

## Government Falsehoods, Democratic Harm, And the Constitution

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The government’s lies inflict injuries that differ in both degree and kind from those caused by nongovernmental parties’ lies. In other words, the government’s intentional and reckless falsehoods threaten distinct and especially serious harms—both to individual targets and to the public more broadly—precisely because of their governmental source. How, if at all, does the Constitution address the government’s harmful falsehoods? Caroline Mala Corbin investigates this important question in *The Unconstitutionality of Government Propaganda*.<sup>1</sup>

### THE GOVERNMENT’S FALSEHOODS THAT INJURE IDENTIFIABLE INDIVIDUALS IN PARTICULARIZED WAYS

At times, the government deploys falsehoods as weapons to punish its enemies and critics or to coerce its targets’ waiver of their rights. Illustrations include the Mississippi State Sovereignty Commission’s defamatory lies—alleging financial, sexual, and legal misconduct—to the employers, friends, and neighbors of those who fought segregation in the 1950s and 1960s.<sup>2</sup> And the FBI’s false threats to African-American editor and journalist Charlotta Bass during World War II that her newspaper would be shut down “if she continued to equate the fight against Nazism with that for civil rights at home.”<sup>3</sup> And, more recently, New Orleans prosecutors’ fake subpoenas (delivered by police officers to pressure crime victims and potential witnesses into coming forward) that falsely stated “A fine and imprisonment may be imposed for failure to obey this notice.”<sup>4</sup>

Courts have recognized that the Constitution can constrain the government’s lies and other expressive choices that inflict these sorts of individualized injuries. While recognizing that the First Amendment does not—indeed, as a practical matter, could not—bar the government from expressing

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<sup>1</sup> Caroline Mala Corbin, *Trump’s Lies: The Unconstitutionality of Government Propaganda*, 81 OHIO ST. L.J. 815 (2020).

<sup>2</sup> See *ACLU v. Miss.*, 911 F.2d 1066, 1068–70 (5th Cir. 1990).

<sup>3</sup> See AIMEE EDMONDSON, IN SULLIVAN’S SHADOW: THE USE AND ABUSE OF LIBEL LAW DURING THE LONG CIVIL RIGHTS STRUGGLE 27–28 (2019).

<sup>4</sup> See *Singleton v. Cannizzaro*, 956 F.3d 773, 777 (5th Cir. 2020).

its own views when doing the government's business,<sup>5</sup> the Supreme Court has also clarified that

[A] government's ability to express itself is [not] without restriction. Constitutional and statutory provisions outside of the Free Speech Clause may limit government speech. And the Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech.<sup>6</sup>

More specifically, courts have held that the government violates the Free Speech Clause when its falsehoods cause nongovernmental third parties to fire or otherwise retaliate against its critics, when its verbal "campaigns of harassment and humiliation" are reasonably likely to deter its targets' protected speech, and when its threats of punishment silence its critics' speech as effectively as actual punishment.<sup>7</sup>

The Due Process Clause offers an additional check on governmental lies that effectively deprive their targets of their liberties. Examples include law enforcement officers' lies to those in custody that coerce their targets' involuntary waiver of constitutional rights, and governmental falsehoods that deny their targets' meaningful exercise of voting rights or unduly burden women's exercise of their reproductive rights.<sup>8</sup>

#### THE GOVERNMENT'S FALSEHOODS THAT INFLICT DEMOCRATIC HARM

In contrast, some of the government's falsehoods inflict collective harms upon the general public. More specifically, the government's intentional or reckless falsehoods can frustrate democratic self-governance when they deny the public the information it needs to hold the government accountable for its performance. Think, for example, of the government's lies told to stymie political and legal accountability for its misconduct. Think too of governmental efforts to undermine public confidence in truth-seeking institutions—like the press, inspectors general, health professionals, and scientists—more generally—that may challenge the government's preferred narrative. Examples here include the government's false attacks on its critics, opponents, and watchdogs,<sup>9</sup> as well as its falsehoods about a wide variety of facts that seek not only to persuade

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<sup>5</sup> Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207–08 (2015) (“[W]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says . . . . Were the Free Speech Clause interpreted otherwise, government would not work.”).

<sup>6</sup> *Id.* at 208.

<sup>7</sup> See HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION 156–82 (2019) (detailing these cases).

<sup>8</sup> See *id.* at 135–46 (discussing these applications).

