RESOLVING THE FIRST AMENDMENT'S CIVIL WAR: POLITICAL FRAUD AND THE DEMOCRATIC GOALS OF FREE EXPRESSION

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This Article presents a timely reexamination of the relationship between the First Amendment and political fraud, defined as the use of knowingly false speech to achieve political goals. We extend core Meiklejohnian free-speech principles to show that political fraud presents an intra-First Amendment conflict because both regulating and not regulating political fraud presents some risk to the First Amendment's goal of self-government. Further, we establish that the self-governance harm of political fraud can justify government intervention, even after the Supreme Court's Alvarez decision. However, the First Amendment equities only permit such intervention when political fraud has the potential to undermine the collective self-determination that the First Amendment is intended to facilitate. We conclude by discussing key procedural protections that would help most effectively implement our substantive standard as an effective tool in mitigating the First Amendment harms of political fraud.

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INTRODUCTION

The First Amendment, the Supreme Court has famously said, dictates that free expression be "uninhibited, robust, and wide open."[1] Towards that end, the Court has on occasion indicated its willingness to tolerate false speech, even when it causes harm. It has done so in an effort to prevent chilling a speaker who, *ex ante,* believes what she is about to say to be true, but fears that, *ex post*, a government adjudicator will find it to have been false.[2] In reaching this conclusion, the Court focused heavily, if not exclusively, on the concern that were such a chilling effect to occur, the voters would be deprived of potentially valuable information that could facilitate the performance of their governing function in the democratic political process.[3]

The Court's opinion echoed the famed theory of free expression developed by philosopher Alexander Meiklejohn, who had grounded free expression in the workings of a democratic system.[4] According to Meiklejohn, free speech "springs from the necessities . . . of self-government."[5] He argued that in our democratic society, the individuals we refer to as our "governors" are in reality properly seen merely as our "agents."[6] It is, rather, the voters who constitute the

1. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
2. *Id.* at 279.
3. *Id.* at 280–82.
4. *See, e.g.*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1965) [hereinafter POLITICAL FREEDOM]. Upon learning of the Supreme Court's decision in *New York Times Co. v. Sullivan*, Meiklejohn declared "it an occasion for dancing in the streets." Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.125 (1964). The author of the Court's opinion in *New York Times*, Justice Brennan, subsequently authored a scholarly article on the influence of Meiklejohn's theory on Supreme Court decision-making. William J. Brennan, Jr., *The Supreme Court and the Meiklejohnian Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).
5. POLITICAL FREEDOM, *supra* note 4, at 27.
6. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT 40–41 (1948) [hereinafter FREE SPEECH AND SELF-GOVERNMENT] (describing a petition to a government official as not a request to a governor but a command to an agent).

true governors. The electorate exercises its governing power in the voting booth.[7] Free expression facilitates the democratic process by providing the voters with information and opinions concerning issues faced by government.[8] Because of the centrality of this "political" speech, Meiklejohn argued, such expression should receive what he described as "absolute" protection.[9] Indeed, he asserted that the *only* concern of the First Amendment is protection of political speech.[10] Meiklejohn's focus on the First Amendment interest of the listener, rather than the speaker, as a means of facilitating political decision-making heavily influenced the Court's iconic decision in *New York Times Co. v. Sullivan* to protect false speech concerning public officials—a doctrine subsequently extended to public figures and, to a certain extent, matters of public interest.[11]

To be sure, Meiklejohn's theory of political speech has its share of controversies and flaws.[12] To provide so-called absolute First Amendment protection to *political* speech but no First Amendment protection to *nonpolitical* speech, as Meiklejohn urged, creates an artificial dichotomy difficult both to justify and to apply. Moreover, his purportedly exclusive focus on the First Amendment interests of the listener, *to the total exclusion of those of the speaker*, creates an absurdly truncated scope of First Amendment protection. And there are many other flaws in his theory too numerous to mention here. The fact remains, however, that Meiklejohn's explication of the manner in which the constitutional guarantee of free expression facilitates the democratic process through the creation of better informed "governors" has a fundamental appeal, despite its unduly limited scope, and the obvious influence of his theory on the Supreme Court's modern shaping of First Amendment doctrine cannot be ignored.[13]

The sad theoretical irony of the decision to protect false political speech, however, is that such protection represents a very dangerous double-edged sword. On the one hand, as the Court reasoned, protecting false political speech may well ultimately, if indirectly, provide the voters with more valuable information and opinions than they would otherwise have had, by removing the serious chill that would-be speakers of truthful information would otherwise feel. On the other hand, extending First Amendment protection to false speech in the political process may also encourage those who are intent on distorting the democratic

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7. *Id.* at 105–06.

