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WHEN GOVERNMENT LIES: THE CONSTITUTIONAL IMPLICATIONS OF GOVERNMENT'S DELIBERATE FALSEHOODS

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INTRODUCTION

Governments lie. They do so for a wide range of reasons to a wide range of audiences on a wide range of topics. Examples include lies about the justifications for military involvement;[1] lies about whether a government official or agency acted in compliance with law or policy;[2] lies about the existence or scope of a government program;[3] lies to protect government actors from political or legal accountability;[4] lies to secure convictions or accomplish other law enforcement objectives; [5] as well as lies to achieve a wide range of national security or other policy goals, both foreign and domestic.[6]

Courts and commentators have devoted considerable attention to whether and when the First Amendment permits the government to regulate

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[1] Examples include allegations that President Polk lied about the reasons that the United States engaged in war with Mexico, that members of the Johnson Administration lied about the events leading to broader U.S. involvement in Vietnam, and that members of the Bush Administration lied about the reasons for the U.S. invasion of Iraq. *See, e.g.*, Peter W. Morgan, *The Undefined Crime of Lying to Congress: Ethics Reform and the Rule of Law*, 86 NW. U. L. REV. 177, 216-221 (1992) (describing President Polk as lying about the "events leading the United States into the Mexican War"); *id*. at 223 (describing allegations that Presidents Monroe and Madison lied to Congress about various military activities in the territory of Florida); ERIC ALTERMAN, WHEN PRESIDENTS LIE 162 (2004) (describing members of the Johnson Administration as lying about alleged attacks on American ships in the Gulf of Tonkin that led to broad congressional authorization for the use of force in Vietnam); JOHN J. MEARSHEIMER, WHY LEADERS LIE 5 (2011) (describing alleged lied by the Bush Administration in the run-up to the U.S. invasion of Iraq).

[2] *E.g.*, Morgan, *supra* note 1, at 189 (describing allegations that several Reagan Administration officials lied about their involvement in Nicaragua); ALTERMAN, *supra* note 1, at 240-41, 279-88 (same).

[3] *E.g.*, JIM NEWTON, EISENHOWER: THE WHITE HOUSE YEARS 315 (2011) (describing the Eisenhower Administration as falsely claiming that Francis Gary Powers' U-2 plane was an off-track weather plane upon learning that it was missing in Soviet airspace).

[4] *E.g.*, MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 262-77 (2009) (describing Brandeis's efforts in private practice to prove that President Taft had lied about whether he had personally investigated charges against, and prepared a memorandum exonerating, the Secretary of Interior); William H. Simon, *Virtuous Lying: A Critique of Quasi-Categorical Moralism*, 12 GEO. J. LEGAL ETHICS 433, 458 (1999) (describing lies told by government officials as part of Watergate cover-up).

[5] *E.g.*, Davis v. Zant, 36 F.3d 1538 (11th Cir. 1994) (concluding that prosecutor falsely stated to the jury that a key government witness had not confessed to murder); U.S. v. Kojayan, 8 F.3d 1315 (9th Cir. 1993) (concluding that prosecutor falsely stated to the jury that an absent witness could have refused to testify).

[6] *E.g.*, Arthur Sylvester, *The Government Has the Right to Lie*, SAT. EVE. POST, Nov. 18, 1967, at 10 (Kennedy press secretary Arthur Sylvester acknowledged that during Cuban missile crisis he knowingly approved a press release that falsely stated that "the Pentagon has no information indicating the presence of offensive weapons in Cuba.").

lies by *private* speakers.[7] But very little attention has yet been paid to the constitutional implications, if any, of the *government*'s deliberate falsehoods.[8] Indeed, the Court's emerging government speech doctrine has only recently begun to explore the constitutional issues raised by government speech more generally; this doctrine interprets the First Amendment to permit the government to assert a "government speech" defense to free speech claims by private parties who seek to alter or enjoin a government's delivery of its own views.[9] In developing this doctrine, the Court to date has generally emphasized the ubiquity and importance of government speech without yet addressing its potential threats to constitutional values.[10] This Article seeks to explore when, if ever, the Constitution prohibits our government from lying to us.

More specifically, this paper explores when (and why) we find government lies most troubling, when those dangers pose harms of constitutional magnitude, and when nonconstitutional options might more appropriately address those harms. It proposes that the most harmful

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[7] *See* United States v. Alvarez, 132 S.Ct. 2537 (2012) (striking down the Stolen Valor Act's prohibition on certain lies regarding military honors as violating the First Amendment).

[8] David Strauss and Jonathan Varat are among the exceptions. *See* David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 355-58 (1991); Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1108-10 (2006).

[9] Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) ("If [public entities] were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."); Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 553 (2005) (explaining that the government's own speech is "exempt" from free speech clause scrutiny).

[10] *See id.* The only exception to date is the Court's willingness to interpret the Establishment Clause to prohibit government's religious speech under some circumstances. *See* Mary Jean Dolan, *Government Identity Speech and Religion: Establishment clause Limits After* Summum, 19 WM. & MARY BILL RTS. J. 1, 24 (2010) ("[A] large proportion of all establishment clause jurisprudence could be thought of as involving claims about government religious speech, with the other broad category related to government aid."). A number of commentators have pointed out the potential harms of government speech in other contexts and have proposed various approaches for addressing those concerns. *See, e.g.,* Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008); Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1293-94 (2011); Leslie Gielow Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35 (2002); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983 (2005); Helen Norton, *The Measure of Government Speech: Identifying Expression's Source,* 88 B.U. L. REV. 587 (2008); Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648 (2013).

government lies are those told by the government to its own public for non-public reasons, and especially those told to a captive or vulnerable public audience or on matters to which the government has special or monopoly informational access. It identifies possibilities for building on current due process and free speech clause doctrine to address such especially harmful government lies, and suggests that other government lies -- despite their harms – may be more appropriately addressed by means other than constitutional litigation.

I start with several caveats. First, this Article focuses only on the government's deliberate falsehoods, rather than on the many other ways in which the government may deceive or mislead its audience.[11] I chose this narrower scope in part for purposes of manageability, as government deceptions and government inaccuracies describe categories considerably larger than that of government lies. Perhaps more important, I also chose this narrower scope because the moral and instrumental harms caused by intentional lies are arguably greater than those caused by deceptions or inaccuracies more generally,[12] and thus make more immediate demands for attention.

Second, I use "lie" to mean a false statement known by the speaker to be untrue and made with the intention that the listener understand it to be true.[13] To be sure, distinguishing truth from falsity can be deeply

[11] *See* SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 13 (1978) (describing the many ways in which speakers can deceive their audience to include messages meant to mislead them "through gesture, through disguise, by means of action or inaction, even through silence").

[12] For examples of arguments that intentionally deceptive speech is more harmful than unintentionally inaccurate speech, see Mark Spottswood, *Falsity, Insincerity, and the Freedom of Expression*, 16 WM. & MARY BILL RTS. J. 1203, 1235 (2008) ("[T]he harm caused by sincerely-believed false speech is generally outweighed by its capacity to drive argumentation, which in turn furthers the collection, dissemination, and preservation of evidence supporting true beliefs.").

[13] *See* BOK, *supra* note – at 13 (Oxford 1978) (defining a lie as "any intentionally deceptive message which is stated"); DAVID NYBERG, THE VARNISHED TRUTH 50 (1993) ("[W]e can say that lying means making a statement (not too vague) you want somebody to believe, even though you don't (completely) believe it yourself, when the other person has a right to expect you mean what you say."); Mark Tushnet, "Telling Me Lies": The Constitutionality of Regulating False Statements of Fact 2 (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 11-02, 2011) (available at http://ssrn.com/abstract=1737930) (defining a lie as a "false statement known by the person making it to be false and made with the intention that at least some listeners will believe the statement to be true, at least for some period before its falsity becomes evident to the listeners"). Other thoughtful commentators define "lies" in other ways. *See, e.g.*, Seana Shiffrin, Speech Matters: Lying, Morality and the Law 163 (Mar. 31, 2014) (unpublished

complex,[14] and I do not seek to revisit debates about whether the government did or did not lie in any given instance. Instead, although we may well vigorously disagree about the size and shape of the universe of government lies, I assume for purposes of this Article that there *is* a universe of some size and shape.

Third, I acknowledge that it is not always easy to determine whether a particular speaker is a government actor. This Article addresses the collective speech of a government agency or body or the speech of an individual empowered to speak for such a body.[15] Examples might include a President who, in order to build support for military action abroad, tells Congress and the public in her State of the Union address that she has evidence that a foreign government had weapons of mass destruction or had violated American territorial space when she knows that she does not have such evidence. Or an Office of the Surgeon General that undertakes a public education campaign directed at high school students that seeks to increase demand for a food or drug produced by a political ally of the Administration by falsely reporting its health effects. Or a governor's office that issues an investigative report that deliberately and falsely covers up its own incompetence or illegal conduct. Or an agency that posts on its website a press release stating that one of its critics had engaged in misconduct when it knows she had not.

Part I of this Article examines the harms potentially inflicted by government lies, as well as the harms posed by efforts to constrain such lies. More specifically, it examines the various harms that government's deliberate falsehoods may inflict upon individual targets as well as upon the broader public, concluding that the harms imposed -- and indeed, the benefits sometimes conferred -- by government lies vary with the government's motive (e.g., public or selfish), subject matter (e.g., national security or nonemergency), and audience (e.g., foreign or domestic, captive or otherwise). It then examines the substantial chilling, institutional competence, and separation of powers concerns posed by efforts to enforce constitutional limitations on government lies. Part II considers when the

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manuscript on file with the author).

[14] *See, e.g.*, Steven R. Morrison, *When is Lying Illegal? When Should It Be? A Critical Analysis of the Federal False Statements Act*, 43 J. MARSHALL L. REV. 111, 116-17 (2009) (questioning whether truth and falsity can in fact be meaningfully distinguished for certain legal purposes).

[15] *See, e.g.*, Beth Orsoff, *Government Speech as Government Censorship*, 67 S. CAL. L. REV. 229, 248 (1993) ("When a government official sends out a letter, pamphlet, or other written instrument on government stationery or government letterhead or uses any seal of the government, then the official has sent an official government communication.").

dangers threatened by government lies are sufficiently great to trigger constitutional enforcement, and identifies possibilities for building on current due process and free speech clause doctrine to address such especially harmful government lies. Part III suggests that other government lies -- despite their harms – may be more appropriately addressed by means other than constitutional litigation given that constitutional efforts to prohibit such lies pose significant dangers of their own.

PART I
THE POTENTIAL HARMS OF GOVERNMENT LIES AND OF EFFORTS TO CONSTRAIN THEM

This Part starts by exploring when (and why) we find the harms of government lies to be most troubling. More specifically, it finds that government lies can inflict targeted harm to individuals as well as collective harm to the public. It then considers the substantial chilling, institutional competence, and separation of powers concerns posed by efforts to enforce limitations on government lies.

A. The Harms Threatened by Government Lies

Government lies can inflict a wide range of harms.[16] Some of those harms track those caused by lies more generally.[17] And as is the case with lies in general,[18] some government lies may strike us as harmless or even

[16] Of course, this is true of speakers' lies in general and not just of lies by the government. *See, e.g.*, David Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736-37 (1987) ("The case for honesty in all human relations, I believe, rests in part on the importance of treating others with respect: lack of candor often carries with it the implication that the listener is less capable of dealing with the truth, and thus less worthy of respect, than the speaker. The case also rests on a more instrumental ground: the need for trust in the carrying on of human affairs. In a society that placed no special value on truthfulness, all cooperative undertakings would be difficult or impossible.").

[17] I have discussed elsewhere some of the harms threatened by nongovernmental speakers' lies. Helen Norton, *Lies and the Constitution,* 2012 SUP. CT. REV. (2013).

[18] *See* NYBERG, *supra* note -- at 24 ("My view, on the other hand, is that trust in others is a co-operative, life-preserving relationship that often depends upon the adroit management of deception, sometimes even lying, for its very subsistence."); *id.* at 61 ("[T]he moral perfectionist requirement of being set against all deception is like telling us to loathe and distrust all bacteria, including the ones responsible for wine, cheese, and normal digestive functions."); Simon, *supra* note -- at 435 (discussing the value of lies "intended to mitigate or prevent injustice" and "paternalistic lies intended to benefit those deceived by them"). And on the flip side, truth itself -- like lies -- can carry costs as well as benefits. *See, e.g.*, FRIEDRICH NIETSZCHE, ON TRUTH AND LIES IN A NONMORAL SENSE (1873) ("What [men] hate is basically not deception itself, but rather the unpleasant, hated consequences of certain sorts of deception. It is in a similarly restricted sense that man

valuable. In addition, lies by the government sometimes inflict harms that are different in kind or degree from those posed by private speakers' lies.[19]

1. Harms to Individuals

Government lies may inflict individual harms that can take a variety of forms. For example, some government lies can deprive specific individuals of their life or liberty. Examples range from lies told by prosecutors in individual cases[20] to the lies told by a number of government officials in efforts to justify the internment of thousands of Japanese-American citizens during World War II.[21]

Some government lies may damage their individual targets' reputation. Examples include law enforcement agencies that falsely brand targets as

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now wants nothing but truth: he desires the pleasant, life-preserving consequences of truth. He is indifferent toward pure knowledge which has no consequences; toward those truths which are possibly harmful and destructive he is even hostilely inclined.").