<sup>9</sup> See *id.* at 156–63 and 176–82 (documenting examples); RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. ST. L.J. 1301 (2017) (documenting the Trump Administration's attacks on the press).

listeners that a particular false assertion is true but also to inculcate listeners' doubt about the possibility of truth more generally. To be sure, U.S. government speakers are not alone in exploiting these sorts of lies for partisan ends, as these expressive strategies feature prominently in the playbook of authoritarian regimes that spread “disinformation” for political and military ends.<sup>10</sup>

Professor Corbin rightly worries about the government’s falsehoods that interfere with democratic functions and institutions. As she explains:

We are able to hold our government officials accountable because we can vote them, or those who appointed them, out of office. In order for our consent-by-vote to be genuine, we need to know what those entrusted to serve us have done. By making it harder to unearth the truth and harder to see it and believe it when it does see the light of day, government propaganda hampers this fundamental democratic process.<sup>11</sup>

Additionally, she writes:

[T]he onslaught of government propaganda destabilizes truth itself, which not only hinders the press’s ability to perform its watchdog function, but also discourages people from even seeking the truth in the first place. Indeed, this destabilization of truth, along with repetition, cognitive shortcuts, echo chambers, and motivated reasoning, helps explain why government propaganda succeeds. The end result is failure to hold government accountable. Instead of an informed electorate giving or withholding its genuine consent at the ballot box, an ill-informed electorate may be giving or withholding a manipulated or falsified consent.<sup>12</sup>

The government’s falsehoods thus inflict *democratic harm* when they deny the public the information necessary to hold the government accountable for its misconduct, undermine citizens’ ability to make informed voting choices, sabotage the policymaking process when participants cannot rely on others’ assertions, and foster public cynicism about (and disengagement from) democratic self-governance.<sup>13</sup>

These falsehoods inflict democratic harm not only by frustrating the people’s ability to translate their preferences into political change, but also by breaching the relationship of trust between governors and governed promised by a healthy democracy. “The people are the source of the government’s authority and (under various substantial restrictions) even of its policies,” moral philosopher Bernard Williams reminds us. “Government is in some sense a trust; there is a special relationship between government and people, and it is a

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<sup>10</sup> See TOM GINSBURG & AZIZ HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 80–81 (2018); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 106 (2018).

<sup>11</sup> Corbin, *supra* note 1 at 357

<sup>12</sup> *Id.* at 354.

<sup>13</sup> See JOHN L. MEARSHEIMER, WHY LEADERS LIE 84–86 (2011).

violation of this conception for secrecy or falsehood to come between trustee and people.”<sup>14</sup>

In short, we expect our government to refrain from speaking in ways that frustrate democracy. Whether our expectations are constitutionally enforceable, however, is a separate question.

#### NONCONSTITUTIONAL REMEDIES FOR THE DEMOCRATIC HARMS OF THE GOVERNMENT’S FALSEHOODS

Of course, courts are neither the only nor necessarily the best recourse when we’re unhappy, even infuriated, with our government and its expressive choices. Other government actors can (and sometimes do) address some of the government’s lies through statute, counter-speech, even impeachment.<sup>15</sup> And nongovernmental actors can (and sometimes do) exercise their power to resist and rebut the government’s destructive speech. To illustrate, in the summer of 2020 as I write this essay, social media platform Twitter labeled two of President Trump’s posts regarding mail-in voting as “potentially misleading,” and shortly thereafter tagged Trump’s tweets on the George Floyd protests in Minneapolis with a warning that the tweet “violated the Twitter Rules about glorifying violence.” At the same time, Facebook CEO Mark Zuckerberg’s refusal to moderate Trump’s posts met with angry outcries by many of its current and former employees: some Facebook employees threatened to resign if Mr. Zuckerberg did not reverse his position, while others participated in a virtual walkout in protest. Whether any of these efforts will influence the government’s expressive choices, or the democratic harm they sometimes inflict, remains to be seen.

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<sup>14</sup> BERNARD WILLIAMS, *TRUTH AND TRUTHFULNESS: AN ESSAY IN GENEALOGY* 210 (2002); *see also* SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 198 (2015) (“Politically, those in charge of putting our joint moral commitments into action and enforcing them—namely, state officials—are well placed to serve as points of triangulation, expositors, and repositories of our best information about the law and its moral and political underpinnings. We need salient common sources of information to help us locate the relevant moral and legal facts and to identify the content of the joint perception of those facts. We also need to know that officials *believe* these to be the relevant facts, if those officials are to merit the role of a legitimate political (not merely epistemic) authority. Thus, state officials, at least in a democracy, must aspire to be relevant epistemic authorities on the law and on at least that aspect of morality embodied in law. We *should* be able to rely on their transmissions about the content of law, legally relevant morality, and legally relevant facts.”).