8. *Id.* at 106.

9. *Id.* at 20–27. In reality, the level of protection Meiklejohn would extend was far from "absolute" in the literal sense of the term. *See* Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversarial Democracy in a Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1307, 1312–13 (2010).

10. POLITICAL FREEDOM, *supra* note 4, at 35–37.

11. *See, e.g.*, Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 374 (1967).

12. *See* Redish & Mollen, *supra* note 9; Robert C. Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993).

13. In addition to Meiklejohn's influence on the *New York Times* decision, see also *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (FCC's "fairness" doctrine upheld under listener-based theory of the First Amendment).

process to defraud the voters into making misguided choices on the basis of factually inaccurate information. Thus, protecting false political speech may just as easily undermine the democratic process as facilitate it.

This conflict gives rise to something far more complex and troublesome than the typical clash between First Amendment values and competing external social interests, as so often happens in First Amendment jurisprudence. Rather, we see the troublesome duality that flows from the decision to protect false political speech as a mammoth *internal* First Amendment struggle between competing constitutional interests. The reasoning for such a conclusion is simple: One reasonably starts from the premise—as both Meiklejohn and the Supreme Court have—that a significant (some would say predominant) purpose served by the First Amendment guarantee of free expression is the facilitation of the democratic process through the fostering of the communication, to and among the voters, of a wide variety of politically relevant information and opinion. But to the extent that protecting political speech furthers central First Amendment values by *facilitating* and *enriching* the democratic process (the Meiklejohnian position), protecting speech that *undermines* the democratic process by distorting voter perceptions—and therefore their decision-making—through dissemination of false information seriously endangers the proper functioning of the democratic process. Because our analysis started from the premise that the constitutional protection of free expression is designed primarily to facilitate democracy through better informing the voters, extending constitutional protection to expression designed to undermine and endanger that democratic process ultimately distorts the very process the First Amendment was designed to protect and foster. Therefore, through the Meiklejohnian lens adopted by the Supreme Court, this conflict is rightly viewed as an intra-First Amendment battle.

The goal in resolving this internal conflict between competing and powerful First Amendment-based interests is to find some method by which we can protect false political speech that fosters the foundational First Amendment value of democratic facilitation, yet simultaneously deny constitutional protection to false expression that endangers the democratic process. The goal of our Article, then, is to shape a First Amendment standard for determining when to protect and when not to protect false political speech to achieve this goal. One should therefore not be surprised that today we choose to focus on the need to protect false speech with the competing First Amendment-based need to deter or suppress what we have chosen to call "political fraud," i.e., false speech that undermines the First Amendment's fundamental goal of promoting political self-government.

The need for a resolution to this question is particularly timely, as partisan actors and hostile foreign powers intent on spreading misinformation to achieve political goals has dominated recent elections.[14] These forms of

14. Samuel Osborne, *Donald Trump Wins: All the Lies, Mistruths, and Scare Stories He Told During the US Election Campaign*, INDEPENDENT (Nov. 9, 2016), https://www.independent.co.uk/news/world/americas/donald-trump-president-lies-and-mistruths-during-us-election-campaign-a7406821.html; Indictment at 2–3, United States v. Internet Research Agency LLC, 18-CR-00032-DLF (D.D.C. Feb. 16, 2018) [hereinafter IRA Indictment].

democratically hostile actors have long been problematic, and their willingness to have elections "turn on rumors, innuendo, and outright fabrication, [and] in effect defeat[] the entire democratic process" raises grave concerns about the continuing vitality of this facet of the political process.[15] In the same way that economic fraud undermines the functioning of markets, these political frauds have undermined the "marketplace of ideas" as a means for achieving correct political outcomes.[16]

While current events have brought political fraud into the national conversation, lies told to gain political advantage are hardly a new phenomenon.[17] Even "[a]t the time the First Amendment was adopted . . . there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool."[18] We may then ask, why reevaluate the relationship between the First Amendment and political fraud now?

The main reason for this renewed constitutional scrutiny is the revolutionary interconnectivity and ease of access to information provided by the Internet, which has exponentially increased the level of risk posed by political fraud.[19] As the Internet has grown into the dominant source for news,[20] commentators have warned that it "doesn't just reflect reality anymore; it shapes it."[21] Problematically, this reality is not one shared across constituencies but instead one that reflects "a realm of siloed communities that experience their own reality and operate with their own facts."[22] Because social media algorithms aim at giving "people news that is popular or trending, rather than accurate or important,"[23] they do little to check these erosions of intersectional discourse. Internet siloing has also affected institutional news outlets, creating a situation where "[i]f you watch Fox News, you're in one reality, and if you read *The New*

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15. Jack Winsbro, *Misrepresentation in Political Advertising: The Role of Legal Sanctions*, 36 EMORY L.J. 853, 863 (1987).

16. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (marketplace of ideas metaphor).

17. Gideon Cohn-Postar, *Politicians, Lies and Election Legitimacy — It's an Old Story*, CONVERSATION (Sept. 6, 2018, 6:44 AM), https://theconversation.com/politicians-lies-and-election-legitimacy-its-an-old-story-101298.

18. Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

19. *See* Erwin Chemerinsky, *False Speech and the First Amendment*, 71 OKLA. L. REV. 1, 3–6 (2018) ("[T]he internet is different from other media that exist for speech. The benefits are great, but so too are the potential costs, especially when it comes to false speech.").

20. Katerina Eva Matsa & Elisa Shearer, *News Use Across Social Media Platforms 2018*, PEW RES. CTR. (Sept. 10, 2018), https://www.journalism.org/2018/09/10/news-use-across-social-media-platforms-2018/ (finding that more than two-thirds of American adults at least sometimes get their news from social media platforms).

21. Renee DiResta, *Social Network Algorithms are Distorting Reality by Boosting Conspiracy Theories*, FAST CO. (May 11, 2016), https://www.fastcompany.com/3059742/social-network-algorithms-are-distorting-reality-by-boosting-conspiracy-theories.

22. *Id.*

23. MICHIKO KAKUTANI, THE DEATH OF TRUTH: NOTES ON FALSEHOOD IN THE AGE OF TRUMP 87 (2018).

York Times, you're in a different reality, and if you're at BuzzFeed, you're someplace else."[24]

This plurality of "factual" viewpoints on key issues is not inherently at odds with democratic self-government.[25] In fact, good-faith debate on critical facts is necessary to avoid perpetuating ingrained but incorrect views: Nobody thinks of Galileo as the villain of his story. Problems arise when political fraudsters capitalize on this subjective view of truth by inserting, in bad faith, whatever self-serving narrative best achieves their personal goals.

Many of these problems were highlighted during the 2016 election, where disinformation from both foreign and domestic actors demonstrated all too vividly the dangers of effectively weaponized political fraud.[26] Most domestic discussion over political fraud centered around the eventual winner of the election, Donald Trump. During his campaign, 76% of statements he made were ranked by PolitiFact as "Mostly False or worse," nearly triple the rate of former President Obama.[27] Out of these statements, approximately one-third were "Pants on Fire" lies, a designation reserved for a "claim that is not only inaccurate but also ridiculous."[28] To underscore the severity of this designation, it is worth considering that other lies rated "Pants on Fire" by PolitiFact on March 27, 2019 included a claim that "Congressman Adam Schiff used taxpayer money to reach a sexual harassment settlement with a 19-year-old male" and a photograph that "shows Barack Obama kissing David Cameron."[29]

While Donald Trump was the most covered, and perhaps most persuasive, political fraudster, he was hardly alone in resorting to falsehoods. For instance, Republican presidential candidate and later cabinet member Ben Carson made statements that were "Mostly False or worse" nearly 10% more often than Donald Trump,[30] and every candidate except Bernie Sanders and Lindsey Graham made a statement sufficiently egregious to be deemed a "Pants on Fire" lie.[31] The sheer

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24. Ewan Palmer, *Barack Obama: 'If You Watch Fox News You're in One Reality, and if You Read the New York Times, You're in a Different Reality*,*'* NEWSWEEK (Mar. 7, 2019), https://www.newsweek.com/barack-obama-fox-news-qualtrics-x4-summit-donald-trump-1354601 (quoting Barack Obama).

25. *See* FREE SPEECH AND SELF-GOVERNMENT, *supra* note 6, at 25 (effective democratic government requires that "all facts and interests relevant to [political] problem[s] shall be fully and fairly presented" to the voters).

26. *See* IRA Indictment, *supra* note 14, at 18–19; *see also* KAKUTANI, *supra* note 23, at 11 ("The ideal subject[s] of totalitarian rule [are] . . . people for whom the distinction between fact and fiction . . . and the distinction between true and false . . . no longer exist.") (quoting HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 474 (Harcourt, 1973)).

27. Angie Drobnic Holan, *All Politicians Lie. Some Lie More Than Others.*, N.Y. TIMES (Dec. 11, 2015), https://www.nytimes.com/2015/12/13/opinion/campaign-stops/all-politicians-lie-some-lie-more-than-others.html (where the "worse" refers to two additional categories of falsehood: "False" or "Pants on Fire").