[19] *See* Michael Walzer, *Political Action: the Problem of Dirty Hands*, 2 Philosophy and Public Affairs 160-180 (1973) ("Why is the politician singled out? Isn't he like the other entrepreneurs in an open society, who hustle, lie, intrigue, weak masks, smile and are villains? He is not, no doubt for many reasons. . . . First of all, the politician claims to play a different part than other entrepreneurs. He doesn't merely cater to our interests; he acts on our behalf; even in our name. . . . [T]he victorious politician uses violence and the threat of violence – not only against foreign nations in our defense but also against us, and again ostensibly for our good . . . .[T]he sheer weight of official violence in human history does suggest the kind of power to which politicians aspire, the kind of power they want to wield, and it may point to the roots of our half-conscious dislike and unease. The men who act for us and in our name are often killers, or seek to become killers too quickly and too easily.").

[20] *See infra* notes – and accompanying text.

[21] *See* PETER IRONS, UNFINISHED BUSINESS: THE CASE FOR SUPREME COURT REPUDIATION OF THE JAPANESE AMERICAN INTERNMENT CASES 4 (2013) ("The evidence of the government's misconduct in these cases is clear and compelling, and rests on the government's own records. It reveals that high government officials, including the Solicitor General, knowingly presented the Supreme Court with false and fabricated records, both in briefs and oral arguments, that misled the Court and resulted in decisions that deprived the petitioners in these cases of their rights to fair hearings of their challenges to military orders that were based, not on legitimate fears that they – and all Japanese Americans – posed a danger of espionage and sabotage on the West Coast, but rather reflected the racism of the general who promulgated the orders."); Eric L Muller, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 LAW & CONTEMP. PROBS. 285, 228-32 (2005) (describing lies by the executive and military to the public and the courts that sought to justify the internment); Korematsu v. United States, 584 F. Supp. 1406, 1418-22 (N.D. Cal. 1984) (granting Mr. Korematsu's coram nobis petition and describing evidence of government lies in the earlier proceedings).

criminals[22] and government officials who falsely declare certain individuals to have otherwise engaged in misconduct. [23]

The foregoing offers just a few illustrations of government lies that seek to manipulate listeners' decisions (e.g., about whether to imprison or detain a target) or opinions (e.g., about the target of defamation). Of course, lies by the government can seek to manipulate its listeners' opinions and decisions in any number of ways and thus inflict moral harm by undermining listeners' autonomy.

From a Kantian perspective, a deliberate lie inflicts moral harm when a speaker uses her listener as a means to the speaker's own ends without treating the listener as an end in himself.[24] Indeed, most of us generally prefer not to have lies told to us because their assault on our individual autonomy feels manipulative and disrespectful. Given the government's potentially coercive power over its listeners, its lies can carry even greater potential for frustrating listener autonomy, both in terms of the likelihood that such lies will actually be effective in manipulating listeners' decisions and also in terms of the potentially life-shaping consequences of those decisions. These concerns are exacerbated with respect to government lies to a captive or otherwise vulnerable audience -- e.g., to students in public schools -- as well as with respect to government lies on matters to which the government has special or monopoly informational access.

But not every lie reflects a speaker's effort to manipulate her listeners for her own purposes, and thus not every lie may pose an equal affront to individual autonomy. Indeed, many thinkers emphasize that a lie's motive

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[22] Paul v. Davis, 424 U.S. 693, 694 (1976) (describing police department's allegedly defamatory description of the challenger as an "active shoplifter").

[23] For examples of alleged defamation by various government officials, see Chastain v. Sundquist, 833 F.2d 311, 312 (D.C. Cir. 1987) (Congressmember wrote – and released to the press – a letter complaining that legal services attorney was obstructing enforcement of child support laws); Hutchinson v. Proxmire, 443 U.S. 111, 133 (1979) (Senator issued press releases and newsletters criticizing researcher's studies); Nadel v. Regents of the University of California, 34 Cal. Rptr. 2d 188 (1994) (state government officials issued allegedly defamatory press releases and press statements). For discussion of the harms threatened by inaccurate agency speech regardless of whether it was intentionally false, see James O'Reilly, *Libels on Government Websites: Exploring Remedies for Federal Internet Defamation*, 55 ADMIN. L. REV. 507 (2003) (describing how agency website statements may be inaccurate in ways that harm their targets); Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 BYU L Rev 1371, 1374 ("Agency publicity can be premature, excessive, misleading, or just plain wrong.").

[24] *See* IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 63-65 (James W. Ellington, transl., 3d ed. 1993).

largely (and perhaps entirely) determines its moral wrongfulness.[25] Sissela Bok, for example, proposes a "test of publicity" for assessing whether lies are sufficiently respectful of listener autonomy to be justifiable:

> The test of publicity asks which lies, if any, would survive the appeal for justification to a reasonable person. It requires us to seek concrete and open performance of an exercise crucial to ethics: the Golden Rule, basic to so many religious and moral traditions. We must share the perspective of those affected by our choices, and ask how we would react if the lies we are contemplating were told to us.[26]

For these reasons, for example, the government's lies told to protect others or to defend the country may be less morally problematic than its self-interested or vindictive lies.[27] In short, the autonomy harms that the government's lies inflict on its listeners vary with the government's motive, subject matter, and audience.

2. Collective Harms to the Public

Some government lies inflict more collective harms – e.g., by undermining the public's trust in its government. Indeed, lies in general can undermine our willingness to trust, and thus our ability to work and cooperate with, each other in deeply damaging ways. Lies by the

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[25] *See* Strauss, *supra* note – at 355 ("[T]here is a difference between lies that are manipulative and false statements made for different reasons. False statements that are not manipulative lack the element of control and domination. An inadvertently false statement, for example, or a false statement made solely for the purpose of protecting a confidence, is less objectionable because it does not involve the same degree of manipulation as a false statement made for the purpose of influencing behavior or thought."); *see also* BOK, *supra* note -- at 78 ("Just as lies intended to avoid serious harm have often been thought more clearly excusable than others, so lies meant to *do* harm are often thought least excusable. And lies which neither avoid nor cause harm occupy the middle ground. Throughout the centuries, beginning with Augustine, such distinctions have been debated, refined, altered.").

[26] BOK, *supra* note -- at 93.

[27] Compare NYBERG, *supra* note -- at 10 (describing as reprehensible "the misuse of public office and public trust for personal self-interest") with BOK, *supra* note -- at 104 ("Both violence and deception [] would be more acceptable to these reasonable persons when used for the purposes of self-defense or life-saving. Finally, both would be more excusable the more trivial their effect on others.") and Strauss, *supra* note -- at 361 ("One should not manipulatively deceive someone casually, but manipulative lying is certainly justified to prevent serious harm. It follows that a serious social problem could justify manipulation of the kind that the persuasion principle forbids.").

government may pose especially grave dangers of this sort because of its power and greater access to certain information.

Seana Shiffrin is among those who have written eloquently about the dangers that any speaker's deliberate falsehoods pose to our ability to trust each other "by giving us reasons to doubt that people's word is reliable as such and that they provide us with sincere warrants when they offer what reasonably appears to be somber testimonial speech."[28] Although Shiffrin is especially interested in the collective harms caused by lies in general, she explains more specifically how lies by the government can be unusually damaging in this respect:

> 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 on the subject. Moreover, not only may 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* them to be so for them 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 about the law and 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.[29]

Professor Shiffrin describes the harm that lies inflict on our collective ability to trust each other (and our government) as a moral wrong.[30] Others have emphasized the instrumental costs to society when its members cannot trust each other -- and especially their government -- to speak truthfully.[31]

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[28] Shiffrin, *supra* note – at 191.

[29] *Id.* at 276; *see also id.* at 187 ("Where someone is, or represents herself to be, an expert on a topic, that [testimonial] warrant is heightened and justifiably so.").

[30] *Id.* at 2-3.

[31] *See, e.g.*, BOK, *supra* note -- at 26 ("A society, then, whose members were unable to distinguish truthful messages from deceptive ones, would collapse. But even before such a general collapse, individual choice and survival would be imperiled. . . . [Liars] often fail to consider the many ways in which deceptions can spread and give rise to practices very damaging to human communities. These practices clearly do not affect only isolated individuals. The veneer of social trust is often thin. As lies spread – by imitation, or in

These dangers can vary with the lie's motive and audience, among other factors. For example, John Mearsheimer is among those who see considerable benefit to certain strategically-motivated government lies, such as those told to a foreign adversary.[32] Along these lines, Kennedy press secretary Arthur Sylvester famously articulated a duty by the government to lie to protect national security in certain circumstances:

> Government officials as individuals do not have the right to lie politically or to protect themselves, but they do always have the duty to protect their countrymen. . . . Sometimes, and those times are rare indeed, Government officials may be required to fulfill their duty by issuing a false statement to deceive a potential enemy, as in the Cuban missile crisis.[33]

On the other hand, Mearsheimer finds the instrumental dangers of government's self-interested lies to its own public to be especially grave.[34] He identifies these dangers more specifically to include thwarting the public's ability to hold government accountable for misconduct, frustrating citizens' ability to make informed voting choices, undermining the policymaking process when participants cannot rely on others' assertions, and alienating the public's faith in democratic governance.[35] The various

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retaliation, or to forestall suspected deception – trust is damaged. Yet trust is a social good to be protected just as the air we breathe or the water we drink. When it is damages, the community as a whole suffers, and when it is destroyed, societies falter and collapse."); Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?,* 59 Depaul L. Rev. 1091, 1111-12 (2010) ("[S]incerity is more powerful than deceit because a society whose members are unable to distinguish sincere messages from deceptive ones would ultimately collapse.").

[32] MEARSHEIMER, *supra* note -- at 7 ("But the fact is that there are good strategic reasons for leaders to lie to their publics as well as to other countries. These practical logics already override well-known and widely accepted moral strictures against lying. Indeed, leaders sometimes think that they have a moral duty to lie to protect their country."); *see also* ALTERMAN *supra* note -- at 39 ("Lying about peaceful negotiations during wartime is a categorically different act than lying about warlike acts in peacetime, and far less troubling. Successful military operations often require secrecy and sometimes even deception.").

[33] Sylvester, *supra* note -- at 14.

[34] *E.g.,* MEARSHEIMER, *supra* note -- at 94 ("Hiding botched policies can lead to further disasters down the road, not just because incompetents are usually kept in key leadership positions for at least some period of time, but also because engaging in cover-ups makes it difficult to have a national security system in which policymakers and military commanders are held accountable for their action.").

[35] *See id.* at 94, 84-86; *see also* ALTERMAN, *supra* note -- at 163 ("Without public honesty, the process of voting becomes an exercise in manipulation rather than the expression of the consent of the governed. Many a scholar has persuasively argued that

lies told by government officials as part of the Watergate cover-up, for example, posed these sorts of costs.[36]

The government's motive for lying -- and whether that motive offends our expectations of our government -- can be key to our assessments of the collective harm, if any, it inflicts upon the public. As Steven D. Smith has observed more generally, one's theory of government speech turns in great part on one's theory of government:

> What a government can properly say depends on what the proper and essential role or function of the government is. And issues of government speech are difficult – intractable, maybe – because there is no agreement about what government is or isn't supposed to be for. In this respect, controversies about government speech are merely symptoms of a deeper disagreement about the proper domain and role of government.[37]

Similarly, one's theory of government lies turns in great part on one's theory of government.[38] Even so, one need not commit to a grand theory of government to expect a government motivated by the public's interest rather than by self-interest, as even a thin concept of good government requires that government refrain from lying to its public in ways that abuse its power.[39] Indeed, a growing body of literature describes government actors

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official deception may be convenient, but over time, it undermines the bond of trust between the government and the people that is essential to the functioning of a democracy."); Cohen, *supra* note -- at 1112 ("If citizens expect public officials to mislead them, they will become wary of arguments offered in public discourse.").