<sup>15</sup> *See* NORTON, *supra* note 7, at 220–31 (detailing an array of nonconstitutional responses to the government’s destructive speech); Katherine Shaw, *Impeachable Speech*, 70 EMORY L.J. (forthcoming 2020) (explaining how the efforts to impeach Presidents Andrew Johnson, Richard Nixon, and Bill Clinton “encompassed, among other things, public presidential rhetoric—lies and misrepresentations; statements that took aim at Congress or undermined the rule of law”).

This might lead one to think that the government's falsehoods call for political solutions (like campaigning and voting against governmental liars) rather than legal solutions that take the form of constitutional litigation. But the better understanding, in Corbin's opinion—and mine—is that the Constitution has something to say about the government's choices that subvert democracy. Indeed, political remedies offer limited respite from the democratic harms of the government's lies that successfully thwart political accountability, and the government has additional political incentive to engage in these lies when its preferred constituencies reward them. Judicial review thus provides a critically important check on the government's choices that inflict democratic harm while evading democratic accountability. Along these lines, many thoughtful commentators have wrestled with how and when the Constitution constrains the government's choices that inflict collective democratic harm in contexts like campaign finance reform, gerrymandering, and election law more generally.<sup>16</sup>

#### CONSTITUTIONAL RESPONSES (AND THEIR LIMITS) TO THE DEMOCRATIC HARMS OF THE GOVERNMENT'S FALSEHOODS

Even so, constitutional law is notoriously limited in its ability to address diffuse or collective harms. The democratic harms of the government's falsehoods thus resist redress through traditional constitutional litigation precisely because those harms are so large and generalized in scope.

Some background may be of help. As a threshold matter, the Supreme Court's justiciability doctrine holds that federal courts do not have the constitutional power to adjudicate a claim unless the plaintiff alleges a "concrete and particularized," rather than generalized, injury.<sup>17</sup> This doctrine seeks, among other objectives, to channel collective grievances to the political process for redress. For this reason, the government's falsehoods that inflict more concrete and individualized harms may be more amenable to constraint through constitutional litigation<sup>18</sup> than its falsehoods that inflict democratic, and thus more generalized, harms.

A related question involves whether and when nongovernmental speakers' lies threaten harm sufficient to justify the government's punishment consistent

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<sup>16</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (noting that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry"); see generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (emphasizing the importance of judicial review to protect those who are unable to protect themselves from majorities through the political process).

<sup>17</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>18</sup> See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (recognizing organizational challengers' standing based on their allegations that the federal government's speech designating them as Communist front organizations injured their reputation, and thus their ability to recruit members and raise funds).

with the First Amendment. More specifically, the Court has signaled that a private party's intentional falsehood must inflict "legally cognizable" harm like reputational harm (in the context of defamation), financial harm (in the context of fraud), or physical injury (recall Justice Oliver Wendell Holmes's familiar example of falsely shouting "fire" in a crowded theater<sup>19</sup>) before the First Amendment permits the government to restrain it.<sup>20</sup> Although the government (unlike private parties) has no First Amendment rights of its own, the Court's insistence on a showing of harm in this context reflects concerns relevant to the government's lies as well—more specifically, its search for limiting principles to protect valuable speech (governmental or otherwise) from chilling effects and to restrain the partisan excesses of courts, other government actors, and litigants. Just as courts sometimes fear the overreach of an Orwellian government's Ministry of Truth in regulating our own speech,<sup>21</sup> they may also worry that constitutional constraints on the government's speech will both offend separation of powers principles and invite opportunistic and abusive litigation by governmental critics who themselves have a tenuous relationship with accuracy and fairness.

For these reasons, as I've written elsewhere, some of the government's most catastrophic lies are those most "resistant to redress."<sup>22</sup> I find this deeply frustrating. Professor Corbin does too.

Like Corbin, I have long felt that the threats sometimes posed by the government's speech are both real and underappreciated—indeed, the government's speech can be *more* dangerous than our speech precisely because of its governmental source. And, like Corbin, I find that the Supreme Court's current doctrine fails to grapple fully with the ways in which the government's speech sometimes affirmatively threatens constitutional commitments. And we both think that various strands of constitutional theory and precedent offer opportunities to address this failure.

