
CLIMATE CHANGE DISINFORMATION, CITIZEN COMPETENCE, AND THE FIRST AMENDMENT

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May government in the United States constitutionally prohibit knowingly false factual statements¹ intended to mislead the public about a matter of public concern such as the desirability of proposed legislation? This intriguing First Amendment question was recently raised by calls to prosecute ExxonMobil for an alleged disinformation campaign on the causes and effects of global warming. In this Article, I argue that punishing ExxonMobil for these alleged lies would violate

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1. In this Article I use the terms "knowingly false factual statements," "intentional misrepresentation of fact," and "lies" interchangeably.

a fundamental yet underexplored precept of American popular sovereignty positing that the people, not the government, are entrusted with determining the veracity of statements in public discourse. While the specific focus of this Article is on ExxonMobil's alleged disinformation campaign, this discussion is meant to serve as a vehicle to more generally explore the question of constitutional protection of lies in public discourse.

INTRODUCTION

In the latter part of 2015, *InsideClimate News* and the *Los Angeles Times* published a series of investigative reports alleging that ExxonMobil engaged in a disinformation campaign designed to deceive the public and policy makers about the causes and dangers of global warming.² The articles made the following allegations: By the late 1970s ExxonMobil realized, based on its own scientists' research, that if left unabated the increase in CO₂ in the atmosphere from fossil fuel combustion would likely cause changes in climate that would have catastrophic consequences for a substantial part of the earth's population by the latter part of the twenty-first century. In the late 1980s, however, ExxonMobil became concerned that the consensus among scientists and the public about the dangers of climate change was likely to result in regulation that could impair its financial interests. To forestall such regulation, ExxonMobil adopted techniques, previously

2. See Neela Banerjee et al., *ExxonMobil: The Road Not Taken*, INSIDECLIMATE NEWS (Sept. 16, 2015), <http://insideclimatenews.org/content/ExxonMobil-The-Road-Not-Taken> [https://perma.cc/6H73-PKYM]; Sara Jerving et al., *What ExxonMobil Knew About the Earth's Melting Arctic*, L.A. TIMES (Oct. 9, 2015), <http://graphics.latimes.com/ExxonMobil-arctic/> [https://perma.cc/CB86-U248]; Katie Jennings et al., *How Exxon Went from Leader to Skeptic on Climate Change Research*, L.A. TIMES (Oct. 23, 2015), <http://graphics.latimes.com/exxon-research/> [https://perma.cc/5GCP-TBFZ]; Amy Lieberman & Susanne Rust, *Big Oil Braced for Global Warming While It Fought Regulations*, L.A. TIMES (Dec. 31, 2015), <http://graphics.latimes.com/oil-operations/> [https://perma.cc/WR4H-DSF4]. For a summary of these articles and other works discussing ExxonMobil's alleged disinformation campaign, see David Kaiser & Lee Wasserman, *The Rockefeller Family Fund vs. Exxon*, N.Y. REV. BOOKS (Dec. 8, 2016), <http://www.nybooks.com/articles/2016/12/08/the-rockefeller-family-fund-vs-exxon/> [https://perma.cc/K7V7-JPWZ], and see David Kaiser & Lee Wasserman, *The Rockefeller Family Takes on ExxonMobil*, N.Y. REV. BOOKS (Dec. 22, 2016), <http://www.nybooks.com/articles/2016/12/22/rockefeller-family-fund-takes-on-exxon-mobil/> [https://perma.cc/4GCC-GGY6] [hereinafter Kaiser & Wasserman, *The Rockefeller Family*].

employed by the tobacco industry to sow doubt about the health risks of cigarette smoking, to try to persuade the public and lawmakers that the risks of global warming were neither as grave nor as certain as ExxonMobil knew the risks to be. To this end, in addition to making false and misleading statements of its own,³ ExxonMobil funded scientists and think tanks that could be relied upon to cast doubt on what ExxonMobil knew were the causes and likely effects of climate change.⁴

3. Exxon frequently used newspaper advertisements as a medium to push this message. In the late 1990s, ExxonMobil released several advertisements that focused on the uncertainty that climate change was occurring and, if it was, whether humans were causing it. The advertisements also highlighted the lack of consensus among scientists. Exxon released a series of advertisements in the year 2000 reflecting these same concerns and advocating against the United States' participation in the Kyoto Protocol. See *2000 ExxonMobil Global Climate Change Op-Ed Series*, CLIMATE FILES, <http://www.climatefiles.com/exxonmobil/2000-exxon-global-climate-change-op-ed-series> (last visited Sept. 1, 2017) [<https://perma.cc/5XSQ-HTL7>]. Until 2004, ExxonMobil continued to publish advertisements promoting the idea that no substantial steps should be taken to prevent climate change until more definitive scientific research was available. *Exxon's Climate Denial History: A Timeline*, GREENPEACE, <http://www.greenpeace.org/usa/global-warming/exxon-and-the-oil-industry-knew-about-climate-change/exxons-climate-denial-history-a-timeline> (last visited Sept. 1, 2017) [<https://perma.cc/UY6L-3TQ3>]. Lee Raymond, the CEO of ExxonMobil from 1999 to 2005, *Lee R. Raymond*, JPMORGAN CHASE & CO., <https://www.jpmorganchase.com/corporate/About-JPMC/ab-board-bio-leerraymond.htm> (last visited Sept. 28, 2017) [<https://perma.cc/5WZA-BCSQ>], also made public statements in speeches similar to ExxonMobil's advertisements, namely, about the uncertainty of climate change research and lack of evidence that humans were causing global warming. See *1997 Exxon's Lee Raymond Speech at World Petroleum Congress*, CLIMATE FILES, <http://www.climatefiles.com/exxonmobil/1997-exxon-lee-raymond-speech-at-world-petroleum-congress> (last visited Sept. 1, 2017) [<https://perma.cc/5FY5-6MNM>]; see also *Exxon's Decades of Deceit*, EXXONKNEW, <http://exxonknew.org/timeline> (last visited Sept. 1, 2017) [<https://perma.cc/288A-MF4Y>].

4. Shortly after the *L.A. Times* and *InsideClimate* articles appeared, ExxonMobil issued a press release claiming that the allegations in these articles were "inaccurate and deliberately misleading." *ExxonMobil Says Climate Research Stories Inaccurate and Deliberately Misleading*, EXXONMOBIL: NEWS & UPDATES (Oct. 21, 2015), <http://news.ExxonMobil.com/press-release/ExxonMobil-says-climate-research-stories-inaccurate-and-deliberately-misleading> [<https://perma.cc/WB2D-LHA7>]. According to this press release:

Activists deliberately cherry-picked statements attributed to various company employees to wrongly suggest definitive conclusions were reached decades ago by company researchers. These activists took those statements out of context and ignored other readily available statements demonstrating that our researchers recognized the developing nature of climate science at the time which, in fact,

In response to these allegations of a disinformation campaign in these investigative reports and elsewhere, commentators have urged that the perpetrators of the alleged disinformation campaign be criminally prosecuted or be held civilly liable for deceiving the public about climate change;⁵ the United States Department of Justice has asked the Federal Bureau of Investigation to consider whether ExxonMobil should be prosecuted for violating the Racketeer Influence and Corrupt Organizations Act;⁶ the Securities and Exchange Commission (SEC) is investigating the company's valuation of its assets in light of climate change;⁷ ExxonMobil investors have filed a federal class action lawsuit alleging securities law violations based in part on the alleged disinformation campaign;⁸ and the Attorneys General of New York and Massachusetts have launched investigations into ExxonMobil's activities.⁹ These investigations and calls for the imposition of

mirrored global understanding.

Id.

5. See, e.g., William C. Tucker, *Deceitful Tongues: Is Climate Change Denial a Crime*, 39 *ECOLOGICAL L.Q.* 831 (2012) (claiming that a concerted effort to deceive the public into not supporting climate legislation is arguably punishable as criminal fraud under various statutes and urging that those who perpetuated this fraud be prosecuted); see also James Parker-Flynn, *The Fraudulent Misrepresentation of Climate Science*, 43 *ENVTL. L. REP.* 11098 (2013) (urging the creation of a narrow federal civil cause of action for the fraudulent misrepresentation of climate science).

6. Patrick Boyle, *DOJ Asks FBI to Mull ExxonMobil Climate Change Probe*, *LAW360* (Mar. 3, 2016), <https://www.law360.com/articles/767085/doj-asks-fbi-to-mull-exxonmobil-climate-change-probe> [<https://perma.cc/N5GD-G68Y>].

7. See Bradley Olson & Aruna Viswanatha, *SEC Probes Exxon over Accounting for Climate Change*, *WALL ST. J.* (Sept. 20, 2016), <http://www.wsj.com/articles/sec-investigating-exxon-on-valuing-of-assets-accounting-practices-1474393593> [<http://perma.cc/4W7H-BV4J>].

8. Complaint for Violations of the Fed. Secs. Laws, *Ramirez v. ExxonMobil Corp.*, No. 3:16-cv-3111, 2016 WL 6594861 (N.D. Tex. Nov. 7, 2016); see Amena H. Saiyid, *Exxon Misled Investors About Climate Risks, Suit Says*, *BLOOMBERG BNA* (Nov. 9, 2016), <https://www.bna.com/exxon-misled-investors-n57982082479> [<https://perma.cc/FK5K-BLKL>].