[36] Simon, *supra* note -- at 458 (describing lies told by government officials as part of Water gate cover-up as "particularly noxious because they were intended to subvert democratic processes of political accountability").

[37] Steven D. Smith, *Why is Government Speech Problematic? The Unnecessary Problem, The Unnoticed Problem, and The Big Problem*, 87 DENV. U. L. REV. 945, 968 (2010); *see id.* (suggesting that controversies over government speech are, at their heart, controversies about government – i.e., "the collapse of any working consensus about what government is for, or about what its proper domain and functions are.").

[38] Relatedly, Deborah Hellman has urged that a theory of corruption requires a theory of democracy. Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy,* 111 MICH. L. REV. 1385, 1421-22 (2013).

[39] Yasmin Dawood, Classifying Corruption 5 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2401297) ("A host of constitutionalist constraints, such as the rule of law and the separation of powers prevent the state's power from being used for private ends. The key idea is that, under the republican tradition, state actors engage in dominating behavior if they advance private interests instead of the common good."); Nadia Sawicki, Ethical Limitations on the State's Use of Arational

as the public's fiduciaries, borrowing from private law concepts to conclude that

> features of fiduciary law usefully model how deliberation can be understood between political unequals, in particular when the individual with more political power is supposed to be holding the interests of the individual with less power in trust. If our elected political leaders are, after all, our public fiduciaries, they may be bound by fiduciary duties that underwrite a dialogic imperative with their constituents.[40]

Public fiduciary theory thus asserts that the public (as beneficiary) should have the same expectations of loyalty and candor of its government as it would of other fiduciaries.[41] In this way, government's self-interested lies can inflict collective harm by violating this duty to its beneficiaries.[42]

Some scholars suggest that the dangers to collective public trust posed by government lies vary in part with the lie's subject matter as well as with its motive. For example, some argue that a government actor's lies about personal matters may be less harmful than those about policy matters -- President Clinton's lies about his relationship with Monica Lewinsky offers

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Persuasion 26 (Loyola Univ. Chicago School of Law, Research Paper No. 2013-004), available at http://ssrn.com/abstract=2286396 ("Citizens expect that in an ideal world, the state will convey information in a fair and neutral manner; that is perceived to be the state's proper role.").

[40] David L. Ponet & Ethan J. Lieb, *Fiduciary Law's Lessons for Deliberative Democracy*, 91 B.U. L. REV. 1207, 1249 (2011); *see also* Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L REV. 1077, 1178 (2004) ("This Article has demonstrated that one of those general purposes [of the Constitution] was to erect a government in which public officials would be bound by fiduciary duties to honor the law, exercise reasonable care, remain loyal to the public interest, exercise their power in a reasonably impartial fashion, and account for violations of these duties. This does not mean that the Constitution authorizes judges to assume the management of government from elected politicians. It does mean, however, that the Constitution was designed to foster among public officials the same tenets of decency and care that the law imposed on their counterparts in private life.").

[41] Ponet & Lieb, *supra* note -- at 1257 ("The fiduciary duties are routinely described as a duty of loyalty and a duty of care – as well as duties of candor, disclosure, and utmost good faith. . . .Most centrally, fiduciaries have a duty of loyalty which prohibits them from acting in a self-interested manner. The duty requires that fiduciaries act for the sole benefit of the beneficiary and prohibits their acting in any manner where their interests conflict with the interests of the beneficiary.").

[42] Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 UC DAVIS L. REV. 457, 477-79 (2009) (describing Delaware case law as holding that "in cases where a director intentionally deceives shareholders, this is an act in bad faith that constitutes a disloyal act").

a famously contested example.[43] Others urge relatedly that the collective harms of government lies may vary with the identity of the speaker, as certain government speakers' relative power or monopoly over certain types of information trigger especially heightened expectations with respect to their truthfulness.[44] Government lies about certain national security and intelligence matters provide an especially prominent example.[45] As another illustration, the public's faith in the legitimacy of the justice system -- and thus its willingness to rely upon and cooperate with it -- may rest in part on high expectations of judges' sincerity.[46]

B. The Dangers Posed by Constitutional Efforts to Constrain Government Lies

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[43] ALTERMAN, *supra* note -- at 2 ("This is not to argue that all lies are equal."); *id.* at 12 ("However objectionable it may be and whatever misjudgments Clinton may have made to land him in so unhappy a quandary, it is hardly comparable to lying about peace treaties or the causes of war.").

[44] *E.g.*, Cohen, *supra* note -- at 1142 ("The need for sincerity might also vary, within each branch of government, based on the specific institution under consideration, depending on such factors as the institution's place within the branch's hierarchy or its prestige and legitimacy at a certain historical moment.").

[45] *See* Leslie Gielow Jacobs, *Bush, Obama and Beyond: Observations on the Prospect of Fact Checking Executive Department Threat Claims before the Use of Force*, 26 CONST. COMMENT. 433, 442-43 (2010) ("A barrier to achieving this kind of contemporaneous accountability for threat claims asserted by the executive department to build support for the use of force is its superior access to and control over the intelligence information that forms the basis of the claims.").

[46] EMILY CALHOUN, LOSING TWICE 48 (2011) ("Citizens of full constitutional stature rightly recognize that, if justices do in fact lie to each other, they also necessarily lie to us. Citizens will also sense that acts of judicial untruthfulness can treat us as less than equal or as persons whose true consent does not matter to judicial legitimacy."); Shapiro, *supra* note -- at 738 ("[A]ny utilitarian calculus must take account of the large institutional losses that would result from a lack of trust in the honesty of judges and from an inability to debate and criticize the true reasons for their decision."); Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 990-01 (2008) ("Unless judges are sincere, the grounds for their decisions cannot be scrutinized in the public domain. And without such scrutiny, those subject to adjudication cannot determine whether the reasons given to them are sound. "). Paul Butler, on the other hand, is among those to argue that judicial lies are sometimes justified to thwart injustice. Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785, 1785-86 (2007) (Judicial lying "is far more common than is openly acknowledged. This Article identifies some cases in which judges intentionally have framed the law to achieve a particular outcome. This Article also suggests that this kind of lie is occasionally justified. Sometimes it is the best of the imperfect choices that judges have when they are confronted with unjust law. This Article recommends judicial lying only when it will thwart extreme injustice . . . ."); *see also* Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 1029 (2009) (identifying costs and benefits of judicial "lies" about jurisdiction).

The preceding subpart explored a range of substantial harms, both individual and collective, threatened by certain government lies. But efforts to enforce constitutional constraints on such lies can pose substantial challenges and perhaps even dangers of their own. Indeed, the sheer number of lies, the variety of reasons for which they are told, and the variety of effects they may cause all combine to suggest that efforts to enforce prohibitions against them can be difficult and at times perhaps unwise.[47] More specifically, such enforcement efforts trigger significant concerns about courts' institutional competence in this area, about undermining the separation of powers, and about chilling government speakers' willingness to engage in important expressive endeavors.

1. Courts' Limited Institutional Competence

Even if we are troubled by the potential dangers of government lies, we may remain skeptical of courts' institutional competence to police such dangers.[48] As David Strauss explains,

> For the courts to enforce a prohibition against government lying or nondisclosure, they would have to make a delicate and complex inquiry into precisely what information was in the government's possession. They would then have to determine the government's reasons for the nondisclosure or false statements. . . . Institutional concerns, therefore, rather than any theoretical weakness, explain why the autonomy justification for the persuasion principle has not given rise to

[47] *See* United States v. Alvarez, 132 S.Ct. 2537, 2553 (2012) (Breyer, J., concurring) ("[T]he pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more. And those who are unpopular may fear that the government will use that weapon selectively, say by prosecuting a pacifist who supports his cause by (falsely) claiming to have been a war hero, while ignoring members of other political groups who might make similar false claims.").

[48] *See* MARK YUDOF, WHEN GOVERNMENT SPEAKS 301 (1983) ("The danger that, in attempting to recalibrate communications networks, courts will create more problems than they solve is greatest when judicial intervention is greatest – when the courts rely on the Constitution to provide direct limits on government expression."). In *Wickard v. Filburn* (a decision most famous for its commerce clause ruling), the Supreme Court raised related pragmatic concerns in rejecting the challenger's efforts to invalidate the results of a referendum because of the Secretary of Agriculture's allegedly misleading speech on the topic. 317 U.S. 111, 117-18 (1942) ("To hold that a speech by a Cabinet officer, which failed to meet judicial ideals of clarity, precision, and exhaustiveness, may defeat a policy embodied in an Act of Congress, would invest communication between administrators and the people with perils heretofore unsuspected.").

> a judicially enforced first amendment prohibition against false statements by the government or manipulative government failures to disclose information.[49]

As just one example, determining whether a government's falsehood is impermissibly motivated is especially challenging not only because an individual or institutional speaker's motives may be mixed, but also because of the difficulties in assessing whether and when government's political self-interest is distinguishable from the public's interest.[50]

2. Separation of Powers

But even though determining falsity and motive may be challenging, courts are of course frequently called upon to make precisely such determinations in a wide range of constitutional, statutory, and common law contexts.[51] A related and perhaps stronger concern thus centers on whether

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[49] Strauss, *supra* note --at 358-59; *see id.* ("Specifically, prohibitions against government lying and manipulative government nondisclosure may be examples of a principle of free expression that is underenforced by the courts. Although the principles underlying the first amendment (under either the persuasion principle or the Meiklejohn theory) should prohibit government action of this kind,that is not a limitation that the courts can implement."). Compounding this challenge is the fact that judges sometimes lie too. *See supra* note –.

[50] Dawood, *supra* note – at 24 ("While the pursuit of political gain is self-interested, it is not necessarily a wrong. Indeed, the difficulty posed by corruption is that it consists of the same mechanisms that undergirds democratic accountability. . . . According to the Framers, the desire of elected officials to get re-elected will provide a safeguard against these officials abusing their power. In other words, elected officials are supposed to be motivated by the prospect of political gain. Elected officials acting for political gain is not the problem; indeed it is meant to be the solution to the problem of public officials not acting in the public interest. It is very difficult, however, to identify the point at which the use of public office for political gain transforms into corruption. This is because corrupt activity overlaps with conduct that is expected in politics."). But even if political self-interest is a permissible end, some means to that end -- i.e., lies -- might nevertheless pose unacceptable harms.

[51] For a sampling of settings in which courts are required to determine the falsity of speech and the mental state of the speaker, *see, e.g.*, United States v Lepowitch, 318 U.S. 702, 704 (1943) (interpreting 18 U.S.C. § 76 simply to require proof that the defendant "sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct"); United States v Debrow, 346 U.S. 374, 376 (1953) (explaining federal perjury law as prohibiting a "false statement willfully made as to facts material to the hearing" under an oath authorized by federal law and taken before a competent tribunal, officer, or person); Lexmark Intern., Inc. v. Static Control Components, Inc., 132 S.Ct. 1377 (2013) ("To invoke the Lanham Act's cause of action for false advertising, a plaintiff must plead (and ultimately prove) an injury to a commercial interest in sales or business reputation proximately caused by the defendant's misrepresentations."); Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, 100 Geo. L.J. 449, 449 (2012)

reliance on constitutional litigation to constrain government lies requires the judiciary to intrude inappropriately into the choices of the politically accountable branches. Indeed, these concerns may leave judges themselves reluctant to enforce constitutional constraints on government lies.[52] Recall that related institutional competence and separation of powers concerns in other constitutional contexts have led courts to create and apply a variety of doctrines to limit the circumstances under which the judiciary is empowered to second-guess the other branches: these include a range of governmental immunities, as well as standing, political question and other justiciability doctrines.[53]

(describing the [private] "law of deception" to include "the torts of deceit, negligent misrepresentation, nondisclosure, and defamation; criminal fraud statutes; securities law, which includes both disclosure duties and penalties for false statements; false advertising law; labeling requirements for food, drugs, and other consumer goods; and, according to recent scholarship, information-forcing penalty defaults in contract law and elsewhere").

[52] As Jonathan Varat observed, for example: "Nor, for example, if President Bush used erroneous information in making the case for going to war in Iraq, misleading those who were asked to support his policy, is it likely that a court would hold that the First Amendment itself required the president to issue a correction, or to be held liable for damages, even if it were proved that he knew he was making a false statement at the time." Varat, *supra* note - at 1133. On the other hand, some commentators see public fiduciary theory as responsive to concerns about courts' institutional competence to assess other governmental actors in certain key contexts, pointing out that judges frequently police related fiduciary duties in the private law context. *See* D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 677 (2013) ("It may be possible for courts to address underlying structural pathologies in political representation by framing the questions in individual-rights terms. The concept of fiduciary duty in agency law, for example, attempts to solve a structural problem (agency costs) through an individual right enforceable in court (the right of a principal to have the agent act for his sole benefit."). Others, in contrast, view a public fiduciary approach as aspirational political theory rather than enforceable constitutional law. See Ponet & Leib, *supra* note – at 1255-56 ("In summary, understanding elected rulers as public fiduciaries offers lessons for deliberative democracy by envisaging a deliberative space for rulers and ruled to interact. Of course, political morality is very difficult to enforce; even if we thought the actual private law fiduciary duties created legal obligations on elected officials, courts only rarely impose fiduciary duties directly.").