To this end, elsewhere I've proposed that we ask and answer a series of questions about the consequences of, and the motivations underlying, the government's speech when thinking about whether and when that speech violates the Constitution.<sup>23</sup>

When we look at the effects of the government's speech, I propose that we ask whether the government's speech has altered its targets' choices and opportunities to their disadvantage, and whether a specific constitutional provision forbids the government from causing such harm. Think, for example, of the government's threats that silence dissenters as effectively as jailing them,

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<sup>19</sup> See *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

<sup>20</sup> See *United States v. Alvarez*, 567 U.S. 709, 719 (2012) (plurality opinion).

<sup>21</sup> See *id.* at 723.

<sup>22</sup> NORTON, *supra* note 7, at 134.

<sup>23</sup> See *generally id.* The next three paragraphs' discussion draws extensively from that work.

the government's lies that pressure its targets into relinquishing their constitutional rights as effectively as denying those rights outright, or the government's religious speech that coerces listeners' participation in prayer or other religious observance as effectively as fining or taxing those who fail to partake.

Under certain constitutional understandings, moreover, the government's speech may violate specific constitutional provisions when it inflicts expressive, or dignitary, harm upon its targets: think here of the government's speech, including but not limited to its falsehoods, that communicates a message of disrespect or hostility to its targets based on who they are or what they believe.

We can also look at the government's motives for speaking and ask *why* the government chose to speak in a certain way, and whether a specific constitutional provision denies the government the power to speak for that reason. This can be the case, for example, of the government's speech intended to interfere with constitutionally protected rights, as well as to advance some religions at the expense of others or to harm members of unpopular groups. Focusing on the government's purposes when speaking also offers a plausible limiting principle (one that interests Corbin too): although government speakers (along with the rest of us) need some breathing room to make honest mistakes, we need not leave them room for intentional or reckless falsehoods.

No doubt there are alternative approaches to the constitutional problems raised by the government's speech, and I hope others will continue to explore those possibilities.<sup>24</sup> Professor Corbin's article does exactly that.

To this end, Corbin's article thoughtfully explores whether and when we should understand the Free Speech Clause to prohibit what she calls "the government's propaganda"—that is, "the government's knowing or reckless propagation of verifiably false or misleading statements of fact on matters of public concern."<sup>25</sup>

Drawing from the Free Speech Clause doctrine that applies to the government's regulation of nongovernmental speakers, Corbin seeks to capture the universe of governmental lies most likely to inflict democratic harms. She thus proposes that courts apply strict scrutiny to the government's speech that intentionally or recklessly asserts a verifiably false or misleading statement of fact on a matter of public concern. As she observes, the Court's doctrine already requires judges to make these assessments "albeit not all at the same time"<sup>26</sup> (and albeit not always without difficulty). These assessments thus do "not

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<sup>24</sup>For instance, in addition to the Free Speech Clause and Due Process Clause constraints identified *supra* notes 2–7 and accompanying text, we might also explore Article II's requirement that the President "take Care that the laws be faithfully executed" and Article IV's guarantee to every state "a Republican form of government" as possible constraints on governmental falsehoods that inflict democratic harm. To be sure, these possibilities would rely less on precedent or historical practice than on methodologies emphasizing constitutional structure, purpose, pragmatism, and ethics.

<sup>25</sup>Corbin, *supra* note 1, at 818.

<sup>26</sup>*Id.* at 829.

require difficult and novel determinations of what amounts to self-interest, or evaluation of problematic emotions, or manipulation of cognitive errors” such that courts “need not engage in line-drawing beyond their institutional competence.”<sup>27</sup> Moreover, as she points out, the government is a hardy and self-interested speaker, and thus unlikely to be easily silenced; indeed, there’s value in giving the government additional legal incentives to take care with its speech.<sup>28</sup>

#### CONCLUSION

Along with Professor Corbin, I feel that the government’s falsehoods can—and sometimes do—inflict serious democratic harm, and that political remedies for such harm are decidedly limited. Even as she and I suggest different frameworks for addressing the constitutional challenges posed by the government’s lies, this shared concern inspires our ongoing efforts to identify the Constitution’s constraints on the government’s choices to wield its expressive power in destructive ways.

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<sup>27</sup> *Id.*

<sup>28</sup> *See Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 600 (4th Cir. 2017) (“To the extent that our review chills campaign promises to condemn and exclude entire religious groups, we think that a welcome restraint.”), *vacated and remanded*, 138 S. Ct. 353 (2017).