9. See Justin Gillis & Clifford Krauss, *ExxonMobil Investigated for Possible Climate Change Lies by New York Attorney General*, *N.Y. TIMES* (Nov. 5, 2015), <http://www.nytimes.com/2015/11/06/science/exxon-mobil-under-investigation-in-new-york-over-climate-statements.html> [<https://perma.cc/AXW4-6KRV>]; see also *AGO's Exxon Investigation*, *MASS.GOV*, <http://www.mass.gov/ago/bureaus/eeb/the-environmental-protection-division/exxon-investigation.html> (last visited Sept. 22, 2017) [<https://perma.cc/25WQ-5UPR>]. After initially cooperating with the investigation and producing millions of documents, Exxon sued the attorneys general in federal district court in Texas to block the investigation, claiming the probe was politically biased in violation of ExxonMobil's First and Fourth

legal sanctions on ExxonMobil for the alleged¹⁰ disinformation campaign pointedly raise the question whether such sanctions would violate the First Amendment. The answer depends on the purpose of the campaign and its intended audience, and relatedly, the precise harm the particular legal action in question seeks to redress.

In Part I of this Article, I argue that the First Amendment bars any legal action based on ExxonMobil's deceiving the public about the causes or the likely effects of climate change for the purpose of defeating climate legislation. In trying to persuade the public that climate legislation was not necessary, ExxonMobil was engaging in public discourse, a form of expression vital to democratic self-governance and therefore rigorously protected by the First Amendment. Because public discourse often involves highly contentious ideological issues, the government cannot be trusted to fairly or accurately separate truth from falsity in this setting. Nor can government be trusted in this context to determine a speaker's state of mind in making an allegedly false statement. For these

Amendment rights. See Chris D'Angelo, *Exxon Moves to Block NY Climate Fraud Investigation, Cries 'Political Bias,'* HUFFINGTON POST (Oct. 18, 2016) http://www.huffingtonpost.com/entry/exxon-mobil-block-new-york-climate-investigation_us_580526a4e4b0dd54ce3472fb [https://perma.cc/42X9-KJWA].

On March 29, 2017, United States District Judge Ed Kinkeade found that venue for ExxonMobil's suit against Schneiderman and Healey did not properly lie in the Northern District of Texas and accordingly transferred the action to United States District Court for the Southern District of New York. See Order, *Exxon Mobil Corp. v. Schneiderman*, No. 4:16-cv-00469-K at *2–3 (N.D. Tex. Mar. 29, 2017), <https://assets.documentcloud.org/documents/3532249/Exxon-v-Healey-Order-Transferring-Venue-to-SDNY.txt> [https://perma.cc/8W8L-YK2D]. In a spectacular display of obiter dicta, Judge Kinkeade devotes nearly all of his 11-page transfer order reviewing at length what he sees as the politically motivated genesis of the investigations. In light of this genesis, Kinkeade strongly suggests that

the attorneys general [are] attempting to squelch public discourse by a private company that may not toe the same line as these two attorneys general . . . [and are] trying to further their personal agendas using the vast power of the government to silence the voices of all those who disagree with them[.]

Id. at 5.

10. I take no position in this Article about whether the allegations that ExxonMobil engaged in a disinformation campaign about the causes and effects of global warming are true. Rather, I will explore the extent, if any, to which First Amendment protection would be available for such a disinformation campaign. I will also assume for the sake of argument that essential statements constituting the disinformation campaign are false factual statements as opposed to non-falsifiable opinion.

reasons, allowing government the power to punish even knowingly false statements in public discourse would unduly damage the political legitimacy that a speaker's participation in democratic self-governance promotes. In addition, allowing government authority to cleanse public discourse of what, in its view, are knowingly false factual statements would risk impairing the electorate's access to valuable information and perspectives. Significantly, to the extent the concern is with these vital *audience* interests, it does not matter whether the speaker is a flesh-and-blood individual or artificial entity such as a business corporation.

Aside from these pragmatic concerns, any attempt by the government to protect the electorate from being deceived about the desirability of legislation is, in principle, contrary to a core precept of American democracy—that the people, acting in our capacity as ultimate sovereign, are capable of sorting out truth from falsity without government guardianship. For this reason, the people being misled about a matter of public policy, including the desirability of legislation, is not a harm that the government can, consistent with the First Amendment, remedy by speech suppression. And since the concern here is exclusively with audience interests, it again would not matter if the speaker is a flesh-and-blood person or a business corporation.

As I will discuss in Part II, however, this does not mean that ExxonMobil is necessarily immune from legal sanction for its alleged disinformation campaign. While government has extremely limited power to regulate the content of public discourse, the First Amendment allows government far more leeway to regulate the content of expression outside this highly protected realm, such as speech directed to consumers or investors. Unlike statements in newspapers, radio, television, and on the internet—which are meant to influence the general public on a matter of public concern—commercial advertisements, or statements in SEC filings or similar financial documents, are not part of public discourse. For this reason, liability imposed on ExxonMobil for false and misleading statements in advertisements for its products or in financial documents would not present a substantial First Amendment issue.

Although the New York and Massachusetts Attorneys General have made some vague references to investigating

consumer fraud,¹¹ they seem to be focusing on securities fraud. So long as SEC filings or other financial documents form the basis of liability, prosecutors would not violate the First Amendment by using ExxonMobil's alleged disinformation campaign as evidence that the company knew the statements in these documents were false.

A much more difficult First Amendment issue would be presented if the theory of liability is that the disinformation campaign itself misled investors into purchasing ExxonMobil stock to their financial detriment. Though it is a close question, I conclude that the First Amendment should not absolutely bar liability for securities fraud even if misleading investors was not an intended consequence of a disinformation campaign meant solely to mislead the public about the desirability of climate legislation.

I. THE FIRST AMENDMENT BARS ANY IMPOSITION OF LIABILITY ON EXXONMOBIL FOR MISLEADING THE PUBLIC REGARDING THE NEED FOR CLIMATE LEGISLATION

Government officials and academic commentators have urged that ExxonMobil be criminally prosecuted or at least held civilly liable for deliberately misleading the public about the need for climate legislation.¹² However, no such legal proceedings seem to be in the offing. This is likely because as much as some prosecutors might like to see ExxonMobil held liable for this alleged deception, they have, on mature consideration, correctly realized that the First Amendment would likely bar such liability. In this Part, I attempt to discern precisely why any attempt to impose such liability on ExxonMobil would offend the First Amendment. In doing so, I more generally explore the First Amendment protection afforded to lies in public discourse. The purpose of this inquiry is to elucidate the basic—though often unarticulated—norms and precepts that animate the American commitment to freedom of expression.

As Justice Louis Brandeis admonished in a seminal free speech opinion: “[t]o reach sound conclusions on these matters,

11. See D'Angelo, *supra* note 9; see also AGO's *Exxon Investigation*, *supra* note 9.

12. See *supra* notes 5 and 6 and accompanying text.

we must bear in mind why a State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequences.”¹³ In other (and less eloquent) words, to get the right answer in a free speech case we must determine the extent to which the regulation in question implicates free speech values, especially core free speech norms. To that end, I begin this Part with a discussion of the relationship between free speech and democracy, the norm widely acknowledged to be a central concern of the First Amendment. I then separately consider the democratic speaker and audience interests implicated by prohibition of lies in public discourse. With respect to speaker interests, a strong argument could be made that prohibiting a business corporation from deliberately trying to mislead the public about the desirability of legislation does not implicate any constitutionally protected interests of the corporation. I show, however, that such a prohibition would be likely to gravely impair the crucial audience interest in receiving information and perspectives needed to effectively participate in the democratic process. In addition, I argue that any attempt to punish ExxonMobil for deceiving the public about the causes or likely effects of climate change in order to forestall legislation would violate a core precept of American popular sovereignty and would thus be patently unconstitutional.

A. *Free Speech, Democracy and Public Discourse*

While vigorous disagreement persists about what other values might also be central to the First Amendment, there is “practically universal agreement” that at least one such core norm is democracy.¹⁴ As the United States Supreme Court long ago explained: “The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our

13. *Whitney v. California*, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring).

14. *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Other contenders for a core norm include the search for truth and individual autonomy. See KATHLEEN SULLIVAN & NOAH FELDMAN, *CONSTITUTIONAL LAW* 935–40 (19th ed., 2016).

constitutional system.”¹⁵ To promote this core democratic concern, American free speech doctrine rigorously protects speech on matters of public concern occurring in settings essential to democratic self-governance.¹⁶ The term that the Supreme Court and commentators often use to describe such highly protected speech is “public discourse.”¹⁷ Such expression includes more than “political speech in the narrow sense” but also embraces more generally “speech concerning the organization and culture of society.”¹⁸ Public discourse promotes vital democratic interests of both speakers and audience.