[53] *See* Dorf, *supra* note – at 1332 (in discussing the constitutionality of government speech in another context, suggesting that one possibility is to acknowledge that elected officials "would be constitutionally obliged to avoid committing the government to expressing the view that any group of persons or relationships are second-class, but you would deny judges the authority to invalidate such government expression on that basis alone"); Ethan J. Lieb, David L. Ponet, & Michael Serota, *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91, 100 (2013) ("Designing an optimal regime for fiduciary oversight involves creating multifarious signals and orientations for fiduciaries to help them in their relationships with beneficiaries. But the law should shy away from judicial micromanagement because public-law relationships – like their private law corollaries – are not generally the sort of relationships that take well to too much judicial meddling."); *id.* at 101 ("Within the fiduciary field, courts are long on rhetoric precisely

Of course, these barriers are not necessarily insuperable, as separation of powers principles have also triggered the creation of a variety of exceptions to and limits on such doctrines to ensure that an independent judiciary remains available to check the political branches in appropriate circumstances.[54] This checking function can be especially important when political remedies are ineffective, as may be the case with respect to governments that act in politically popular ways that nonetheless undermine key constitutional values (for example, when a government lies to punish or silence a politically unpopular critic), or governments that seek to entrench themselves in defiance of political controls (for example, when governments lie to manipulate election outcomes).[55]

3. Chilling Valuable Government Speech

Just as government's regulation of private speakers' falsehoods may sometimes threaten to chill valuable speech,[56] so too may be the case with respect to efforts to regulate government's own lies.[57] Indeed, measures that constrain government lies may chill both truthful government speech as well as certain valuable government lies.

First, the dangers of legal efforts to constrain government lies include the possibility of chilling government speakers in ways that deprive the public of accurate and valuable information.[58] As Mark Yudof has

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because they rarely wield the stick – and extralegal sanctions do much of the work to police compliance. In the political sphere, we have many extralegal mechanisms to reinforce fiduciary obligations: elections, civil society, newspapers, and watchdog groups are as much a part of the tapestry of fiduciary governance as courts are.").

[54] For example, governmental immunities generally operate to bar only suits for money damages and not suits seeking injunctive relief; in certain circumstances even immunities from damages may be overcome or waived.

[55] *See* Baker v. Carr, 369 U.S. 186 (1962).

[56] *See* New York Times v. Sullivan, 376 U.S. 254, 280 (1964) (concluding that the First Amendment prohibits the imposition of liability for a false statement about a public official unless made "with knowledge that it was false or with reckless disregard of whether it was false or not").

[57] On the other hand, chilling may be less of a concern with respect to speakers who have strong incentives to continue to speak, as the Court has recognized with respect to commercial speakers. Government similarly has substantial reason, including self-perpetuating incentives, to continue to speak even in the face of regulation.

[58] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340-41 (1964) ("Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. . . . And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.").

observed, requiring government to guarantee truth in its expression might inhibit it from performing important information-gathering and public communication functions.[59] One can easily imagine the government's partisan political opponents or its enforcement targets seizing upon constitutional litigation (or the threat thereof) to deter, delay, or thwart important government speech that they find politically or personally objectionable.[60]

Second, some government lies in certain contexts may even have value of their own. [61] As we have seen, for example, a number of commentators argue that government's deliberate falsehoods to achieve certain strategic objectives -- e.g., thwarting adversaries in times of war or calming public panic -- can sometimes be valuable.[62] Again, the prospect of constitutional litigation might deter or delay valuable government expression that takes this form. [63]

Perhaps lies' very ubiquity means that the public is less likely to be fooled -- and thus to be harmed -- by the government's deliberate falsehoods because it is less likely to trust the government. On the other hand, as discussed above, the erosion of public trust is one of the substantial

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[59] YUDOF, *supra* note -- at 46.

[60] *See* Morgan, *supra* note -- at 199-226 (expressing related concern that statutory prohibitions on lying to the government could be inappropriately applied to government speakers for political or other reasons by the government speaker's enemies); O'Reilly, *supra* note -- at 546 ("A primary concern for regulators is to reduce the ability of an affected entity to prevent, remove, or mitigate the appearance of a piece of accurate data on the agency website or other information product concerning that entity. If the suggested changes were adopted, there could be abuse of the new process by affected entities seeking delay or agency silence about the violated conditions.").

[61] A number of lies by private speakers are seen as beneficial or at least relatively harmless. *See, e.g.*, United States v. Alvarez, 132 S.Ct. 2537, 2553 (2012) (Breyer, J., concurring) ("False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates' methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth."). For these reasons, I have argued elsewhere that lies' ubiquity and diversity counsels the government's care and restraint when seeking to regulate them. Norton, *Lies and the Constitution*, *supra* note -- at 200-01.

[62] *See supra* notes -- and accompanying text.

[63] *See* Dorf, *supra* note -- at 1286 ("Being incidentally insulted or otherwise harmed by government speech, we might say, is just part of the price each of us potentially pays for making an effective government, much in the same way that being harmed by private speech is part of the price we pay for the First Amendment.").

collective harms posed by the government's lies.[64] To the extent that political and other remedies to date have failed to curb government lies, our options include resigning ourselves to the harms of such lies or exploring other approaches. The remainder of this paper examines some possibilities.

PART II
POSSIBLE CONSTITUTIONAL CONSTRAINTS ON GOVERNMENT LIES

The preceding Part suggested that there are very good reasons to be concerned about government lies, and also that there are very good reasons to be concerned about efforts to constrain them. This Part identifies the ways in which the harms of certain government lies include threats to key constitutional values and explores how we might develop current due process and free speech clause doctrine to address those threats, while also proposing certain limits on the application of those doctrines to lessen the enforcement concerns described above.

A. The Due Process Clause

The due process clause prohibits the government's deprivation of life, liberty, or property without due process of law.[65] Government lies can violate procedural due process protections when they deprive life, liberty, or property without adequate procedural safeguards. Government lies can violate substantive due process regardless of the presence of procedural safeguards when they lack an adequate government justification – i.e., when they constitute government's arbitrary or mean-spirited deprivation of life, liberty, or property.[66] The scope of these protections turn in great part on how broadly one is willing to define protected liberty and perhaps interests.

Courts have already identified a few specific situations where the link between a government lie and the denial of constitutionally protected liberty seems especially strong. Prosecutorial lies that lead to the wrongful deprivation of individual physical liberty offer an especially clear

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[64] *See supra* notes -- and accompanying text.

[65] U.S. CONST. amend. 5 and 14.

[66] For a discussion of procedural and substantive due process more generally, *see* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 546 (3rd ed. 2006).

illustration.[67] Other possibilities involve government lies that may interfere with other constitutionally protected interests.[68] The Supreme Court, for example, has signaled that government lies about abortion can pose an impermissible undue burden to a woman's right to choose abortion.[69] As another possibility, some lower courts have indicated that government lies on ballots or election materials can violate the due process clause in certain extreme circumstances.[70]

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[67] Davis v. Zant, 36 F.3d 1538 (11th Cir. 1994) (concluding that prosecutor falsely stated to the jury that a key government witness had not confessed to murder); U.S. v. Kojayan, 8 F.3d 1315 (9th Cir. 1993) (concluding that prosecutor falsely stated to the jury that an absent witness could have refused to testify). Relatedly, courts generally require police officers' lies to have coercive effect on their targets before finding them to violate the Constitution. *See, e.g.*, Illinois v. Perkins, 496 U.S. 292, 296-97 (1990) (finding no constitutional violation when an undercover law enforcement officer posed as a fellow inmate to whom a jailed suspect made damaging admissions: "*Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner."); *see also* United States v. Byram, 145 F.3d 405, 408-09 (1st Cir. 1998) ("Certainly some types of police trickery can entail coercion: consider a confession obtained because the police falsely threatened to take a suspect's child away from her if she did not cooperate. But trickery is not automatically coercion. Indeed, the police commonly engage in such ruses as suggesting to a suspect that a confederate has just confessed or that police have or will secure physical evidence against the suspect. While the line between ruse and coercion is sometimes blurred, confessions procured by deceits have been held voluntary in a number of situations. . . . Further, the Supreme Court's tolerance of police guile in *Frazier* makes clear that the police can often mislead suspects, at least where coercion is not involved; thus, it is impossible to treat all such false statements as improper, let alone outrageous or uncivilized. Police investigation can be a rough business, and untruths may sometimes be necessary to save a kidnap victim, retrieve a missing firearm, or for other reasons quite apart from the desire to solve a specific crime already committed.") (citations omitted).

[68] Note that courts' discussion of these possibilities are as yet relatively undeveloped. For example, the decisions to date suggest a materiality but perhaps not a causation requirement – i.e., the decisions do not appear to require a showing that the government's lie actually interfered with a specific individual's reproductive or voting decision, but instead that the lie carried the potential to do so.

[69] *See* Planned Parenthood v. Casey, 505 U.S. 833, 882 (1992) ("If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible."); Planned Parenthood v. Rounds, 686 F.3d 889 (8th Cir. 2012) (debating whether government-required statements that abortion causes increased risk of suicide and suicide ideation were truthful and not misleading and thus consistent with substantive due process).

[70] *See* Smith v. Cherry, 489 F.2d 1098 (7th Cir. 1973) (finding possible due process violation when state election officials presented what court found was misleading ballot that knowingly misidentified a sham candidate as the nominee, when the sham candidate quickly resigned and was replaced by government officials' preferred candidate); Burton v. Georgia, 953 F.2d 1266, 1269 (11th Cir. 1992) ("We are aware of no cases in which a federal court has invalidated a state election on grounds like those asserted by plaintiffs. For such extraordinary relief to be justified, it must be demonstrated that the state's choice

Whether and when the due process clause constrains government's defamatory lies remains a matter of controversy.[71] In *Paul v. Davis*, the Supreme Court considered a procedural due process challenge to a local police department's creation and distribution a flyer that identified the challenger to area merchants as one of several "Active Shoplifters," even though the pending shoplifting charges against him had not been proven and were later dismissed.[72] A majority of the Court held that government defamation does not violate procedural due process protections unless the government's lie causes some harm in addition to stigmatic injury (like job loss or other economic harm),[73] in which case a name-clearing hearing would be required.[74] In dissent, Justice Brennan vigorously objected, concluding that the "logical and disturbing corollary of this holding is that

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of ballot language so upset the evenhandedness of the referendum that it worked a 'patent and fundamental unfairness' on the voters. Such an exceptional case can arise, in the context of a case such as this one, only when the ballot language is so misleading the voters cannot recognize the subject of the amendment at issue."); McLaughlin v. N.C. Bd of Elections, 65 F.3d 1215, 1227 (4th Cir. 1995) (raising the possibility that false ballot speech could violate the due process clause while finding that the contested ballot speech was not misleading); Caruso v. Yamhill County, 422 F.3d 848 (9th Cir. 2005) (same).

[71] Note that the Speech or Debate Clause provides a constitutional defense to certain defamatory speech by federal legislators, but only in certain limited circumstances. *See, e.g.*, Chastain v. Sundquist, 833 F.2d 311, 312 (D.C. Cir. 1987) ("We reaffirm the common law rule and settled constitutional design that elected representatives must answer for libelous statements made outside the scope of their legislative duties."); Hutchinson v. Proxmire, 443 U.S. 111, 133 (1979) ("Voting and preparing committee reports are the individual and collective expressions of opinion within the legislative process. As such, they are protected by the Speech or Debate Clause. Newsletters and press releases, by contrast, are primarily means of informing those outside the legislative forum; they represent the views and will of a single member. It does not disparage either their value or their importance to hold that they are not entitled to the protection of the Speech or Debate Clause."); Doe v. McMillan, 412 U.S. 306, 313-14 (1973) ("Our cases make perfectly apparent, however, that everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause. Members of Congress may frequently be in touch with and seek to influence the Executive Branch of Government, but this conduct 'though generally done, is not protected legislative activity.' Nor does the Speech or Debate Clause protect a private republication of documents introduced and made public at a committee hearing, although the hearing was unquestionably part of the legislative process.").

