

University of Colorado Law School

Colorado Law Scholarly Commons

Articles

Colorado Law Faculty Scholarship

2018

(At Least) Thirteen Ways of Looking at Election Lies

Helen Norton

University of Colorado Law School

Follow this and additional works at: <https://scholar.law.colorado.edu/articles>



Part of the [Business Organizations Law Commons](#), [Election Law Commons](#), [First Amendment Commons](#), [Judges Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Science and Technology Law Commons](#), and the [Supreme Court of the United States Commons](#)

Citation Information

Helen Norton, *(At Least) Thirteen Ways of Looking at Election Lies*, 71 OKLA. L. REV. 117 (2018), available at <https://scholar.law.colorado.edu/articles/1182>.

Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact jane.thompson@colorado.edu.

(AT LEAST) THIRTEEN WAYS OF LOOKING AT ELECTION LIES*

HELEN NORTON**

Lies take many forms. Because lies vary so greatly in their motivations and consequences (among many other qualities), philosophers have long sought to catalog them to help make sense of their diversity and complexity. Augustine and Aquinas, for instance, separately proposed moral hierarchies of lies based on their differing assessments of certain lies' relative harm and value.¹ Legal scholars too have classified lies in various ways to explain why we punish some and protect others.²

* See WALLACE STEVENS, *Thirteen Ways of Looking at a Blackbird*, in THE COLLECTED POEMS OF WALLACE STEVENS 99 (Vintage Int'l 2015) (1954).

** Professor and Ira C. Rothgerber, Jr. Chair in Constitutional Law, University of Colorado School of Law. Thanks to Jessica Reed-Baum for excellent research assistance, to Josh Sellers, Joe Thai, and Jim Weinstein for thoughtful comments, and to the *Oklahoma Law Review* for a terrific symposium.

1. Augustine, On Lying ¶ 25 (n.d.), in SEVENTEEN SHORT TREATISES OF S. AUGUSTINE, BISHOP OF HIPPO 382, 408–09 (Charles Lewis Cornish & Henry Browne trans., Oxford, John Henry Parker 1847), <https://archive.org/details/seventeenshorttr00augu> (describing eight different types of lies, some more pernicious than others: lies in religious teaching, lies that harm others and help no one, lies that harm others and help someone, lies told for the pleasure of lying, lies told “with [the] desire of pleasing by agreeableness in talk,” lies that harm no one and that help someone, lies that harm no one and that save someone’s life, and lies that harm no one and that save someone’s “purity”); THOMAS AQUINAS, *Opposed to Truth: Of Lying*, in THE “SUMMA THEOLOGICA” OF ST. THOMAS AQUINAS: PART II (SECOND PART) 85, 90 (Fathers of the English Dominican Province trans., 1922) (1485), <https://archive.org/details/summatheologicao12thomuoft> (“Now it is evident that the greater the good intended, the more is the sin of lying diminished in gravity. Wherefore a careful consideration of the matter will show that these various kinds of lies are enumerated in their order of gravity: since the useful good is better than pleasurable good, and the life of the body than money, and virtue than the life of the body.”).

2. I have taxonomized lies in other legal settings elsewhere. See Helen Norton, *Lies to Manipulate, Misappropriate, and Acquire Governmental Power*, in LAW AND LIES 143 (Austin Sarat ed., 2015) [hereinafter Norton, *Lies to Manipulate*] (discussing lies to the government, about being the government, and to become the government); Helen Norton, *Government Lies and the Press Clause*, 89 U. COLO. L. REV. 453 (2018) (discussing the government’s various press-related lies and misrepresentations); Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 163–85 [hereinafter Norton, *Lies and the Constitution*] (proposing that the First Amendment protects some lies because they have affirmative value in their own right, some to prevent the chilling of valuable speech, some to prevent government overreaching, and some not at all). For a sampling of other legal commentators’ thoughtful taxonomies of lies, see, for example, Alan Chen & Justin

In this Essay, I offer yet another taxonomy of lies, focusing specifically on election lies—that is, lies told during or about elections.³ As we shall see, we can divide and describe election lies in a wide variety of ways: by speaker, by motive, by subject matter, by audience, by means of delivery, and more. These different ways of thinking about election lies are by no means mutually exclusive; indeed, they often overlap.

In this Essay, I use the term “lies” to mean a speaker’s deliberately or recklessly false assertions of fact made with the intention that the listener believe them to be true.⁴ But of course such “lies” themselves are a subset of a larger category of deception that includes misrepresentations, secrets, and more.⁵ I chose this narrower focus not only due to limitations of time and space, but also because such intentional or reckless falsehoods may be especially morally blameworthy in their disrespect for the listener and because they may threaten greater instrumental harm than other forms of deception.⁶

Election lies understandably disturb us when they succeed in deceiving their targets, when they influence election outcomes, and when they degrade our public discourse. At the same time, however, we also fear

Marceau, *Developing a Taxonomy of Lies Under the First Amendment*, 89 U. COLO. L. REV. 655 (2018); David Han, *Categorizing Lies*, 89 U. COLO. L. REV. 613 (2018).

3. Catherine Ross has recently offered an insightful taxonomy of campaign-related deceptions that includes “straight-out lies,” “intentional distortions,” “bullshit,” and “indirect prevarication.” Catherine J. Ross, *Ministry of Truth: Why Law Can’t Stop Prevarications, Bullshit, and Straight-Out Lies in Political Campaigns*, 16 FIRST AMEND. L. REV. 367 (2018). Other helpful discussions of election lies include Gerald G. Ashdown, *Distorting Democracy: Campaign Lies in the 21st Century*, 20 WM. & MARY BILL RTS. J. 1085 (2012); Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?* 74 MONT. L. REV. 53 (2013); William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285 (2004).

4. See BERNARD WILLIAMS, *TRUTH & TRUTHFULNESS* 96 (2002) (“I take a lie to be an assertion, the content of which the speaker believes to be false, which is made with the intention to deceive the hearer with regard to that content.”).

5. See Ross, *supra* note 3. Here I also distinguish election lies from campaign promises sincerely made but later abandoned. See *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (“[O]ne would be naïve not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment.”).

6. See Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 177 (2001) (explaining that “bald-faced lies” may be more dangerous than other forms of deception because they do not offer “the listener the opportunity for more precise questioning”); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 356 (1991) (explaining that lies pose greater threats to listener autonomy than secrets because they “affirmatively throw[] the hearer off track”).

government overreach and the dangers of partisan enforcement, we worry that regulation will inadvertently chill truthful and thus valuable speech, and we sometimes wonder whether the causal link between election lies and significant harm is sufficiently direct to justify the lies' constraint.⁷

Hard constitutional questions arise when important values like electoral integrity and free speech come into conflict.⁸ Indeed, in the related (but distinct) context of campaign finance regulation, Professor Zephyr Teachout describes a tension “between two different ideas of what is at the center of the Constitution—the First Amendment or the integrity of the electoral process.”⁹ These tensions, in turn, invite the question whether electoral integrity simply requires a system free from corruption as narrowly defined by the Supreme Court,¹⁰ or whether electoral integrity instead sometimes affirmatively requires that election-related speech be truthful.¹¹

7. See Helen Norton, *The Government's Lies and the Constitution*, 91 IND. L.J. 73, 116 (2015) (describing a possible reluctance to regulate election-related lies because of the greater difficulties in establishing a direct connection between those lies and their targets' voting decisions given the many reasons for voters' choices).

