash. 1998).

53. *Brown v. Hartlage*, 456 U.S. 45, 60 (1982).

elections that are acknowledged regardless of party or perspective—facts that constitute our shared world. A functioning democracy depends, at minimum, on a shared reality of election results and belief in elections as the legitimate arbiter of governmental power.<sup>54</sup>

Second, lies about election results present a unique threat to democratic legitimacy. Without a mechanism to discern the factual outcome of an election, there is no solid basis for a peaceful transfer of power or democratic legitimacy. This sociological fact makes factual lies about election outputs, like election inputs, exceptional for constitutional purposes. As election law scholar Rick Hasen has observed, voters who supported losing candidates must “believe that the election was run fairly and that candidates on the other side have the legitimate right to take office.”<sup>55</sup> Otherwise, “[c]onsistent lies claiming a rigged or stolen election can undermine this voter confidence and create the conditions whereby groups of voters no longer accept election winners as legitimate.”<sup>56</sup> Those lies undermine the *reason* some political untruths are protected in the first place: to safeguard self-governance. In this sense, lies about election outcomes, meaning who won an election, parallel lies about election inputs, such as the time or location of polling or qualifications to vote. Both types of lies directly undermine democratic legitimacy.

Third, lies about election results are exceptional because of their implications for future elections. These threats include both violent and non-violent attempts to undermine future democratic elections and transfers of power. On a practical level, lies about election results invite partisan retaliation. In response to persistent claims that the 2020 election was stolen, for example, state lawmakers introduced hundreds of voting restriction bills, including laws that limit voting options and voting time, purge voter rolls, expand voter ID requirements, and increase partisan influence over elections.<sup>57</sup> Retaliatory measures that undermine electoral integrity may allow officials to thwart the will of voters—if not *ex ante*, then *ex post*.

Lies about stolen elections also invite retaliatory violence—violence that is believed by its perpetrators to be patriotic and aimed at protecting

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54. See generally *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (“Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.”).

55. Richard L. Hasen, Donald Trump Should Remain Deplatformed from Facebook, Twitter, and YouTube Despite the High Bar That Platforms Should Apply to the Question of Deplatforming Political Figures 4 (Sept. 24, 2022) (unpublished manuscript), <https://ssrn.com/abstract=4228749> [<https://perma.cc/5689-HD4D>].

56. *Id.*

57. Kaleigh Rogers, *The Big Lie’s Long Shadow*, FIVETHIRTYEIGHT (Jan. 12, 2022), <https://fivethirtyeight.com/features/the-big-lie-voting-laws> [<https://perma.cc/7HSS-6CMN>].

democracy.<sup>58</sup> The conflict around transfer of power following the 2020 presidential election is illuminating in this regard, as well. Many reports, including those of the House Select Committee, have detailed the connection between the January 6, 2021 attempt to stop the certification of the 2020 election results and President Trump’s false statements about the election outcome.<sup>59</sup> These reports highlight Trump’s repeated claims on the morning of January 6, and many other times, that the election was “rigged” and “based on irregularities and fraud, plus corrupt[ion].”<sup>60</sup> He delivered the same message—that the 2020 election was stolen—in a speech before thousands of demonstrators at the “Save America Rally” later that day.<sup>61</sup> Significantly,

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58. Zack Stanton, *What if 2020 Was Just a Rehearsal?*, POLITICO (Sept. 26, 2021, 7:13 AM), <https://www.politico.com/news/magazine/2021/09/26/trump-politics-american-democracy-threat-2021-2022-analysis-514180> [<https://perma.cc/6X57-BZ5H>]; see also Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265, 271 (2022).

Public polling is consistent with this view: in mid-2021, a third of Republicans supported the storming of the Capitol. See Bryan Bennett, *Americans Less Confident in Our Democracy After January 6th*, NAVIGATOR (June 4, 2021), <https://navigatorresearch.org/americans-less-confident-in-our-democracy-after-january-6th> [<https://perma.cc/LP9F-W3GN>]. By year’s end, roughly a third of Trump voters believed that “it is OK to engage in violence to protect American democracy.” Joel Rose & Liz Baker, *6 in 10 Americans Say U.S. Democracy Is in Crisis as the ‘Big Lie’ Takes Root*, NPR (Jan. 3, 2022, 5:00 AM), <https://www.npr.org/2022/01/03/1069764164/american-democracy-poll-jan-6> [<https://perma.cc/E7LN-83BK>]. Republican voters’ belief that the election as stolen has hovered around 70% since January 6, 2021. See Jennifer Agiesta and Ariel Edwards-Levy, *CNN Poll: Percentage of Republicans Who Think Biden’s 2020 Win Was Illegitimate Ticks Back Up near 70%*, CNN (Aug. 3, 2023), <https://www.cnn.com/2023/08/03/politics/cnn-poll-republicans-think-2020-election-illegitimate/index.html> [<https://perma.cc/PCR8-L87T>]; *After Three Years and Many Indictments, the “Big Lie” That Led to the January 6th Insurrection Is Still Believed by Most Republicans*, PUB. RELIGION RSCH. INST. (Jan. 5, 2024), <https://www.ppri.org/spotlight/after-three-years-and-many-indictments-the-big-lie-that-led-to-the-january-6th-insurrection-is-still-believed-by-most-republicans> [<https://perma.cc/US63-JAHN>]. A mid-2024 poll found that “[a]mong Republican respondents who believe President Joe Biden did not lawfully win the 2020 election, about 31% think that either ‘a lot’ or ‘a great deal’ of political violence will occur after the 2024 election.” Hannah Robbins, *Election 2024: Poll Suggests Republicans Who Believe Trump Won in 2020 Expect Significant Chaos in November*, JOHNS HOPKINS UNIV. HUB (Aug. 7, 2024), <https://hub.jhu.edu/2024/08/07/snf-agora-poll-july-2024> [<https://perma.cc/M86Y-59ZR>].

59. The House Select Committee to Investigate the January 6th Attack on the United States Capitol investigated this connection. See H.R. REP. NO. 117-663 (2022).

60. Courtney Subramanian, *A Minute-by-Minute Timeline of Trump’s Day as the Capitol Siege Unfolded on Jan. 6*, USA TODAY (Feb. 11, 2021, 4:56 PM), <https://www.usatoday.com/story/news/politics/2021/02/11/trump-impeachment-trial-timeline-trump-actions-during-capitol-riot/6720727002> [<https://perma.cc/245U-TZNY>] (statement of Donald J. Trump).

61. George Petras et al., *Timeline: How the Storming of the U.S. Capitol Unfolded on Jan. 6*, USA TODAY (Jan. 6, 2021), <https://www.usatoday.com/in-depth/news/2021/01/06/dc-protests->

he urged his audience to understand retaliatory violence as a defense of democracy, warning that “if you don’t fight like hell, you’re not going to have a country anymore . . . . So we are going to walk down Pennsylvania Avenue . . . and we are going to the Capitol.”<sup>62</sup> Appeals to patriotism, coupled with false statements about the election’s outcome, were key provocations for the mob that stormed the Capitol.<sup>63</sup>

These dynamics are not limited to the United States. Recent political conflict in Brazil likewise exemplifies how lies about stolen elections can precipitate retaliatory violence in the name of democracy. Then-outgoing President Jair Bolsonaro made repeated false claims that the country’s most recent democratic election was stolen from him.<sup>64</sup> Much like supporters of

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capitol-riot-trump-supporters-electoral-college-stolen-election/6568305002 [https://perma.cc/2NVK-JQYR].

62. *Id.* (statement of Donald J. Trump).

63. See *Capitol Riots Timeline: What Happened on 6 January 2021?*, BBC (Aug. 1, 2023), <https://www.bbc.com/news/world-us-canada-56004916> [https://perma.cc/BP3E-WEUC]; see also Chris Cameron, *These Are the People Who Died in Connection with the Capitol Riot*, N.Y. TIMES (Jan. 5, 2022), <https://www.nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html> (stating two police officers took their own lives after the attack). Just minutes after Vice President Pence was escorted from the Senate chamber, Trump tweeted, “Mike Pence didn’t have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!” Subramanian, *supra* note 60. Trump’s reaction when informed of rioters’ calls to hang Pence was that Pence “deserve[d] it.” Timothy Bella, *Cheney States Trump Said on Jan. 6 that Pence ‘Deserves’ to Be Hanged*, WASH. POST (June 10, 2022, 9:57 AM), <https://www.washingtonpost.com/politics/2022/06/10/jan6-trump-pence-deserves-hanged-cheney-capitol/>; *Here’s Every Word from the Sixth Jan. 6 Committee Hearing on its Investigation*, NPR (June 28, 2022, 6:23 PM), <https://www.npr.org/2022/06/28/1108396692/jan-6-committee-hearing-transcript> [https://perma.cc/8THY-47UN]. Trump has similarly defended demonstrators’ chants of “Hang Mike Pence!” as understandable, saying “if you know a vote is fraudulent, right, how can you pass on a fraudulent vote to Congress?” Jesse Rodriguez & Rebecca Shabad, *Trump Defends Jan. 6 Rioters’ ‘Hang Mike Pence’ Chant in New Audio*, NBC NEWS (Nov. 12, 2021, 9:20 AM), <https://www.nbcnews.com/politics/donald-trump/trump-defends-jan-6-rioters-hang-mike-pence-chant-newly-n1283798> [https://perma.cc/9XTD-3WD7]. The mob was close enough to the Vice President that “members of his Secret Service detail . . . were contacting family members to say goodbye.” Luke Broadwater & Maggie Haberman, *Jan. 6 Panel Presents Evidence of Trump’s Refusal to Stop the Riot*, N.Y. TIMES (July 21, 2022), <https://www.nytimes.com/2022/07/21/us/politics/trump-jan-6.html>.

64. Jack Nicas et al., *How Bolsonaro Built the Myth of Stolen Elections in Brazil*, N.Y. TIMES (Oct. 25, 2022), <https://www.nytimes.com/interactive/2022/10/25/world/americas/brazil-bolsonaro-misinformation.html>.

President Trump, Bolsonaro's followers responded by storming the Brazilian National Congress, the Supreme Federal Court, and the presidential office.<sup>65</sup>

More broadly, democratic backsliding has occurred in numerous countries—including in India, Turkey, Nigeria, Bangladesh, Hungary, Poland, and beyond—in what some have described as the “crash of the postwar ‘democratic wave.’”<sup>66</sup> And while the specifics of antidemocratic actions are unique to each country and institutional context, they share common features that are helpful context to understanding the threat of lies about election outcomes in the United States. What are those similarities? And why are these issues now surfacing around the globe?

One reason is that the current prominent forms of antidemocratic politics are different than the ones that prevailed in the twentieth century. International law scholar Kim Lane Scheppele describes a new, though now familiar, form of autocrat that has arisen in liberal constitutional democracies around the world, which has become a hallmark of global democratic backsliding. She terms this form of antidemocratic politics “autocratic legalism.”<sup>67</sup> Such political figures are not made in the model of Hitler or Stalin, who relied on more overt rejections of the existing legal and political systems, she observes.<sup>68</sup> They do not arrive with tanks or consolidate power in complete or obvious ways, nor do they advocate for tearing down existing institutions or call for all-encompassing ideological revolutions.<sup>69</sup> These politicians instead claim to espouse democracy and constitutionalism.<sup>70</sup> Their public legitimacy depends on their claims to winning elections and making the political world and legal system appear to remain at least roughly as it was. They rely on lawyers who help them use legal, if norm-breaking, means

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65. Anthony Faiola & Marina Dias, *Assault on Presidential Palace, Congress Challenges Brazil's Democracy*, WASH. POST (Jan. 8, 2023, 7:06 PM), <https://www.washingtonpost.com/world/2023/01/08/bolsonaro-invade-congress-lula/>; Chris Cameron, *The Attack on Brazil's Seat of Government Resembles the Storming of the U.S. Capitol on Jan. 6, 2021*, N.Y. TIMES (Jan. 8, 2023), <https://www.nytimes.com/2023/01/08/world/americas/brazil-jan-6-riots.html>; Elizabeth Dvoskin, *Come to the 'War Cry Party': How Social Media Helped Drive Mayhem in Brazil*, WASH. POST (Jan. 8, 2023), <https://www.washingtonpost.com/technology/2023/01/08/brazil-bolsonaro-twitter-facebook/>.