28. *Id.*

29. *Latest Pants on Fire! Fact Checks*, POLITIFACT, https://www.politifact.com/truth-o-meter/rulings/pants-fire/ (last visited Mar. 27, 2019).

30. Holan, *supra* note 27 (Ben Carson made "mostly false or worse" statements 84% of the time compared to Donald Trump's 76%).

31. *Id.*

prevalence of lying by the candidates is unfortunately compelling evidence that they believed such a strategy was likely to be effective.

In addition to domestic political actors, hostile foreign powers also sought to use political fraud to undermine faith in American elections and democracy.[32] In 2018, special counsel Robert Mueller indicted 13 Russian operatives for a conspiracy to use "fraud and deceit for the purpose of interfering with the U.S. political and electoral processes, including the presidential election of 2016."[33] The core of the conspiracy was to use social media to "develop certain fictitious U.S. personas into 'leaders of public opinion' in the United States."[34] These fake accounts were then leveraged to "interfere with the 2016 U.S. presidential elections" through disinformation,[35] voter suppression,[36] and staged political rallies in the United States aimed at fomenting political division.[37] Analyzing the impact of this multimillion dollar conspiracy to defraud the American people is difficult, as "[s]ocial media companies don't want us to know," and "[t]he analytical tools to quantify the impact don't readily exist."[38] Nonetheless, the growing consensus is that "it [is] increasingly hard to say Russian efforts to influence the American mind were a failure."[39]

The Internet's existence also means that political fraud can be perpetrated by noninstitutional actors.[40] For example, Cameron Harris, a college student, started a fake news website, "ChristianTimesNewspaper.com" and posted a story claiming that "[t]ens of thousands of fraudulent Clinton votes [had been] found in an Ohio warehouse."[41] This story echoed both Donald Trump[42] and Russian

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32. *See* SPECIAL COUNSEL ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 1 (2019) ("The Russian government interfered in the 2016 presidential election in sweeping and systematic fashion.").

33. IRA Indictment, *supra* note 14, at 2–3.

34. *Id.* at 14.

35. *Id.* at 17.

36. *Id.* at 18.

37. *Id.* at 20–23 (Russians hosted a "Support Hillary. Save American Muslims" rally where they paid an American to hold a sign attributing to Hillary Clinton a quote stating "I think Sharia Law will be a powerful new direction of freedom").

38. Molly McKew, *Did Russia Affect the 2016 Election? It's Now Undeniable*, WIRED (Feb. 16, 2018, 10:25 PM), https://www.wired.com/story/did-russia-affect-the-2016-election-its-now-undeniable/.

39. *Id.*; *see also* Jane Mayer, *How Russia Helped Swing the Election for Trump*, NEW YORKER (Sept. 24, 2018), https://www.newyorker.com/magazine/2018/10/01/how-russia-helped-to-swing-the-election-for-trump. *But see* Nate Silver, *How Much Did Russian Interference Affect the 2016 Election?*, FIVETHIRTYEIGHT (Feb. 16, 2018, 6:26 PM), https://fivethirtyeight.com/features/how-much-did-russian-interference-affect-the-2016-election/ (arguing that "[t]he magnitude of the interference revealed *so far* is not trivial but is still fairly modest as compared with the operations of the Clinton and Trump campaigns." (emphasis added)).

40. *See* Chemerinsky, *supra* note 19, at 4 ("[T]he internet has democratized the ability to reach a mass audience.").

41. Scott Shane, *From Headline to Photograph, a Fake News Masterpiece*, N.Y. TIMES (Jan. 18, 2017), https://www.nytimes.com/2017/01/18/us/fake-news-hillary-clinton-cameron-harris.html.

disinformation that had alleged voter fraud on the part of the Clinton campaign.[43] The website was eventually shared by six million people, primarily through Facebook.[44] At this scale of visibility, 1% of Harris' readership was larger than the margin of victory in nine states in the 2016 general election.[45] These states collectively accounted for 61 Electoral College votes.[46]

These various examples highlight how political fraud, although ever present in our political system, has taken on a new and more dangerous dimension in the current technological age. The Internet has both created an environment where people are more susceptible to political fraud and provided the tools for exploiting that susceptibility on a massive scale. It has also democratized these tools, enabling even private individual actors to perpetrate significant political frauds.[47] Because the advent of the Internet has caused political fraud "to go nuclear," it has become necessary to seriously discuss possible avenues of nonproliferation.