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

9. ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA* 191 (2014); see also Deborah Hellman, *Liberty, Equality, Bribery, and Self-Government: Reframing the Campaign Finance Debate* 11 (Univ. of Va. Sch. of Law, Pub. L. & Legal Theory Research Paper No. 2017-47, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3028102 (“While it is certainly true that speaking often requires money and that the liberty to speak freely is at stake when laws limit political contributions and expenditures, this liberty is not the only relevant liberty at issue in these cases. Also relevant is the liberty of self-government.”); *id.* at 2 (“[W]hen courts consider whether campaign finance laws are constitutional, they should remember that the equality of political participation and the liberty of self-government are also important constitutional values that can be brought to bear, along with the liberty of free speech, when deciding whether campaign finance restrictions can be upheld under current law.”).

10. See *Citizens United v. FEC*, 558 U.S. 310, 360–61 (2010).

11. See James Weinstein, *Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibition of Lies in Political Campaigns*, 71 OKLA. L. REV. 167, 222 (2018) (recommending that, in deciding whether an election-related lie may be regulated, we ask “the extent to which the [regulation] advances the core purposes of the election domain to promote fair and efficient elections” and “the extent to which the [regulation] impairs the core democratic purposes of the domain of public discourse to promote political legitimacy and to provide the public with useful information and perspectives”); see also Frederick Schauer & Richard Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1816 (1999) (suggesting that elections are sufficiently exceptional to justify the regulation of election-related speech in ways “that would be impermissible in the general domain of public discourse”); *id.* at 1808 (“[W]e

Spoiler alert: I do not propose to solve the knotty problem(s) of election lies in this Essay. Instead, I identify some possible sorting mechanisms, offer a few historical and contemporary illustrations, and suggest why these distinctions among election lies might (or might not) matter when figuring out what to do about them. I do not intend this as an exhaustive or perfect taxonomy; indeed, I encourage others to improve upon it. By illuminating the diversity and complexity of election-related lies, I emphasize the value in thinking more carefully about what troubles us about them and why. In so doing, I hope to help sharpen our thinking about when and why election lies might be harmful or instead valuable; when and why their regulation might threaten other harms; and when and why they might be amenable to constraint through law, norms, markets, and architecture¹²—or not at all.

I. Differences Among Speakers

Election speakers—and thus election liars—vary widely: they may be foreign or domestic, robot or human, governmental or nongovernmental, members of a profession where speech is heavily regulated, and more.

A. Foreign Speakers

As we now know, Russian speakers perpetrated a range of falsehoods during the 2016 U.S. election “as part of a strategy to influence public opinion.”¹³ They not only disseminated speech that was false in content, but also lied about the source of that speech by creating websites and social media posts, profiles, and pages falsely attributed to nonexistent Americans.¹⁴

could decide that elections constituted a distinct domain for First Amendment purposes without committing to what we would do within that domain.”).

12. See Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662–64 (1998) (describing how law, social norms, markets, and architecture each regulate human behavior in different ways).

13. Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63, 71 (2017); see also Joseph Thai, *The Right to Receive Foreign Speech*, 71 OKLA. L. REV. 269 (2018) (describing Russian interference in the 2016 U.S. election). Of course, the United States itself has sometimes interfered with other nations’ elections. *E.g.*, BARBARA TUCHMAN, *Kissinger: Self-Portrait*, in PRACTICING HISTORY 218, 223 (1981) (describing then-Secretary of State Kissinger’s authorization of “expenditures by the Central Intelligence Agency to influence the Chilean elections of 1970”).

14. See Elizabeth Dwoskin et al., *Russians Took a Page from Corporate America by Using Facebook Tool to ID and Influence Voters*, WASH. POST (Oct. 2, 2017), <https://www.washingtonpost.com/business/economy/russians-took-a-page-from-corporate-america-by-using-facebook-tool-to-id-and-influence-voters/2017/10/02/681e40d8-a7c5->

Of course, foreign speakers may not have any autonomy interests protected by the First Amendment, as the Supreme Court has held that at least some constitutional guarantees do not extend to noncitizens overseas.¹⁵ Even more important, foreign speakers' lies to influence American elections to their own advantage threaten especially grave harm to key constitutional values—particularly if we understand the First Amendment's primary purpose as protecting speech that facilitates the United States' democratic self-governance.¹⁶ For related reasons, as Professor Josh Sellers's contribution to this symposium explains, federal law already regulates campaign speech by foreign nationals in various ways “to prevent foreign interference in our elections.”¹⁷

11e7-850e-2bdd1236be5d_story.html?utm_term=.9695ff239796 (“Russian operatives set up an array of misleading Web sites and social media pages to identify American voters susceptible to propaganda, then used a powerful Facebook tool to repeatedly send them messages designed to influence their political behavior, say people familiar with the investigation into foreign meddling in the U.S. election.”); Ellen Nakashima et al., *Top U.S. Intelligence Official: Russia Meddled in Election by Hacking, Spreading of Propaganda*, WASH. POST (Jan. 5, 2017), https://www.washingtonpost.com/world/national-security/top-us-cyber-officials-russia-poses-a-major-threat-to-the-countrys-infrastructure-and-networks/2017/01/05/36a60b42-d34c-11e6-9cb0-54ab630851e8_story.html?utm_term=.f46260a2d2bc (“The country’s top intelligence official testified to Congress on Thursday that Russia’s meddling in the 2016 presidential campaign went well beyond hacking to include disinformation and the dissemination of ‘fake news’ – an effort, he said, that continues.”); Scott Shane, *Fake Facebook Accounts with Ties to the Kremlin Posed as U.S. Activists*, N.Y. TIMES, Sept. 13, 2017, at A16; Scott Shane, *To Sway Vote, Russia Used Army of Fake Americans: Flooding Twitter and Facebook, Imposters Helped Fuel Anger in Polarized U.S.*, N.Y. TIMES, Sept. 8, 2017, at A1.

15. *E.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268–69 (1990) (declining to apply Fourth Amendment protections extraterritorially to noncitizens); *Johnson v. Eisentrager*, 339 U.S. 763, 784–85 (1950) (declining to apply Fifth Amendment protections extraterritorially to noncitizens). On the other hand, some resist such a limited view of the Constitution’s reach. *See* Timothy Zick, *The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation*, 52 B.C. L. REV. 941, 1024 (2011) (urging courts to consider a more robust understanding of First Amendment rights across borders).

16. *See* ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 24–25 (1948) (identifying democratic self-governance as the primary purpose of the Free Speech Clause).

17. Joshua S. Sellers, *Legislating Against Lying in Campaigns and Elections*, 71 OKLA. L. REV. 141, 155 (2018); *see also* 52 U.S.C. §§ 30121(a)(1)(A)-(B) (2012) (prohibiting foreign nationals from making monetary contributions to political candidates and political parties); *id.* § 30121(a)(1)(C) (prohibiting foreign nationals from making independent expenditures for certain electioneering communications).