66. David Singh Grewal, *A World-Historical Gamble: The Failure of Neoliberal Globalization*, AM. AFFS. (Nov. 20, 2022), <https://americanaffairsjournal.org/2022/11/a-world-historical-gamble-the-failure-of-neoliberal-globalization> [<https://perma.cc/B99N-RVK4>].

67. Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 584 (2018).

68. *Id.* at 571.

69. *Id.* at 574.

70. *Id.* at 580–81.

to remove limits to their power.<sup>71</sup> These leaders proclaim a democratic mandate while hollowing out democratic constitutionalism from the inside. Importantly, examples of this type of legalistic power grab are not limited to any political ideology or to right- or left-wing movements or politicians. Left-wing autocratic leaders like socialist Hugo Chávez in Venezuela, and right-wing ones like Bolsonaro, use remarkably similar tactics.<sup>72</sup>

This new form of antidemocratic politics and the threat to democracy that it poses are particularly relevant with regard to the constitutional status of lies about election outputs. These forces contextualize the specific threat to democratic constitutionalism that false claims—indeed, knowingly false claims—of stolen elections pose. In a world in which antidemocratic leaders depend on (the assertion of) a democratic mandate for their legitimacy, a central means of avoiding the consequences of electoral losses and demands for a transition of power is to falsely claim victory and assert that one’s opponents are the antidemocratic ones stealing elections.<sup>73</sup>

In addition to this strategic political shift, economic conditions may play a role in the recent rise of antidemocratic forces.<sup>74</sup> David Grewal, a keen scholar of intellectual history, has incisively argued that global trade policies following the Cold War have had long-term effects, including prompting “not

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71. See *id.* at 581. Thus, “to the casual visitor who doesn’t pay close attention, a country in the grips of an autocratic legalist looks perfectly normal.” *Id.* at 575; cf. Johnny Harris & Michelle Cottle, *Inside the Completely Legal G.O.P. Plot to Destroy American Democracy*, N.Y. TIMES (Sept. 21, 2022), <https://www.nytimes.com/2022/09/21/opinion/republicans-democracy-elections-bannon.html>.

72. Political scientists have also observed a new wave of authoritarian leaders who “abuse state power, tolerate or encourage violent extremism, and tilt the electoral playing field against their rivals,” even as they use their claimed support for “formal democratic institutions . . . as the principal means of obtaining and exercising political authority.” Levitsky and Way term this phenomenon “competitive authoritarian[ism].” Steven Levitsky & Lucan Way, *America’s Coming Age of Instability: Why Constitutional Crises and Political Violence Could Soon Be the Norm*, FOREIGN AFFS. (Jan. 20, 2022), <https://www.foreignaffairs.com/articles/united-states/2022-01-20/americas-coming-age-instability> [<https://perma.cc/HT57-C9Z6>].

73. This may be coupled with ostensibly legal if norm-busting efforts to stay in power despite electoral loss. In the U.S. context, this was the argument that Vice President Pence could unilaterally change the election outcome through his role counting state electors.

74. Yann Algan et al., *The European Trust Crisis and the Rise of Populism*, 2 BROOKINGS PAPERS ECON. ACTIVITY 309, 309 (2017) (finding that “crisis-driven economic insecurity is a substantial determinant of populism and political distrust”); see also, e.g., Cameron Ballard-Rosa et al., *The Economic Origins of Authoritarian Values: Evidence from Local Trade Shocks in the United Kingdom*, 54 COMP. POL. STUD. 2321 (2021) (demonstrating that regions where the labor market was more affected by imports from China adopt more authoritarian values); Sirus H. Dehdari, *Economic Distress and Support for Radical Right Parties—Evidence from Sweden*, 55 COMP. POL. STUD. 191 (2022) (finding that economic distress among low-skilled native-born workers leads to higher support for radical right parties).

just a decline of the ideal of liberal democracy but, more fundamentally, an erosion of its underlying socioeconomic foundations.”<sup>75</sup> A body of social science research suggests that negative economic shocks decrease trust in political institutions, increase support for populist parties, and contribute to political instability.<sup>76</sup> Whether or not economic forces have contributed to the rise of antidemocratic strains of populism, constitutional democracies worldwide are facing acute pressure.

Particularly in the United States, the economic incentives of media companies, both on- and offline, in the face of increasing polarization may contribute to either democratic stability or autocratic rise.<sup>77</sup> It is now well established that since the beginning of the twenty-first century, Americans have become more polarized and oriented around identity categories.<sup>78</sup> This identity-based polarization and twenty-first century information capitalism, which is fueled by user attention,<sup>79</sup> have given rise to identity-affirming news streams. News has become hyper partisan not only on sites such as Infowars,

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75. Grewal, *supra* note 66.

76. See, e.g., Luigi Guiso et al., Populism: Demand and Supply 1 (Nov. 25, 2018) (unpublished manuscript), [https://www.researchgate.net/publication/325472986\\_demand\\_and\\_supply\\_of\\_populism](https://www.researchgate.net/publication/325472986_demand_and_supply_of_populism) [<https://perma.cc/UC7V-LC3V>] (“[On the demand side,] economic insecurity drives consensus to populist policies directly and through indirect negative effects on trust and attitudes towards immigrants. On the supply side, populist parties are more likely to emerge when countries are faced with a systemic crisis of economic security.”); Yotam Margalit, *Political Responses to Economic Shocks*, 22 ANN. REV. POL. SCI. 277, 277 (2019) (finding support in the political science literature for economic shocks leading to decreased trust in institutions and increased support for nationalist, populist, and far right parties or for redistributive policies and the left); Larry Bartels & Nancy Bermeo, *Mass Politics in Tough Times*, in MASS POLITICS IN TOUGH TIMES: OPINIONS, VOTES AND PROTEST IN THE GREAT RECESSION 1, 15–16 (Larry Bartels & Nancy Bermeo eds., 2014) (providing examples of economic shocks contributing to political change); Christopher Blattman & Edward Miguel, *Civil War*, 48 J. ECON. LIT. 3, 24 (2010) (“The correlations of civil conflict with both low income levels and negative income shocks are arguably the most robust empirical patterns in the literature cited above, but the direction of causality remains contested.”).

77. Cf. ADAM CHILTON & MILA VERSTEEG, HOW CONSTITUTIONAL RIGHTS MATTER 54–55 (2020) (noting authoritarian ability to purchase or otherwise economically influence media and contrasting that with avenues of influence over religious expression).

78. Shanto Iyengar et al., *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POL. SCI. 129, 130 (2019); Shanto Iyengar & Sean J. Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, 59 AM. J. POL. SCI. 690, 690 (2015) (“When defined in terms of social identity and affect toward copartisans and opposing partisans, the polarization of the American electorate has dramatically increased.”); Christopher Weber & Samara Klar, *Exploring the Psychological Foundation of Ideological and Social Sorting*, 40 POL. PSYCH. 215, 215 (2019). See generally NOLAN MCCARTY ET AL., POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES (2d ed., 2016); KEITH T. POOLE & HOWARD ROSENTHAL, IDEOLOGY AND CONGRESS (2d rev. ed., 2007).

79. TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS 5–6 (2016).

but also on more mainstream broadcast media, such as *Fox News* and *MSNBC*, which attract viewers to their flagship opinion shows through identity-reinforcement.<sup>80</sup> Yochai Benkler, Rob Faris, and Hal Roberts have demonstrated that in this context mis- and dis-information spreads asymmetrically among those with few identify-affirming facts to share.<sup>81</sup> (As of late in the U.S., this group has been predominated by consumers of right-wing media, but the principle is not limited to any group or perspective.) When there is bad news for a certain identity group (e.g., your preferred presidential candidate loses an election), false but identify-affirming information (e.g., that the election was stolen) produces more media

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80. See YOCHAI BENKLER ET AL., NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS 14–15 (2018); see also Yochai Benkler, *A Political Economy of the Origins of Asymmetric Propaganda in American Media*, in THE DISINFORMATION AGE 43, 43–66 (2021); ROBERT M. FARIS ET AL., BERKMAN KLEIN CTR. FOR INTERNET & SOC’Y, PARTISANSHIP, PROPAGANDA, AND DISINFORMATION: ONLINE MEDIA AND THE 2016 U.S. PRESIDENTIAL ELECTION 20 (2017).

Studies have come to conflicting conclusions on the role of social media and the internet in polarization. Some argue that the internet and social media create challenges to democracy by creating echo chambers. See, e.g., CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 71 (2018); ELI PARISER, THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU 88–89 (2011). Facebook’s leaked internal research suggests a related but distinct point, namely that targeted algorithms that promote platform engagement can also contribute to outrage and sensationalism. Keach Hagey & Jeff Horwitz, *The Facebook Files: Facebook Tried to Make Its Platform a Healthier Place. It Got Angrier Instead.*, WALL ST. J. (Sept. 15, 2021, 9:26 AM), <https://www.wsj.com/articles/facebook-algorithm-change-zuckerberg-11631654215> (discussing “Facebook Files” leaked by whistleblower Frances Haugen). Empirical academic work backs up the proposition that emotionally salient stories (including false ones) spread more readily online. See Carlos Carrasco-Farré, *The Fingerprints of Misinformation: How Deceptive Content Differs from Reliable Sources in Terms of Cognitive Effort and Appeal to Emotions*, HUMS. & SOC. SCI. COMM’NS, Dec. 29, 2022, 468, at 2, <https://www.nature.com/articles/s41599-022-01174-9> [<https://perma.cc/KCL9-8VGA>]; Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCIENCE 1146, 1146 (2018) (finding false news spreads more than true, in part because it triggers more emotional reactions). In particular “[a]nger encourages partisan, motivated evaluation” of information and increases the salience of partisan cues, demonstrating that emotions “affect what citizens perceive to be political reality.” Brian E. Weeks, *Emotions, Partisanship, and Misperceptions: How Anger and Anxiety Moderate the Effect of Partisan Bias on Susceptibility to Political Misinformation*, 65 J. COMM’NS 699, 699 (2015). At the same time, other empirical research undermines the broader contention that the internet or social media are causing polarization. See, e.g., Levi Boxell et al., *Cross-Country Trends in Affective Polarization* 26–34 (Nat’l Bureau of Econ. Rsch., Working Paper No. 26669, 2021), [https://www.nber.org/system/files/working\\_papers/w26669/w26669.pdf](https://www.nber.org/system/files/working_papers/w26669/w26669.pdf) [<https://perma.cc/G3RM-8F7G>] (finding that internet penetration is not associated with polarization internationally and that the U.S. has experienced the most rapid growth in polarization); Levi Boxell et al., *Greater Internet Use Is Not Associated with Faster Growth in Political Polarization Among US Demographic Groups*, 114 PROC. NAT’L ACAD. SCI. 10612, 10612 (2018).

81. Benkler, *supra* note 80, at 49. See generally BENKLER ET AL., *supra* note 80, at 286–87.

engagement. This, in turn, increases the false information's virality and spread. This level of identity-based polarization and related media environment differs markedly from that of the not-so-distant past, in which a handful of mainline broadcast news channels created a space of shared belief about facts in the world, including election results.<sup>82</sup>

Against this backdrop, not only the truth of a given fact, but also the very possibility of belief in facts across perspectives, becomes elusive.<sup>83</sup> As Dan Kahan's research on cultural cognition has demonstrated, identities contribute to how facts themselves are perceived.<sup>84</sup> Or as Hannah Arendt famously observed, "[i]n an ever-changing, incomprehensible world," masses can reach the point where "at the same time, [they] believe everything and nothing, think that everything [is] possible and that nothing [is] true."<sup>85</sup>

Arendt presciently described another factor that contributes to our current antidemocratic threat: the desire to view complex historical changes as the

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82. Nate Persily has pointed to the decline of established mainstream media as creating a void that was filled by populist nationalism online. Nathaniel Persily, *The 2016 Election: Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63, 64 (2017). See generally NATHANIEL PERSILY, KOFI ANNAN FOUND., *THE INTERNET'S CHALLENGE TO DEMOCRACY: FRAMING THE PROBLEM AND ASSESSING REFORMS* (2019), <https://pacscenter.stanford.edu/publication/the-internets-challenge-to-democracy-framing-the-problem-and-assessing-reforms> [<https://perma.cc/59PF-TZU7>] (providing a modern analytical framework for the international Kofi Annan Commission on Elections and Democracy in the Digital Age).