[72] Paul v. Davis, 424 U.S. 693, 694 (1976).

[73] *Id.* at 712 (holding that the government's "defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any 'liberty' or 'property' interests protected by the Due Process Clause").

[74] YUDOF, *supra* note -- at 279 (reading *Paul v. Davis* to mean that government speakers must hold hearings before procedural due process guarantees permit them to make false and derogatory statements when firing or otherwise depriving targets of state-guaranteed status).

no due process infirmities would inhere in a statute constituting a commission to conduct ex parte trials of individuals, so long as the only official judgment pronounced was limited to the public condemnation and branding of a person . . . ."[75]

The Court's decision in *Paul* continues to attract criticism from those who urge the Court to find a due process violation based on the reputational harms of certain defamatory government lies alone.[76] Barbara Armacost, for example, describes the Court's holding as reflecting an inappropriately limited understanding of the due process clause that ignores the unique reputational harms of government defamation, especially in the criminal context.[77] Indeed, government defamation of an individual as a criminal

[75] *Paul*, 424 U.S. at 721 (Brennan, J., dissenting); *see also id.* at n. 9 ("Today's holding places a vast and arbitrary power in the hands of federal and state officials. It is not difficult to conceive of a police department, dissatisfied with what it perceives to be the dilatory nature or lack of efficacy of the judicial system in dealing with criminal defendants, publishing periodic list of 'active rapists,' active larcenists,' or other 'known criminals.' The hardships resulting from this official stigmatization -- loss of employment and educational opportunities, creation of impediments to professional licensing, and the imposition of general obstacles to the right of all free men to the pursuit of happiness -- will often be as severe as actual incarceration, and the Court today invites and condones such lawless action by those who wish to inflict punishment without compliance with the procedural safeguards constitutionally required of the criminal justice system.").

[76] *See, e.g.*, Randolph J. Haines, *Reputation, Stigma and Section 1983: The Lessons of* Paul v. Davis, 30 STAN. L. REV. 191, 239 (1977) (urging a motive-based procedural due process analysis for procedural due process that prohibits government defamation accompanied by an intent to stigmatize: "In the state defamation context, an intent-to-stigmatize standard preserves state autonomy by limiting section 1983 actions to instances of intentional abuses of power."); Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-invention*, 43 U.C. DAVIS L. REV. 79, 102, 142 (2009) (arguing that reputation should be protected as liberty for procedural due process reasons, especially in light of states' growing ability to label citizens as "potential terrorists, gang members, sex offenders, child abusers, and prostitution patrons"); Shaudee Navid, *They're Making a List, But Are They Checking It Twice? How Erroneous Placement on Child Offender Databases Offends Procedural Due Process*, 44 UC DAVIS L. REV. 1641, 1667 (2011) (describing circuit split as to whether the government's erroneous listing of the challenger in a child offender database deprives him of a liberty interest and suggesting procedural cure with a system that effects timely removal of erroneous listings).

[77] Barbara E. Armacost, Race and Reputation: *The Real Legacy of* Paul v. Davis, 85 VA. L. REV. 569, 575 (1999) ("The injury to reputation at issue in *Paul* is exactly the kind of claim that ought to be governed by federal constitutional law rather than state law"); *id.* at 621-23 ("[B]ecause government officials have a virtual monopoly on criminal enforcement, the power to cause this kind of reputational harm is uniquely governmental. . . . The words and actions of police officers are viewed as official declarations of the law enforcement arms of the government."); *id.* at 625 (suggesting that government defamation akin to an adjudication should trigger procedural due process protections: "The distinction

might be understood as a type of punishment -- i.e., hard law[78] -- that triggers procedural due process concerns.[79] Other commentators, moreover, suggest that government defamation can damage reputation in a way that violates substantive due process protections of liberty or property interests,[80] and the Court itself has declined to foreclose this possibility.[81]

In short, in cases where government lies clearly involve deprivations of "life, liberty, or property," the due process clause is already at work. Questions remain in other cases that would require some expansion or at least further development of our understanding of "life, liberty, or property." Either way, the due process clause seems better-equipped to address certain targeted individual harms rather than more collective harms to the public generally.[82] Such a targeted focus ameliorates a number of the enforcement challenges identified in the preceding Part, as constitutional efforts to prohibit government lies that inflict less specific and more collective harms exacerbate institutional competence, separation of powers,

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between statements that brand or accuse and those that simply report law enforcement actions would serve as a sensible limiting principle for the due process cause of action for governmental defamation");

[78] "Blacklisting" – like the "no fly" list -- can inflict a "hard law" type of effect by barring folks from otherwise lawful activities. *See, e.g.*, Aaron H. Caplan, , 2010 WIS. L. REV. 1203, 1206 (2010) ("Persons appearing on a blacklist are not treated as suspected wrongdoers, but as confirmed wrongdoers who face consequences as a result. Yet these consequences are imposed without the procedures the U.S. Constitution ordinarily relies on to ensure that wrongdoers are correctly identified and punishment appropriately imposed.").

[79] Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U. L. REV. 277, 284 (1984) ("Typically, the due process allegation directs the court's focus to the procedures surrounding the deprivation. Herein lies the problem: most plaintiffs are not really complaining about the lack of procedural safeguards; rather, they are complaining about the absence of compensation for a loss that has been inflicted tortiously by a state official."). Although immunities limit many defamation actions against the government they need not pose an insuperable barrier at least in theory, as some states waive such immunities. Some commentators, moreover, call for Congress to amend the Federal Tort Claims Act, to waive immunity from defamation for federal actors. *See* O'Reilly, *supra* note -- at 522.

[80] *See, e.g.*, Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 Geo. L.J. 555 (1997) (arguing that reputation should be understood as a fundamental property interest that triggers strict scrutiny under substantive due process).

[81] The majority in *Paul v. Davis* expressly declined to address substantive due process issues. *Paul*, 424 U.S. at 710 n.5. Indeed, more recent opinions have suggested the potential applicability of substantive due process guarantees to government's defamatory lies. *See* Connecticut Dep't of Public Safety v. Doe, 538 U.S. 1, 1165 (2000) (Souter, J., concurring).

[82] A focus on individual harm is also more likely to survive standing's screen for "concrete and particularized" harm.

and chilling concerns.[83] The less tangible the harms threatened by prohibited lies, for example, the greater our concerns about chilling potentially valuable government speech.[84] Government lies that cause monetary loss or deprive individuals of protected liberty interests inflict fairly specific injuries of the type that judges commonly evaluate.[85] To be sure, such a targeted approach fails to address the many other ways in which the government's lies can cause significant harm -- for example, by frustrating listeners' autonomy or undermining public trust. By focusing on government lies that inflict comparatively specific or targeted harms, I do not mean to suggest that government lies that inflict other sorts of harms are less damaging, but simply note instead that they pose greater enforcement challenges.

B. The Free Speech Clause

Although the text of the First Amendment explicitly constrains the government as regulator rather than as speaker,[86] the government's deliberately false speech can nevertheless undermine the key values that inform the First Amendment's free speech clause.[87] More specifically, under certain circumstances, government lies frustrate democratic self-governance, threaten listener autonomy, and distort the marketplace of

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[83] Relatedly, courts and commentators often look to specific or tangible harm as a limiting principle that helps identify especially dangerous lies while lessening prospects for government overreaching or partisan or otherwise selective when assessing whether and when the First Amendment prohibits government's efforts to regulate lies by private speakers. *See* United States v. Alvarez, 132 S.Ct. 2537, 2545 (plurality) (identifying a longstanding historical tradition of regulating private speakers' lies only when associated with "defamation, fraud, or some other legally cognizable harm"). Interpreting the Constitution to constrain only government lies that inflict certain specific or targeted harms may be similarly attractive for related pragmatic reasons.

[84] *See* David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. Rev. 70, 119 (2012) (noting the challenging but not unusual judicial task of choosing the appropriate point on this autonomy spectrum at which to understand the government's regulation of private speakers' lies to be permissible under the First Amendment).

[85] A showing of government defamation, for example, would require the challenger to prove that the government made a false statement of fact, that the speaker was at fault, and that the target suffered harm.

[86] U.S. CONST. amend 1**.** The Court has held that the government's own speech is exempt from free speech clause scrutiny. See supra note --.

[87] See Thomas L. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422, 423 (1980) (describing the key values underlying the First Amendment's protection of speech to include furthering democratic self-governance, enabling the exercise of individual autonomy, and facilitating the discovery of truth and the dissemination of knowledge).

ideas. As discussed below, however, whether they should be found actually to violate the First Amendment is a somewhat different question.

First, some government lies may frustrate a self-governance view of the First Amendment that values speech for its ability to inform and facilitate political participation.[88] The Supreme Court has noted that political lies by private speakers can offend such a Meiklejohnian view of the free speech clause;[89] lies by the government carry even greater potential to undermine these values.[90] Moreover, the threats posed by government lies to democratic self-governance are exacerbated in those contexts where such deliberate falsehoods are especially unlikely to be remedied by counterspeech. Examples include situations where the government lies about information to which it has near-monopoly access, such as national security and intelligence matters.[91] Other examples include government lies to a captive or vulnerable audience where rebuttal is not a meaningful option, as can be the case with respect to government lies to students in public schools.[92] Again, audience, subject matter, and the identity of the

[88] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 24-25 (1948); see also Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive In First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 424-25 (1996) (describing the Meiklejohnian view of the First Amendment as protecting the public's thinking process' from injury or 'mutilation."').

[89] Garrison v. Louisiana, 379 U.S. 64, 75 (1964) ("That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effectuated.").

[90] MEARSHEIMER, *supra* note -- at 93 ("[W]henever leaders cannot sell a policy to their public in a rational-legal manner, there is a good chance that the problem is with the policy, not the audience."); Spottswood, *supra* note -- at 1253 ("Insincere assertions do not further our interest in governing ourselves through a free and open exchange of information and ideas, because they involve the betrayal of the public interest, not argument made in service of it."); Strauss, *supra* note -- at 358 "[F]alse statements by the government . . . can seriously hamper the discussion necessary for democratic self-government that, according to the Meiklejohn theory, the first amendment was designed to protect.").

[91] *See* Jacobs, *supra* note – at 444 ("The president and his top officials relied on controlled information release in a number of ways to support their use of force advocacy. That they withheld much information within their control meant that they could rely upon the public's knowledge that they had superior access to the entire body of existing information to characterize the facts with greater certainty than the content of the information reflect, to omit mention of dissent, to suggest that they had more and better quality information than they presented, and to ask the public to embrace the truth of the threat claims based on trust rather than proof.").

[92] See Jeffrey M. Cohen, *The Right to Learn: Intellectual Honesty and the First Amendment*, 39 HAST. CONST. L.Q. 659 (2012) (urging that students have a First Amendment right to learn that includes the right to "honest, deceit-free" compulsory

government speaker can be key in assessing the threat to free speech clause values posed by the government's deliberate falsehoods. [93]

Second, as discussed above, government lies may manipulate listeners in ways that undermine individual autonomy and dignity, the protection of which is thought by many to lie at the heart of the First Amendment's free speech clause.[94] As described earlier, a lie's motive can be especially relevant in assessing the autonomy injuries it may inflict, and thus its moral wrongfulness.[95] Indeed, for this reason, several thoughtful commentators have taken the view that manipulative government lies offend an autonomy-based view of the First Amendment. As Jonathan Varat, for example, explains, "[T]he most powerful argument in favor of government authority to restrict deception, and the most powerful argument against government-imposed deception, are the same: the manipulative, domineering, and fundamentally disrespectful invasion of autonomy worked by deception."[96]

Third, government's deliberate falsehoods may frustrate the search for truth and the dissemination of knowledge,[97] as government lies that deceive rather than inform threaten to distort the "marketplace of ideas."[98] Recall

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education).

[93] *See* Daniel J. Hemel, *Executive Action and the First Amendment's First Word*, 40 PEPP. L. REV. 601, 604-05, 616-17 (2013) (arguing that executive action that offends free speech values may be "ultra vires executive action that runs afoul of the Fifth Amendment's Due Process clause").

[94] *See* Emerson, *supra* note -- at 423**;** Spottswood, *supra* note – at 1253 ("[B]ecause the coercive nature of insincere speech robs another of the ability to exercise her own autonomy, insincere statements exist outside the sphere of autonomy that Kantian moral theorists argue should be a ground of constitutional protection.")

[95] *See supra* notes -- and accompanying text.