B. Robot Speakers

Robots, both foreign and domestic, also played a substantial role in spreading “fake news”¹⁸ and other election-related lies in the 2016 U.S. election.¹⁹ Nonhuman speakers have little, if any, protected autonomy interests under the First Amendment (although humans are, of course, behind their speech and, in any event, robots’ speech can still have value to human listeners).²⁰ Moreover, the robotic source of such lies can intensify their speed and reach, and thus, perhaps, their harm.²¹

C. Corporate Speakers

Corporations also engage in election-related speech that can include lies. Unlike human individuals, corporations do not have dignitary interests of their own,²² although, as the Supreme Court has emphasized, listeners may find value in political campaign speech regardless of its corporate origin.²³ Corporations’ relative power and wealth may—or may not—trigger greater concern about their ability to manipulate elections in various ways,

18. For thoughtful discussion of the related problem of “fake news,” see generally Lili Levi, *Real “Fake News” and Fake “Fake News,”* 16 FIRST AMEND. L. REV. 232 (2018) (discussing the related problem of “fake news”); Mark Verstraete et al., *Identifying and Countering Fake News* (Univ. of Ariz., Ariz. Legal Stud., Discussion Paper No. 17-15, 2017), <https://ssrn.com/abstract=3007971>.

19. See Persily, *supra* note 13, at 70 (“[B]ots can spread information or misinformation, and can cause topics to ‘trend’ online through the automated promotion of hashtags, stories, and the like. During the 2016 campaign, the prevalence of bots in spreading propaganda and fake news appears to have reached new heights.”).

20. See Toni M. Massaro & Helen Norton, *Siri-ously? Free Speech Rights for Artificial Intelligence*, 110 NW. U. L. REV. 1169, 1174 (2016) (explaining that the First Amendment may protect robotic speech when it is of value to human listeners).

21. See Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 222 (2018) (“But there is a danger that counterspeech will not be enough to deal with the flood of bot-driven fake news making it harder for voters with civic competence to separate truth from fiction and make informed voting and policy choices. For this reason, the First Amendment should not be interpreted to bar the government from enacting carefully drawn laws which would require social media and search companies such as Facebook and Google to provide certain information to let consumers judge the veracity of posted materials.”).

22. See Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1678 (2015) (suggesting that the First Amendment has been traditionally understood to protect corporations’ speech only to the extent that it furthers human listeners’ interests because corporations do not have dignitary interests of their own).

23. See *Citizens United v. FEC*, 558 U.S. 310, 349–50 (2010).

including through their lies.²⁴ Indeed, for related reasons election law already treats corporations differently in certain ways: federal law, for example, prohibits corporations from contributing directly to candidate campaigns.²⁵

D. Candidates as Speakers

Individual candidates (and their campaigns) spread some election lies,²⁶ while speakers other than those associated with a campaign do so as well. Why might this distinction matter? Perhaps we think it fair to expect more of candidates and their campaigns with respect to their factual assertions about matters to which they have privileged access, such as information about the candidate's own credentials and experience.²⁷ And maybe a campaign's lies tell us something about the character of the candidate we are considering. On the other hand, the candidate's own expression—including his or her lies—furthers his or her own autonomy and self-governance interests.²⁸

24. See Richard Briffault, *Two Challenges for Campaign Finance Disclosure After Citizens United and Doe v. Reed*, 19 WM. & MARY BILL RTS. J. 983, 1005 (2011) (“[Large donors] are seeking to use their wealth and intensity of commitment to exercise a greater degree of influence over a collective, public decision than not only the vast majority of voters, but also most other donors.”).

25. 11 C.F.R. § 114.2 (2016) (prohibiting corporations' campaign contributions).

26. *E.g.*, Persily, *supra* note 13, at 68 (“More striking still, the official campaigns would retweet these [false] stories. Donald Trump retweeted one suggesting that his support among blue-collar workers was the highest for any candidate since Franklin Delano Roosevelt. Eric Trump, Kellyanne Conway, and Corey Lewandowski all retweeted an article from a fake-news website (abcnews.com.co) which claimed that Clinton had sent hired protesters to disrupt Trump's rallies.”); Angie Drobnic Holan & Linda Qui, *2015 Lie of the Year: The Campaign Misstatements of Donald Trump*, POLITIFACT (Dec. 21, 2015), <http://www.politifact.com/truth-o-meter/article/2015/dec/21/2015-lie-year-donald-trump-campaign-misstatements/> [<https://perma.cc/62ZC-6BKN>] (documenting 2015 falsehoods by the Trump campaign).

27. See Norton, *Lies to Manipulate*, *supra* note 2, at 188–89.

28. See Weinstein, *supra* note 11, at 226–27 (“[Regulating candidates' lies about their opponents] can be thought of as a basic ground rule for a fair contest analogous to a rule prohibiting boxers from hitting each other below the belt. . . . Although a subsidiary purpose of a candidate's speech might sometimes be to contribute to public opinion in the hopes of changing laws or policy, this is rarely, if ever, the primary purpose of such speech. Rather, the dominant purpose of such expression is to influence public opinion in order to get elected.”).

E. Judges and Lawyers as Speakers

Ethics codes impose higher expectations of truthfulness upon certain speakers on the campaign trail (and elsewhere). More specifically, judges and lawyers differ from most other campaign speakers in that professional responsibility rules govern their speech, including their lies.²⁹ In upholding laws that punish judicial candidates' campaign lies, for example, courts have emphasized the threats posed by such lies to the public's confidence in the integrity of the judiciary.³⁰

F. Governmental Speakers

Sometimes the government (rather than a nongovernmental speaker) may be the source of an election lie. Why might this matter?³¹ To be sure, the government's speech on some election issues—like ballot issues—can be of great value to voters.³² But our own government's election-related lies can

29. See, e.g., *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1667 (2015) (holding that Florida's rule prohibiting judges from engaging in speech soliciting campaign donations was narrowly tailored to achieve the state's compelling interest in maintaining "public confidence in the integrity of its judiciary").

30. See *Myers v. Thompson*, 192 F. Supp. 3d 1129, 1141–42 (D. Mont. 2016) (upholding Montana Code of Judicial Conduct provision that prohibits judges and judicial candidates from making knowing or reckless falsehoods) ("Counterspeech is not a remedy to a systemic challenge that is false and undermines the public's confidence in the third branch of government."); *Inquiry Concerning a Judge No. 14-488 Re: Shepard*, 217 So. 3d 71, 78 (Fla. 2017), *cert. denied sub nom. Shepard v. Fla. Judicial Qualifications Comm'n*, 138 S. Ct. 737 (2018) (upholding Florida Code of Judicial Conduct provision that prohibits judicial candidates from "knowingly misrepresent[ing] the identity, qualifications, present position or other fact concerning the candidate or an opponent"). *But see Nat Stern, Judicial Candidates' Right to Lie*, 77 MD. L. REV. 774, 776 (2018) (arguing that such prohibitions are likely unconstitutional).

31. Recall that the *Citizens United* majority asserted that "the First Amendment generally prohibits the suppression of political speech based on the speaker's identity." *Citizens United v. FEC*, 558 U.S. 310, 350 (2010). But this assertion failed to acknowledge that the Court's own doctrine often treats speakers—such as commercial speakers, students, prisoners, and public employees—differently based on their expression's differing potential for harm. See *id.* at 394 (Stevens, J., dissenting). And, of course, listeners often use a speaker's identity as a proxy for the message's quality and credibility. See *infra* notes 60–62 and accompanying text.