B. Speakers’ Interests

As I shall explain in more detail below, business entities such as ExxonMobil have, in my view, no constitutionally salient interests of their own in participating as speakers in public discourse.¹⁹ These entities manifestly have no democratic interests of their own in such participation. Rather, the democratic value of speech by these entities inheres in the information and perspectives that they provide “We the People” in performing our democratic function. As I stated at the outset, however, my concern in this Article extends beyond the particular question of whether ExxonMobil can constitutionally

15. *Stromberg v. California*, 283 U.S. 359, 369 (1931); *see also* *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (stating that the First Amendment serves “as the guardian of our democracy”).

16. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (“[S]peech . . . at a public place on a matter of public concern . . . is entitled to ‘special protection’ under the First Amendment.”). As Robert Post has explained, in modern democratic societies, certain modes of communication form “a structural skeleton that is necessary . . . to serve the constitutional value of democracy.” Robert C. Post, *Recuperating First Amendment Doctrine*, 47 *STAN. L. REV.* 1249, 1276 (1995). These democratic modes of communication include the speakers’ corners of a park, films, newspapers, magazines, as well as electronic media, including radio, television and the internet.

17. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 22 (1971); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 *HARV. L. REV.* 601 (1990).

18. ERIC BARENDT, *FREEDOM OF SPEECH* 189 (2005).

19. This view is highly contested, however, with others maintaining that business entities have First Amendment speaker interests. *See, e.g.*, Martin H. Redish & Howard M. Wasserman, *What’s Good for General Motors: Corporate Speech and the Theory of the First Amendment*, 60 *GEO. WASH. L. REV.* 235, 251–55 (1998) (arguing that speech by business corporations promotes the autonomy and self-realization of managers of and investors in such entities).

be punished for its alleged disinformation campaign and encompasses the more general issue of First Amendment protection for lies in public discourse. Accordingly, I will consider the speaker interests that are implicated by the punishment of knowingly false statements of fact in public discourse, including those of flesh-and-blood speakers.

The opportunity to engage in public discourse is a crucial means by which citizens in a democracy contribute to the public opinion that controls their representatives between elections.²⁰ For this reason, the opportunity to engage in this public debate is, like voting, not just instrumental to democracy but rather constitutive of such a form of government.²¹ Like voting, the opportunity to participate in public discourse is vital to the legitimacy of the legal system in that it allows individuals to have their say about laws that bind them.²² There may be no fully satisfactory answer to the age-old question of what justifies the state using force to make free and autonomous people obey laws with which they reasonably disagree. But the democratic process, including the ability to vote for representatives who enact the laws, as well as the opportunity to freely criticize or support laws they are considering enacting, is perhaps “arguably the best that can be done . . . for justifying the legitimacy of the social order.”²³ In addition to promoting legitimacy in this essential normative sense, the opportunity to participate in public discourse contributes to “the descriptive conditions necessary for a diverse and heterogeneous population to live together in a relatively peaceable manner under a common system of

20. For a more detailed discussion of democratic speaker interests, see Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491 (2011).

21. See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 200 (1996).

22. For an extensive discussion of how the opportunity to participate in public discourse as speakers promotes political legitimacy, see James Weinstein, *Hate Speech Bans, Democracy and Political Legitimacy*, 32 CONST. COMMENT. 527 (2017) [hereinafter Weinstein, *Hate Speech Bans*]; James Weinstein, *Free Speech and Political Legitimacy: A Response to Ed Baker*, 27 CONST. COMMENT. 361 (2011). See also Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 214 (1972) (arguing that for a government to be legitimate, citizens must be able to recognize its authority “while still regarding themselves as equal, autonomous, rational agents”).

23. C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 262, 263 (2011).

governance and politics.”²⁴

Crucially, the opportunity to freely and openly participate in public discourse promotes not just the legitimacy of the entire legal system, but also the legitimacy of particular laws. In a recent article, I discuss how, for instance, restrictions on peoples’ ability to oppose antidiscrimination measures by engaging in hate speech will diminish, and under certain circumstances might even destroy, the legitimacy of enforcing these antidiscrimination measures against those whose speech was curtailed.²⁵ In similar ways, the legal restrictions on those who are dubious about anthropogenic climate change will diminish, and in some cases might annihilate, the application of climate legislation to them.

Admittedly, as vital to democracy and political legitimacy as the right to participate in public discourse may be, these interests do not, as a theoretical matter, entail a right of a speaker to try to deceive the public by proclaiming as fact something the speaker knows not to be true. As a pragmatic matter, however, there is good reason not to entrust government officials with the power to determine the truth or falsity of factual claims made in the often highly ideological context of public discourse, especially when the claims are factually complex or uncertain.²⁶ There is even greater reason to distrust the ability of government officials to fairly and accurately determine the speaker’s state of mind in making the allegedly false statement.

Specifically, government officials hostile to the speaker’s point of view are more likely to believe that the speaker knew that the statement was false, while officials who share the speaker’s ideological perspective will be more likely to find that any misstatement of fact was an innocent one. For this reason, I shudder at the thought of authorities in Alabama having the

24. Robert Post, *Legitimacy and Hate Speech*, 32 CONST. COMMENT. 651, 651 (2017).

25. See Weinstein, *Hate Speech Bans*, *supra* note 22, at 566–74.

26. “[Our] forefathers did not trust any government to separate the true from the false for us.” *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). See *United States v. Alvarez*, 567 U.S. 709, 736 (2012) (Breyer, J., concurring) (noting that in “political contexts . . . the risk of censorious selectivity by prosecutors is . . . high”). For examples of factual misstatements on complex, highly contentious issues of public concern, see James Weinstein, *Seana Shiffrin’s Thinker-Based Theory of Free Speech: Elegant and Insightful, But Will it Work in Practice?*, 27 CONST. COMMENT. 385, 395–96 (2011).

power to prosecute an abortion rights activist because they conclude that the speaker intentionally made false or misleading statements about how often partial-birth abortion is medically necessary, or California officials prosecuting an anti-abortion activist for falsely misrepresenting the extent to which abortion causes depression.²⁷ It is no answer that judges, at trial and on appeal, provide a safeguard against speakers being wrongfully punished for making knowing misstatements of fact in public discourse. For one, in highly ideological cases even judges are subject to “judicial viewpoint discrimination.”²⁸ But even if the speaker is ultimately vindicated, defending against a prosecution or even an investigation can be an expensive and arduous process.

As discussed in more detail below, it may be true that even when the serious pragmatic problems just described are accounted for, allowing government some limited power to punish knowingly false factual statements in public discourse would improve the quality of public debate. But the core speaker interest protected by the First Amendment is not principally concerned with the quality of public discussion, but rather with the legitimacy that the opportunity to participate in public discourse confers on the legal system. So despite any improvement in the quality of public discourse, prosecutions for lies in public discourse will likely deter speakers from making honest but mistaken claims on highly contentious matters of public concern.²⁹ As a result, the legitimacy of the entire legal

27. In the abortion debate it is not uncommon for both sides to make factual misstatements. See Weinstein, *supra* note 26 at 395.

28. See James Weinstein, *Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination*, 29 U.C. DAVIS L. REV. 471 (1996). As Judge Learned Hand wrote in criticizing the “clear and present danger” test that failed miserably to provide protection to those protesting America’s involvement in World War I: “Once you admit that the matter is one of degree . . . you give to Tomdickandharry, D.J. [District Judge] so much latitude . . . that the jig is at once up.” Letter from Judge Learned Hand to Zechariah Chaffee, Jr. (Jan. 2, 1921), reproduced in Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 770 (1975). He added that even the Justices of the United States Supreme Court “have not shown themselves immune from the ‘herd instinct.’” *Id.*

29. It could be argued that it would be anomalous for the First Amendment to generally grant speakers in public discourse absolute immunity to make false and misleading statements while providing speakers only qualified immunity against defamation actions for speech in public discourse. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (stating that false statements about the official conduct of a public official may be subject to liability if made with knowledge of

system as well as individual laws would be diminished. For this reason, the core democratic value underlying the First Amendment ordinarily protects an individual from legal sanction for making even intentional misrepresentations of fact in public discourse.

Suppose that Ann, a popular libertarian blogger with a scientific background, is persuaded from her perusal of relevant peer-reviewed literature that the case for anthropogenic climate change is overwhelming. She confides as much in an email to her sister. Nonetheless, for ideological reasons, Ann believes that proposed congressional climate legislation is wrong in principle as well as bad for the American economy. So in addition to making economic arguments against such legislation, Ann persistently contends that the evidence for anthropogenic climate change is more uncertain than she knows it to be. If a prosecutor in a state with particularly broad anti-fraud laws were to prosecute Ann for misleading the public through her deceitful commentary, I would think the First Amendment would and should bar such a prosecution. Indeed, because the right of an individual in the United States to participate in public discourse is so rigorously protected, few prosecutors in this country would even consider prosecuting a blogger for even intentional misstatements of facts intended to mislead the public with regard to the desirability of legislation.