83. Amanda Taub identified a similar key goal of disinformation in contemporary Russia: "By eroding the very idea of a shared reality, and by spreading apathy and confusion among a public that learns to distrust leaders and institutions alike, [disinformation] undermines a society's ability to hold the powerful to account and ensure the proper functioning of government." Amanda Taub, *'Kompromat' and the Danger of Doubts*, N.Y. TIMES (Jan. 16, 2017), <https://www.nytimes.com/2017/01/15/world/europe/kompromat-donald-trump-russia-democracy.html>; see also ZEYNEP TUFEKCI, TWITTER AND TEARGAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST 229 (2017) ("The aim of twenty-first-century [authoritarian] powers is to break the causal chain linking information dissemination to the generation of individual will and agency, individual will and agency to protests, and protests to social movement action. Rather than attempt to break the first link, information dissemination, censorship through information glut focuses on the second link, weakening the agency that might be generated by information."). These tactics are not limited to political power; the tobacco industry's now well-known efforts to manufacture doubt about the harms of smoking is a prominent private sector example of similar dynamics. NAOMI ORESKES & ERIK CONWAY, *MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING* 23 (2010).

84. Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 2 (2011). See generally Dan M. Kahan, *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851 (2012) (reporting the results of an original study demonstrating the effects of cultural cognition on perceptions of simulated protests involving constitutional issues).

85. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 382 (2d ed. 1962).

product of a simple cause.<sup>86</sup> Such explanations often lean on identity-based categories to respond to the hunger for an overarching explanation for historically contingent and often unexplainable losses, injustices (real or perceived), or misfortunes.<sup>87</sup> The Nazis were perhaps the leading example of this type of propaganda strategy. As historian Benjamin Carter Hett describes: “The realities that Germans faced after 1918 were all but unacceptable: a lost war that had cost the nation almost two million [lives], a widely unpopular revolution, a seemingly unjust peace settlement, and economic chaos accompanied by huge social and technological change” and globalization.<sup>88</sup> The Nazis gave voice to the crushing loss many Germans felt, and an explanation to make sense of that incomprehensible world.<sup>89</sup>

While there is significant debate in the political science literature, prominent research suggests that countries in the transitional space between full democracy and closed authoritarianism are at most risk of political instability, while the most stable states are full democracies and full autocracies.<sup>90</sup> Among those to have reached this conclusion is the Political Instability Task Force, which is a group of researchers convened by the U.S.

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86. Arendt described this phenomenon as “supersense,” that is, when totalitarian ideologies “pretended to have found the key to history or the solution to the riddles of the universe.” *Id.* at 457. It is supersense that gives “the contempt for reality its cogency, logicity, and consistency.” *Id.* at 458. She observes that totalitarian destruction of human dignity springs from this need for total consistency because “[n]o ideology which aims at the explanation of all historical events of the past and at mapping out the course of all events of the future can bear the unpredictability which springs from the fact that men are creative, that they can bring forward something so new that nobody ever foresaw it.” *Id.*

87. The present moment is characterized by a media and cultural environment in which information-flow, the economy, and political life are increasingly fragmented, divided, and untethered. Hannah Arendt noted an earlier but similar shift. As David Luban describes, Arendt explained “that nineteenth century capitalism’s production of ‘superfluous wealth and superfluous men’ shredded the traditional European class system and created a mass society of atomized individuals, who no longer understood their place in the world, and were therefore ripe for recruitment into mass movements peddling meaning.” David Luban, *Hannah Arendt Meets QAnon: Conspiracy, Ideology, and the Collapse of Common Sense* 12 (Geo. L. Fac. Publ’ns & Other Works, No. 2384, 2021), (quoting HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 200, 225 (3d ed. 1994)), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3402&context=facpub> [<https://perma.cc/QT3L-U8CG>].

88. BENJAMIN CARTER HETT, *THE DEATH OF DEMOCRACY* 13 (2018).

89. *See generally id.* Barbara Walter has found that a dominant group’s loss of power or status often motivates political violence and is frequently part of the sort of factionalism discussed above. Barbara F. Walter, ‘*These are Conditions Ripe for Political Violence*’: *How Close Is the US to Civil War?*, *GUARDIAN* (Nov. 6, 2022, 4:00 PM), <https://www.theguardian.com/us-news/2022/nov/06/how-close-is-the-us-to-civil-war-barbara-f-walter-stephen-march-christopher-parker> [<https://perma.cc/N5VK-WNB8>]; BARBARA F. WALTER, *HOW CIVIL WARS START* 63 (2022).

90. This transitional space is sometimes referred to as “anocracy.” Walter, *supra* note 89.

Central Intelligence Agency in 1994 to study the factors and forces affecting the stability of the post-Cold War world.<sup>91</sup> Saliently here, the Task Force found that among partial democracies,<sup>92</sup> those with high levels of factionalism were “an exceptionally unstable type of regime”—with odds of instability over thirty times that of full autocracies.<sup>93</sup> Factionalism, in this context, means the polarized orientation of political groups, particularly around identity-based categories.<sup>94</sup> Factionalism in this sense has increased in the

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91. Jack A. Goldstone et al., *A Global Model for Forecasting Political Instability*, 54 AM. J. POL. SCI. 190, 196–97 (2010); see also *Political Instability Task Force: New Findings*, WILSON CTR., <https://www.wilsoncenter.org/event/political-instability-task-force-new-findings> [<https://perma.cc/6K8G-77LQ>]; WALTER, *supra* note 89; Scott Gates et al., *Institutional Inconsistency and Political Instability: Polity Duration, 1800–2000*, 50 AM. J. POL. SCI. 893, 895–906 (2006) (finding that anocracies are more unstable than full democracies or fully authoritarian states); Ian Bassin, *Is Civil War Coming to America?*, N.Y. TIMES (Jan. 18, 2022), <https://www.nytimes.com/2022/01/18/books/review/how-civil-wars-start-barbara-f-walter-the-next-civil-war-stephen-marche.html>.

For prominent other views, including those highlighting the roles of social inequality, greed, and leaders in causing political instability, see, for example, Grewal, *supra* note 66, which collects citations pointing to economic shocks as a contributor to political instability, decrease in trust, and/or populist rise; CHRISTOPHER BLATTMAN, *WHY WE FIGHT: THE ROOTS OF WAR AND THE PATHS TO PEACE* 14–17 (2022), which identifies five explanations for war: unchecked leaders, intangible incentives, misperceptions, uncertainty, and commitment problems; Frances Stewart, *Horizontal Inequalities and Conflict: An Introduction and Some Hypotheses*, in *HORIZONTAL INEQUALITIES AND CONFLICT: UNDERSTANDING GROUP VIOLENCE IN MULTIETHNIC SOCIETIES* 3 (Frances Stewart ed., 2008), which argues that “horizontal inequalities”—that is, “inequalities in economic, social or political dimensions or cultural status between culturally defined groups”—are an important cause of violent conflict; Paul Collier & Anke Hoeffler, *Greed and Grievance in Civil War*, 56 OXFORD ECON. PAPERS 563 (2004), which argues that economic variables, rather than social ones such as high inequality or a lack of political rights, provide more explanatory power as causes of civil wars; James D. Fearon & David D. Laitin, *Ethnicity, Insurgency, and Civil War*, 97 AM. POL. SCI. REV. 75, 75 (2003), which points to the role of poverty, political instability, rough terrain, and large populations—not ethnic or religious diversity—as factors that explain the risk for civil wars; Paul Collier & Anke Hoeffler, *Greed and Grievance in Civil War* 1–2 (World Bank Dev. Rsch. Grp. Pol’y, Working Paper No. 2355, 2000), which establishes a model whereby greed for, and opportunity to, predate resources fuels grievance and rebellion; and STEPHEN MARCHE, *THE NEXT CIVIL WAR: DISPATCHES FROM THE AMERICAN FUTURE* (2022), which explores the idea that social and economic inequalities could increase civil war risk.

92. Goldstone et al. define partial democracies as “systems in which the chief executive is chosen through competitive elections and [where] political competition is not effectively repressed, but [where] either elections are not fully free and fair, or political participation is not fully open and well institutionalized.” Goldstone et al., *supra* note 91, at 196.

93. *Id.* at 197.

94. “We thus are confident that it is . . . a certain kind of relationship among political elites—a polarized politics of exclusive identities or ideologies, in conjunction with partially democratic institutions—that our categories capture and that most powerfully presages instability.” *Id.* at 198; see also Walter, *supra* note 89.

United States with hyperpolarization.<sup>95</sup> This is not to suggest that the United States is or will be at serious risk of acute political instability, let alone civil war, under any reasonably foreseeable set of facts. My point is instead that retaining strong safeguards for democratic institutions is even more important in the context of high levels of identity-based polarization characteristic of the current United States.

Dominant groups often feel threatened by increasing representation of minority groups,<sup>96</sup> and the idea of sharing power equally with minority groups may stir feelings of victimization in dominant members.<sup>97</sup> Many leaders have pursued propaganda strategies that manipulate a dominant group's feelings or fears of loss into a sense of aggrieved victimhood, then direct that emotion at a group not responsible for it.<sup>98</sup> Hungary provides one notable contemporary example. Prime Minister Victor Orbán has adopted strategies that depend on a victim narrative fueled by identity-based differences.<sup>99</sup> Orbán has cast Hungary as the victim of the imperial designs of globalists,

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95. See Iyengar et al., *supra* note 78, at 131–34 (collecting citations regarding increased polarization).

96. JASON STANLEY, *HOW FASCISM WORKS: THE POLITICS OF US AND THEM* 94 (2018); see also Dehdari, *supra* note 74, at 2 (finding that higher support for radical right parties related to economic shocks is influenced by visibility of immigrants, and collecting citations connecting immigration and support for such parties); Guiso et al., *supra* note 76, at 1 (finding that economic insecurity affects attitudes towards immigrants, thereby increasing support for populism).

97. STANLEY, *supra* note 96, at 94–95. This dynamic is not limited to fragile democracies. “As this group of Americans—Whites who believe the country is for people like them— . . . feel marginalized, in a corner,” Sociologist Samuel Perry explains, “there is more potential for them to become more radical, more militant.” Michelle Boorstein, *Researchers Warn that Christian Nationals Are Becoming More Radical and Are Targeting Voting*, WASH. POST (Mar. 18, 2022, 2:00 PM), <https://www.washingtonpost.com/religion/2022/03/18/white-christian-nationalism-raskin-tlaib-democracy-freethought-secular>. A survey in 2021, for example, found that 56% of Republicans agreed that “[t]he traditional American way of life is disappearing so fast that we may have to use force to save it.” Daniel A. Coz, *After the Ballots Are Counted: Conspiracies, Political Violence and American Exceptionalism: Findings from the January 2021 American Perspectives Survey*, AEI SURV. CTR. ON AM. LIFE (Feb. 11, 2021), <https://www.americansurveycenter.org/research/after-the-ballots-are-counted-conspiracies-political-violence-and-american-exceptionalism> [<https://perma.cc/KB6E-JD5H>]. Hasen has similarly stressed that “[a]t an extreme, such [false] claims [of election fraud] may create the conditions for the subversion of election results, either through violence or other means of altering valid election outcomes.” Hasen, *supra* note 55, at 4.

98. “The exploitation of the feeling of victimization by dominant groups at the prospect of sharing citizenship and power with minorities is a universal element of contemporary international fascist politics.” STANLEY, *supra* note 96, at 95. Those leaders seek to accumulate power by “promising to alleviate the feeling of victimization by punishing that group.” *Id.* at 99, 101; see HETT, *supra* note 88, at 6 (arguing that Hitler’s “most important gift was to tap into the anger of people who felt they were the victims of political humiliation and economic hardship”).