32. See Helen Norton, *Campaign Speech with a Twist: When the Government Is the Speaker, Not the Regulator*, 61 EMORY L.J. 209, 215–16 (2011). On the other hand, some remain concerned that the government's campaign-related speech—even if truthful—threatens to coerce listeners or drown out competing speakers precisely because of the government's identity as the speaker. See *id.* at 217–25.

be especially corrosive to a healthy democracy.³³ In terms of legal remedies, the First Amendment does not protect the government's own speech (unlike that of nongovernmental speakers) and the government's speech may instead sometimes be constrained by the Constitution itself.³⁴

For this discussion's purposes, "government speech" means the speech of a governmental body (like an agency report, legislative committee report, or legislative resolution) and the speech of an individual empowered to speak for the government (like a President's proclamation or a surgeon general's report), but not the speech of an individual employed by the government when he or she speaks in her personal capacity.³⁵ Incumbents' speech, of course, can be hard to characterize because they have the potential to speak both as governmental officials and as political candidates. In parsing the two, I urge a functional approach that looks to the setting, the purpose, and the likely consequences of the speech. For example, we should be quicker to characterize an incumbent's expression as the government's when the incumbent's speech has greater coercive or other negative effect precisely because it comes from someone who wields government power (for instance, when it draws from the information and power advantages that attend the government).

* * *

In sum, why might the identity of the election liar matter? First, the nature of the speaker may shed some light on the First Amendment value, if any, of the lie. For instance, the First Amendment sometimes protects lies because of their value in furthering the speaker's autonomy—as is the case, for example, of lies told to preserve the speaker's privacy or that enable the speaker to choose how to portray herself to others.³⁶ But some liars may have less of a claim to constitutionally protected autonomy interests precisely because of their foreign, robotic, corporate, or governmental identity. Second, the speaker's identity may exacerbate the threats that its

33. See WILLIAMS, *supra* note 4, at 210 ("Government is in some sense a trust; there is a special relationship between government and people, and it is a violation of this conception for secrecy or falsehood to come between trustee and people."); see also Norton, *supra* note 7, at 78–83 (describing the various ways in which the government's lies threaten harm to the public).

34. See Norton, *supra* note 7, at 96 ("[S]ome government lies about voting matters can violate the Due Process Clause. More specifically, the government's lies about the location of polls or the times at which they close can deprive individuals of the meaningful exercise of voting rights. So too could be the case of the government's lies about candidates' identity or party affiliation.").

35. *Id.* at 76–77.

36. See Norton, *Lies and the Constitution*, *supra* note 2, at 166.

election lies pose to key constitutional values: think, for example, of the threats to democratic self-governance posed by foreign or governmental lies. With respect to possible solutions, finally, the election lies of some speakers (such as robots) may be more amenable than others to regulation by code, some (like corporations) to markets, some (like candidates) to norms, and some (like government) to law. Maybe.

II. Differences Among the Motives for Election Lies

The liar's motive may also be relevant to our assessment of the lie's potential harm.

A. For Political Gain

Many, if not most, election lies seek to shape election outcomes by influencing votes for or against a specific candidate or ballot issue. These efforts may be motivated by the liar's belief that a given outcome will further his or her self-interest, or perhaps the public's interest.

B. To Avoid Legal Accountability

Some election lies instead seek to protect a candidate or campaign from legal, rather than political, accountability. Recall the lies by various members of the Nixon administration in the aftermath of the 1972 elections, lies sometimes regulated by obstruction of justice laws and related statutes.³⁷

C. For Financial Gain

Some election lies (along with other forms of "fake news") appear motivated entirely by the speaker's financial gain. As the *Washington Post* and *New York Times* have detailed, more clicks on false or otherwise provocative posts often mean more money for the speaker who generates the post.³⁸ Some suggest that a purely financial motive for an election-

37. See William H. Simon, *Virtuous Lying: A Critique of Quasi-Categorical Moralism*, 12 GEO. J. LEGAL ETHICS 433, 458 (1999).

38. See Terrence McCoy, *For the 'New Yellow Journalists,' Opportunity Comes in Clicks and Bucks*, WASH. POST (Nov. 20, 2016) https://www.washingtonpost.com/national/for-the-new-yellow-journalists-opportunity-comes-in-clicks-and-bucks/2016/11/20/d58d036c-adbf-11e6-8b45-f8e493f06fcd_story.html?utm_term=.650f8c55de7b (describing the financial incentives of fake news posts); Scott Shane, *How to Make a Masterpiece in Fake News*, N.Y. TIMES, Jan. 19, 2017, at A1 (describing how a website operator received \$1000 an hour in web advertising revenue when he posted an intentionally false story claiming that thousands of fraudulent votes for Hillary Clinton had been found in an Ohio warehouse).

related lie means that the lie is better characterized as unprotected fraud or corruption than protected public discourse.³⁹

D. To Undermine the Notion of Truth Itself

Some election lies seek not to persuade the listener that a particular false assertion is in fact true, but instead to inculcate listeners' cynicism and doubt about the possibility of truth and thus undermine democratic institutions more generally.⁴⁰ Indeed, authoritarian regimes have long spread "disinformation" for political and military ends: for example, "[t]he fundamental purpose of dezinformatsiya, or Russian disinformation . . . is to undermine the official version of events—even the very idea that there is a true version of events—and foster a kind of policy paralysis."⁴¹ Relatedly, governmental and nongovernmental speakers alike sometimes lie about the press and other truth-seeking institutions to discredit them in the public eye.⁴² This is by no means a new—or uniquely American—phenomenon:

In countries where press freedom is restricted or under considerable threat — including Russia, China, Turkey, Libya, Poland, Hungary, Thailand, Somalia, and others — political leaders have invoked “fake news” as justification for beating back media scrutiny. . . . [T]he president’s mantra of “fake news” stirs different concerns among many foreign politicians and analysts, who fear it erodes public confidence in democratic

39. See TEACHOUT, *supra* note 9, at 276 (“Corruption describes a range of self-serving behaviors. People are corrupt when their private interest systematically overrides public goals in public roles, when they put their self-love ahead of group love.”).

40. See Jack M. Balkin, *Constitutional Rot*, in CAN IT HAPPEN HERE? AUTHORITARIANISM IN AMERICA (Cass R. Sunstein ed., 2018) (forthcoming 2018) (manuscript at 7), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2992961 (“Propaganda also undermines the crucial role of deliberation and the search for truth in a democracy. Propaganda attempts to put everything in dispute, so that nothing can be established as true, and everything becomes a matter of personal opinion or partisan belief. Because everything is a matter of opinion, one can assume that anything a political opponent says can be disregarded, and that factual claims contrary to one’s own beliefs can also be disregarded. . . . Moreover, if people stop believing in the truth of what they read, they don’t have to think hard about political questions. Instead, they can simply make political decisions based on identity or affiliation with their political allies. Propaganda, in other words, undermines truth to destroy the concept of the public good and to encourage tribalism.”).

41. Neil Farquhar, *A Powerful Russian Weapon: The Spread of False Stories*, N.Y. TIMES (Aug. 28, 2016), <http://nyti.ms/2bR9n3c>.

42. See generally RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. ST. L.J. 1301 (2017).

institutions at a time when populism and authoritarianism are returning in many regions.⁴³

The harms of such truth-disrupting lies are especially pernicious, their remedies particularly elusive.⁴⁴

III. Differences in the Subject Matter of Election Lies

Election lies involve false assertions of fact about a wide variety of matters. These differences may affect our assessment of the lies' potential harm as well as the prospects for their constraint.