United States v. Alvarez,³⁰ the United States Supreme

their falsity or with reckless disregard for the truth); *Gertz v. Robert Welch, Inc.* 418 U.S. 324, 347, 349 (1974) (stating that false statements about a private person on a matter of public concern may be subject to liability so long as liability is not imposed without a showing of fault or actual damages). For two reasons, I do not think that recognizing absolute immunity as the general standard for false statements made as part of public discourse would be inconsistent with the lack of absolute immunity for false statements of fact that damage individual reputations. First, defamation is one of the “few historic and traditional categories of expression long familiar to the bar.” *Alvarez*, 567 U.S. at 717 (plurality opinion) (internal quotations omitted). Second, and in my view more importantly, the limited scope of defamation laws as narrowed by First Amendment limitations when applied to public discourse, as well as the need to show concrete injury, minimize the chilling effect that such laws have on democratic participation. *Accord id.* at 736 (Breyer, J., concurring) (“[L]imitations of context, requirements of proof of injury, and the like, narrow [fraud and perjury statutes, for example] to a subset of lies where specific harm is more likely to occur. The limitations help to make certain that the statute does not allow its threat of liability or criminal punishment to roam at large, discouraging or forbidding the telling of the lie in contexts where harm is unlikely or the need for the prohibition is small.”).

30. 567 U.S. at 709.

Court's most comprehensive discussion to date of First Amendment protection of lies, strongly supports the conclusion that Ann could not constitutionally be prosecuted for her intentional misrepresentations about climate change. Xavier Alvarez had been convicted under the Stolen Valor Act for claiming when introducing himself as board member of a water district that he held the Congressional Medal of Honor.³¹ In a 6-3 decision, the Court held that the conviction violated the First Amendment.

A plurality opinion by Justice Anthony Kennedy, joined by Chief Justice John Roberts and Justices Ruth Bader Ginsburg and Sonia Sotomayor, held the Stolen Valor Act unconstitutional. Finding the law to be a content-based restriction of expression that did not fall within "the few historic and traditional categories of expression"³² unprotected by the First Amendment, Justice Kennedy subjected the law to "the most exacting scrutiny."³³ He acknowledged that the government had a "compelling interest" in protecting "the integrity of the military honors system in general, and the Congressional Medal of Honor in particular."³⁴ He found, however, that the restriction on speech imposed by the Act was not "actually necessary" to achieve these interests because the government had "not shown, and cannot show, why counterspeech would not suffice to achieve its interest."³⁵ In addition, Kennedy observed that because the government could provide a database listing the Congressional Medal of Honor winners, the speech restriction was not the "least restrictive means among available, effective alternatives."³⁶

Significantly, not only did Kennedy find the Act unconstitutional, he concluded that although Alvarez's lies were "contemptible," his "*right* to make those statements is protected by the [First Amendment]."³⁷ If Alvarez had a right to make a knowingly false statement arguably *not* connected with a matter of public concern—introducing himself at a water board meeting—and thus arguably *not* within the highly

31. *Id.* at 714–15.

32. *Id.* at 717.

33. *Id.* at 724.

34. *Id.* at 724–25.

35. *Id.* at 726.

36. *Id.* at 729.

37. *Id.* at 729–30 (emphasis added).

protected realm of public discourse, it would follow *a fortiori* that Ann has a First Amendment right to lie in a context that is undoubtedly public discourse.

Concurring in the result, Justice Stephen Breyer, joined by Justice Elena Kagan, agreed that the Act was unconstitutional. Applying intermediate rather than strict scrutiny, he found the Act overbroad in that “it applies in family, social, or other private contexts, where lies will often cause little harm.”³⁸ Crucially, Justice Breyer then noted that the Act “also applies in political contexts, where although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is also high.”³⁹ This observation is in accord with the special protection of public discourse and the skepticism about the ability of government officials to fairly and accurately prosecute speech in this realm that I have emphasized. Unlike the plurality, however, Breyer does not state that Alvarez’s speech is protected by the First Amendment. Rather, he leaves open the possibility that lies, such as Alvarez’s about being awarded the Congressional Medal of Honor, made neither in a private setting nor a political context, might have been constitutionally punished under a “more finely tailored statute.”⁴⁰ The approach suggested by Breyer grants government more power than the plurality would allow to punish lies outside of public discourse. Significantly, however, this approach would also carefully scrutinize and almost certainly invalidate any attempt to punish knowing lies, such as Ann’s, that are part of the public debate on a highly contentious matter of public concern.

Justice Samuel Alito, joined by Justices Antonin Scalia and Clarence Thomas, filed a dissenting opinion. Noting the many occasions in which the Court had stated that “false

38. *Id.* at 736 (Breyer, J., concurring).

39. *Id.*

[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.

Id. at 734.

40. *Id.* at 737–38.

statements of fact do not merit First Amendment protection for their own sake,”⁴¹ the dissent recognized that the Court had also “recognized that it is sometimes necessary to extend a measure of strategic protection to these statements in order to ensure sufficient breathing space for protected speech.”⁴² In Justice Alito’s view, however, “the Stolen Valor Act presents no risk at all that valuable speech will be suppressed.”⁴³ Significantly, and again supporting the conclusion that even intentionally false statements of fact about climate change made by an individual in public discourse are protected speech, Alito explained that the Stolen Valor Act stands in “stark contrast to . . . laws prohibiting false statements about history, science, and similar matters.”⁴⁴ This is because, unlike the Stolen Valor Act, laws prohibiting false statements about “matters of public concern” would present a “grave and unacceptable danger of suppressing truthful speech.”⁴⁵

The rationales of the plurality, concurring, and dissenting opinions in *Alvarez* all support the conclusion that Ann’s knowingly false statements about climate change are protected by the First Amendment. It might be objected that, for two reasons, Ann’s expression is not analogous to ExxonMobil’s alleged disinformation campaign. First, it is one thing to mislead the public on a matter of public concern by personally speaking out on an issue as did Ann; it is quite another to spend huge sums of money, as did ExxonMobil, to fund others to publish papers and write articles to mislead the public. In addition, it can be argued that only flesh-and-blood individuals like Ann, not artificial entities like ExxonMobil, have constitutionally cognizable interests in participating in democratic self-governance.

As to the first objection, there can be no doubt that as a descriptive matter the First Amendment protects expenditures for ideological purposes. *Buckley v. Valeo* held it unconstitutional to impose any limitation on the amount of money that an individual can spend to support or oppose a

41. *Id.* at 750 (Alito, J., dissenting).

42. *Id.* (internal quotations omitted).

43. *Id.* at 752. Nor in Alito’s judgment was the Act subject to facial invalidity on overbreadth grounds because of its potential application to private or political speech. In his view, there was no showing that the Act was substantially overbroad. *Id.* at 753.

44. *Id.* at 752.

45. *Id.* at 751.

candidate in a federal election.⁴⁶ There are strong reasons for regulating campaign expenditures for candidate elections, for instance, preventing corruption and the appearance of corruption.⁴⁷ In contrast, expenditures to promote ideological causes outside of the election domain ordinarily do not give rise to these problems. It therefore follows *a fortiori* that an individual has a right to make unlimited expenditures to propagate her views in public discourse. The Court in *Buckley* was, in my view, right to vindicate speaker interests in this way.⁴⁸ Someone feeling passionately, for instance, about animal protection should have the right to spend the large sums of money it takes to purchase advertisements in the media condemning animal cruelty in the food industry. And if she does not feel that she has the ability to herself compose an effective message, she should have the right to hire people to do so for her. Denying citizens the right to participate in public discourse through such expenditures could seriously undermine the legitimating function of free speech.⁴⁹

The second objection has far greater force. Unlike flesh-and-blood individuals, artificial entities such as business corporations are not relevant entities for the legitimation that the opportunity to participate in public discourse confers. It is implausible, for instance, to suggest that a political system is rendered illegitimate as to corporations, or to their managers or stockholders, because these entities are not allowed to vote.⁵⁰ For this reason, properly interpreted, the First Amendment does not, for the sake of promoting any democratic interest of the artificial entities themselves, protect their right

46. 424 U.S. 1, 59 (1976).

47. *Id.* at 45–47.

48. Though I think the Court was wrong to extend this right to business corporations in *Citizens United v. Federal Election Commission*. See James Weinstein, *Participatory Democracy as the Basis of American Free Speech Doctrine: A Reply*, 97 VA. L. REV. 633, 634 (2011); see also text accompanying *infra* note 50.

49. See *supra* notes 22–25 and accompanying text.

50. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 424 (2010) (Stevens, J., dissenting) (noting that corporate “speakers’ are not natural persons, much less members of our political community”); see also Toni M. Massaro & Helen Norton, *Siriously? Free Speech Rights and Artificial Intelligence*, 110 NW. U. L. REV. 1169, 1176 (2016) (“[B]ecause corporations do not themselves ‘experience the value of democratic legitimation,’ they do not themselves hold free speech rights equivalent to individuals”) (citing ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 69 (2014)).

to participate in the political process through public discourse.⁵¹ Furthermore, unlike individual citizens, artificial entities such as business corporations have no autonomy interests founded in “self-expression, self-realization, and self-fulfillment” to be served by free speech.⁵² So if speaker interests were all that the First Amendment protected, ExxonMobil could, in my view, be constitutionally punished for intentionally making false statements to try to dissuade the public from supporting climate legislation.⁵³ But although the speaker’s interest in democratic participation is indisputably a core value underlying the American free speech principle, it is also undeniably not the only important interest protected by the First Amendment.