Despite an increasing need for and interest in regulating political fraud,[48] lower federal and state supreme courts have generally shown hostility to statutes regulating even deliberately false election speech.[49] The challenge for legislatures seeking to regulate political fraud is finding a way to navigate the Supreme Court's false speech jurisprudence, which has been described by one commentator as a "quagmire."[50] Doing so requires effectively protecting critical political speech, while at the same time acknowledging government's very legitimate interest in deterring political fraud.

The indeterminacy that plagues the Supreme Court's false speech jurisprudence is reflected in the variety of ways scholars have dealt with the false speech quagmire. Various scholars have found doctrinal support for the conclusion that political fraud can be regulated on a showing that the false statement was made with actual malice,[51] or negligence,[52] or that it cannot be regulated at all,

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42. *Id.*

43. IRA Indictment, *supra* note 14, at 19.

44. Shane, *supra* note 41.

45. *See 2016 Presidential Election Results*, POLITICO (Dec. 13, 2016, 1:57 PM), https://www.politico.com/mapdata-2016/2016-election/results/map/president/ (listing state by state voting).

46. *Id.*

47. Shane, *supra* note 41.

48. *See* For the People Act, H.R. 1, 116th Cong. §§ 1301–04 (2019).

49. *See, e.g.*, Susan B. Anthony List v. Driehaus, 814 F.3d 466 (6th Cir. 2016); Commonwealth v. Lucas, 34 N.E.3d 1242 (Mass. 2015); 281 Care Comm. v. Arneson, 766 F.3d 774 (8th Cir. 2014).

50. *See* Christopher P. Guzelian, *False Speech: Quagmire?*, 51 SAN DIEGO L. REV. 19, 21 (2014); *see also* Chemerinsky, *supra* note 19, at 5 (noting there is "no consistent answer as to whether false speech is protected by the First Amendment").

51. *See* William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 291 (2004); *see also* Staci Lieffring, Note, *First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech After* United States v. Alvarez, 97 MINN. L. REV. 1047, 1077 (2013) (agreeing on actual malice, but additionally requiring the false statement to be material).

except to the extent it overlaps with torts such as defamation.[53] Much of this scholarly disagreement stems from an underlying categorical rejection of what should be seen as the proper framework for analyzing the constitutionality of government's regulation of political fraud.[54] Because there is "no consistent answer as to whether false speech is protected by the First Amendment," the choice of a starting point has a significant influence on one's conclusion.[55]

In a certain sense, it should not be all that difficult to circumnavigate existing Supreme Court doctrine concerning the regulation of false speech. In the most famous case to deal with the subject, *New York Times Co. v. Sullivan*,[56] the Court itself held that consciously false defamatory speech lies outside the scope of First Amendment protection, even when it concerns the essence of the political process (the so-called "actual malice" exception).[57] Doctrinally, then, we glean from this decision the simple proposition that harmful, intentionally false speech is beyond the First Amendment's protective scope. We then draw upon well-established First Amendment exceptions for false statements such as perjury and fraud on the market to shape our model of the First Amendment and political fraud.[58] Admittedly, the doctrinal conclusion that we reach may give rise to a certain degree of controversy,[59] but it is one that makes sense, particularly in the context of political fraud, where, it should be recalled, *suppression* of political fraud furthers First Amendment democratic values as much as *protection* of political expression does.

We recognize, however, that greater risks to truthful political expression may result from allowing regulation of generic false statements than confining regulation to defamatory ones, as the Court did in *New York Times*. For that reason, we develop a variety of procedural and ancillary limitations on our proposed exception to First Amendment protection, designed to prevent it from being weaponized as a tool of expressive intimidation. Ultimately, we readily concede that it will be impossible to guarantee that adoption of our proposed model for regulation of political fraud will not result in a certain degree of intimidation and chilling. But the serious harm to the central democratic values designed to be furthered by the First Amendment guarantee of free expression caused by political fraud more than justifies that risk. To borrow the words of Justice Holmes, "[i]t is an experiment, as all life is an experiment."[60]

The first Part of this Article establishes a doctrinal baseline by surveying and attempting to explain the often confusing network of Supreme Court decisions

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52. *See* Lee Goldman, *False Campaign Advertising and the "Actual Malice" Standard*, 82 TUL. L. REV. 889, 891 (2008).

53. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 238 (1992).

54. *Compare id.* (regulation of tortious false speech), *with* Marshall, *supra* note 51, at 285 (campaign finance regulation).

55. Chemerinsky, *supra* note 19, at 5.

56. 376 U.S. 254 (1964).

57. *Id.* at 279–84.