A. Lies About the Mechanics of Voting

Lies about the mechanics of voting include lies about the dates of an election, the location of polls, and the times at which the polls close.⁴⁵ Examples include letters and flyers instructing Republicans to vote on Tuesdays, Democrats on Wednesdays.⁴⁶ These lies also include lies about the legal consequences of voting—for instance, false claims that individuals in certain communities could be arrested if they try to vote.⁴⁷

43. Steven Erlanger, 'Fake News,' *Trump's Obsession, Is Now a Cudgel for Strongmen*, N.Y. TIMES (Dec. 12, 2017), <https://nyti.ms/2C7CEkq>.

44. See Persily, *supra* note 13, at 69 ("The power of fake news does not derive merely from the changed attitudes of viewers of such stories. It could also demobilize voters by fanning cynicism regarding the candidates and the election. False stories create a blanket of fog that obscures the real news and information communicated by the campaigns. The available academic evidence suggests that viewers have considerable difficulty distinguishing between real and fake news, and that trust in the media is already at an all-time low. The prevalence of false stories online erects barriers to educated political decision making and renders it less likely that voters will choose on the basis of genuine information rather than lies or misleading 'spin.'").

45. The government's lies that deprive individuals of the meaningful exercise of voting rights may additionally be constrained by the Due Process Clause. See Norton, *supra* note 7, at 116 ("Consider first a secretary of state's office—the office charged with administering elections within that state—that lies to certain audiences about where polls are located or when the polls will close in hopes of depressing their vote. Such lies are likely to prevent some number of individuals from voting, and thus are functionally indistinguishable from locking the doors to the polls. In other words, these lies . . . directly deprive targets of a constitutionally protected right for reasons that will fail strict scrutiny, and thus violate the Due Process Clause.") (emphasis added).

46. See Gilda R. Daniels, *Voter Deception*, 43 IND. L. REV. 343, 343–46 (2010).

47. See *id.* at 347–48 (describing calls to voters "misinforming them that they would be arrested if they tried to vote on Election Day and falsely reporting that their polling places had changed"); *id.* at 353 (describing campaign materials "warning people found guilty of

B. Lies About the Content of Ballot Measures

Election lies sometimes involve the content of ballot measures that take the form of initiatives or referenda. Sometimes lies about these measures take place before the election. Jocelyn Friedrichs Benson, for example, recounts that the signature-gathering process for what was called the Michigan Civil Rights Initiative in 2006 “became mired in allegations that the circulators deceptively represented the initiative to voters as one that supported affirmative action policies, while in reality it sought to limit them.”⁴⁸

Sometimes the ballot language itself includes a falsehood.⁴⁹ In 2008, for example, an Illinois appellate court ordered the Secretary of State to issue a corrective notice in response to ballot language that falsely stated that “THE FAILURE TO VOTE THIS BALLOT IS THE EQUIVALENT OF A NEGATIVE VOTE.”⁵⁰

C. Lies About a Candidate’s Credentials

Candidates sometimes engage in autobiographical lies about their own credentials relevant to their competence, expertise, or trustworthiness, such as lies about their veteran status, educational degrees, past employment, or

any infraction, including traffic tickets, to stay away from the polls or face possible imprisonment”).

48. Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 HARV. C.R.-C.L. L. REV. 1, 3 (2009); see also *id.* (describing a federal court finding that petition circulators had “engaged in a pattern of voter fraud by deceiving voters into believing that the petition supported affirmative action”).

49. Indeed, some state statutes and state constitutions constrain false or misleading ballot language. Remedies can include pre-election corrective notices and occasionally even post-election voidance of the result. See *Bradley v. Hall*, 251 S.W.3d 470, 472 (Ark. 1952) (finding ballot language to be misleading in violation of state law when it enabled the legislature to legalize new service charges but was instead described as empowering the legislature to enact laws “to authorize, define, and limit” such charges); *Advisory Op. to the Attorney Gen. re: Indep. Nonpartisan Comm’n to Apportion Legislative & Cong. Dists.*, 926 So. 2d 1218, 1229 (Fla. 2006) (striking a proposed state constitutional amendment from the ballot after concluding that the proposal violated the state’s single-subject requirement and that the ballot summary was misleading); *Ex parte Tipton*, 93 S.E.2d 640, 644 (S.C. 1956) (invalidating election results where the ballot language described a proposed state constitutional amendment as providing a debt limitation when in fact it removed a debt limitation).

50. *Chi. Bar Ass’n v. White*, 898 N.E.2d 1101, 1104 (Ill. App. Ct. 2008).

other life experience.⁵¹ Indeed, because voters often use incumbency as a heuristic in making voting decisions, candidates sometimes even lie about whether they are the incumbent.⁵²

Election lies also frequently include lies about an opponent's credentials, character, or other qualities. These can include defamatory lies about an opponent (which may be actionable when accompanied by the requisite malice),⁵³ as well as lies that are not defamatory in a legal sense, but nonetheless seek to exploit some voters' bigotry to the liar's advantage—such as “birther” lies claiming that President Barack Obama was born in Africa.⁵⁴ Lies of this sort have long antecedents. For example, as Kathleen Hall Jamieson describes: “A week before the election that would put Harding in the White House, ‘An Open Letter to the Men and Women of America’ was circulated throughout the South. The letter contained five affidavits swearing that Warren Gamaliel Harding was ‘not a White man.’”⁵⁵

51. See Norton, *Lies to Manipulate*, *supra* note 2, at 176–90 (discussing the constitutionality of candidates' reputation-enhancing lies about their own credentials).

52. *E.g.*, Treasurer of the Comm. to Elect Gerald D. Lostracco v. Fox, 389 N.W.2d 446, 448 (Mich. Ct. App. 1986) (describing campaign advertisements that misrepresented the candidate as the incumbent); Ohio Democratic Party v. Ohio Elections Comm'n, 2008-Ohio-4256, 2008 WL 3878364, at *8 (Ohio Ct. App. 2008) (upholding a statute that prohibited a candidate's campaign literature from using the title of an office not currently held by the candidate); Cook v. Corbett, 446 P.2d 179, 181 (Or. 1968) (describing nonincumbent candidate's campaign advertisements urging voters to “re-elect” her).

53. See *Harte-Hanks Commc'ns, Inc. v. Connaughten*, 491 U.S. 657, 659 (1989) (upholding defamation claim by candidate for elected judicial office).

54. See Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Trump*, 93 IND. L.J. 1, 13 (2017) (“Donald Trump entered political life by relentlessly pushing ‘birtherism,’ the arguably racist lie that Barack Obama, the nation's first African-American President, was not a natural-born American citizen and so was constitutionally barred from serving as President.”). As a comparative matter, note that the United Kingdom prohibits campaign lies about an opponent's “personal character or conduct.” Representation of the People Act 1983, c. 2, § 106; see also *Phil Woolas Loses Bid to Overturn Court Decision Removing Him from Parliament*, GUARDIAN (Dec. 3, 2010), <https://www.theguardian.com/politics/2010/dec/03/phil-woolas-loses-bid-overturn-court-decision> [<https://perma.cc/F3QE-AERZ>] (describing court's decision to uphold a candidate's disqualification for falsely accusing his opponent “of wooing Islamist extremists and of not condemning threats of violence”).