[96] Varat, *supra* note – at 1108-10; *see also* Strauss, *supra* note -- at 358 ("[W]hen the government makes false statements or fails to disclose information for the purpose of manipulating its own citizens, its conduct is wrong. . . ."); *id.* at n.67 ("It might be thought that the reason the courts do not enforce a prohibition against government lying is that the language of the First Amendment does not authorize such a prohibition. But as a matter of language it is not implausible to say that the government 'abridg[es] the freedom of speech' when it deliberately lies about a matter of great public concern for the purpose of preventing a full public debate.").

[97] Varat, *supra* note -- at 1132 ("By its nature, government deception impairs the enlightenment function of the First Amendment, limiting the citizenry's capacity to check government abuse and participate in self-governance to the maximum extent.").

[98] The Supreme Court already recognizes the possibility of such market failures with its refusal to protect false or misleading commercial speech in order to safeguard listeners from deception; its choice is bolstered by its confidence that commercial speakers are unlikely to be chilled from continuing to engage in valuable speech. *See, e.g.,* Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 592 (1980) (Rehnquist, J., dissenting) ("There is no reason for believing that the marketplace of

that the Court has interpreted the First Amendment to prohibit government from regulating private speech to enforce its own orthodoxy as to the truth,[99] government lies that skew or distort the public discourse raise similar (and perhaps heightened) concerns. Again, this may be especially true where the government has selective access to the information in question, thus limiting meaningful opportunities for counterspeech.[100]

Although government lies can undermine free speech values, determining that they actually violate the free speech clause may require expansion or at least refinement of current doctrine.[101] That the government does not have a First Amendment right to lie, in other words, does not necessarily mean that it has an enforceable constitutional duty to refrain from lying. Addressing these challenges invites us to consider when, if ever, we should understand government speech as a form of what some call "hard law" subject to free speech clause scrutiny and under what circumstances we should understand it to be instead what some call "soft law" that may or may not be subject to constitutional constraint.[102]

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ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market."). Indeed, current First Amendment doctrine permits government to hold certain speakers – e.g., commercial and professional speakers – to higher standards of accuracy to help inform listeners' decisionmaking. *See* Robert Post, *Informed Consent to Abortion: a First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 950 (2007) ("But in the context of medical practice we insist upon competence, not debate, and so we subject professional speech to an entirely different regulatory regime," including requirements of accuracy).

[99] *See* United States v. Alvarez, 132 S.Ct. 2537, 2547 (2012) (plurality); *id.* at 2555 (Breyer, J., concurring); *id.* 2563-64 (Alito, J., dissenting).

[100] *See supra* notes -- and accompanying text; see also Jess Alderman, *Words to Live By: Public Health, the First Amendment, and Government Speech*, 57 BUFF. L. REV. 161, 164 (2009) ("Scientific information can be particularly difficult for listeners to evaluate, so they will turn to sources they trust for information. Because the government is empowered to regulate and promote health, can expend vast resources, and has historically played a central role in the promotion of health, government speech has a uniquely powerful influence on public health.").

[101] The Court has held that the government's own speech is generally exempt from free speech clause scrutiny. *See supra* note --. But it has done so in contexts where the identity of the speaker as private or governmental was contested. *See id.* I have urged elsewhere that government should not be able to claim the government speech when its speech is not transparently government in cases where the challengers are claiming that government has impermissibly silenced, excluded, or punished their own speech. Helen Norton, *Campaign Speech Law With a Twist: When the Government is the Speaker, Not the Regulator*, 61 Emory L.J. 210, 255-56 (2011). This paper explores, *inter alia*, when the government's lies are sufficiently dangerous to justify a departure from the general rule that the government's own speech is insulated from free speech clause review.

[102] *See, e.g.*, Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 6 (forthcoming 2012) ("Hard power is, quite simply, 'the ability to coerce;' . . . . Soft power, by contrast,

Government's deliberate falsehoods generally involve efforts to persuade or influence that may not necessarily involve the exercise of its coercive state power in traditional ways. But, as explained above, the government's lies may still threaten key constitutional values.[103] Determining whether and how the Constitution limits government lies may require us to reconsider the sort of effects or harms of government action more commonly understood to be constrained by the Constitution.[104]

The Supreme Court has most directly addressed the question of when government speech – by itself -- violates the Constitution in the context of the establishment clause. More specifically, the Court has sometimes found government's religious speech to violate the establishment clause when such expression coerces its targets' behavior.[105] To be sure, divisions remain even among advocates of coercion theory about whether and when government's religious speech alone can coerce behavior; some coercion

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is 'the ability to get what you want through attraction rather than coercion or payments.'"); Jacob E. Gerson & Eric A. Posner, *Soft Law: Lessons from Congressional Practice,* 61 STAN. L. REV. 573, 577 (2008) (defining "soft law" to include statements by lawmaking authorities that do not have legally coercive status – i.e., that do not have the "force of law"). To be sure, however, a number of thoughtful commentators contest such distinctions as meaningless, instead urging that *all* government action is coercive. *See, e.g.,* Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 POL. SCI. QTLY 470 (1923) (arguing because private actors can assert coercive power just as government can, government's choice to leave certain matters to background law rather than to public regulation simply creates opportunities for coercion by private actors; government thus always distributes coercion in different ways rather than coercing or refraining from coercion).

[103] *See* Jack M. Balkin, Old School/New School Speech Regulation 8 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2377526) (explaining "how the 'soft power' of government influence can sometimes substitute for direct regulation of owners of private infrastructure"); *id.* at 43 ("Yet it was surprisingly easy for the American officials to use the soft power of public statements and a few well-placed inquiries to persuade the private enterprises that control the digital infrastructure of expression to stop doing business with WikiLeaks.").

[104] *See* David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1640 (2006) ("Government can speak, but its possession of coercive authority along with its ability to shape public discourse make it unlike any other speaker. Any approach to the constitutional status of government speech should take each of these factors into account.").

[105] As articulated by Justice Kennedy, who is among those most often associated with coercion analysis: [G]overnment may not coerce anyone to support or participate in religion or its exercise. . . . Forbidden involvements include compelling or coercing participation or attendance at a religious activity, religious oaths to obtain government office or benefits, or delegating government power to religious groups. County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 659-60 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

theorists are quicker to identify a listener's behavior as coerced by the government's religious speech than others.[106] On one hand, Justice Kennedy defines impermissible "coercion" relatively broadly to include government's religious speech that changes onlookers' behavior through peer pressure and other social dynamics– as would be the case, for example, with a prayer at a public high school graduation that students feel pressure to attend and not to leave.[107] Justice Scalia, in contrast, defines impermissible "coercion" quite narrowly to include only the threat or imposition of government punishment.[108]

Along these lines, we might similarly focus a free speech clause inquiry on government lies that are sufficiently coercive to cause their targets to alter their behavior.[109] And just as is the case with respect to determining when government's religious speech is impermissibly coercive for establishment clause purposes, so too is there room to debate when government lies are impermissibly coercive for free speech clause purposes. Government lies that seek to coerce their targets' silence, for example, can threaten such behavioral harm. Indeed, a few lower courts have signaled

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[106] *See* Michael W. McConnell, *Coercion: The Lost Element of Establishment,* 27 WM. & MARY L. REV. 933, 941 (1987) ("A noncoercion standard, of course, would not answer all questions. For example, it obviously would not answer the question, 'What is coercion?' Enormous variance exists between the persecutions of old and the many subtle ways in which government action can distort religious choice today.").

[107] Lee v. Weisman, 505 U.S. 577, 593-95 (1992) (Kennedy, J.) (concluding that prayers by clergy at public high school graduations are inherently coercive given the pressure on students to attend graduation and then not to leave during the prayers).

[108] *Id.* at 640 (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty.").

[109] Elsewhere I've suggested that government's hateful speech might be sufficiently "hard" or coercive to violate the equal protection clause when it inflicts certain behavioral harms. Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 WM. & MARY L. REV. 159, 194-96 (2012). With respect to government speech more generally, Abner Greene has urged that we take care before concluding that government speech is actually coercive. He explains coercion as "choice under a kind of pressure that allows us fairly to say, 'she did not choose; she was compelled.'. . . Although there are difficult cases at the margin, we generally accept the distinction between coercion and persuasion, deeming action pursuant to persuasion a proper exercise of autonomy. . . . In sum, one of the basic principles underlying the strong protection of private speech is that the persuasive effect of speech is not a proper reason for regulation. Only when there is no time for counterargument, or when persuasion will not cure the original harm, do we permit regulation of speech. We should think no differently about government speech. Assuming that dissent is open, and assuming no monopolization, we should consider even quite persuasive government speech to be just that, quite persuasive, and hold fast the distinction between persuasion and coercion."). Abner Greene, *Government of the Good*, 53 VAND. L. REV. 1, 42-43 (2000)).

that government's lies potentially violate the free speech clause when they take the form of threats that have the intent or effect of coercing silence or other behavior.[110] Moreover, government lies that do not rise to the level of threats sill carry the potential for coercing behavior when the audience is captive or otherwise unusually vulnerable,[111] or where the government has selective access to the information underlying the lie.[112] For related reasons, Beth Orsoff urged attention to context when assessing the coercive potential of government expression in general:

> Some might argue, and some courts have held, that only a government threat to prosecute where the government official has the power to carry through on the threat is

[110] Penthouse Int'l Ltd v. Meese, 939 F.2d 1011, 1016 (D.C. Cir 1991) ("At least when the government threatens no sanction – criminal or otherwise – we very much doubt that the government's criticism or effort to embarrass the distributor threatens anyone's First Amendment rights."); *id.* at 1020 (Randolph, J., concurring) ("I believe the First Amendment may well prohibit government officials from spreading false, derogatory information in order to interfere with a publisher's distribution of protected material. While this might require an inquiry into the official's motive, it is not unusual for a First Amendment violation to turn on whether governmental conduct was undertaken for the purpose of infringing on someone's speech. I also do not think there would be any particular difficulty in drawing a line between cases in which an official has spoken the truth or perhaps made an inadvertent misstatement and cases in which the official has engaged in intentional lying in order to bring about the injury. A ruling along these lines would, however, constitute new law.") (citations omitted); Trudeau v. FTC, 456 F.3d 178 (D.C. Cir. 2006) (entertaining possibility that false government press release issued in retaliation for First Amendment activity may violate the First Amendment, but concluding that the contested government press release was not false).

[111] YUDOF, *supra* note -- at 169 ("At some point, at gut level perhaps, we all know propaganda when we see and hear it, and perhaps judges, with equally sensitive stomachs, should respond to such propaganda by declaring it unconstitutional under the First Amendment. The inability to formulate reasonably precise and generalizable standards does not necessarily mean that judges should not act; but, as in the case of pornography, our collective inarticulateness should give us pause. Perhaps a factor that should be taken into account in determining the likelihood of government distortion of the thinking processes of citizens is the degree to which the government has captured the audience."); Brian C. Castello, *The Voice of Government as an Abridgement of First Amendment Rights of Speakers: Rethinking* Meese v. Keene, 1989 DUKE L.J. 654, 676-77 (1989) ("Government speech that forces a captive audience to be subject to a particular viewpoint presents the clearest example of coerced consent.").

[112] *See* Toni M. Massaro. *Tread on Me!* 33 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2401084) (urging an exception to the government speech doctrine in "circumstances in which the government exerts so much expressive power that its actions are tantamount to direct speech regulation. . . . One factor, although not the only one, that should be relevant to deterring the contours of this caveat is the extent to which government has nigh-on monopoly power over the information in question.").

> enough to be considered government censorship. However, all government criticism carries with it an implied threat. Thus, the test should be whether the average reasonable person receiving the government criticism would perceive it as a threat, not whether the government official can legitimately execute the threat. Furthermore, this threat should not be narrowly construed only as a threat to prosecute. The government can threaten an individual as effectively in much more subtle ways. For example, threatening to audit an individual's or business' taxes for the past seven years, refusing to issue or renew a permit, or even hinting at a possible grand jury investigation could cause an individual or company to change behavior just as effectively as a threat of prosecution.[113]

Coercion theory thus offers a possible approach to interpreting the free speech clause to constrain some government lies. An alternate approach would constrain an even larger universe of harmful government lies by drawing from the work of expressivist scholars who maintain that the government inflicts a constitutional wrong simply by sending certain messages of inferiority or disparagement, regardless of whether listeners experience reputational, behavioral, or material harm as a result.[114] This

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[113] See Orsoff, *supra* note -- at 234; *see id.* at 252("Government speech that intends or effectively threatens violates the First Amendment"). Justice Blackmun made a related in *Meese v. Keene*, 481 U.S. 465, 490-01 (1987) (Blackmun, J., dissenting) **(**"Because the Court believes that the term 'political propaganda' is neutral, it concludes that 'the Act places no burden on protected expression.' The Court's error on neutrality leads it to ignore the practical effects of the classification, which create an indirect burden on expression. As a result, the Court takes an unjustifiably narrow view of the sort of government action that can violate First Amendment protections. Because Congress did 'not pose any obstacle to appellee's access to the materials he wishes to exhibit' in that it "did not prohibit, edit, or restrain the distribution of advocacy materials," the Court thinks that the propaganda classification does not burden speech. But there need not be a direct restriction of speech in order to have a First Amendment violation. The Court has recognized that indirect discouragements are fully capable of a coercive effect on speech, and that the First Amendment protections extend beyond the blatant censorship the Court finds lacking here.").