58. *See* discussion *infra* Part III.

59. *See* discussion *infra* Part III.

60. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

concerning First Amendment protection for consciously false statements as part of the political process.[61] In the Part that follows, we explain the harms of political fraud, specifically linking those harms to the proper functioning of the democratic process, which the First Amendment is designed to protect.[62] In the final Part, we propose our First Amendment approach to political fraud, which includes a number of substantive and procedural limitations designed to deter the weaponization of the power to regulate political fraud by those in power as a means of chilling or suppressing expression.

I. FALSE SPEECH IN THE SUPREME COURT

Despite false political speech's historical pedigree, the Supreme Court has never spoken directly on the issue of generic political fraud. Most of the contemporary discussion, in both scholarship and lower court decisions, concerns the Court's most recent discussion of false speech, *United States v. Alvarez*.[63] Lower federal and state supreme courts have relied on *Alvarez* in striking down laws regulating political fraud, even laws they had found to be constitutional pre–*Alvarez*.[64] The difficulty with relying on *Alvarez* as the touchstone for the regulation of political fraud is that the facts of *Alvarez* are hardly analogous to cases involving sophisticated and widespread political fraud.[65] Xavier Alvarez's lie—that he was a winner of the Congressional Medal of Honor—was told in his inaugural meeting after winning an election, not in the context of his campaign.[66] In fact, the Tenth Circuit upheld the constitutionality of the law struck down in *Alvarez* on far more troubling facts.[67]

Further complicating the use of *Alvarez* as a new baseline for regulations targeting political fraud is that *Alvarez* purported to apply to only a limited set of statutes that target "falsity *and nothing more*."[68] This hardly seems like an apt description of lies that threaten to undermine democratic self-government. Nonetheless, *Alvarez* remains at the center of the political fraud debate, likely because the Supreme Court has not touched on the issue of political fraud with more clarity. To fully understand *Alvarez*, however, it is first necessary to grasp the prior Supreme Court case law on the issue.

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61. *See infra* Part I.

62. *See infra* Part II.

63. 567 U.S. 709 (2012).

64. *See* Susan B. Anthony List v. Driehaus, 814 F.3d 466, 471–72 (6th Cir. 2016) (finding that *Alvarez* abrogates previous precedent upholding an Ohio false election speech law); *see also* 281 Care Comm. v. Arneson, 766 F.3d 774 (8th Cir. 2014); Commonwealth v. Lucas, 34 N.E.3d 1242 (Mass. 2015).

65. *See Alvarez*, 567 U.S. at 714 (describing Alvarez's lie as a "pathetic attempt to gain respect that eluded him").

66. *Id.* at 713.

67. *See* United States v. Strandlof, 667 F.3d 1146, 1151 (10th Cir. 2012); *see also* Guzelian, *supra* note 50, at 35 (noting that Strandlof's lies had "result[ed] in a leadership role in several volunteer veterans' fundraising organizations and meetings with numerous state and federal politicians").

68. *Alvarez*, 567 U.S. at 719 (emphasis added).

*A. False Speech Pre-*Alvarez

Alvarez characterized the Supreme Court's previous false speech cases as collectively dealing with "defamation, fraud, or some other legally cognizable harm associated with a false statements, such as an invasion of privacy or the costs of vexatious litigation."[69] The categorical balance of harms in these cases was struck by the Supreme Court in the seminal case *New York Times Co. v. Sullivan*.[70]

1. New York Times Co. v. Sullivan

The factual basis of *New York Times* was a libel complaint brought by a commissioner of Montgomery County, Alabama against the *New York Times* for a full-page advertisement entitled "Heed Their Rising Voices."[71] This advertisement, taken out by Alabama clergymen, detailed a "wave of terror" inflicted by Alabama police officers in response to the civil rights movement and sought funds to "support the student movement, 'the struggle for the right-to-vote,' and the legal defense of Dr. Martin Luther King, Jr."[72] Because it was "uncontroverted that some of the statements contained in the [ad] were not accurate," the only question was whether a jury verdict for libel based on those inaccuracies was consistent with the First and Fourteenth Amendments.[73]

New York Times adopted a Meiklejohnian perspective on the First Amendment, beginning from the premise that the constitutional protection of free expression "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social change desired by the people."[74] Because the advertisement was "an expression of grievance and protest on [a] major public issue[, it] fell within the category of" protected speech.[75] The more difficult question was "whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent."[76]

The majority chose to protect false expression because it recognized that since "erroneous statement is inevitable in free debate . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'"[77] These concerns led to the adoption of the constitutional rule that even tortious false speech could not be regulated absent a showing that it was made with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[78]