55. KATHLEEN HALL JAMIESON, *DIRTY POLITICS* 75 (1992); see also *id.* at 43–44 (documenting campaign attacks on Andrew Jackson and Abraham Lincoln that included claims that Jackson's mother was a prostitute and that Lincoln was a perjurer, robber, and swindler).

D. Lies About a Candidate's Endorsements or Associations

Because individuals often rely on endorsements as a valuable heuristic (or cognitive shortcut) for their voting decisions,⁵⁶ election lies frequently include lies about who has endorsed the liar—or about who has endorsed the liar's opponent. Joseph McCarthy, for example, infamously and successfully fabricated lies of this sort: "In the senatorial election of 1952, [McCarthy] ran a vicious campaign against Millard Tydings, the Democratic candidate from Maryland, printing a fake photo of Tydings shaking hands with Earl Browder, the leader of the American Communist Party. Tydings lost by forty thousand votes."⁵⁷ Along the same lines, "in 1962 a group in California published a pamphlet showing incumbent governor Pat Brown bowing deferentially to Soviet leader Nikita Khrushchev. The photo was fake," and "the original had shown Brown bowing to a visiting Laotian child."⁵⁸ More recently, voting guides in Maryland falsely claimed that certain prominent African Americans and well-known Democrats had endorsed various Republican candidates.⁵⁹

E. Lies About the Source of Speech

Listeners often use the source of speech as a proxy for its quality and credibility.⁶⁰ Indeed, the Supreme Court has recognized the value of such

56. See Norton, *supra* note 32, at 247 (explaining that "knowledge of the opinions of trusted—or distrusted—third parties, who might include experts, community leaders, and government speakers" are among the most effective of voter heuristics).

57. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 380 (2004); see also Note, *Avoidance of an Election or Referendum When the Electorate Has Been Mised*, 70 HARV. L. REV. 1077, 1084 & nn.57–58 (1957) (describing a short-lived Senate committee proposal in response to this incident that would have prohibited all types of "composite" photographs). These sorts of lies are related to forgeries, which are lies about the source of speech. See *infra* notes 60–67 and accompanying text.

58. JAMIESON, *supra* note 55, at 47. When Democrats produced the photo's negative, the state Republican party repudiated the ad—another important remedial possibility. *Id.*

59. Daniels, *supra* note 46, at 344.

60. See Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 592–97 (2008) (describing how individuals use the source of speech as a heuristic for its credibility or lack thereof); Adam J. Berinsky, *This Is How You Stop Fake News*, WASH. POST (Mar. 28, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/28/this-is-how-you-stop-fake-news/?utm_term=.fc9a2d338a87

("Just as important as how a rumor is debunked is who does the debunking. Politicians who support good public policy by speaking against their partisan interests – in this case, Republicans speaking out against the death panel rumors – are considered credible sources by citizens across the ideological spectrum. When fighting 'fake news,' politicians and the

information to listeners, upholding campaign speech regulations that require the truthful disclosure of the source of certain campaign communications and contributions.⁶¹

To exploit the value of a message's perceived source to listeners, many election lies involve deceptive aliases and sometimes even outright forgeries to confuse or deceive voters about a communication's actual origins.⁶² For instance, as I've written elsewhere, "some speakers seek to use pseudonyms that disguise the source of political contributions or communications, and such pseudonyms are occasionally sufficiently deceptive that we might at times even think of them as a type of lie."⁶³

These sorts of election-related lies about the source of speech also have a long pedigree.⁶⁴ As described by Kathleen Hall Jamieson:

media should present the right authority. In our politically polarized time, we may be able to harness the power of partisanship to stop the spread of misinformation.”).

61. *Citizens United v. FEC*, 558 U.S. 310, 371 (2010) (“[D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”).

62. *See, e.g.*, Ross, *supra* note 3, at 20 (describing Senator Birch Bayh's report of “a 1972 incident in which the Committee to Re-Elect the President forged a letter on the stationery of Democratic Senator Edward Muskie that ‘accused Senators Humphrey and Jackson,’ against whom he was competing in the Democratic presidential primary” of legal and other misconduct); Eileen Sullivan, *Schumer Files Police Report After Fraudulent Document Emerges*, N.Y. TIMES (Dec. 13, 2017), <https://www.nytimes.com/2017/12/13/us/politics/schumer-fraudulent-document-harassment.html> (describing how U.S. Senator Charles Schumer filed a report with the Capitol Police upon the emergence of a fraudulent document “which looks like a court filing” that “described false allegations” against the senator). For a thoughtful discussion of the unique harms posed by forgeries, see Marc J. Blitz, *Lies, Line Drawing, and (Deep) Fake News*, 71 OKLA. L. REV. 59, 110 (2018) (concluding that, in order to address these harms, “scholars and jurists should at least explore adding the following addendum to the framework from *United States v. Alvarez*: where false statements do not merely state false facts, but are also given in a form that carries with it indicia for reliability (such as a falsified newspaper or video or audio tape), the government should have greater power to regulate than it typically has to regulate false words”).

63. Helen Norton, *Secrets, Lies, and Disclosure*, 27 J. L. & POL. 641, 642 (2012); *see also id.* at 644 (“[S]ome political speakers seek to shape their listeners' voting behavior by denying those listeners information about the source of the message or of the candidate's (or cause's) financial support – information that is not only indisputably true but also of great interest and value to listeners.”).

64. *See* MICHAEL KLARMAN, *THE FRAMERS' COUP* 404, 409 (2016) (“Both sides [in the debate over the Constitution's ratification] also published fake letters and essays in the newspapers. For example, Federalists in Pennsylvania published a fictitious letter purportedly written by Daniel Shays, the leader of the Massachusetts debtors' rebellion, that was addressed to Philadelphia Antifederalists and urged them to ‘write letters to the frontier

The “Council of White Citizens of Atlanta” sent letters from Atlanta to 6000 black voters in Detroit in the presidential campaign of 1956. The message: Vote Democratic “because the Democratic Party keeps the colored in their place.” After the election was over, investigative reporters learned that the Council was a fabrication of a Detroit adman who was doing volunteer work for Michigan Minutemen for Eisenhower.⁶⁵

More recently, Michael Kang explained that

Interest groups strategically obscure their involvement when they believe identification would hurt their campaigns. Many industry groups form political committees to conduct campaign activities under nondescript names like “Californians for Paycheck Protection” (religious conservatives supporting limitations on labor union political activity), “Alliance to Revitalize California” (Silicon Valley executives supporting a tort reform measure), and “Californians for Affordable and Reliable Electrical Service” (industry opponents of utility regulation).⁶⁶

Newer manifestations include websites that deceive readers about their true origins. According to the *Los Angeles Times*, during the 2014 election cycle the National Republican Congressional Committee (NRCC) “created nearly 20 websites appearing to support Democratic candidates in all but the small print . . . that include[d] donation forms that accept credit cards and encourage viewers to contribute up to \$500, but instead of money going to the Democratic candidates, it goes to the NRCC.”⁶⁷

counties, where the people [are] most easily deceived, and alarm them with a number of hard words, such as aristocracy, monarchy, oligarchy, and the like, none of which they will understand.’ Antifederalists used the same device. Madison, referring to ‘an arrant forgery’ in the newspapers reporting that John Jay had become an opponent for ratification, complained to Washington that ‘tricks of this sort are not uncommon with the enemies of the new Constitution’. . . In Pennsylvania, Federalist publishers went so far as to deliberately distort the published account of the state ratifying convention’s debates to make it appear as if the Constitution had been unopposed there.”)