99. Franklin Foer, *Victor Orbán’s War on Intellect*, ATLANTIC (June 2019), <https://www.theatlantic.com/magazine/archive/2019/06/george-soros-viktor-orban-ceu/588070>.

including George Soros, who seek to build a European empire and wipe Hungary and traditional Hungarians from its face.<sup>100</sup> Demographic shifts in the United States, which is expected to become a majority-minority country in the next few decades,<sup>101</sup> may contribute to the appeal of anti-minority political rhetoric.

The rise of new forms of antidemocratic politics, changes in the global economy, identity-based polarization, a fractured media environment that is financially incentivized to reinforce consumer identity, and majority reaction to demographic shifts not only contribute to possible antidemocratic threats in the United States, but also illustrate the importance of shoring up its democratic institutions. Public perception of election results and electoral integrity are fundamental to democratic legitimacy and transfers of power that ensure that publics can in fact choose their leaders. For these reasons, false statements about election outcomes should be understood as uniquely important to upholding the First Amendment's fundamental democratic

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100. Orbán asserts that he alone can “defend the integrity of the family, the nation, and Christendom against ‘the holy alliance of Brussels bureaucrats, the liberal world media, and insatiable international capital.’” See Foer, *supra* note 99. Globalists like Soros, Orbán says, see immigration “as a chance to replace the European Union of nation states with a multicultural empire of mixed populations . . . [in] an alliance with multinational power groups . . . [and] financial speculators.” *Id.*; see also Shaun Walker, *George Soros: Orbán Turns to Familiar Scapegoat as Hungary Rows with EU*, GUARDIAN (Dec. 5, 2020), <https://www.theguardian.com/world/2020/dec/05/george-soros-orban-turns-to-familiar-scapegoat-as-hungary-rows-with-eu> [<https://perma.cc/2D2G-RDHU>] (“We are fighting an enemy that is different from us. Not open, but hiding; not straightforward but crafty; not honest but base; not national but international; does not believe in working but speculates with money; does not have its own homeland but feels it owns the whole world.”). Russian President Vladimir Putin, too, has created a propagandistic narrative to stoke feelings of Russian victimhood at the hands of the West, and to create a basis for retribution against Russia’s alleged persecutors. See Steven Zeitchik, *Americans May Be Greatly Underestimating the Impact of 10 Years of Putin’s Propaganda*, WASH. POST (Mar. 22, 2022, 2:00 PM), <https://www.washingtonpost.com/technology/2022/03/22/putin-propaganda-pozdorovkin-qa/>; *Decision Taken on Denazification, Demilitarization of Ukraine—Putin*, TASS RUSSIAN NEWS AGENCY (Feb. 23, 2022), <https://tass.com/politics/1409189> [<https://perma.cc/JPJ9-32YE>]; Miriam Berger, *Putin Says He Will ‘Denazify’ Ukraine. Here’s the History Behind That Claim*, WASH. POST (Feb. 24, 2022), <https://www.washingtonpost.com/world/2022/02/24/putin-denazify-ukraine/>; see also TIMOTHY SNYDER, *THE ROAD TO UNFREEDOM* 165 (2018) (“In the Russian invasion [of Crimea], the strong used the weapons of the weak—partisan and terrorist tactics—in order to pretend to be the weak.”).

101. SANDRA L. COLBY & JENNIFER M. ORTMAN, U.S. CENSUS BUREAU, P25-1143, PROJECTIONS OF THE SIZE AND COMPOSITION OF THE U.S. POPULATION: 2014 TO 2060 (2015) (“[B]y 2044, more than half of all Americans are projected to belong to a minority group (any group other than non-Hispanic White alone); and by 2060, nearly one in five of the nation’s total population is projected to be foreign born.”).

purpose—and ensuring that the public’s commitment to democracy cannot be turned against itself.

### III. COMBATING LIES ABOUT ELECTION RESULTS

Practically speaking, how might governments or private actors respond to lies about election results? What legal and policy changes might we institute that would further First Amendment values? This Part lays out avenues to deter and reduce the spread of knowing lies about election outcomes.

#### A. Enforcement of Laws Prohibiting Election-Subverting Conduct

One key way to deter lies about election results is to enforce existing laws targeting election-related conduct. Both federal and state laws regulate the processes of collecting, counting, and certifying votes—and provide penalties for obstructing or subverting those processes, conspiring to do so, or engaging in election fraud, intimidation, or suppression.<sup>102</sup> Those laws include prohibitions on ballot box stuffing, false vote tabulations, vote buying, and intimidation of election officials.<sup>103</sup> In addition, the First Ku Klux Klan Act, passed during Reconstruction, further criminalizes conspiracy “to injure, oppress, threaten, or intimidate any person . . . in the exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same.”<sup>104</sup>

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102. *See, e.g.*, 52 U.S.C. § 10307(c) (paying voters to register in an election where a federal candidate is on the ballot); 18 U.S.C. § 597 (paying voters to vote in an election where a federal candidate is on the ballot); *id.* § 1952 (vote buying through the mail-in states where vote buying is a bribery offense); 52 U.S.C. § 20511 (vote buying where purchased registrations or votes are voidable under state law); 18 U.S.C. § 245(b)(1)(A) (intimidation of voters through physical duress); 52 U.S.C. § 20511 (physical or economic intimidation in connection with registration to vote in a federal election); 18 U.S.C. § 594 (physical or economic intimidation in connection with voting in a federal election); *id.* § 610 (intimidating a federal employee in connection with an election); *id.* §§ 241–42 (malfeasance by election officials acting under color of law, including ballot box stuffing, rendering false vote tabulations, or preventing valid voter registrations or votes from being given effect in any election); 52 U.S.C. §§ 10307(c), 10307(e), 20511 (prohibiting the same in an election where a federal candidate is on the ballot); 18 U.S.C. § 1512 (obstruction and conspiracy to obstruct an official proceeding); *id.* § 371 (conspiracy to defraud the United States).

103. *See* 18 U.S.C. § 610; 52 U.S.C. §§ 10307, 20511.

104. 18 U.S.C. § 241 (originally enacted as Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 140, 141); *see also id.* § 242 (prohibiting anyone acting under the color of law from wilfully subjecting any person “to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States”).

Enforcing existing laws aimed at ensuring election integrity may reduce the incentives to knowingly lie about election outcomes because the aim of spreading election lies may be to justify, legitimize, or act as cover for unlawful actions to affect what would otherwise be an electoral loss. The federal indictment of President Trump, for example, charged him with a conspiracy against rights in violation of the Klan Act and alleged that he “pursued unlawful means of discounting legitimate votes and subverting the election results” of the 2020 election that were built on “lies that there had been outcome-determinative fraud.”<sup>105</sup> Election lies may be less attractive if laws prohibiting the conduct of election subversion are more strongly enforced.

Laws aimed at prohibiting election-subverting conduct, or conspiracy or solicitation of that conduct, generally raise no First Amendment concerns. Ballot box stuffing, for example, is conduct, not speech, as is obstructing the counting of electoral votes. Nor does using election lies to justify unlawful conduct transform that conduct into speech for First Amendment purposes.<sup>106</sup> Randall Eliason, former Chief of Public Corruption at the D.C. U.S. Attorney’s office, has pointed out that even if I honestly believe that “a bank has cheated me and owes me money, that doesn’t mean I can rob the bank to get my money back.”<sup>107</sup> A similar logic applies in First Amendment law: the fact that I engage in an activity for a reason related to protected speech or expression—say, I break environmental laws because I want to express my strong view that climate change does not exist or I assassinate a politician

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105. Superseding Indictment, *supra* note 3, at 1–2.

106. President Trump’s lawyers appear to have embraced this argument. See Michael S. Schmidt & Maggie Haberman, *Trump Election Charges Set Up Clash of Lies Versus Free Speech*, N.Y. TIMES (Aug. 3, 2023), <https://www.nytimes.com/2023/08/02/us/politics/trump-indictment-lies-vs-free-speech.html> (statement of John Lauro, one of Trump’s defense attorneys) (“What the government would have to prove in this case, beyond a reasonable doubt, is that speech is not protected by the First Amendment, and they’ll never be able to do that.”); Zhang, *supra* note 5 (statement of John Lauro) (“This is an attack on free speech and political advocacy. . . . Our defense is going to be focusing on the fact that what we have now is an administration that has criminalized the free speech and advocacy of a prior administration during the time that there’s a political election going on.”); @todayshow, TIKTOK (Aug. 2, 2023), <https://www.tiktok.com/@todayshow/video/7262770078859414826> [<https://perma.cc/48FC-QKLC>] (Lauro arguing that “this is the first time that the First Amendment has been criminalized . . . [and] the first time a sitting president is attacking a political opponent on First Amendment grounds and basically making it illegal to state your position and engage in political advocacy”); CNN, *Trump’s Attorney: First Amendment Protected Trump’s Speech*, YOUTUBE (Aug. 1, 2023), <https://m.youtube.com/watch?v=GW7Bixvkc0> [<https://perma.cc/34VF-2WW3>] (Lauro arguing that political speech has “an almost absolute protection”).

107. Randall Eliason, *Breaking Down Trump’s January 6 Indictment*, SIDEBARS (Aug. 2, 2023), <https://www.sidebarsblog.com/p/breaking-down-trumps-january-6-indictment> [<https://perma.cc/65XE-TLXN>].

because I passionately disagree with the policies she plans to enact—does not render my illegal conduct somehow protected speech, let alone render my prosecution per se unconstitutional.<sup>108</sup> Were it otherwise, no law could be enforced.

To be sure, the First Amendment requires a heightened mens rea in some contexts involving covered speech or association. For example, under the right of association, in order for membership in a group to be penalized, the First Amendment requires specific intent to further the group’s unlawful activities.<sup>109</sup> In the context of incitement, speech can be constitutionally restrained when it is intended and “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>110</sup> And, when a public figure brings a defamation claim, the defamatory statement must be made with “knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>111</sup> In those contexts, then, lack of that mens rea is a constitutional bar on liability. None of these contexts involve conduct, however. And none stand for the principle that because I have a political *reason* to engage in unlawful conduct, the constitution immunizes that conduct from all regulation.

While intimidation; conspiracy, solicitation, and aiding and abetting; or fraud charges could face First Amendment challenges, each is almost certainly foreclosed by existing law. With regard to intimidation, the Supreme Court has long made clear that “threats of violence are outside the First Amendment.”<sup>112</sup> And it recently held that only subjective recklessness of the threatening nature of one’s statements is required for a stalking conviction to conform to First Amendment standards.<sup>113</sup> Most voter and election official intimidation laws require specific intent, and so are

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108. This is a distinct issue when compared to that raised by expressive conduct (say, I burn a flag to express my opposition to a war), where the conduct itself is engaged to express a message or may be perceived as doing so. The analysis in that context, too, is not about whether *I* intend to express a message through my conduct, but whether the *government’s* reasons for regulating my conduct are related to what it expresses (or is perceived to express). See *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (asking if the governmental interest “is unrelated to the suppression of free expression”); Amanda Shanor & Sarah E. Light, *Anti-Woke Capitalism, the First Amendment, and the Decline of Libertarianism*, 118 NW. U. L. REV. 347, 404–09 (2023). Free exercise law has, since *Employment Division v. Smith*, 494 U.S. 872 (1990), embodied a parallel principle. There is considerable question about whether the newly configured Supreme Court will overturn *Smith*, but currently there is no similar movement to overrule *O’Brien*.

109. *Spence v. Washington*, 418 U.S. 405, 406–07 (1974) (per curiam).

110. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

111. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

112. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

113. *Counterman v. Colorado*, 600 U.S. 66, 69 (2023).

presumably constitutionally permissible; any that do not might be cured with a subjective recklessness interpretation or amendment.<sup>114</sup>

Conspiracy, solicitation, and aiding and abetting claims raise similar issues. Even though these crimes are carried out by words—like fraud, perjury, many antitrust violations, and a host of other crimes—both conspiracy and solicitation have long fallen outside of the First Amendment’s borders.<sup>115</sup> The Supreme Court recently avoided reaching the constitutionality of a federal law that prohibits “encouraging or inducing” unlawful immigration by interpreting the law in question to reach only the crimes of solicitation and aiding and abetting, which, like conspiracy, require intent to bring about a particular unlawful act.<sup>116</sup> Those sorts of crimes, the Court explained, reach “no further than speech integral to unlawful conduct,” which “has no social value” and therefore “is unprotected,” noting that the Court has “applied this principle many times.”<sup>117</sup> Fraud, too, has long been deemed outside of the First Amendment and included on the Court’s lists of uncovered speech.<sup>118</sup> Thus, while lies in public discourse on which no one relies cannot be banned, the Court was clear in *Alvarez* that “[w]here false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.”<sup>119</sup> The fact that conspiracy, solicitation, and fraud are conducted through words,

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114. See generally 174 AM. JUR. *Trials* § 23 (2022).

115. KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 6–7, 41–76 (1992) (listing communication-related crimes communications that generally do not generate First Amendment attention, including conspiracy, bribery, and perjury, and describing categories of activities generally beyond the First Amendment’s ambit, such as agreements, offers, and threats); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768 (2004) (describing the way in which many activities that are colloquially considered speech remain untouched by the First Amendment, including antitrust and securities regulation, criminal solicitation, and most of evidence law); Mark Tushnet, *The Coverage/Protection Distinction in the Law of Freedom of Speech—An Essay on Meta-Doctrine in Constitutional Law*, 25 WM. & MARY BILL RTS. J. 1073, 1074 (2016) (“Similar examples pervade the law.”).

116. *United States v. Hansen*, 599 U.S. 762, 766 (2023). The Court similarly avoided ruling on the scope of § 230 of the Communications Decency Act, which shields internet companies from liability for the speech others post on their platforms, by turning to principles of secondary liability. *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 490 (2023); *Google, L.L.C. v. Gonzalez*, 598 U.S. 617, 622 (2023) (per curiam).

117. *Hansen*, 599 U.S. at 783.

118. *United States v. Alvarez*, 567 U.S. 709, 717 (2012).

119. *Id.* at 723 (citing *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)) (noting that fraudulent speech generally falls outside the protection of the First Amendment).

then, does not immunize conspirators, solicitors, or those who engage in fraud from liability.

Existing caselaw does not fully answer *why* those crimes are not “speech” for constitutional purposes. We might imagine that the sociological basis for the lack of coverage for conspiracy, solicitation, aiding and abetting, antitrust violations, and contracts lies in the relatively strong and cohesive norms around agreements and promises. As I have argued elsewhere, broad agreement about how expression “works” in the world often leads to the treatment of those activities as conduct for constitutional purposes.<sup>120</sup> As for fraud and perjury, like malpractice, those actions involve strong norms around reliance—another context where there is often no First Amendment coverage.<sup>121</sup>

Regardless of the ultimate reasoning, laws that prohibit election interference and subversion, including conspiracy and solicitation of those crimes, are almost certainly constitutional. Those laws should be strongly enforced, both to directly protect election integrity and to deter knowing lies about election outcomes.

#### *B. Executive Action and Enactment of Laws Combating Election Lies*

Like the enforcement of laws prohibiting election-subverting conduct, it is similarly clear that governments may encourage private media companies, even vigorously, to take down, take action against, and adopt policies to prevent the spread of election lies without infringing on the First Amendment rights of media consumers. In *Murthy v. Missouri*, the Supreme Court rejected on standing grounds a challenge to the work of, among others, the Federal Bureau of Investigation (“FBI”) and the Cybersecurity and Infrastructure Security Agency (“CISA”) to pressure social media platforms to combat election-related misinformation.<sup>122</sup> For example, the FBI and CISA met with the platforms prior to the 2020 and 2022 elections, “alerted the platforms to posts containing false information about voting, as well as pernicious foreign influence campaigns that might spread on their sites,” and “forwarded third-party reports of election-related misinformation to the platforms.”<sup>123</sup> Federal, state, and local governments constitutionally can, and should, take similar efforts to encourage social media platforms to combat misinformation about election results—including in the 2024 election. And

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120. See Shanor, *supra* note 34, at 323.

121. *Id.* at 349.

122. 603 U.S. 43, 70 (2024).

123. *Id.* at 53.

they should convey concern to traditional media outlets about election-result misinformation that those outlets disseminate. Referencing his experience working in the federal government, Justice Brett Kavanaugh noted in oral arguments that officials have long called up the media to give feedback on coverage.<sup>124</sup>

Governments at the federal, state, or local levels could also conceivably pass laws that forbid false statements of fact about the outcome of elections, similar to existing state laws about election inputs, and enforce them through direct civil administrative or criminal sanctions.<sup>125</sup> The marked institutional concerns about the threat of incumbent abuse that augur against criminal or regulatory sanctions for core political speech, however, counsel against direct governmental regulation of lies about election results.

As an alternative, governments could create private rights of action through which voters who were deceived by lies about election results could sue those who published or distributed them. To be constitutional, tort liability would need to be limited to lies about a final (generally judicially) established factual outcome of an election, not an opinion about it; contexts when the plaintiff relied on the false statement of fact; and when the publisher made the false statement with actual malice.<sup>126</sup>

It is important to identify the precise harm such a cause of action might target. We could conceptualize the harm as one to the election or democracy generally. But what would that mean exactly, and how might a plaintiff bring a concrete case? We could analogize election denial cases to cases of presumed damages, where a plaintiff need not show an individual harm.<sup>127</sup> Yet current law on presumed damages would make this approach

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124. At argument, Justice Kavanaugh, who previously worked in the Bush White House, said to Principal Deputy Solicitor General, Brian Fletcher: “I guess I had assumed, thought, experienced government press people throughout the federal government who regularly call up the media and—and berate them. . . . You said the anger here was unusual. I guess I wasn’t—wasn’t entirely clear on that from my own experience.” Transcript of Oral Argument at 27, *Murthy*, 603 U.S. 43 (No. 23-411). The statement drew courthouse laughter, after which Fletcher responded: “I guess I will say I bet this is not the first time that there has been profanity or intemperate language in exchanges between White House or agency communications staff and members of the press.” *Id.* at 28.

125. In 2018, Democrats introduced a law that would prohibit falsehoods made with the “intent to impede or prevent another person from exercising the right to vote.” Transgressors found guilty of violating the law could face a \$100,000 fine and up to five years in prison. Matt Ford, *Is Lying About an Election Free Speech or Fraud?*, NEW REPUBLIC (July 27, 2018), <https://newrepublic.com/amp/article/150265/lying-election-free-speech-fraud> [<https://perma.cc/64AG-PH59>].

126. For a discussion of the actual malice standard and elements of tortious speech, see *supra* Part I.

127. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310–11 (1986).

challenging. The Supreme Court has rejected presumed damages for abstract constitutional rights, citing both the difficulty of placing values on abstract rights and the related potential of using tort law to punish unpopular people:

[D]amages based on the “value” of constitutional rights are an unwieldy tool for ensuring compliance with the Constitution. History and tradition do not afford any sound guidance concerning the precise value that juries should place on constitutional protections. Accordingly, were such damages available, juries would be free to award arbitrary amounts without any evidentiary basis, or to use their unbounded discretion to punish unpopular defendants.<sup>128</sup>

The same concerns acutely exist in the context of lies about election results.

The better questions are if and how individual voters are concretely harmed by lies about stolen elections. First, voters may experience a range of expected harms: they may vote differently in following elections or choose not to vote at all, they may contribute time or campaign contributions differently, and they may face employment, business, or reputational repercussions for expressing views in reliance on the defendant’s lies. Such harms may be difficult to quantify, but they are the grist of ordinary tort law. Voters who are deceived by lies about stolen elections may also experience dignitary harms. Here, torts against defendants who deprive or create obstacles to the plaintiff’s ability to vote—that is, interfere with the inputs of an election—are instructive.<sup>129</sup> In those cases, the Supreme Court has made clear that

[i]n the eyes of the law [the] right [to vote] is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of the damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the value of the right.<sup>130</sup>

This is the “money value of the particular loss that the plaintiff suffered—a loss of which each member of the jury has personal knowledge. It is *not* the value of the right to vote as a general, abstract matter, based on its role in our history or system of government.”<sup>131</sup>

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128. *Id.* at 310; *see also* *Carey v. Phipps*, 435 U.S. 247, 263 (1978).

129. *See* HASEN, *supra* note 20, at 114 (“Although *Mansky* did not reach the issue, the government could probably require websites and platforms with large numbers of users, such as major social media companies, to remove demonstrably false election speech from their sites.”).

130. *Stachura*, 477 U.S. at 311 n.14.

131. *Id.* (citations omitted).

A similar harm exists with regard to lies about election outcomes. It is the deprivation of the autonomy to vote, speak, contribute, and advocate—to *participate*—in our democracy, which depends on shared facts about elections. Interference with a person’s autonomy and intrusion into their right to make decisions for themselves—particularly about matters of importance—may constitute dignitary harms through their disregard for the deceived individual’s worth.<sup>132</sup> Deceiving a voter that an election was stolen may harm an individual in that way. While that harm may be hard to measure because it does not have a market price, it is nonetheless a *real* harm.<sup>133</sup> The value of that autonomy is also something jurors have personal knowledge of. This makes sense: democracy is constitutionally valuable not as an abstract idea, but as the participation of individuals across the country. Protecting the autonomous participation of citizens of equal worth—the social practice of democracy—is at the core of First Amendment values.

Before elaborating the appropriate First Amendment standards that would apply to such a private right of action, it is worth asking: would this approach remedy the spread or risks of lies about election outcomes? Would it be a helpful remedy above and beyond the other efforts to combat such disinformation or other actions we might take, such as fact checking, funding alternative sources of media, or facilitating a less politically polarized media environment? Certainly, tort liability is not the panacea for election disinformation. Even considering the narrower category of lies about election results, tort liability would pose its own normative and institutional challenges. It should be considered in addition to, not instead of, other longer-term efforts, such as facilitating a less polarized media ecosystem through support for public broadcasting and local journalism.

There are reasons to believe that civil liability would be a helpful remedy, however, and potentially a relatively swifter one. Why? Civil liability would alter the financial incentives that shape media business models and currently encourage the spread of election falsehoods. It could financially incentivize traditional and social media companies not to publish or republish false statements about election outcomes, provided § 230 of the Communications Decency Act did not shield social media companies from such liability.<sup>134</sup> There is a critical choke point in the spread of disinformation from obscure

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132. Stephen D. Sugarman & Caitlin Boucher, *Re-Imagining the Dignitary Torts*, 14 J. TORT L. 101, 105 (2021) (quoting Denise G. Reaume, *Indignities: Making a Place for Human Dignity in Modern Legal Thought*, 28 QUEEN’S L.J. 61, 87 (2002)).

133. Because some of these harms may be difficult to quantify, lawmakers might consider statutory damages.

134. *See* 47 U.S.C. § 230.

parts of the internet to the public at large. Research has shown that the key way that disinformation becomes ubiquitous is when obscurely published ideas are picked up and distributed by mainstream television and print outlets, such as *Fox News*, *USA Today*, and *The New York Times*.<sup>135</sup> This is a crucial point. Without the republishing of lies about election outcomes by those larger media companies (coming from little-known or prominent sources), people like my grandmother, an avid TV news watcher, might not receive them—let alone be doused by a firehose of them.<sup>136</sup>

A central reason that media companies publish or do not take down election lies is that there is profit in them, as many have recognized; there is a huge base of people who would like those lies to be true and will tune in or otherwise give their attention to those lies in an information economy based on scarce and valuable attention. Liability would incentivize media to avoid peddling known falsehoods about election outcomes and their legitimacy, or at least dampen current incentives. The proposal of such laws might also encourage those companies to take more robust private actions to avoid their enactment—which are likely to be the fastest and possibly most effective reforms, as discussed below. By contrast, structural media reforms, which may be most likely to reduce the democratic threat of election lies long term, cannot be implemented quickly.