Adoption of the actual malice standard was predicated on the Court's conclusion that the mere fact that a regulation targets false speech does "not mean

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69. *Id.*
70. 376 U.S. 254, 271 (1964).
71. *Id.* at 256.
72. *Id.* at 256–57.
73. *Id.* at 258, 262–63.
74. *Id.* at 269; *see also* Brennan, *supra* note 4 (explaining the Meiklejohnian roots of *New York Times*).
75. *N.Y. Times*, 376 U.S. at 271.
76. *Id.*
77. *Id.* at 271–72.
78. *Id.* at 279–80.

that only false speech will be deterred."[79] Statutes regulating false speech could cause speakers to self-censor "criticism [of official conduct], even though it is believed to be true and even though it is in fact true, because of doubt whether it can proved in court or fear of the expense of having to do so."[80] This chilling effect on valuable, true speech would impair the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," represented by the First Amendment.[81] A rule preventing liability without a showing of actual malice was therefore necessary to ensure that true speech had sufficient "breathing space" to ensure effective discussion of public issues relevant to voters.[82] Even harmful false speech could not be regulated under a negligence standard, because doing so risked choking off the "breathing space" free expression needed to survive. The risk of chilling true speech was therefore unacceptable, regardless of the competing harm.

2. Brown v. Hartlage

The balance of harms struck by the actual malice requirement was extended indirectly to political fraud in *Brown v. Hartlage*, which concerned an application of the Kentucky Corrupt Practices Act.[83] That Act prohibited candidates for public office from making monetary promises in exchange for votes.[84] During his campaign for Jefferson County commissioner, Carl Brown had promised on behalf of himself and his running mate to "lower our salaries, saving the taxpayers $36,000 during our first term of office, by $3,000 each year."[85] Learning shortly after that this promise to return money to the taxpayers "arguably violated the Kentucky Corrupt Practices Act," they quickly issued a statement retracting their promise due to its potential illegality.[86]

Brown won the election, and Earl Hartlage, his opponent, filed an action claiming that Brown's promise had violated the Act and "seeking to have the election declared void."[87] Although the Kentucky trial court found that Brown's rapid correction of his promise had rendered the election fair, the appellate court reversed and vacated the election.[88] Brown appealed to the United States Supreme Court on the grounds that application of the Corrupt Practices Act to his statement violated the First Amendment.[89]

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79. *Id.* at 279.
80. *Id.* at 280.
81. *Id.* at 270.
82. *Id.* at 280–81 ("[W]here an article is published and circulated among voters for the sole purpose of giving what the defendant believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith and without malice, the article is privileged.") (quoting Coleman v. MacLennan, 98 P.281, 286 (Kan. 1908)).
83. 456 U.S. 45, 47 (1982).
84. *Id.* at 49 (quoting KY. REV. STAT. § 121.055 (1982)).
85. *Id.* at 48.
86. *Id.*
87. *Id.* at 49.
88. *Id.* at 50–51.
89. *Id.* at 46–47.

One of the arguments made in defense of the Corrupt Practices Act was that it applied only in a case where a commissioner's salary was "fixed by law, and where the promise cannot, therefore, be delivered."[90] Essentially, then, the law applied only to false speech. However, even that narrower construction was found inadequate because there had been "no showing in this case that petitioner made the disputed statement other than in good faith and without knowledge of its falsity, or that he made the statement with reckless disregard as to whether it was false or not."[91] Because the law did not incorporate the safeguard of an actual malice requirement, it created a "chilling effect" on speech that was "incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns."[92] *Brown* can therefore be read as implicitly endorsing the position that political frauds made with actual malice can be regulated consistent with the First Amendment. At the time, most "legislatures, courts, and commentators . . . assumed that standard to be governing law."[93]

3. McIntyre v. Ohio Election Commission

The validity of political fraud statutes cabined by the actual malice safeguard also received implicit endorsement in *McIntyre v. Ohio Election Commission*.[94] *McIntyre* involved a challenge to an Ohio law that "prohibit[ed] the distribution of anonymous campaign literature."[95] One of the asserted state interests in defense of the law was an "interest in preventing fraud and libel."[96] Although the Court found that this interest "carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large," it nonetheless found that the anonymous pamphleteering ban was not necessary to advance that interest.[97]