65. JAMIESON, *supra* note 55, at 80.

66. Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and ‘Disclosure Plus,’* 50 UCLA L. REV. 1141, 1158–59 (2003).

67. Daniel Rothberg, *Republican Party Wing Creates 18 Fake Websites for Democrats*, L.A. TIMES (Feb. 7, 2014), <http://www.latimes.com/nation/politics/politicsnow/la-pn-republican-fake-websites-democrats-20140207-story.html> [https://perma.cc/D735-CS6F]; see also Hasen, *supra* note 3, at 71 (“[A] state should be able to stop a person from falsely

F. Lies About Policy-Related Facts

Lies about policy-related matters include falsehoods about the facts that support, or undermine, a candidate's policy platform or a ballot initiative—such as lies about data on immigration, unemployment, crime, and more.⁶⁸

Once again, these efforts are by no means new. Kathleen Hall Jamieson describes nineteenth-century election lies charging “that Andrew Jackson had executed Tennessee militiamen without trial and without cause. In 1960, Kennedy tagged the Republicans with responsibility for a missile gap that he could not find once he assumed office.”⁶⁹ More recently, Jamieson describes how candidate David Duke

used national interview time to insinuate false claims into public consciousness. Unchallenged on either “Larry King Live” or “Nightline” was Duke’s assertion that the U.S. Post Office drops the test scores of whites and elevates them for blacks. A spokesperson for the U.S. Post Office categorically denies that statement saying that the only score alterations are for veterans who receive an extra five points and disabled veterans who receive ten.⁷⁰

* * *

Why might the differences among the topics of election lies matter in thinking about whether and (if so) how to address them? Some election lies

representing identity in an election context with the aim of defrauding donors of their money. For example, a group cannot falsely claim it is raising money for a candidate's campaign but then use the money for a different purpose. Falsely representing yourself as a representative of a candidate, party or committee for financial gain seems well within the type of anti-fraud law that it appears all on the Court accept as constitutionally permissible.”). Rightly or wrongly, laws that punish lies intended to manipulate the target's financial decisions are considerably less constitutionally controversial than lies intended to manipulate his or her voting decisions. *See Norton, Lies and the Constitution, supra* note 2, at 189–92.

68. *E.g.*, Adam Davidson, *The Financial Page: Trump's Abuse of Government Data*, NEW YORKER (Apr. 3, 2017), <https://www.newyorker.com/magazine/2017/04/03/trumps-abuse-of-government-data> (“Sean Spicer said at a press briefing that the President wanted to make clear that the unemployment rate ‘may have been phony in the past, but it’s very real now.’ . . . The danger is that a President who disparages the data might convince his followers that bad economic news is political propaganda, and offer numbers that have no statistical rigor behind them.”; *see also* Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175 (2018) (describing warring facts about public policy, abortion, climate change, vaccines, immigration, and voter fraud).

69. JAMIESON, *supra* note 55, at 45.

70. *Id.* at 155.

involve false assertions that threaten especially direct harm: think, for example, about lies about the mechanics of voting that effectively deter or prevent some individuals from voting altogether. Some—like lies about the source of a message—involve factual assertions that are more objectively verifiable than others, perhaps lessening concerns that their legal regulation will chill valuable speech or invite partisan enforcement.⁷¹

IV. Differences in the Timing of Election Lies

Most of the lies described so far occur before an election. But some take place afterward to achieve purposes apart from influencing a campaign's outcome.

A. Post-Election Lies About the Other Side's Campaign

These include lies falsely alleging an opponent's misconduct, perhaps to divert attention from other matters.⁷² For example, in response to growing concerns about his campaign's connections to Russia, President Trump falsely claimed that then-President Obama had wiretapped him during the 2016 presidential campaign.⁷³

71. Note that, in the context of union representation elections, the National Labor Relations Board regulates forgeries but not other campaign lies. See *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127, 132 (1982) (“[W]e will no longer probe into the truth or falsity of the parties’ campaign statements, and we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene where a party has used forged documents which render the voters unable to recognize propaganda for what it is.”); Helen Norton, *Truth and Lies in the Workplace*, 101 MINN. L. REV. 31, 42 (2016) (“The [National Labor Relations Board] now sets aside election results on the basis of lies deemed noncoercive only when they take the form of lies about who is responsible for certain election-related speech (i.e., forgery) and not those that involve other deliberate misrepresentations of fact or law.”).

72. See JAMIESON, *supra* note 55, at 205 (“Candidates divert public and press attention from legitimate issues by calculated strategies of distraction.”).

73. See David Shepardson, *Trump Claims Obama Wiretapped Him During Campaign; Obama Refutes It*, REUTERS (Mar. 4, 2017, 8:05AM), <https://www.reuters.com/article/us-usa-trump-obama/trump-claims-obama-wiretapped-him-during-campaign-obama-refutes-it-idUSKBN16B0CC> [<https://perma.cc/JX4P-DGSX>]. The Department of Justice later acknowledged the absence of any evidence for Trump's claim. See Nina Burleigh, *Trump's Claim That Obama Wiretapped His Campaign Is False: U.S. Department of Justice*, NEWSWEEK (Sept. 2, 2017, 12:49 PM), <http://www.newsweek.com/trump-russia-investigation-wiretap-fbi-obama-658888>; Deirde Walsh, *Justice Department: No Evidence Trump Tower Was Wiretapped*, CNN: POLITICS (Sept. 3, 2017, 5:50PM), <http://www.cnn.com/2017/09/02/politics/justice-department-trump-tower-wiretap/index.html>.

B. Post-Election Lies About Voter Fraud

Like many other election lies, deliberate or reckless falsehoods alleging widespread voter fraud have a long history.⁷⁴ Most recently, President Trump claimed—without evidence—that “[i]n addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally” and “[s]erious voter fraud in Virginia, New Hampshire and California – so why isn’t the media reporting on this? Serious bias – big problem!”⁷⁵ If such lies lead to legal changes that effectively disenfranchise certain voters, they threaten especially pernicious harms.⁷⁶

74. See ERIC BURNS, INFAMOUS SCRIBBLERS: THE FOUNDING FATHERS AND THE ROWDY BEGINNINGS OF AMERICAN JOURNALISM 377 (2006) (recounting that Thomas Jefferson encouraged pamphleteer and journalist James Callender’s claim that John Adams had engaged in voter fraud).