C. Audience Interests

Another important democratic interest served by free and open public discourse is the audience interest in receiving information needed to develop informed views on matters of public policy.⁵⁴ Several decades ago in *First National Bank of Boston v. Bellotti*,⁵⁵ the Court invalidated a Massachusetts law closely confining the circumstances under which corporations could make political contributions or expenditures to influence

51. Massaro & Norton, *supra* note 50, at 1176; *see also* James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from Nike v. Kasky*, 54 CASE W. RES. L. REV. 1091, 1115 (2004) (arguing that business corporations are not “entities in need of the legitimizing function of free speech”). In contrast to business corporations, ideological corporations usually directly promote the political interests of their members, and for that reason, the Court was correct to extend rigorous First Amendment protection to the speech of such entities. *See* Fed. Election Comm’n v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986).

52. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 804 (1978) (White, J., dissenting). *But see* Redish & Wasserman, *supra* note 19 (arguing that speech by business corporations promotes the autonomy and self-realization of managers of and investors in such entities).

53. Concededly, however, others, including perhaps a majority of the Supreme Court, do believe that business corporations have speaker interests that the First Amendment protects. *See supra* note 19 and accompanying text. If one accepts what to my mind is the truly remarkable view that the First Amendment not only protects corporate speaker interests but that these interests are co-extensive and of equal weight with democratic participatory interests of flesh-and-blood speakers, then punishment of ExxonMobil would violate its First Amendment right to participate in the political process.

54. *See* Weinstein, *supra* note 20, at 500–01.

55. 435 U.S. at 765.

questions submitted to the voters. In responding to the contention that corporations have no First Amendment right to participate in public discourse, the Court stated that “[t]he Constitution often protects interests broader than those of the party seeking their vindication” and noted that “[t]he First Amendment, in particular, serves significant societal interests.”⁵⁶ Accordingly, the Court emphasized the interests of the audience apart from any rights of the corporate speaker impaired by the speech restriction at issue.⁵⁷ More recently, the Court in *Citizens United v. Federal Election Commission* invalidated restrictions on corporate campaign expenditures in federal elections.⁵⁸ Unfortunately, there is some isolated language in the majority opinion suggesting,⁵⁹ erroneously in my view,⁶⁰ that business corporations themselves have constitutionally protected interests in participating in the political process. Despite these few unfortunate references, the Court properly emphasized as it did in *Bellotti* that the speech restriction at issue deprived the electorate of information needed for fully informed democratic participation. “Corporations and other associations, like individuals,” the Court explained, “contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster.”⁶¹

56. *Id.* at 776.

57. *Id.*

58. 558 U.S. 310 (2010).

59. *See id.* at 340–41 (“By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice.”); *see also id.* at 341 (“We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.”).

60. *See supra* text accompanying notes 51 and 52.

61. *Citizens United*, 558 U.S. at 343 (citations and internal quotation marks omitted). The Court pointed out that there are approximately 5.8 million for-profit corporations in America, most of which are small businesses lacking large amounts of wealth. *Id.* at 354. Accordingly, in the Court’s view, the restrictions at issue “muffled the voices that best represent the most significant segments of the economy,” thereby depriving the electorate “of information, knowledge and opinion vital to its function.” *Id.* I agree with the majority that political speech by business corporations can provide the electorate with valuable information and perspectives. Nonetheless, I think *Citizens United* was wrongly decided in light of the strong countervailing interests in preventing corruption and the appearance of corruption, as well as the ability of corporations to convey their views through political action committees. But this disagreement has little bearing on the issues under discussion in this Article.

Still, whatever might be said about the benefit to the audience from artificial entities participating in public discourse, it does not necessarily follow that the making of knowingly false statements by such entities should be protected by the First Amendment. For it could be powerfully argued that lies not only fail to promote but actually undermine “the discussion, debate, and the dissemination of information” needed by citizens to knowledgeably participate in public discourse and to competently perform their electoral duties.⁶²

The best argument for extending First Amendment protection to lies in order to promote the audience interest in access to information and perspectives is the concern, discussed above,⁶³ that government officials cannot be trusted to fairly and accurately identify and prosecute knowingly false statements in the often highly ideological context of public discourse. It is possible that “the risk of censorious selectivity by prosecutors”⁶⁴ will impede the information and distort perspectives made available to the audience to such an extent that the cure ends up being worse than the disease. On the other hand, even when the likely distorting effects of selective prosecutions are accounted for, it may be that the accuracy, and hence the reliability and usefulness of the information available to citizens, might be enhanced if lies in public discourse were not protected by the First Amendment.⁶⁵

62. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)); see also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (“False statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas.”); Weinstein, *supra* note 51, at 1126 n.121 (discussing Professor Ronald Dworkin’s suggestion that it is in everybody’s interest that public discourse does not contain deliberate misrepresentations of fact). Some have argued that false statements of fact can serve to clarify the truth. See, e.g., *Sullivan*, 376 U.S. at 279 n.19 (“Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’”) (quoting JOHN STUART MILL, ON LIBERTY). But even when the potentially salutary effect of lies is accounted for, it may be that the making of knowingly false statements of fact in public discourse on balance impairs the informational value of this discussion.

63. See *supra* notes 26–28 and accompanying text.

64. *United States v. Alvarez*, 567 U.S. 709, 736 (2012) (Breyer, J., concurring).

65. Consideration of any clarifying benefit from lies would not likely change this calculus. See *supra* note 62 (discussing the potential value of lies).

Whether granting government the power to punish lies will impede or promote the audience interest in receiving useful information and perspectives is a difficult empirical question. So if the information and perspectives business corporations can provide to promote citizens' knowledgeable participation in public discourse and to aid them in casting informed votes were the only consideration, a good case could be made that the First Amendment should not protect intentional factual misrepresentations by business corporations. Standing in the way of this conclusion, however, is a deep though underexplored principle of American popular sovereignty.

As James Madison wrote in denouncing the Sedition Act of 1798, "[t]he people, not the government, possess the absolute sovereignty."⁶⁶ For this reason, as he had earlier observed in discussing the nature of popular sovereignty, "the censorial power is in the people over the Government, and not in the Government over the people."⁶⁷ To vindicate this basic democratic precept, the First Amendment forbids government from punishing speech because it believes the expression will lead the electorate to make unwise or even disastrous social policy decisions.⁶⁸

Imagine that certain persuasive voices in public discourse were influencing public opinion against ratification of a treaty essential to our national security. Even if it could be shown to a moral certainty that rejection of this treaty would have catastrophic consequences for the nation, including greatly increasing the risk of nuclear attack on our soil, it would be unthinkable within our democratic traditions for the government to prohibit public opposition to the treaty.⁶⁹ And I

66. See *Sullivan*, 376 U.S. at 274 (quoting 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 569–70 (1876)).

67. 4 ANNALS OF CONG. 934 (1794).

68. The First Amendment "embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech." *Brown v. Hartlage*, 456 U.S. 45, 60 (1982).

69. See, e.g., THOMAS CHRISTIANO, *THE RULE OF THE MANY* 15–16 (1996) ("[C]itizens have a right to rule because the right embodies the liberty or the equality of citizens. Even if citizens make bad decisions on certain occasions, it remains that the mistakes are rightfully theirs to make."); see also Thomas Christiano, *Democracy*, STAN. ENCYCLOPEDIA OF PHIL. (Spring ed. 2015), <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=democracy>

would like to suggest that it is no more permissible for government to suppress this expression because it contained factual misrepresentations calculated to mislead the public into opposing the ratification of the treaty. This is because the First Amendment presumes that as the ultimate governors of society, we are rational agents capable of sorting out truth from falsity without government supervision.⁷⁰ As Justice Robert Jackson eloquently explained more than seventy years ago: “The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind In this field, every person must be his own watchman for truth”⁷¹

This is not to say, of course, that humans in general, or the American populace in particular, are in fact fully rational beings. We obviously are not. But the attribution of rationality to participants engaging in public discourse is not a description but rather an ascription. As Justice Jackson suggests, this ascription derives from the basic democratic precept that “We the People,” who possess the ultimate sovereign power, are capable of self-government without the need of government guardianship to keep us from being misled in our capacity as ultimate sovereign. On this view, allowing government to determine which claims in public discourse are true and which are false would present not just the pragmatic difficulties I emphasized in my discussion of speakers’ interests; such government guardianship would *in principle* violate the core democratic precept that the people are capable of ruling themselves.

[<https://perma.cc/JX8A-6L2H>] (“[T]he right of self-government gives one a right, within limits, to do wrong. Just as an individual has a right to make some bad decisions for himself or herself, so a group of individuals have a right to make bad or unjust decisions for themselves regarding those activities they share.”). Many years ago, I heard a radio interview with a South Korean official who was asked why the Communist party is outlawed in his county. The official explained that this was because many South Koreans were simple peasants who likely would be deceived by communist lies to vote the party into power. While some American politicians might share the view that American citizens could be deceived into supporting a dangerous political party, few would dare articulate this as a reason for banning the party.

70. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 355 (2010) (our form of government “entrust[s] the people to judge what is true and what is false”); *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (“But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine.”).