[114] *See, e.g.*, Dorf, *supra* note -- at 1275-76 (rejecting the views of those scholars "who have articulated general skepticism about 'expressivist' theories of law; they argue that law ought to concern itself solely with direct, concrete harms. To my mind, the skeptics do not adequately address how deeply embedded expressivist notions are in at least some of our constitutional doctrine. The skeptical view of expressivism may explain why the law often denies recovery or liability for expressive harm, but expressivism-skepticism has clearly been rejected in at least some contexts."); Tebbe, *supra* note -- (drawing from free speech and equal protection doctrine, among others, to identify a constitutional theory prohibiting the government from engaging in certain disparaging speech).

approach also draws in part from the establishment clause setting, where Justice O'Connor's endorsement analysis found government to violate a constitutional commitment to religious pluralism when it delivered a message that citizens' status varies based on their religion (or nonreligion).[115] Applying expressivist theory to the problem of government lies would treat government lies that fall short of threats or otherwise lack coercive power as nevertheless offensive to the free speech clause when they are sufficiently disparaging to communicate a governmental message of the target's inferiority. Of course, such an expressivist approach invites greater indeterminacy about which lies actually deliver such a message -- and thus also invites greater institutional competence, separation of powers and chilling concerns.[116]

PART III
NONCONSTITUTIONAL ALTERNATIVES FOR ADDRESSING THE HARMS OF GOVERNMENT LIES

This Part examines a variety of nonconstitutional alternatives for addressing harmful government lies, both existing and potential. These options include legal constraints external to government speakers (like statutory and common law claims that address certain deliberate falsehoods generally or deliberate falsehoods by certain government speakers specifically), constraints internal to government speakers (like agency ombuds and inspector generals), and political checks that are largely nonlegal but that can be supplemented or strengthened through legal means (like expanded protections for government whistleblowers).

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[115] County of Allegheny v. ACLU, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (citations omitted) ("As a theoretical matter, the endorsement test captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.' . . . If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community and an accompanying message to adherents that they are insiders, favored members of the political community."); *see also* Lynch v. Donnelly, 465 U.S. 668, 694 (1984) ("Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.").

[116] *See* Norton, *Government's Hateful Speech*, *supra* note -- at 196-208 (discussing the advantages and disadvantages of an expressivist approach to government's racist, misogynist, or otherwise hateful speech).

A. Statutory (and Other Legal) Constraints

In addition to – or instead of – constitutional remedies, a variety of statutory and other legal options remain available to constrain certain government lies. Although statutory constraints carry some of the enforcement difficulties discussed in Part I, tailored statutory alternatives can address some of those challenges by offering a tool more like a scalpel than a bludgeon for addressing government lies that threaten especially grave harms.[117] Indeed, a number of statutes already prohibit false statements in specific contexts that include – or specifically target -- certain government speakers.

For example, some statutes prohibit certain lies in certain settings for certain purposes by speakers generally, including but not limited to government speakers. These include laws that target dishonest or corrupt behavior that includes but is not limited to lies, such as statutes that prohibit obstruction of justice,[118] abuse of process, or malicious prosecution.[119] Perjury statutes offer an especially helpful example of a setting-specific approach, as they target lies under oath that are material to certain high-stakes decisions.[120] Perjury laws thus prohibit lies that threaten individualized and concrete harms to litigants when they lead to erroneous verdicts[121] along with more collective harms to the public's ability to trust in the integrity of the justice system.[122]

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[117] Private law regulation of private speakers' deceptive speech offers a parallel by targeting certain deliberate falsehoods based on specific harm. *See* Klass, *supra* note -- at 449 ("Many laws address the flow of information between private parties. Familiar examples include the torts of deceit, negligent misrepresentation, nondisclosure, and defamation; criminal fraud statutes; securities law, which includes both disclosure duties and penalties for false statements; false advertising law; labeling requirements for food, drugs, and other consumer goods; and, according to recent scholarship, information-forcing penalty defaults in contract law and elsewhere. Taken together, these and similar laws constitute what I will call the 'law of deception.'").

[118] Morgan, *supra* note -- at 185-86.

[119] *E.g.*, Sterenbuch v. Goss, 266 P.3d 428, 439 (Colo. App. 2011).

[120] *See, e.g.*, 18 U.S.C. §1621; United States v Debrow, 346 U.S. 374, 376 (1953) (explaining federal perjury law as prohibiting a "false statement willfully made as to facts material to the hearing" under an oath authorized by federal law and taken before a competent tribunal, officer, or person).

[121] *See* Geoffrey Stone, *A Free and Responsible Press*, 1993 U. Chi. Legal F. 127, 132 (1993) ("The rules of evidence do not permit the presentation of knowingly false evidence. The reasons for this rule are clear. Such evidence serves no legitimate purpose in the effort to determine the truth. But it is worse than that, for such evidence is also destructive of the factfinding process. It attempts to distort, distract, and mislead. At best, such evidence will waste time and effort in requiring energy to be devoted to demonstrating that the testimony is false; at worst, the falsehood will not be revealed and the jury will reach the

Other statutes target lies made to certain audiences, such as the Federal False Statements Act that prohibits material falsity in communications with the government.[123] The Act punishes any lie to the government (including but not limited to those made by other government speakers) without regard to whether the lie was intended to obtain a monetary benefit or whether it caused any material harm to the government.[124] It instead targets lies that are "predictably capable of affecting" government decisionmaking;[125] such decisions can take a wide variety of forms, including decisions to grant a benefit or contract, as well as decisions about whether and how to deploy the government's investigative resources. [126] On one hand, such an approach is considerably more focused than a general prohibition on (government) lies by targeting those that are material to governmental decisions -- and thus that pose autonomy threats to government decisionmakers as well as collective public harms in terms of depleted or diverted governmental resources. On the other hand, an even narrower focus would further ameliorate enforcement concerns. Indeed, some commentators have urged limiting constructions of the statute to certain specific settings in part to prevent the chilling of valuable speech by other government actors; examples include proposals to interpret the statute to prohibit only lies

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wrong substantive result.").

[122] See *Alvarez*, 132 S.Ct. at 2546 (explaining that perjury "undermines the function and province of the law and threaten[ing] the integrity of judgments that are the basis of the legal system").

[123] *See, e.g.*, 18 U.S.C. § 1001 (prohibiting knowingly and willfully making "any materially false, fictitious or fraudulent statement or representation . . . in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States").

[124] *See* Morrison, *supra* note - at 127 (cited in note --); see also United States v Yermian, 468 U.S. 63, 71 (1984) (describing how the Act was originally interpreted to apply to lies intended to defraud the federal government out of its property or money, but was later amended to more broadly prohibit deceptive communications that interfered or obstructed lawful government functions); *id.* at 79-80 (Rehnquist dissenting) (same); Brogan v United States, 522 U.S. 398, 412 (1998) (same).

[125] *See, e.g.*, Kungys v United States, 485 U.S. 759, 771 (1988) (explaining that a statement is "material" if "predictably capable of affecting" government decision).

[126] *See* United States v Gilliland, 312 U.S. 86, 93 (1941) ("The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described."); Varat, *supra* note -- at 1114-15 ("Lies in the course of official government proceedings risk producing false beliefs in the minds of official investigators, risking perversion of the investigative process. Arguably, the deceptions in those instances also interfere with the reasoning processes of – and the respect owed to – the deceived parties, and are likely to influence their behavior.").

material to government decisionmaking that are made in response to official congressional inquiries.[127]

Some nonconstitutional legal constraints on lies are speaker-specific. For example, the rules of professional responsibility impose an additional duty of truthfulness on lawyers (many of whom are government actors) and judges,[128] with heightened responsibilities applicable to prosecutors as a particular type of government speaker.[129]

Some speaker-specific statutes focus on government speakers in particular, such as the rarely-enforced congressional ban on government "propaganda" that denies appropriations to federal agencies engaged in false or deceptive speech about their activities.[130] As another example, consider

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[127] *See* Morgan, *supra* note – at 189 (proposing to limit the statute's sweep "formaliz[ing] the circumstances under which it may be prosecuted -- for example, by restricting its coverage to statements provided in response to official congressional inquiries."). For other proposed narrowing constructions, see Brogan v United States, 522 U.S. 398, 409 (1998) (Ginsburg, J. concurring) (suggesting a more circumscribed focus for the Act that targets lies "designed to elicit a benefit from the Government or to hinder Government operations"); Morrison, *supra* note --at 139 (urging that the Act be interpreted or amended to prohibit lies told to the government with the capacity to secure money, jobs, benefits, or "other things of value" or "giv[e] false information which frustrates lawful regulation").

[128] MRPC 3.3(a)(1) ("A lawyer shall not knowingly[] make a false statement of fact of law to a tribunal"), 4.1(a) ("In the course of representing a client a lawyer shall not knowingly[] make a false statement of material fact or law to a third person"), 8.4(c) ("It is professional misconduct for a lawyer to[] engage in conduct involving dishonesty, fraud, deceit or misrepresentation"); Model Code of Judicial Conduct 4.1 (A) (11) (prohibiting judges and judicial candidates from "knowingly, or with reckless disregard for the truth, make any misleading statements). For examples of attorneys disciplined for deliberate falsehoods, *see* In re Paulter, 47 P.3d 1175 (Colo. 2002) (imposing discipline on attorney for deliberate falsehoods).

[129] See MRPC 3.8; Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 313 (2001) ("[T]he prosecutor has a legal and ethical duty to promote truth and to refrain from conduct that impedes truth. The courts have explicitly recognized the existence of this duty, and have implicitly recognized this duty by reversing convictions when a prosecutor engages in conduct that undermines the search for truth."); *id*. at 314-15 ("The duty is found as well in the prosecutor's domination of the criminal justice system and his virtual monopoly of the fact-finding process. More than any other party in the criminal justice system, the prosecutor has superior knowledge of the facts that are used to convict the defendant, exclusive control of those facts, and a unique ability to shape the presentation of those facts to the fact-finder.").

[130] For example, since 1951 each Congress has enacted an appropriations rider that entirely bars federal agencies from unauthorized expenditures to engage in "publicity or propaganda." *E.g*., Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 3 (2004) ("No part of any appropriation contained in this or any other Act shall be used for publicity or propaganda purposes within the United States not heretofore authorized by the Congress."). For a discussion of its underenforcement (which suggests

the statute that specifically targets the Consumer Product Safety Commission, requiring the agency to "assure that its public statements are accurate and fair; give manufacturers advance notice and an opportunity to respond, subject to some exemptions, including emergencies; respond to the manufacturer's objections or face an injunction and retract errors in roughly the same manner that the agency made the original disclosure."[131] Also with respect to agency speakers, some commentators have urged courts to interpret the Administrative Procedure Act (APA) to prohibit agencies' inaccurate statements (presumably including lies) as arbitrary and capricious.[132] Relatedly, some courts have interpreted the National Environmental Protection Act to prohibit agencies from issuing environmental impact statements that are based on false, inaccurate, or misleading data.[133] Other commentators who share those concerns instead urge Congress to amend the APA expressly to prohibit agencies' inaccurate or misleading speech (again, presumably including lies),[134] after concluding that such an interpretation of the current APA is unlikely.[135] Other examples that target lies specifically by certain government speakers include statutes prohibiting false governmental statements on ballot referenda.[136]

In addition to more specific targeting, statutory approaches also offer possibilities for nontraditional remedies that may address harmful government lies while further ameliorating the dangers of enforcement

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the difficulty with enforcement even in the nonconstitutional context), *see* Norton, *Campaign Speech Law*, *supra* note -- at 229-32.

[131] *See* Cortez, *supra* note – at 1420.

[132] *See* Ernest Gellhorn, *Adverse Publicity by Agencies*, 86 HARV. L. REV. 1380 (1973).