Any form of tort liability would be significantly constitutionally constrained, even in light of the uniqueness of factual speech about election results to First Amendment law. First, an intent standard is constitutionally required.<sup>137</sup> Two standards in somewhat analogous contexts are informative: (1) the actual malice standard applicable in defamation cases against public figures,<sup>138</sup> which requires clear and convincing evidence that a statement was made with knowledge that it was false or with reckless disregard of whether it was false or not, and (2) in the context of groups that advocate the violent overthrow of the government, the requirement of proof of intent to further the organization's illegal aims.<sup>139</sup> It is arguable that the standard for private defamation—where a plaintiff must only prove that a statement was false and made with ordinary negligence with respect to the truth or falsehood of the

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135. See FARIS ET AL., *supra* note 80, at 109.

136. See *id.* at 131 (observing that “tightly insulated echo chamber[s],” such as Breitbart and the Daily Caller, “proved immensely powerful” in influencing the larger discourse of the 2016 presidential campaign and indirectly setting the agendas of mainstream news sources like *The New York Times*).

137. Cf. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

138. *Id.* at 280.

139. See *Scales v. United States*, 367 U.S. 203, 229 (1961).

statement—may be constitutionally adequate.<sup>140</sup> But the important constitutional interest in robust and free flowing political discourse augurs in favor of the actual malice standard. Media companies and their counsel are also deeply familiar with that standard already because it is the prevailing rule they must follow to avoid defamation liability when publishing statements about public figures.

A second important limitation springs from a key reason that lies about election inputs and outcomes can be constitutionally regulated: reliance. In some sense, this is about causation. Did the plaintiff reasonably rely on the defendant's material falsehood? And should that reliance be assessed wholesale or retail? With regard to First Amendment standards in contexts such as perjury, advertising, applying for a job, and malpractice, the answer is wholesale. The inquiry is into the nature of the relationship: doctor/patient, witness/court, advertiser/consumer, and applicant/employer. We do not ask if the court in a given case relied on a lying witness to decide if the First Amendment applies. Instead, it is decided at the level of social relationship,<sup>141</sup> as the Court did in *Alvarez*. That approach should be the case for lies about election inputs and outputs as well.

How might this work? Consider, for example, if my friend Ben is at a bar, ranting that the 2000 election—the election of *Bush v. Gore*—was stolen. As with Xavier Alvarez, it is difficult to see any relationship of reliance at play. (We do not normally consider the bar-goer/bar-goer relationship one of reliance.) Accordingly, Ben's assertion about the election should be protected, just as Alvarez's lie-without-reliance was. By contrast, consider Rachel Maddow on her show, the President tweeting, Ben in a press release in his role as Director of the ACLU's Speech, Privacy, and Technology Project, an Insta-influencer with 100 million followers, or the Chair of the Democratic Party or the Federal Election Commission on a Sunday morning news show. It seems clear that reliance is far more likely in relationships between the public and prominent speakers acting in their public figure role than between Ben and anyone at a bar. The concept here is in some sense like the public figure doctrine in defamation, but where the probative inquiry is

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140. *Sullivan*, 376 U.S. at 280.

141. *See* Shanor, *supra* note 34, at 357. By contrast, tort law requires justifiable reliance be assessed retail in fraud cases—meaning each plaintiff must prove her reliance on the defendant's misrepresentation. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 11 (2020). Fraud falls categorically outside of the scope of the First Amendment. The First Amendment standard operates by social category—so that, for example, all cases of fraud do not each become questions of constitutional law—though individual torts or criminal liability may require a higher standard in given cases.

about a relationship of informational reliance.<sup>142</sup> Note that the question of reliance for First Amendment purposes may overlap with questions of harm for purposes of the tort, but these questions are distinct.

Third, to be constitutional, such laws could only prohibit lies about the *facts* of election outcomes, not *opinions* about them.<sup>143</sup> The First Amendment has long made a sharp distinction between facts and opinions, and it permits reduced levels of scrutiny in a number of contexts regarding false facts.<sup>144</sup> This is part of why fraud, for example, can be banned without raising any First Amendment concern.<sup>145</sup> By contrast, opinion is subject to strict scrutiny. The Supreme Court reached this issue in *United States v. United Foods*, which invalidated a mandated subsidy that funded opinion advertising about which mushroom was “best.”<sup>146</sup> Because the “best” mushroom is a matter of opinion, the Court held the First Amendment robustly protected advertisers’ claims.<sup>147</sup> Likewise, in order to pass constitutional muster, a cause of action could only extend to false statements of fact, not opinions about election results (as some of the broader state laws discussed above now attempt to do).

This is not to create a magic words requirement or an easily evaded standard. When a purported opinion implies an assertion of fact it is treated as a fact for First Amendment purposes, as the Supreme Court has long recognized in the context of defamation.<sup>148</sup> Whether a statement is one of fact or opinion is an objective standard evaluated from the perspective of the listening public. That is why there is no First Amendment distinction between “Jones is a liar” and “In my opinion, Jones is a liar.”<sup>149</sup> For this reason, an

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142. See generally *Wells v. Liddy*, 186 F.3d 505, 531–33 (4th Cir. 1999) (explaining that “public figures” may have to meet a higher burden of proof when alleging defamation on account of their public status).

143. See, e.g., Post, *supra* note 16, at 649 (“The *Falwell* decision draws a sharp distinction between the communication of facts within public discourse, which can be subject to legal supervision for truth or falsity, and the communication of opinions or ideas within public discourse, which is constitutionally immunized from such supervision.”).

144. See generally BRANNON, *supra* note 9.

145. See, e.g., *United States v. Stevens*, 559 U.S. 460, 468 (2010) (listing fraud as one of the “historic and traditional categories” of speech not protected by the First Amendment); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563–64 (1980) (“[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity.” (citations omitted)).

146. See 533 U.S. 405, 408 (2001); see also *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 19 (1986).

147. See *United Foods*, 533 U.S. at 409–11.

148. See *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 11–21 (1990).

149. *Id.* at 18–19.

election denier could not evade liability through statements of purported opinion that the public would understand as an assertion of fact. At the same time, expressions of hyperbole, puffery, and other “imaginative expression,” even if stated as fact, are treated as opinion if reasonable listeners would understand them as such.<sup>150</sup>

To illustrate, the head of Al Gore’s presidential campaign (or Al Gore himself) could face liability for saying, after all litigation was said and done, that “Gore won the election,” but not for saying that Gore won the popular vote (true fact),<sup>151</sup> nor for saying that the Supreme Court’s decision in *Bush v. Gore* was wrong, antidemocratic, or morally bankrupt, and that Gore should be president (opinion). Similarly, consider the context of increasingly antidemocratic voting laws and partisan gerrymandering. Could the Chairperson of the Democratic Party face liability for arguing that “Brian Kemp stole the Georgia governor’s election” on Sunday morning news shows when, against the background of antidemocratic voter-suppressing laws and partisan gerrymandering, the courts determined that Kemp prevailed? I believe so. The Chairperson could express outrage at the voter suppression, opine that Stacey Abrams would have won without it, argue that gerrymandering is unfair, and maintain that America isn’t a real democracy. By contrast, consider a candidate who regularly asserts before her election that “I believe the election is going to be rigged,” and who argues after the election: “I don’t think the election was fair. It doesn’t seem right to me. [The other party] didn’t play by fair rules. I don’t accept the results of the election.”<sup>152</sup> Do those statements express assertions of objective fact? That would be a question of what reasonable listeners would understand and would depend on context.

Critics might also question whether an incumbent president would be immune from suit, and so one of the most important voices that voters rely upon would not be affected by a cause of action for election denial. Just as presidential immunity should track the First Amendment doctrine with regard to incitement, presidents who knowingly or recklessly spread lies about election results should not be understood to be acting even within the outer perimeter of the Office of the President. Which is to say, even or perhaps especially, a sitting president should not be immune from such a suit.

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150. *Greenbelt Coop. Pub. Ass’n v. Bresler*, 398 U.S. 6, 13–14 (1970).

151. See generally FED. ELEC. COMM’N, 2000 PRESIDENTIAL GENERAL ELECTION RESULTS, [https://www.fec.gov/resources/cms-content/documents/FederalElections2000\\_PresidentialGeneralElectionResultsbyState.pdf](https://www.fec.gov/resources/cms-content/documents/FederalElections2000_PresidentialGeneralElectionResultsbyState.pdf) [<https://perma.cc/BEP8-ZESU>].

152. Many thanks to Rick Hasen for this incisive hypo.

Some might further question whether actions limited to false facts and by the actual malice standard would do any good. This is a serious critique. The *New York Times v. Sullivan* standard has faced thoughtful criticism.<sup>153</sup> Such a high standard for election denial would protect against many of the new threats to democracy it might create. It may also ameliorate the most egregious lies about election outcomes by candidates and companies that could later face costly litigation.<sup>154</sup> Tort liability might alter the balance of business incentives that currently encourage media companies to spread known false facts, which could place a break on the spread of election denier lies. Repeated factual assertions that an election was stolen or votes flipped may also have different audience effects than opinions that don't objectively imply as much.

The Dominion case has brought these points into vivid public view. Dominion Voting Systems sued Fox for \$1.6 billion for its claims that Dominion's machines rigged the 2020 presidential election and fraudulently threw it to Joe Biden.<sup>155</sup> Discovery in the case unearthed emails and text messages that show that Fox hosts and executives knew that Biden fairly won the election, and that Dominion did not rig it, but kept airing those lies.<sup>156</sup> Privately, Fox's chairman, Rupert Murdoch, called Trump's election fraud claims "really crazy stuff," Fox Senior Vice President called it "MINDBLOWINGLY NUTS," and host Sean Hannity said that "I did not believe it for one second."<sup>157</sup> But despite privately arguing that "Sidney Powell is lying" and that her claims were "shockingly reckless," Tucker Carlson and other Fox hosts repeatedly aired them, with Tucker describing her claim on air as "amount[ing] to the single greatest crime in American history. Millions of votes stolen in a day. Democracy destroyed. The end of our centuries' old system of . . . government."<sup>158</sup>

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153. See, e.g., *McKee v. Cosby*, 139 S. Ct. 675, 676–82 (Feb. 19, 2019) (mem.) (Thomas, J., concurring in denial of certiorari but calling for a reconsideration of the *Sullivan* standard); Genevieve Lakier, *Is the Legal Standard for Libel Outdated? Sarah Palin Could Help Answer*, WASH. POST (Feb. 3, 2022, 2:58 PM), <https://www.washingtonpost.com/outlook/2022/02/03/sullivan-nyt-palin-free-press>.

154. See generally *U.S. Dominion, Inc. v. Fox News Network, LLC*, No. N21C-03-257, 2021 WL 5984265 (Del. Super. Ct. Dec. 16, 2021) (illustrating the risk of liability for a media company that broadcasts false statements about the results of an election).

155. Dominion's Brief in Support of Its Motion for Summary Judgment on Liability of Fox News Network, LLC and Fox Corporation at 1–2, 9, *U.S. Dominion, Inc.*, Nos. N21C-03-257, N21C-11-082 (Feb. 16, 2023), 2023 WL 2500589.

156. *Id.*

157. *Id.* at 1, 9, 141.

158. *Id.* at 4, 28–29.

The communications between Fox hosts and executives that came to light make several things clear: they felt compelled to continue airing false claims that the election was stolen out of fear that Fox viewers would flee the network for others that would broadcast what they wanted to hear. The communications illuminate that their motivations were financial—protecting the brand, stock price, and their jobs. Carlson texted Hannity about a Fox reporter who pointed out that there was no evidence of fraud: “It needs to stop immediately, like tonight. It’s measurably hurting the company. The stock price is down. Not a joke.”<sup>159</sup> The identity-affirmation business model and related financial incentives ran counter to telling the truth.

Dominion Voting Systems was subsequently held to have sufficiently pled actual malice,<sup>160</sup> and later won summary judgment as to falsity, leaving the question of actual malice to the jury.<sup>161</sup> Following that decision and hours after the jury for the trial was selected, Fox agreed to pay the voting company \$787.5 million to settle the case, one of the largest for a defamation case in history.<sup>162</sup>

The *Dominion* case demonstrates that the high *Sullivan* standard—that a false statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not”<sup>163</sup>—may be highly speech-protective but is not toothless. The magnitude of the settlement figure puts news organizations on notice that the sort of knowing misinformation that Fox commentators peddled about the 2020 election can have dramatic financial consequences—a possibility that may alter business and journalistic practices

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159. *Id.* at 31.