71. *Thomas*, 323 U.S. at 545 (Jackson, J., concurring).

To see why the government suppressing lies to protect the people from being misled is contrary to a basic precept of popular sovereignty, at least as traditionally understood in this country, imagine that you are a ruler who originally possessed all of the political power in a certain society. In order to form a “more perfect” society, “establish Justice,” etc., you “ordain and establish” a constitution, which among other things, delegates legislative power to a national assembly. Despite this delegation, however, you retain the ultimate sovereignty in this society, including the power to select the members of the assembly, to directly make provincial laws, and to adopt a new constitution.

Suppose that the assembly passes a law empowering your ministers to keep from you any publication that in their judgment contains knowing falsehoods that might deceive you into making the wrong decision in the exercise of your retained power. Let us further suppose that although there is a possibility that such censorship will deprive you of valuable information or perspectives you need to make these decisions, on balance it is more likely that this guardianship arrangement will improve the quality of the information you receive. Even with the possibility of receiving more accurate information, wouldn't you prefer that, instead of being prevented from having access to any mendacious material, your ministers let you see it but pointed out to you the statements that they thought were untrue? It seems to me that this advisory arrangement would better respect your rationality and authority as ultimate sovereign than would the guardianship arrangement.

What this thought experiment shows, I believe, is that government might properly add its own voice to the discussion and advise citizens that a statement made in public discourse is a lie. But it also suggests that punishing speakers for making knowing factual misrepresentations in order to prevent these lies from deceiving the people about the desirability of legislation or any other matter of public concern is inconsistent with the people's role as the ultimate governors of society.⁷² Crucially, if I am right that punishing speech for this reason is in principle contrary to a fundamental precept of American

72. For an earlier, somewhat more tentative exposition of this position, see Weinstein, *supra* note 51, at 1105–06, n.64.

democracy, it is entirely irrelevant whether the speaker making the deceptive statement is a flesh-and-blood individual or an artificial entity.

The Court would likely agree that bans on even knowing misstatements of fact to prevent the people from being misled about the desirability of legislation are in principle contrary to the First Amendment. As Justice Kennedy explained in *Alvarez*: “Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth.”⁷³ Rather, “[t]he remedy for speech that is false is speech that is true.”⁷⁴ In sum, imposing sanctions on ExxonMobil for engaging in an alleged disinformation campaign calculated to deceive the public about the desirability of climate legislation would offend a basic precept of our traditions of popular sovereignty and freedom of expression and therefore, would likely be held unconstitutional.⁷⁵ This does not mean, however, that ExxonMobil is legally off the hook for its alleged disinformation campaign.

II. THE FIRST AMENDMENT WOULD, WITH PROPER SAFEGUARDS, PERMIT SANCTIONS FOR COMMERCIAL HARMS RESULTING FROM THE ALLEGED DISINFORMATION CAMPAIGN

Perhaps realizing that prosecuting ExxonMobil for deceiving the public into opposing climate legislation would be barred by the First Amendment, the attorneys general investigating ExxonMobil are, unlike some government officials and academic commentators,⁷⁶ apparently eschewing any such theory of liability. Rather, both New York Attorney General Schneiderman and Massachusetts Attorney General Healey seem to be focusing on consumer and securities fraud as the basis of potential liability. When asked about the First

73. *United States v. Alvarez*, 567 U.S. 709, 723 (2012).

74. *Id.* at 727.

75. This view is not inconsistent with the Court’s cases affording less than absolute immunity to false defamatory statements in public discourse. *See supra* note 29. In those cases, the Court upholds the legitimate state interest in redressing reputational injury to individuals. This rationale is quite different from the paternalistic concern to prevent the people from being misled about the desirability of legislation or some other collective decision within our bailiwick as ultimate sovereign.

76. *See supra* notes 5 and 6 and accompanying text.

Amendment implications of his investigation in a 2016 interview, Schneiderman replied: “The First Amendment doesn’t protect you for fraud.”⁷⁷ He added that “[t]hree card-monte operators can’t say, ‘Hey, I’m just exercising my First Amendment rights!’”⁷⁸ Schneiderman is correct that the First Amendment generally presents no obstacle to actions for fraudulent misrepresentation, including consumer or securities fraud. But he is off-base in suggesting that his investigation presents as trivial a First Amendment problem as prosecuting a crooked card dealer. To the contrary, whether any fraud liability can, consistent with the First Amendment, be imposed on ExxonMobil based on their alleged disinformation campaign presents both an interesting and difficult First Amendment issue.

This Part begins with a discussion of why the typical fraud action does not implicate First Amendment values. It then briefly considers the possibility of a consumer fraud claim against ExxonMobil. It concludes, however, that unlike the notorious tobacco disinformation campaign on which ExxonMobil’s campaign is allegedly based, there seems to be no viable claim that ExxonMobil’s campaign misled consumers. Rather, the attorneys general and private plaintiffs are focusing on the theory that ExxonMobil committed securities fraud by failing to disclose to investors that, because of global warming, it would be unable to exploit valuable oil and gas reserves. No First Amendment problem arises if the alleged disinformation campaign is used to show ExxonMobil knew but did not disclose this information. But as I shall discuss in detail, a very difficult First Amendment issue would be presented if the claim is that the disinformation campaign misled investors into purchasing ExxonMobil stock.

A. *Fraud and the First Amendment*

In his plurality opinion in *United States v. Alvarez*, Justice Kennedy emphasized that because the Stolen Valor Act did not require that the false claims about military honors be used to

77. See John Schwartz, *ExxonMobil Fraud Inquiry Said to Focus More on Future Than Past*, N.Y. TIMES (Aug. 19, 2016), <https://www.nytimes.com/2016/08/20/science/exxon-mobil-fraud-inquiry-said-to-focus-more-on-future-than-past.html> [https://perma.cc/S75E-H88].

78. *Id.*

“gain a material advantage, it would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition.”⁷⁹ He noted, in contrast, that “[w]here false claims are made to effect a fraud or secure moneys or other valuable considerations . . . it is well-established that the Government may restrict speech without affronting the First Amendment.”⁸⁰ He accordingly listed fraud among “the few historic and traditional categories of expression long familiar to the bar” that may be regulated because of their content.⁸¹ Similarly, Justice Alito’s dissent observed that “[l]aws prohibiting fraud . . . were in existence when the First Amendment was adopted, and their constitutionality is now beyond question.”⁸²

The usual reason given for excluding fraud from First Amendment coverage is the one given by both the plurality and the dissent: such expression has historically been considered to be categorically without First Amendment protection. In his concurrence, Justice Breyer offered a different reason. “Fraud statutes,” he observed, “typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury.”⁸³ This requirement, like similar constraints on other types of actionable lies that are ordinarily not protected by the First Amendment,⁸⁴ “help[s]

79. *Alvarez*, 567 U.S. at 723.

80. *Id.* (citing *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1971)) (noting that fraudulent speech generally falls outside the protections of the First Amendment).

81. *Id.* at 717 (internal quotations omitted).

82. *Id.* at 747 (Alito, J., dissenting) (quoting *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948)) (“[T]he government’s power ‘to protect people against fraud’ has ‘always been recognized in this country and is firmly established.’”). Justice Breyer does not explicitly state the prohibition of fraud and the many other “statutes and common-law doctrines” that he “concede[s] . . . make the utterance of certain kinds of false statements unlawful,” *id.* at 734 (Breyer, J., concurring), comports with the First Amendment. It is nonetheless evident that he agrees with both the majority and dissent that such prohibitions ordinarily present no First Amendment problems. *See infra* text accompanying notes 83–85.

83. *Alvarez*, 567 U.S. at 734 (Breyer, J., concurring) (citing RESTATEMENT (SECOND) OF TORTS § 525 (AM. LAW INST. 1977)) This provision provides:

One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.

RESTATEMENT (SECOND) OF TORTS § 525.

84. In addition to fraud, Breyer lists: defamation; torts involving intentional

to make certain that the statute does not allow its threat of liability or criminal punishment to roam at large, discouraging or forbidding the telling of the lie in contexts where harm is unlikely or the need for the prohibition is small.”⁸⁵

The explanation that the several opinions in *Alvarez* offer for why fraud (and other types of traditionally actionable lies) is not within First Amendment coverage is helpful so far as it goes. But as is characteristic of Supreme Court free speech decisions, these opinions are remarkably undertheorized. A more basic reason that fraud is categorically without First Amendment protection is that, as I now discuss, the typical fraud case does not threaten any First Amendment values.

Consider for instance, the following examples from the Restatement of Torts (Second) of knowingly false misstatements constituting fraudulent misrepresentation: a claim by a seller of a second-hand car that the car will run fifteen miles on a gallon of gasoline if the speaker knows that it has never run more than seven miles per gallon of gasoline; an assurance from the seller of stock that shares will within five years pay dividends when the speaker knows that the corporation is hopelessly insolvent; and a false statement by a seller of a horse that a veterinary surgeon a week before had examined the horse and had pronounced it sound.⁸⁶ There can be no credible argument that imposing liability on the speaker for making any of these statements or others listed in this section of the Restatement⁸⁷ would interfere with core democratic-audience interests underlying the First Amendment that I emphasize above.