75. Donald Trump (@realDonaldTrump), TWITTER (Nov. 27, 2016, 12:30 PM), <http://twitter.com/realDonaldTrump>; Donald Trump (@realDonaldTrump), TWITTER (Nov. 27, 2016, 4:31 PM), <http://twitter.com/realDonaldTrump>. Studies refute the charge. CHRISTOPHER FARMIGHETTI ET AL., BRENNAN CTR. FOR JUSTICE, NONCITIZEN VOTING: THE MISSING MILLIONS I (2017) (finding that election officials referred only approximately thirty incidents of suspected noncitizen voting for further investigation or prosecution out of 23.5 million votes cast in the 2016 election, and that forty out of forty-two jurisdictions studied reported no known incidents of noncitizen voting); see also Editorial, *Trump’s Commission on Voter Fraud Is, Well, Fraudulent*, WASH. POST (May 17, 2017), https://www.washingtonpost.com/opinions/trumps-commission-on-voter-fraud-is-well-fraudulent/2017/05/17/e6ffc564-39ae-11e7-9e48-c4f199710b69_story.html?utm_term=.c50ce77ef92d (“Multiple studies have shown, and the overwhelming consensus of both Republican and Democratic voting officials at the state and local levels has been, that fraudulent voting, particularly of the in-person variety, is all but nonexistent in the United States. A thorough survey three years ago came up with 31 credible instances of voter impersonation that could have been prevented by ID laws, out of more than 1 billion votes cast in elections from 2000 to 2014.”).

76. See *Veasey v. Abbott*, 265 F. Supp. 3d 684, 698 (S.D. Tex. 2017) (concluding that Texas law requiring voter identification must be eliminated “‘root and branch’ . . . as the law has no legitimacy” because of a lack of evidence of in-person voter impersonation fraud); Editorial, *Why Does Donald Trump Lie About Voter Fraud?*, N.Y. TIMES (Dec. 5, 2016), <https://www.nytimes.com/2016/12/05/opinion/why-does-donald-trump-lie-about-voter-fraud.html> (“This is how voter suppression efforts start. First come the unverified tales of fraud; then come the urgent calls to tighten voter registration rules and increase ‘ballot security,’ which translate into laws that disenfranchise tens or hundreds of thousands of qualified voters.”).

V. Differences in the Means of Transmission

We can also categorize election lies by their means of transmission, as technology can sometimes exacerbate their harm. A quarter-century ago, Kathleen Hall Jamieson bemoaned television's effects on the quality and integrity of campaign discourse.⁷⁷ Today, Twitter's abbreviated format invites outrageous and often false assertions. More generally, social media rewards popularity rather than truth—and falsity is often very popular. As Nathaniel Persily observed:

The power (if any) of fake news is determined by the virality of the lie that it propagates, by the speed with which it is disseminated without timely contradiction, and consequently by how many people receive and believe the falsehood. As with other information or rumors in the offline world, many factors can drive a story's popularity: its entertainment value, novelty, salaciousness, and the like. But the pace with which lies can travel in the online world is much greater, and different strategies and technologies, such as automated social-media bots, can spread those lies to the right people.

. . . .

. . . The “search for truth” is necessarily far down the list of priorities for the social network, just as it is for its users, who will often find false, negative, bigoted, or other outrageous speech to be more meaningful and engaging.⁷⁸

77. JAMIESON, *supra* note 55, at 9–10 (“But television has granted the manufacturers of campaign discourse some Svengalian powers that print and radio lacked. Specifically, its visual capacity couples with an ability to reconfigure ‘reality’ in ways that heighten the power of the visceral appeal. Its multimodal nature makes analytic processing of rapidly emerging claims all but impossible. And its status as entertaining wallpaper grants television the privilege of surrounding us with claims that education has taught us to reject were they lodged on the printed page. Finally, on both radio and television, the identity of the unseen voice-over announcer is unknown and in that anonymity not accountable in any useful for the claims he or she insinuates into our consciousness.”).

78. Persily, *supra* note 13, at 70, 74; *see also id.* at 68 (“Over the campaign’s final three months, the twenty top-performing false election stories generated more engagement than did the twenty top stories featured by mainstream news outlets. . . . The prevalence of false stories online erects barriers to educated political decision making and renders it less likely that voters will choose on the basis of genuine information rather than lies or misleading ‘spin.’”).

VI. Differences in Audiences

We can also sort election lies by their audience, which again might inform our assessment of the lies' potential harm. Many election lies, of course, are directed towards voters. Indeed, liars can increasingly tailor and target their messages to specific voters to maximize their potential for successfully deceiving their audience.⁷⁹ Sometimes voters themselves lie to others. Voters' lies to the government about certain matters constitute fraud, for example, and are regulated by law in a variety of ways.⁸⁰ Some election lies have altogether different audiences. Some, for example, specifically target the press in hopes of fooling it and thus undermining its credibility in the public's eyes. Examples include recent efforts to trick the Washington Post into publishing a false report about U.S. Senate candidate Roy Moore in apparent hopes of discrediting the newspaper.⁸¹

79. See Levi, *supra* note 18, at 26 (“One important element in the dangerous mosaic implicated by ‘fake news’ in the digital environment is the ability to target individual voters or desired groups of voters. This allows the speaker to tailor political disinformation to particular voters’ or groups’ emotional and/or cognitive biases and weaknesses . . .”).

80. See, e.g., 52 U.S.C. § 10307(c) (2012) (prohibiting a voter’s lie regarding “information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote”); *id.* § 10307(d) (prohibiting voters from falsifying or concealing any material fact, or making any false statement, representation, writing, or document); see also Benson, *supra* note 48, at 6 (quoting U.S. ELECTIONS ASSISTANCE COMM’N, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATION FOR FUTURE STUDY 13–14 (2016)) (describing examples of voters’ lies to include “[s]igning a name other than his or her own[,] . . . [v]oting or attempting to vote more than once[,] . . . [r]egistering to vote without being entitled to register,” and “knowingly making a materially false statement on an application for voter registration”) (quotation marks omitted). Professor Benson distinguishes lies *by* voters from lies *to* voters as the difference between “voter fraud” and “election fraud,” or the difference between “voter-initiated” and “voter-targeted” lies. See *id.* at 6. Elsewhere I have noted the discomfort created by a legal regime that prohibits lies about and to, but not by, the government. Norton, *Lies to Manipulate*, *supra* note 2, at 91–92. Here too we might worry about a legal regime that is often considerably quicker to punish alleged lies by voters to the government than lies by the government (and by those who want to become the government) to voters.

81. See Shawn Boburg, Aaron C. Davis & Alice Crites, *A Woman Approached the Post with Dramatic – and False – Tale About Roy Moore. She Appears to Be Part of Undercover Sting Operation*, WASH. POST (Nov. 27, 2017), https://www.washingtonpost.com/investigations/a-woman-approached-the-post-with-dramatic--and-false--tale-about-roy-moore-she-appears-to-be-part-of-undercover-sting-operation/2017/11/27/0c2e335a-cfb6-11e7-9d3a-bcbe2af58c3a_story.html?utm_term=.e727h; see also Rachel Maddow, *Rachel Maddow’s Urgent Warning to the Rest of the Media*, WASH. POST (July 7, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/07/07/rachel-maddows-urgent->

Conclusion

In offering this long—yet no doubt incomplete—litany of falsehoods, I don't propose to solve the problem of election lies. I hope instead to show that election lies pose many problems, plural. As we have seen, for example, some may threaten greater or more direct harm than others, and some may be more responsive to different forms of constraint than others. More specifically, a better understanding of the various types of election lies, their dangers, and (perhaps) their value may shed light on whether and when norms, markets, or architecture may be better situated than law to address them (or vice versa). In other words, the variety and complexity of the problem of election lies require nuanced and diverse responses that recognize the harms of various lies as well as the challenges posed by efforts to constrain them.

warning-to-the-rest-of-the-media/?utm_term=.b213f973edfa (describing warning to other reporters to watch out for “bogus” news reports apparently intended to discredit the reputation of the reporter).