160. *U.S. Dominion Inc.*, 2021 WL 5984265, at \*19, \*28.

161. *U.S. Dominion Inc.*, 2023 WL 2730567, at \*18–21.

162. Lora Kelley, *Fox News Settled Its Suit, but Similar 2020 Election Cases Are Pending*, N.Y. TIMES (Apr. 19, 2023), <https://www.nytimes.com/2023/04/19/business/smartmatic-fox-dominion-lawsuits.html>. A related case brought by another voting company, Smartmatic, is still ongoing and currently in discovery. See *Smartmatic USA Corp. v. Fox Corp.*, No. 151136/2021, 2023 WL 3075267 (N.Y. Sup. Ct. Apr. 25, 2023). Like in the *Dominion* case, the plaintiffs’ complaint was held to have sufficiently pled actual malice by the trial court. See *Smartmatic USA Corp.*, 2022 WL 685407, at \*29 (Mar. 8, 2022). That decision was upheld on appeal. *Smartmatic USA Corp.*, 183 N.Y.S.3d 402 (App. Div. 2023). See generally Jan Wolfe & Helen Coster, *Fox News Loses Bid to Dismiss Dominion Defamation Lawsuit Over Election Coverage*, REUTERS (Dec. 16, 2021, 5:20 PM), <https://www.reuters.com/legal/government/fox-news-loses-bid-dismiss-dominions-16-billion-defamation-lawsuit-2021-12-16> [<https://perma.cc/W29D-NGP9>]; Alison Durkee, *Smartmatic Settles With Newsmax: Here’s Where It and Dominion’s Other Lawsuits Stand*, FORBES (Sept. 26, 2024, 4:10 PM), <https://www.forbes.com/sites/alisondurkee/2024/09/26/smartmatic-goes-to-trial-against-newsmax-today-heres-where-it-and-dominions-other-lawsuits-stand> [<https://perma.cc/H4VT-443C>]; Elizabeth Williamson, *With New Ruling, Sandy Hook Families Win over \$1.4 Billion From Alex Jones*, N.Y. TIMES (Nov. 10, 2022), <https://www.nytimes.com/2022/11/10/us/politics/alex-jones-sandy-hook-damages.html>.

163. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

around the country. The settlement also demonstrates that we are not in a fully post-truth world: facts still matter. We will have to wait and see if the ruling alters the behavior of Fox and other major media companies and, if so, to what extent. Fox's press release stating that the settlement reflects the company's "continued commitment to the highest journalistic standards"<sup>164</sup> raises legitimate questions about the likelihood that even extremely large defamation settlements, at least if few in number, will significantly alter industry practices—and may caution against overly rosy views of tort liability as a form of democracy protection.

But the case demonstrates something else: the need for a cause of action other than defamation to incentivize media companies to truthfully report election results. Had Fox hosts not focused on Sidney Powell's astonishing claims that a particular company, Dominion, had rigged its voting machines, manipulated vote counts, and was even "owned by a company founded in Venezuela to rig elections for the dictator Hugo Chávez"—there would be no cause of action to shed light on the media company's knowing lies about the election.<sup>165</sup> Absent a defamed individual or company, the business model continues to incentivize election lies. In a world in which not only Dominion but many others had viable claims, media companies might be differently incentivized.

Fourth, what should be the timeframe for adjudicating the facts of election outcomes? Legitimate concerns about the outcome of a contested election, fraud, or corruption may arise. Robust discussion of those concerns is absolutely critical to both democratic legitimacy and First Amendment values. For this reason, liability should only attach not immediately after an election, but instead after a final disposition of any and all election challenges, such that only statements made after and with knowledge of that disposition or with reckless disregard of it could be subject to liability. This longer timeframe, as well as the process provided by judicial review of election-related facts, is important to safeguard robust and free-flowing discussion of election irregularities or corruption and to encourage media coverage and public awareness of both concerns and factual findings of fraud or corruption.

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164. Press Release, Fox News Media, Statement on Fox News' Settlement with Dominion Voting Systems (Apr. 18, 2023), <https://press.foxnews.com/2023/04/fox-news-and-dominion-voting-systems-reach-settlement> [<https://perma.cc/XH4Y-U8J3>].

165. Susana Granieri, *Fox Settles Defamation Suit with Venezuelan Businessman Over Fraudulent Election Claims*, FIRST AMEND. WATCH (Apr. 10, 2023), <https://firstamendmentwatch.org/fox-settles-defamation-suit-with-venezuelan-businessman-over-fraudulent-election-claims> [<https://perma.cc/2BSL-9M2N>].

Finally, the proposal raises hard questions about courts as institutional factfinders. Courts are human and fallible. Judges acquire their positions through a political process. And the judiciary, like the rest of American society, is increasingly polarized. Courts may in good faith decide election rigging cases incorrectly. Or an election may be stolen but insufficient evidence may exist to prove as much in court. In such contexts, a court might conclude that the factual outcome of an election was not sufficiently well established for tort liability to attach. But the deeper concern cannot be sidestepped: there are abiding risks of judicial review.

Questions about the legitimacy, composition, and polarization of the judiciary exacerbate these concerns. Many thoughtful commentators argue that the U.S. Supreme Court, and the federal judiciary more broadly, face a legitimacy crisis, in part because gerrymandering and structural features, such as the Senate and Electoral College, have produced minority rule. While these worries apply generally, they raise even more acute concerns in the law of democracy context. These concerns may also weigh in favor of private action like those outlined below or other efforts to ameliorate the deep divides and tribalization of our current politics.<sup>166</sup>

It increasingly appears that court and democracy law reforms (such as federal legislation to limit gerrymandering and shore up voting rights, term limits for Supreme Court justices, and electoral college reform) are needed to address the structural problems underlying minority rule and concerns over judicial legitimacy in the U.S.—reforms that currently face steep political obstacles. U.S. courts may nonetheless be a relatively viable institutional option to limit the most egregious antidemocratic lies about stolen elections, at least in the shorter term. This is in part because the difficulty of amending the U.S. Constitution, the process of judicial confirmation, and life tenure—the constitutional features that make some forms of court and democracy law reform difficult—make political moves to fully capture the courts relatively more challenging in the U.S. than in many other constitutional democracies.<sup>167</sup>

At the same time, courts have significant institutional advantages in sifting evidence, assessing credibility, and requiring truthful testimony under threat of penalty. Courts are also already making factual decisions about election outcomes, gerrymandering, voting rights, the January 6 prosecutions, the

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166. Cf. Robert Post, *The Unfortunate Consequences of a Misguided Free Speech Principle* (Feb. 21, 2023), <https://ssrn.com/abstract=4255938> [<https://perma.cc/J77E-NPXW>] (arguing that different, not more, speech is in need to cure our broken politics).

167. As Scheppele observes, the “U.S. constitutional order simply has more choke points that make seizing control of the courts difficult.” Scheppele, *supra* note 67, at 552 n.21.

*Dominion* suit, and presidential immunity, to name but a few, and so are already deeply involved with these very questions. Moreover, professional judicial norms, and to a lesser extent professional norms for members of the bar more generally, stress objectivity, at least as to facts. That both federal and state courts—across any ideological lines one might draw—rejected the many false claims of election fraud following the 2020 election suggests that institutional advantages and professional norms retain some force. An outcome-driven or attitudinal model of judging cannot easily explain those cases, let alone their virtual unanimity.

It appears, however, that at least five of the co-conspirators named in the January 6 indictment are lawyers,<sup>168</sup> supporting Schepple's observation that contemporary efforts to consolidate power in antidemocratic ways may be made under cover of law. The actions and arguments of Trump's co-conspirator attorneys, in light of Schepple's insights, raise important questions for the bar and what can or should be done to encourage attorneys to support the Constitution and democracy.<sup>169</sup> At the same time, key Republican lawyers, including those within the Trump administration, pushed back against baseless election fraud claims and efforts to subvert the 2020 election. Those include former Vice President Mike Pence, who stood to remain in office had he agreed to throw out slates of electors or at least pause the vote certification;<sup>170</sup> former federal judge Michal Luttig, who

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168. News outlets have speculated that those co-conspirators include attorneys Rudy Giuliani, John Eastman, Sidney Powell, Jeffrey Clark, and Kenneth Chesebro. See Holly Bailey et al., *Here Are the Trump Co-Conspirators Described in the DOJ Indictment*, WASH. POST (Aug. 1, 2023), <https://www.washingtonpost.com/national-security/2023/08/01/doj-trump-indictment-trump-coconspirators/>; Zach Schonfeld & Rebecca Beitsch, *What to Know About the 6 Co-Conspirators in Trump's Indictment*, HILL (Aug. 1, 2023, 9:24 PM), <https://thehill.com/regulation/court-battles/4132487-what-to-know-about-the-six-co-conspirator-s-in-trumps-indictment> [<https://perma.cc/Z6RU-S972>].

169. Over a hundred law school deans, organized by the ABA Task Force for American Democracy, recently issued a letter affirming that “training for the next generation of lawyers should include . . . [t]eaching our students to uphold the highest standards of professionalism, which includes a duty to support our constitutional democracy” and “[e]ncouraging our students to support and defend the Constitution and the rule of law.” Letter from the Deans of American Law Schools (June 18, 2024), <https://www.americanbar.org/content/dam/aba/administrative/news/2024/deans-letter-061824.pdf> [<https://perma.cc/P2M2-8BT6>].

170. Mike Pence (@Mike\_Pence), X (Jan. 6, 2021, 1:02 PM), [https://twitter.com/Mike\\_Pence/status/1346879811151605762/photo/2](https://twitter.com/Mike_Pence/status/1346879811151605762/photo/2) [<https://perma.cc/B84S-FY4J>] (using Pence's Letter to Congress to articulate that vesting the Vice President with unilateral authority to decide presidential contests would be entirely antithetical to our constitutional design); see also Aaron Glantz, *Read Pence's Full Letter Saying He Can't Claim 'Unilateral Authority' to Reject Electoral Votes*, PBS NEWS (Jan. 6 2021, 1:43 PM), <https://www.pbs.org/newshour/politics/read-pences-full-letter-saying-he-cant-claim-unilateral->

advised the Vice President that he did not have the constitutional power to change the electoral vote;<sup>171</sup> White House counsel Pat Cipollone, who raised concerns about President Trump’s activities on and leading up to January 6;<sup>172</sup> Attorney General Bill Barr, who announced in December 2020 that federal authorities had found no outcome-affecting election fraud;<sup>173</sup> Department of Justice officials Jeffrey Rosen and Richard Donoghue, who organized and threatened to lead a mass resignation of DOJ officials if Trump appointed Jefferey Clark Attorney General in order for him to pursue baseless election fraud claims;<sup>174</sup> and Georgia Secretary of State Brad Raffensperger, who rejected President Trump’s entreaties to “find” necessary votes to overturn Georgia’s election results,<sup>175</sup> among others.

This is not to diminish the risks attendant to judicial oversight of election lies. It is worth remembering that in Wisconsin, only one vote—that of conservative state Supreme Court Justice Brian Hagendorn—prevented the

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authority-to-reject-electoral-votes [<https://perma.cc/L6MH-U7ZB>] (analyzing and showcasing Pence’s letter in which he rejects the notion that the Vice President has unilateral authority to decide the electoral votes).