With respect to speakers’ interest, the inability of a seller

infliction of emotional distress; perjury statutes; laws prohibiting false claims of terrorist attacks or other lies concerning the commission of crimes or catastrophes; laws forbidding impersonation of a public official; and statutes prohibiting trademark infringement as among the “statutes and common-law doctrines” that “make “the utterance of certain kinds of false statements unlawful.” *Alvarez*, 567 U.S. at 734–36. (Breyer, J., concurring). He notes that this list is “not exhaustive [but] is sufficient to show that few statutes, if any, simply prohibit without limitation the telling of a lie, even a lie about one particular matter. . . . [Rather,] limitations of context, requirements of proof of injury, and the like, narrow the statute to a subset of lies where specific harm is more likely to occur.” *Id.* at 736.

85. *Id.*

86. RESTATEMENT (SECOND) OF TORTS § 525 illus. 1, 3, 4 (AM. LAW INST. 1977).

87. *Id.* § 525 illus. 2, 5.

to deceive a buyer about the gas mileage of a used car, or the value of stock shares, or the health of a horse, in no way restricts the seller's ability to comment on any issue of public concern, including discussion about gas-mileage requirements, securities fraud rules, or ethical treatment of horses. But not only will punishment of these factual misrepresentations in a commercial context not directly prevent speakers from participating in democratic self-governance, imposing sanctions on such speech will not deter others from doing so. For this reason, imposing liability on speech constituting the typical fraudulent misrepresentation will not deprive the audience of any information or perspective useful either for their own participation in public discourse or needed for informed voting.

Nor is such tort liability for fraudulent misrepresentation inconsistent with the core premise of American popular sovereignty, discussed above, which "entrust[s] the people to judge what is true and what is false."⁸⁸ This is because the attribution of complete rationality and independence to citizens in their capacity as ultimate sovereign ("*the people*") is not applicable to people acting in other capacities, including as consumers of products or services. Rather, in these capacities the First Amendment permits the government to consider us as the not fully rational beings that we actually are, and to recognize that in these settings we are often vulnerable and dependent on others.⁸⁹

Not only does imposing liability for the typical fraudulent misrepresentation not violate the core democratic norm underlying the First Amendment, such liability would not impair either the search for the truth or individual autonomy, the other two values often proposed as core free speech norms.⁹⁰ Whatever can be said for the ability of an unregulated "marketplace of ideas" to find truth on such matters as science, history, and politics,⁹¹ it cannot seriously be contended that

88. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 355 (2010).

89. *See Post*, *supra* note 20, at 483–84 (contrasting the autonomy of speakers and listeners within public discourse with the dependence of listeners on not fully-autonomous speakers outside of public discourse such as in the relationship between dentist and patient or lawyer and client).

90. *See supra* note 14.

91. For criticism of the marketplace of ideas rationale, see C. Edwin Baker, *First Amendment Limitations on Copyright*, 55 VAND. L. REV. 891, 897 (2002); Weinstein, *supra* note 20, at 502. For a defense of that rationale, see Eugene Volokh, *In Defense of the Marketplace of Ideas / Search for Truth as a Theory of*

forbidding deceptive statements in a commercial transaction will impair this quest. With respect to individual autonomy, laws that prevent someone from choosing to lie rather than tell the truth might in some sense be conceived as infringing upon the speaker's autonomy. But because intentionally deceiving another into giving up something of value impairs more important autonomy interests of the person defrauded, laws preventing such activity on balance promote rather than impair autonomy.

Finally, it should be noted that on the rare occasions that some overreaching fraudulent misrepresentation law does threaten important free speech values, the Court has invalidated the law on First Amendment grounds. For instance, to protect the First Amendment right to solicit money for charitable purposes, the Court has invalidated prophylactic measures designed to prevent fraud by setting limits on fundraising fees.⁹² But even with respect to charitable solicitations, the Court has explained that while the First Amendment "protects the right to engage in charitable solicitation," that provision "does not shield fraud."⁹³ Thus the Court has upheld the power of government to punish affirmative misrepresentations by charitable solicitors concerning how much of the donated funds would actually be paid over to the charities.⁹⁴

B. Consumer Fraud

Both Attorneys General Schneiderman and Healey have said that they are investigating whether ExxonMobil's alleged disinformation campaign deceived consumers.⁹⁵ They have not, however, specified in what way they believe consumers may have been defrauded. Others, however, have compared ExxonMobil's activities to the notorious disinformation campaign waged by the tobacco companies to sow doubt about whether cigarette smoking caused lung cancer and other health

Free Speech Protection, 97 VA. L. REV. 595 (2011).

92. See *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980); see also *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988).

93. *Illinois ex rel. Madigan v. Telemarketing Assoc's, Inc.*, 538 U.S. 600, 611–12 (2003).

94. *Id.* at 619.

95. See *supra* text accompanying note 11.

problems.⁹⁶ Indeed, ExxonMobil's campaign is said to have been consciously based on this earlier disinformation campaign and employed many of the same scientists.⁹⁷ In 2006, after a lengthy trial, a federal court held that, in violation of RICO, several tobacco companies "knowingly and intentionally engaged in a scheme to defraud smokers and potential smokers, for purposes of financial gain, by making false and fraudulent statements, representations, and promises."⁹⁸ This finding was upheld on appeal.⁹⁹ For two related reasons, however, comparison of ExxonMobil's alleged activities to the tobacco companies' disinformation campaign is inapt as a basis for consumer fraud liability.

The first important difference is that the tobacco companies' disinformation campaign was directed towards consumers or potential consumers, namely, "smokers and potential smokers."¹⁰⁰ ExxonMobil's campaign, in contrast, was targeted at the public at large for the purpose of turning public opinion against the need for climate legislation.¹⁰¹ While the attorneys general have expressed concern that ExxonMobil's campaign deceived consumers,¹⁰² they have not, so far as I have been able to determine, pointed to any evidence that this was either the intent or the effect of ExxonMobil's campaign. The second difference is that in the tobacco case the government was able to show that the tobacco companies' disinformation campaign about the dangers of cigarettes likely caused smokers to continue to smoke and potential smokers to begin doing so.¹⁰³ In contrast, it may well be more difficult to show ExxonMobil's alleged disinformation campaign deceived consumers into purchasing ExxonMobil products. Tellingly, despite apparently initially investigating whether ExxonMobil's activities constituted consumer fraud,¹⁰⁴ neither

96. See Kaiser & Wasserman, *The Rockefeller Family*, *supra* note 2.

97. *Id.*

98. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 852 (D.D.C. 2006).

99. *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095 (D.C. Cir. 2009).

100. *Philip Morris*, 449 F. Supp. 2d at 886–87.

101. See *supra* notes 2–4 and accompanying text.

102. See *supra* note 11 and accompanying text.

103. *Philip Morris*, 449 F. Supp. 2d at 858 ("Defendants have intentionally maintained and coordinated their fraudulent position on addiction and nicotine . . . [And, b]y the use of this fraud, Defendants have kept more smokers smoking, recruited more new smokers, and maintained or increased revenues.").

104. See *supra* note 11 and accompanying text.

attorney general seems to be vigorously pursuing this theory.¹⁰⁵ Rather, both are focusing on whether the alleged disinformation campaign deceived ExxonMobil's investors into purchasing shares in the company.

C. *Securities Fraud*

As the investigation of the attorneys general has developed, it has focused on the concern that ExxonMobil may have committed “massive securities fraud” by making knowing misrepresentations to investors regarding the value of the company's oil and gas reserves.¹⁰⁶ Specifically, the attorneys general are investigating whether, despite knowing that the global regulatory efforts to combat climate change would dramatically reduce demand for fossil fuels thereby “stranding” these assets in the ground, ExxonMobil misled its investors about the value of these reserves.¹⁰⁷ In addition, investors have recently filed a class action lawsuit in federal court seeking recovery under § 10(b) of the Securities and Exchange Act based in part on the alleged disinformation campaign.¹⁰⁸ Whether the imposition of liability on ExxonMobil under this theory would violate the First Amendment depends entirely on how prosecutors or plaintiffs use the alleged disinformation campaign in a securities fraud case against ExxonMobil.

As discussed above, because the typical fraud case does not threaten any First Amendment value, “false claims . . . made to effect a fraud or secure moneys or other valuable considerations,” are not protected by the First Amendment.¹⁰⁹ Accordingly, imposing liability on ExxonMobil for false or misleading statements in SEC filings, shareholder reports, or corporate announcements about the value of its gas and oil reserves would not “affront[] the First Amendment.”¹¹⁰ Nor would it violate the First Amendment if prosecutors or plaintiffs used the alleged disinformation campaign solely as evidence that the company had knowledge that it did not

105. Nor to my knowledge have any private consumer fraud actions been filed against ExxonMobil based on the alleged disinformation campaign.