[133] *See* Western North Carolina Alliance v. North Carolina Dep't of Transp., 312 F. Supp. 2d 765, 777 (E.D.N.C. 2003) ("While there is no evidence to suggest that Defendants intentionally misrepresented the safety data, the Court finds that the gross inaccuracy of the safety data shows a failure to take a 'hard look.'"); Natural Resources Defense Council v. U.S. Forest Service, 421 F.3d 797, 811-13 (9th Cir. 2005) (finding that the agency's use of inflated, inaccurate, and misleading data violated NEPA)

[134] Cortez, *supra* note -- at 1376-77 ("Congress should declare that adverse publicity is 'final agency action' under the APA and is reviewable for an abuse of discretion); *id.* ("[C]ourts should recognize a cause of action under the APA or via procedural due process, if applicable.").

[135] O'Reilly, *supra* note – at 518 ("[M]ost federal courts probably will not accept claims that an APA cause of action for judicial review can be asserted against the mere act of a website posting or publication of data, unless more direct harm occurs, or unless special circumstances can be established. The need for the plaintiff to show final agency action, to show exhaustion of remedies, and to show that the matter is ripe for adjudication, all combine to make web posting or publishing a non-reviewable act.").

[136] *See Avoidance of an Election or Referendum When the Electorate Has been Misled*, 70 HARV. L. REV. 1077, 1078 (1957).

efforts.[137] For example, a statute might limit available remedies to injunctive relief rather than damages (in some ways akin to the remedies for breaches of private fiduciary duties);[138] more specifically, it might require suspension or removal of a falsehood from an agency's website.[139]

More creative remedies include creating formal opportunities for counterspeech – for example, by a commission charged with identifying and publicizing certain government lies. Along these lines, one commentator has proposed the creation of an agency ombuds charged with responding to complaints about inaccurate agency speech (presumably this would include allegations of an agency's deliberate falsehoods).[140] Agency Inspector Generals offer another possible internal check.[141] The United Kingdom has adopted a similar approach, creating an independent government watchdog agency specifically charged with assessing and publicizing the (in)accuracy of the government's speech.[142]

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[137] Mark Yudof proposed an overarching approach to government lies that sounds in statutory rather than constitutional remedy: "The greatest threat of government domination and distortion of majoritarian processes emanates from executive bodies and officers. The greatest hope of restraining that power lies with the legislative branches of government. If a legislative body determines that particular government expression threatens democratic processes, the courts should not second-guess that decision. . . . My preferred technique for judicial resolution of government-speech issues is a variation of the 'legislative remand.' When grave issues of government expression and the First Amendment are involved, a court should be especially concerned that legislative bodies authorize the communications activity. This essentially statutory approach allows the courts to police government expression, while denying the judiciary the ultimate power to silence executive officers." YUDOF, *supra* note – at 301; *id.* at 302 ("The 'suspensive veto' would not be grounded in the Constitution itself; for the ultra vires doctrine is a method of statutory construction which permits the avoidance of constitutional difficulties.").

[138] Similarly, in private defamation context, some have proposed relief limited to declaratory judgment on truth or falsity and attorney's fees. *See, e.g.*, David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CAL. L. REV, 847 (1986); Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CAL. L. REV. 809 (1986); see also Cass Sunstein, On Rumors: How Falsehoods Spread, Why We Believe Them and What Can be Done 78 (Farrar, Straus, and Giroux 2009) (urging that we find ways "to protect people against falsehoods without producing the excessive deterrence of costly lawsuits" – e.g., through a right to demand retraction after finding of falsehood; right to notice and take down; damage caps).

[139] O'Reilly, *supra* note – at 536.

[140] *Id.* at 538-39.

[141] *See* Cortez, *supra* note – at 1424 (describing how the Inspector General for the Securities and Exchange Commission investigated the agency's inaccurate publicity allegedly designed to embarrass the targeted company).

[142] *See* Carl Bialik, *This UK Sheriff Cites Officials for Serious Statistical Violations*, (June 3, 2009) (available at http://online.wsj.com/news/articles/SB124398720006979435); Cortez, *supra* note -- at 1438 (urging use of an ombuds or chief information officer "to

Again, statutory alternatives give legislatures the option of crafting solutions that specifically target especially harmful government lies – ideally (but not always) in ways that minimize enforcement concerns. As an illustration of the advantages and disadvantages of such an approach, the proposed (but never enacted) Executive Accountability Act would target especially harmful government lies by criminalizing executive officials' knowing and willful false statements to promote the use of force – but in a context that arguably maximizes separation of powers concerns.[143]

B. Political and Other Nonlegal Checks on Government Lies

The significant challenges posed by legal efforts to police government lies (regardless of whether they are constitutional or statutory in origin) may invite a turn to political remedies.[144] These include lobbying, petitioning, campaigning, voting, and (with respect to certain government speakers) impeachment. Some point to Richard Nixon's resignation and Lyndon Johnson's decision not to seek re-election as examples of the value of political controls in related contexts.[145]

Political remedies might also include the government's voluntary self-constraint. Examples of voluntarily-adopted internal controls (which generally focus on rooting out inaccuracies more generally rather than lies more specifically) include the Environmental Protection Agency's system for addressing and responding to complaints that data on its website is inaccurate.[146] One commentator has urged other agencies to follow suit on their own initiative:

> Agencies should articulate written standards for issuing different forms of adverse publicity, particularly via new media. These standards should address the content of announcements and establish both internal procedures for issuing publicity and procedures for private parties to request corrections or retractions through timely administrative

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review disputes about agency publicity" to "generate more credibility with industries and the media, and perhaps deter litigation").

[143] HR 743, 111th Cong.; S 1529 (would amend federal criminal code to prohibit knowing and willfully materially false statements for purpose of garnering congressional support for use of American military).

[144] *See* Jacobs, *supra* note -- at 434 ("While certain types of legal reforms could help to impose accountability on executive branch actors who make threat claims, they are both unlikely to be enacted or, if enacted, to be effectively enforced, at least in the short term.").

[145] *See* Morgan, *supra* note -- at 229.

[146] *See* O'Reilly, *supra* note – at 533.

> appeals -- all subject to reasonable exceptions for emergencies and other justifications in the public interest. Agency self-restraint is perhaps the most effective and most realistic response.[147]

Others are considerably less optimistic about the effectiveness of political controls. Although meaningful reliance on political remedies requires as vigorous a press and as skeptical and engaged a public as possible,[148] some argue that the American press has too often failed to provide a meaningful check on deceptive or misleading government speech in support of the use of military force.[149] In response, nonlegal political checks can nevertheless be supplemented or strengthened through legal means. Examples include expanded constitutional and statutory protections for government whistleblowers (which currently remain decidedly limited)[150] and more vigorous enforcement of the Freedom of Information Act and related transparency measures.[151]

C. Applications

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[147] *See* Cortez, *supra* note – at 1376.

[148] *See* Jacobs, *supra* note -- at 452; YUDOF , *supra* note -- at 113-16.

[149] ALTERMAN, *supra* note -- at 137 ("While it is impossible for the media to compel government officials to tell the truth, had these officials been forced to worry about the likelihood of a press firestorm over the discovery of a lie – or at least about the possibility of public opprobrium – they might have been more reluctant to engage in the systematic deceit that took place routinely during the Johnson and Nixon administrations. The theoretical foundation of the First Amendment lies in the media's ability to hold public officials accountable. But if those officials feel free to lie to the press – and by extension, the nation – with impunity, then democracy becomes pseudo-democracy, as the illusion of accountability replaces the real thing."); Editorial, *A Pause for Hindsight*, N.Y. TIMES, July 16, 2004 at A1 ("Over the last few months, this page has repeatedly demanded that President Bush acknowledge the mistakes his administration made when it came to the war in Iraq, particularly its role in misleading the American people about Saddam Hussein's weapons of mass destruction and links with Al Qaeda. If we want Mr. Bush to be candid about his mistakes, we should be equally open about our own . . . . [E]ven though this page came down against the invasion we regret now that we didn't do more to challenge the president's assumptions.")

[150] *See* Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233 (2008) (discussing value of leaks and whistleblowers to ensuring government accountability).

[151] *See* Mary-Rose Papandrea, *Under Attack: The Public's Right to Know and the War on Terror*, 25 B.C. THIRD WORLD LAW JOURNAL 35 (2011) (identifying the judiciary's reluctance to enforce FOIA as a barrier to public transparency).

If we recall the hypotheticals posed in the Introduction,[152] we can see how each can be understood to threaten due process or free speech values (or both), and also how enforcement efforts pose significant institutional competence, separation of powers, and chilling concerns.

For example, a President's lies to Congress and the public about the reasons for U.S. military intervention can undermine the public's ability to engage in democratic self-governance, threaten listeners' autonomy by potentially skewing their political, and frustrate the search for truth. Moreover, such lies threaten a range of devastating harms, both individual and collective, as they can lead to the loss of lives by both civilians and soldier, the disastrous diversion of national resources, and a substantial loss in public trust. In addition, the lie concerns a matter on which the President will often have greater (and perhaps monopoly) informational access, thus limiting opportunities for meaningful counterspeech and political accountability.

On the other hand, the audience (Congress and the American public) is neither captive nor particularly vulnerable, which makes it difficult to characterize their decisions in reliance on the President's lies as coerced in violation of the free speech clause. Establishing a link between the President's lie and the deprivation of life or liberty for due process purposes presents similarly challenging causation issues. Furthermore, one can easily anticipate that constitutional litigation challenging the President's speech as a lie might be motivated by partisan rather than public interests, and that the judiciary might be understandably reluctant to second-guess the choices of the President when exercising her Article II powers as commander-in-chief. Nonconstitutional approaches -- such as enhanced protections for whistleblowers and vigorous enforcement of FOIA and related accountability measures -- designed to enhance the effectiveness of political remedies offer an incomplete response, but may nevertheless be the best among imperfect options in light of the challenges raised by constitutional enforcement efforts in this context.

A Surgeon General's lies about the health risks of certain products motivated by non-public reasons can frustrate the search for truth (especially given the office's presumed expertise on health matters), undermine listener autonomy by skewing consumer and health choices, and distort political debates about proposed regulatory action. When such lies are told to a relatively captive and vulnerable audience of young people,

[152] *See supra* note -- and accompanying text.

they threaten to manipulate behavior in violation of a coercion-based approach to the free speech clause. Such an approach is not without its dangers, however, as here too the prospect of opponents' constitutional litigation might deter valuable if unpopular government speech (consider, for example what tobacco companies might have done with such an option in response to the Surgeon General's 1960s speech on the dangers of tobacco). These concerns might be addressed at least in part by limiting available remedies to injunctive relief and counterspeech.

An agency's lie about its own misconduct frustrates meaningful political accountability and thus democratic self-governance (as well as the search for truth and listeners' autonomy with respect to their voting choices). That such a lie deprives life, liberty, or property within the meaning of the due process clause, however, seems unlikely. Similarly, such a lie seems unlikely to coerce listener behavior in violation of the free speech clause. A government's lies about its own misconduct thus might be better addressed by statutory approaches that target certain limited contexts (e.g., lies that obstruct justice, lies under oath, or lies in in the context of legislative hearings or other investigative settings).

An agency's defamatory targeting of its critics to punish or silence them may offend the due process clause by damaging reputation or imposing the equivalent of criminal punishment in ways that deprive individuals of protected liberty interests. It may also violate the free speech clause if intended to and successful in coercing its targets' silence or other behavioral change. Concerns about the dangers posed by enforcement efforts may be lessened in light of the difficulties that challengers face in proving the elements of defamation, especially if available remedies are limited.

CONCLUSION

When, if ever, does the Constitution bar the government from lying? On one hand, many government lies offend important due process and free speech values. On the other hand, constitutional efforts to constrain such lies can also pose significant dangers of their own by undermining the separation of powers and by chilling government speakers' willingness to engage in important informational and communicative endeavors. Doctrinal or statutory approaches that focus on government lies that inflict relatively specific or targeted harms may help balance these concerns, even if imperfectly. For example, government lies that deprive individuals of life, liberty, or property may violate the due process clause. And government lies that have the intent or effect of coercing targets' silence or other behavioral change may violate the free speech clause. Despite their

harms, other government lies may be more appropriately addressed by nonconstitutional means -- e.g., by statutory approaches that target certain specific settings or speakers or that provide for nontraditional remedies that ameliorate enforcement concerns.

As Michael Walzer has written, "I suspect we shall not abolish lying at all, but we might see to it that fewer lies were told if we contrived to deny power and glory to the greatest liars – except, of course, in the case of those lucky few whose extraordinary achievements make us forget the lies they told."[153] This paper has explored a variety of approaches to "deny[ing] power and glory to the greatest liars" while recognizing that some harmful government lies will nevertheless inevitably escape redress.

[153] Walzer, supra note --.