171. Michael Luttig (@judgeluttig), X (Jan. 5, 2021, 9:53 AM), [https://twitter.com/judgeluttig/status/1346469787329646592?s=20&t=Td\\_Y4qShrbLDB8\\_O-PkQxg](https://twitter.com/judgeluttig/status/1346469787329646592?s=20&t=Td_Y4qShrbLDB8_O-PkQxg) [<https://perma.cc/3SYL-NV49>] (“The only responsibility and power of the Vice President under the Constitution is to faithfully count the electoral college votes as they have been cast.”); Stephanie Lai, *J. Michael Luttig, a Conservative Judge, Tweeted His Analysis that the Vice President Had No Power to Alter the Election Results*, N.Y. TIMES (June 16, 2022), <https://www.nytimes.com/2022/06/16/us/j-michael-luttig-tweets-pence-trump.html>; Politico Staff, *The Never-Before-Told Backstory of Pence’s Jan. 6 Argument*, POLITICO (Feb. 18, 2022, 5:00 AM), <https://www.politico.com/news/2022/02/18/former-judge-beat-trump-january-6-00010056> [<https://perma.cc/LYM2-F8JM>].

172. Lisa Mascaro & Farnoush Amiri, *Trump WH Counsel Cipollone Gives 1/6 Testimony, New Info*, ASSOCIATED PRESS (July 8, 2022, 5:33 PM), <https://apnews.com/article/capitol-siege-crime-donald-trump-presidential-elections-election-2020-fcec3b203ff165d2952ef119ef892352> [<https://perma.cc/5KB5-GQQH>]; *Pat Cipollone Says He Agreed with AG Barr that There Was No Widespread Election Fraud: Clip of Seventh Hearing on Investigation of January 6 Attack on the U.S. Capitol*, C-SPAN (July 12, 2022), <https://www.c-span.org/video/?c5023241/pat-cipollone-agreed-ag-barr-widespread-election-fraud>.

173. Ryan Lucas, *Barr Says No Election Fraud Has Been Found by Federal Authorities, All Things Considered*, NPR (Dec. 1, 2020, 4:16 PM), <https://www.npr.org/2020/12/01/940819896/barr-says-no-election-fraud-has-been-found-by-federal-authorities> [<https://perma.cc/A2NF-FXRC>].

174. Barbara Sprunt, *Former DOJ Officials Detail Threatening to Resign En Masse in Meeting with Trump*, NPR (June 23, 2022, 8:05 PM), <https://www.npr.org/2022/06/23/1107217243/former-doj-officials-detail-threatening-resign-en-masse-trump-meeting> [<https://perma.cc/AP5T-8JA3>].

175. Amy Gardner & Paulina Firozi, *Here’s the Full Transcript of the Call Between Trump and Raffensperger*, WASH. POST (Jan. 5, 2021, 1:15 PM), [https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356\\_story.html](https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html).

overturning of that state's election.<sup>176</sup> If anything, these events point to the fragility of American democratic institutions and their dependence on individuals, particularly those willing to place democracy over professional advancement. But this is and will be the case with or without a private right of action that more strongly counters existing incentives—both financial and professional—to engage in election fraud and boost the virality of election lies. The persistence of those incentives demands that we consider a range of measures to deal with antidemocratic threats.

### C. *The Role of Private Actors in Combatting Election Lies*

Private action is one of the most critical and promising methods to stop the spread of lies about election results and to communicate truthful ones. Television news producers and newspaper editors, like social media decision-makers, have the most control and influence over our collective information ecosystem and can act nimbly to stop election lies, even if they face implementation challenges.

To date, however, the actions of X (the company formerly known as Twitter) and Facebook to fight or even slow election lies has been uneven, and major television outlets have been influential spreaders of election lies.<sup>177</sup> Bracketing Elon Musk's takeover, Twitter's earlier actions are instructive. Twitter adopted a civic integrity policy in 2020 that said its platforms could not be used to further false or misleading information about *both* the inputs and the results of elections.<sup>178</sup> It details the forms of disinformation about

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176. *See generally* Trump v. Biden, 951 N.W.2d 568 (Wis. 2020) (rejecting a challenge that would have invalidated enough votes to change the results of the 2020 Presidential Election in Wisconsin); Wis. Voters All. v. Wis. Elections Comm'n, 985 N.W.2d 449 (Wis. Dec. 4, 2020) (unpublished table decision), <https://electioncases.osu.edu/wp-content/uploads/2020/11/WVA-v-WEC-Order-Denying-Petition.pdf> [<https://perma.cc/3LGM-G9EF>]; Dahliah Lithwick & Mark Joseph Stern, *Jack Smith's Indictment of the Entire Legal Profession*, SLATE (Aug. 2, 2023, 5:42 PM), <https://slate.com/news-and-politics/2023/08/rudy-giuliani-co-conspirators-jack-smith-indictment.html> [<https://perma.cc/4L3C-P37F>].

177. *See, e.g.*, Kate Conger et al., *Confusion and Frustration Reign as Elon Musk Cuts Half of Twitter's Staff*, N.Y. TIMES (Nov. 4, 2022), <https://www.nytimes.com/2022/11/04/technology/elon-musk-twitter-layoffs.html>. Elon Musk's purchase of Twitter, combined with his own apparent willingness to trade in disinformation, may exacerbate the risk that social media poses in terms of the spread of election lies—particularly after he fired half Twitter's staff, including hollowing out its content moderation teams. *See id.*

178. *Expanding Our Policies to Further Protect the Civic Conversation*, X BLOG (Sept. 10, 2020), [https://blog.x.com/en\\_us/topics/company/2020/civic-integrity-policy-update](https://blog.x.com/en_us/topics/company/2020/civic-integrity-policy-update) [<https://perma.cc/8TR5-RNCK>]. In the leadup to the 2020 election, Twitter cracked down on the dissemination of election lies, reflected in its then-existing Civic Integrity Policy. *See* Alison

election inputs that the policy prohibits. As to election results, the policy articulated that Twitter “will label or remove false or misleading information intended to undermine public confidence in an election or other civic process” including “disputed claims that could undermine faith in the process itself [such as] unverified information about election rigging, ballot tampering, vote tallying, or certification of election results,” as well as “[m]isleading claims about the results or outcome of a civic process which calls for or could lead to interference with the implementation of the results of the process.”<sup>179</sup> This policy is consistent with the proposal outlined here.

Twitter applied that policy to #StopTheSteal and related content following the storming of the U.S. Capitol. It announced in January 2022, however, that it had stopped applying that policy to 2020 election lies in March of 2020.<sup>180</sup> In other words, Twitter enforced its civic integrity policy to election lies for only two months—and only told the public it had stopped doing so nearly two years later. Laws requiring companies to disclose such policies and their enforcement efforts would enhance public oversight and corporate accountability for these actions—and such mandated disclosures appear likely constitutional, even in the heartland of social media platforms, after the Supreme Court’s recent decision in the *NetChoice* cases.<sup>181</sup>

Market forces have failed to incentivize media companies to combat election lies. Because a significant contingency of consumers may exist who believe or would like to believe such lies, there are alluring pressures on both traditional and social media companies to cater to those views. This is one reason that tort liability may be necessary, particularly to address actors who face the steepest market incentives to spread election lies.

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Durkee, *Twitter Will Label Trump’s Misleading Tweets About Election Fraud and Premature Claims of Victory*, FORBES (Sept. 10 2020, 2:47 PM), <https://www.forbes.com/sites/alisondurkee/2020/09/10/twitter-will-label-trumps-misleading-tweets-about-election-fraud-and-premature-claims-of-victory> [<https://perma.cc/H9VG-V6UN>]. After Twitter became X in 2023, X adopted a similar policy, albeit one that differed somewhat in semantics. See *Civic Integrity Policy*, X (Aug. 2023), <https://help.x.com/en/rules-and-policies/election-integrity-policy> [<https://perma.cc/VCQ9-BQVJ>] (“You may not use X’s services for the purpose of manipulating or interfering in elections or other civic processes, such as posting or sharing content that may suppress participation [or] mislead people about when, where, or how to participate in a civic process.”).

179. X BLOG, *supra* note 178.

180. Daniel Dale, *Twitter Says It Has Quit Taking Action Against Lies About the Election*, CNN (Jan. 28, 2022, 8:06 PM), <https://www.cnn.com/2022/01/28/politics/twitter-lies-2020-election/index.html> [<https://perma.cc/K276-GFXW>].

181. See *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2409 (2024) (reversing and remanding lower court preliminary injunctions against Florida and Texas laws “curtail[ing] the platforms’ capacity to engage in content moderation”).

Market forces, however, may not be the entire story. Another reason that some media leaders may have been hesitant to restrict the spread of election lies is a commitment to a stylized, libertarian understanding of free expression. Leaders of both traditional and social media companies are important interpreters of the First Amendment and observers of political institutions and shifts, so their views about free speech and democracy may be hugely influential. Facebook executives, for example, have long expressed a deep commitment to free expression. Mark Zuckerberg has argued that free expression and its role in democracy critically informs Facebook moderation policies. In 2019, he testified before Congress: “Our policy is that we do not fact-check politicians’ speech. And the reason for that is that we believe that in a democracy it is important that people can see for themselves what politicians are saying.”<sup>182</sup> Twitter executives, too, at one point argued that the site was the “free-speech wing of the free-speech party.”<sup>183</sup> More recently, after taking over Twitter, Elon Musk asserted that under his leadership the site would adopt even more speech-protective policies.<sup>184</sup>

One might think that companies are driven only by profit and talk of free expression is nothing but a marketing ploy. There is a long and large body of literature on the purposes of the corporation, spanning the Berle and Dobbs debates to current arguments about “woke” capitalism, environmental, social, and corporate governance (“ESG”), and “stakeholderism” versus shareholder primacy.<sup>185</sup> A deep engagement with those debates is beyond the scope of this

182. C-SPAN, *Testimony of Mark Zuckerberg During Hearing Before U.S. House Financial Services Committee*, YOUTUBE (Oct. 23, 2019), [https://www.youtube.com/watch?v=FE\\_Xf33FocA](https://www.youtube.com/watch?v=FE_Xf33FocA) [<https://perma.cc/3JY9-VDM9>]; see also Andrew Marantz, *Daily Comment, Facebook and the “Free Speech” Excuse*, NEW YORKER (Oct. 31, 2019), <https://www.newyorker.com/news/daily-comment/facebook-and-the-free-speech-excuse>.

183. Shira Ovide, *Buying Twitter, Elon Musk Will Face the Reality of His Free-Speech Talk*, N.Y. TIMES (Apr. 26, 2022), <https://www.nytimes.com/2022/04/26/technology/twitter-elon-musk-free-speech.html>.

184. *Id.*

185. See, e.g., Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 TEX. L. REV. 1423 (2021); Elizabeth Pollman, *The Making and Meaning of ESG*, 14 HARV. BUS. L. REV. 403 (2024); cf. *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans,’* BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [<https://perma.cc/2WAA-Q84G>] (articulating commitment to all stakeholders); Robert Eccles, *An Open Letter to the Business Roundtable 181*, FORBES (Aug. 19, 2020, 5:59 AM), <https://www.forbes.com/sites/bobeccles/2020/08/19/an-open-letter-to-the-business-roundtable-181> [<https://perma.cc/7ZB4->

Article. Here I make the modest claim that as an empirical matter, executives do sometimes make choices for non-market or market plus other reasons, including based upon views about freedom of expression, democracy, or other principles. I also take the executives of social media companies at their word that free expression values and views of democracy at least on occasion influence their decisions about platform governance. To the degree that is true—as I believe it should be—leaders of media companies should know that First Amendment law and values emphatically do not counsel against taking action to limit the spread of knowing lies about election outcomes. Instead, free speech principles not only permit, but encourage media companies to combat election lies.

Does calling on media companies not to spread or to take down content that advances lies about the outcome of elections place outsized power over our public discourse in private hands? There are important discussions ongoing and to be had about how best to address that issue. But media companies already exert that power, and democracy worldwide is at a critical inflection point. Media leaders should exercise their influence in the public sphere with a clearer understanding of the First Amendment and its commitment to the future of American democracy.

#### IV. CONCLUSION

The combination of hyperpolarization, an attention-based media ecosystem that incentivizes identity-affirming news, and a global wave of antidemocratic politics demands that lawmakers and private actors alike do more to shore up democratic institutions—including fighting election lies. To do so would not only be consistent with the First Amendment but in furtherance of its most fundamental values.

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2BQ5] (“The Business Roundtable wishes to emphasize that the principal objective of a business enterprise is to generate economic returns to its owners.”).