106. Schwartz, *supra* note 77.

107. *Id.*

108. See *supra* note 8 and accompanying text.

109. United States v. Alvarez, 567 U.S. 709, 723 (2012) (plurality opinion).

110. *Id.*

disclose to investors that its assets would likely be stranded. As the Supreme Court has explained, “[t]he First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.”¹¹¹ In a recent interview Attorney General Schneiderman said that he will use this disinformation campaign to establish the company’s knowledge of the risk to its reserves posed by climate change.¹¹² If this is the sole use he makes of this speech, no substantial First Amendment issue will arise. A difficult First Amendment problem would arise, however, if the prosecution or plaintiffs argue that the disinformation campaign misled investors into purchasing shares in ExxonMobil.

Unlike statements a corporation makes in a SEC filing, statements directed to the general public in newspapers or other democratic modes of information, such as radio, television, or the internet, can offer valuable information and perspectives to the electorate.¹¹³ For this reason, it would raise serious First Amendment issues if plaintiffs or prosecutors use such public discourse, not just to show corporate knowledge, but because of its persuasive impact on the public. Indeed, as I argued above, the First Amendment would absolutely bar imposing sanctions on ExxonMobil for deceiving the public about the desirability of climate legislation. The “stranded asset” theory, however, seeks to impose liability not for misleading citizens about the merits of legislation or any other matter of public concern, but rather for misleading investors about the value of crucial company assets. If ExxonMobil had engaged in its alleged disinformation with the specific purpose of deceiving investors about the value of its gas and oil reserves, the First Amendment might well permit imposition of liability for securities fraud despite the fact that the knowingly false statements were directed to the general public. Although having the trappings of public discourse, the speech then would not be aimed at trying to influence the public on some matter of public concern, but merely a cleverly disguised way of defrauding investors about the value of the company’s

111. *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993); *see also* *United States v. Jefferson*, 751 F.3d 314 (5th Cir. 2014).

112. “The older stuff really is just important to establish knowledge and the framework and to look for inconsistencies.” Schwartz, *supra* note 77.

113. *See supra* text accompanying notes 54–61.

assets.¹¹⁴ Interesting though it may be, this difficult First Amendment issue is one we need not belabor, for there is no evidence that even a subsidiary purpose of the alleged disinformation campaign was to deceive investors about the value of any of ExxonMobil's assets.¹¹⁵

A claim that plaintiffs or prosecutors are more likely to make is this: Although the purpose of the alleged disinformation campaign might have been to persuade the general public not to support climate legislation, an incidental effect of this campaign was to mislead ExxonMobil investors about facts relevant to whether they should purchase shares in that company. Specifically, some investors deceived by the disinformation campaign about the cause and likely effect of climate change would in turn be misled about the value of the company's gas and oil reserves or, more generally, the long-term profitability of the company. This raises the very difficult First Amendment question of whether ExxonMobil can be held liable for an unintended though reasonably foreseeable consequence of its alleged disinformation campaign.

It would ordinarily be very problematic to hold any speaker, corporate or otherwise, engaging in public discourse liable for an unintended effect of its speech. Imposing liability for such an unintended consequence could chill speakers from supplying the electorate with useful information or perspectives. But if what has been alleged about ExxonMobil's activities is true, this is not an ordinary case of a corporation engaging in public discourse. The claim is that ExxonMobil propagated information that it knew to be false with the intent to deceive the public. In addition, because ExxonMobil

114. See generally *United States v. Wenger*, 427 F.3d 840 (3d Cir. 2005) (rejecting a First Amendment challenge by a radio host and newsletter publicist convicted of securities fraud for failing to disclose the fact that he was paid in stock by companies he promoted). Because of the highly ideological nature in this country about the causes and probable effects of climate change, there would be considerable risk of ExxonMobil being unfairly targeted for this expression in a suit based on the theory the true purpose of the disinformation campaign was to mislead investors. For this reason, the First Amendment should be construed as requiring the government or private plaintiffs to prove by clear and convincing evidence that a significant purpose of the public statements was to mislead its investors about the value of its stock. See *infra* note 119 and accompanying text.

115. As a statutory matter, however, this would not be a problem under New York's Martin Act, which does not require intent to defraud. See John S. Baker, Jr., *Warning to Corporate Counsel: If State AGs Can Do This to ExxonMobil, How Safe Is Your Company?*, 15 GEO. J. L. & PUB. POL'Y 313, 322 (2017).

obviously knew that this audience contained potential investors, it was foreseeable that this subset of their audience might rely to their detriment on these statements in deciding whether to purchase stock in the company. So would imposing liability on a corporation for unintended but reasonably foreseeable damage to investors arising from intentional factual misrepresentations in public discourse violate the First Amendment? I find this to be a close and difficult question. On balance, however, I think that liability could be constitutionally imposed but only if confined by stringent First Amendment safeguards.

Unlike regulating speech to protect the public from deception regarding a matter of public concern, imposing liability for knowingly false statements in public discourse to protect investors would not violate the core democratic precept, discussed above, that the electorate must be trusted to distinguish truth from falsity. And because, properly understood, the First Amendment protects the right of business corporations to participate in public discourse, not for the sake of the corporate speaker, but instrumentally to promote democratic audience interests, imposing such liability would not impair any core speaker interests. In addition, this would allow those misled by the false statements to recover compensation for their economic injury, as well as deter future intentional misstatements that corporations can reasonably foresee would likely be relied on by investors or potential investors.

On the other hand, as emphasized above, there is good reason to be skeptical about the government's ability in the highly ideological context that often characterizes public discourse to accurately and fairly determine whether a statement is false or to determine whether the speaker knew that the statement was false. Relatedly, in this context "the risk of censorious selectivity by prosecutors is also high."¹¹⁶ Indeed, ExxonMobil has strenuously objected, and a district court agreed, that the investigation by the attorneys general is politically motivated.¹¹⁷ So allowing imposition of liability would likely have a chilling effect on corporate speech resulting in the loss of valuable information and perspectives available to

116. *United States v. Alvarez*, 567 U.S. 709, 736 (2012) (Breyer, J., concurring).

117. *See supra* note 9 (discussing Judge Kinkeade's order).

the electorate.

It is difficult to know how to balance these competing and largely incommensurable concerns. In particular, how does one weigh the interest in allowing recovery for economic damage indirectly resulting from lies in public discourse against the potential loss of valuable information and perspectives that might result from allowing such a remedy? One way to resolve this problem is to focus on the relative certainty of the harms. It is uncertain whether imposing liability in this context would result in any significant loss to the electorate of valuable information and perspectives. In contrast, the economic injury to be redressed is fairly certain, or at least can be made so by proper First Amendment constraints.

Regardless of any lesser standard for liability allowed by the securities law,¹¹⁸ to comport with the First Amendment in securities fraud cases involving public discourse, the prosecutor or plaintiff should have to prove by clear and convincing evidence that the corporation knowingly misrepresented a material fact upon which investors reasonably relied.¹¹⁹ These restrictions will “help to make certain that” the availability of securities fraud sanctions “does not allow its threat of liability or criminal punishment to roam at large” unduly inhibiting corporate contributions to public discourse.¹²⁰ Indeed, it is arguable that allowing such limited restrictions on knowingly lying in public discourse might improve the usefulness of the information available to the electorate. By the same token, the requirements of materiality and reasonable reliance will mean that the harms addressed will be both relatively certain and concrete.

118. See *supra* note 115.

119. Cf. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (to prevent the libel law from unduly deterring participation in public debate, the Court imposed similar constitutional limitations on libel actions by public official for speech about their official conduct). See Wendy Gerwick Couture, *The Collision Between the First Amendment and Securities Fraud*, 65 ALA. L. REV. 903, 946–51, 974 (2014) (arguing for application of the “*Sullivan* balancing test” to securities fraud claims based on noncommercial speech about public companies). First Amendment limitations aside, it should be noted that it is uncertain whether statements directed to the public at large, such as those constituting ExxonMobil’s alleged disinformation campaign, would meet Rule 10b-5’s requirement that the false or misleading statements be “in connection with” a securities transaction. See Thomas Molony, *Beyond the Target Market: Product Marketing and Rule 10b-5’s “In Connection With” Requirement*, 61 CLEV. ST. L. REV. 101 (2013).

120. *Alvarez*, 567 U.S. at 736 (Breyer, J., concurring).

CONCLUSION

The specific focus of this Article has been the extent to which, consistent with the First Amendment, ExxonMobil can be held liable for an alleged disinformation campaign designed to mislead the public about the need for climate legislation. More generally, it has explored the question of when legal liability may constitutionally be imposed on a speaker for making knowingly false factual statements in public discourse. In doing so, I have tried to articulate and defend a basic, though not often discussed, precept immanent in the concept of American popular sovereignty, one that forbids government from suppressing speech to prevent the people from being misled on a matter relevant to their authority as ultimate sovereign. On this view, it would be wrong in principle for government to impose liability on ExxonMobil for trying to mislead the public about the causes and likely effects of climate change in order to reduce public support for climate legislation.

A more difficult First Amendment issue arises if liability is imposed on ExxonMobil, not for trying to mislead the public about the need for climate legislation, but rather for the unintended but reasonably foreseeable economic damage to investors misled by the alleged lies. In large part because such a theory of liability does not violate the basic anti-guardianship precept of popular sovereignty that I have explored, I suggest that liability imposed on this ground might be constitutional but only if confined by stringent First Amendment limitations.