This was because "Ohio's prohibition of anonymous leaflets plainly is not its principal weapon against fraud."[98] The "principal weapon," rather, was its "detailed and specific prohibition against making or disseminating false statements during political campaigns."[99] Although the anonymous pamphleteering ban did help in the enforcement of those laws, its applicability to "documents that are not even arguably false or misleading" rendered it unconstitutionally overbroad.[100] While the majority expressly "did not pass on the validity of an ordinance limited to prevent [political fraud]," both they and the dissent built much of their analysis

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90. *Id.* at 60.
91. *Id.* at 61.
92. *Id.*
93. Goldman, *supra* note 52, at 904 ("Despite the fact that the Court's adoption of the actual malice standard in cases regulating false campaign speech appeared to be an afterthought . . . legislatures, courts, and commentators have assumed that standard to be governing law.").
94. 514 U.S. 334 (1995).
95. *Id.* at 336.
96. *Id.* at 349.
97. *Id.*
98. *Id.* at 350.
99. *Id.* at 349.
100. *Id.* at 351.

around presupposing such validity.[101] Therefore, *Brown* and *McIntyre* seemed to strongly support the view that political fraud statutes were constitutional, provided that they incorporated the safeguard of "actual malice" as defined originally in *New York Times*. *Alvarez* largely rejected this presumption by prompting a more serious look at both sides of the false speech equation.

B. United States v. Alvarez

Until *Alvarez*, the conversation around false speech primarily centered around the necessary safeguards required to provide the "strategic protection" to false speech necessary to protect true speech.[102] Because without the protections provided by requiring a showing of actual malice, free speech lacked the "breathing space that [it needs] to survive." [103] Therefore, harm was irrelevant when statutes failed to provide this baseline of protection. Any rule less than actual malice risked choking off the freedom of expression, and this risk was unacceptable regardless of the severity of the countervailing harm. *Alvarez* shifted the conversation to the other side of the scales. Rather than asking what rules are necessary to make the burden on speech sufficiently minimal, the Court considered what harms are sufficient to make the competing interest sufficiently compelling to justify regulation. This shift in focus has led to a reconsideration of the constitutionality of statutes regulating even intentionally false speech.[104]

Perhaps the clearest example of how *Alvarez* has shifted the conversation on political fraud is the Sixth Circuit's decision in *Susan B. Anthony List v. Driehaus*.[105] In that case, the Sixth Circuit reversed its position on the constitutionality of Ohio's false speech law, finding that *Alvarez* "clearly abrogate[d]" their prior reasoning.[106] This reflects a uniform trend of successful challenges to political fraud laws, even those that require a showing of actual malice, in the wake of *Alvarez*.[107] Much of this shift has been a result of *Alvarez*'s main rule, which limits government intervention to cases where false speech causes "defamation, fraud, or some other legally cognizable harm."[108] All other

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101. *Id.* at 343–44; *see also id.* at 382 (Scalia, J., dissenting) ("[T]he usefulness of a signing requirement lies not only in promoting observance of the law against campaign falsehoods (though that alone is enough to sustain it).").

102. Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

103. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964).

104. *See, e.g.*, Jason Zenor, *A Reckless Disregard for the Truth? The Constitutional Right to Lie in Politics*, 38 CAMPBELL L. REV. 41, 58–62 (2016); Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 56 (2013) ("For many years, courts have divided on the constitutionality of laws regulating false campaign speech . . . . This past June, however, the Supreme Court issued an opinion in *U.S. v. Alvarez*, a case which no doubt will cause courts to reconsider the constitutionality of such laws.").

105. 814 F.3d 466 (6th Cir. 2016) (finding unconstitutional a ban on false campaign speech made with actual malice).

106. *Id.* at 471.

107. *See id.*; *see also* Commonwealth v. Lucas, 34 N.E.3d 1242 (Mass. 2015); 281 Care Comm. v. Arneson, 766 F.3d 774 (8th Cir. 2014).

108. United States v. Alvarez, 567 U.S. 709, 719 (2012); *see also 281 Care*, 766 F.3d at 783 ("Like the Stolen Valor Act, [Minnesota's political fraud law] targets falsity, as opposed to legally cognizable harms associated with a false statement.").

interventions are met with exacting scrutiny and "near-automatic condemnation."[109] This rule would seem to draw close to an absolutist view of political fraud, expressed pre-*Alvarez* as a constitutional rule that "[i]n political campaigns, the grossest misstatements, deceptions, and defamations are immune from legal sanction unless they violate private rights—that is, unless individuals are defamed."[110]

Despite this widespread reaction to *Alvarez*, universal adoption of such a rule constitutes an unduly narrow reading of the decision. A preferable view is to treat *Alvarez* as imposing nothing more than the requirement that knowingly false speech can only be regulated when it causes significant harm. It is true that the opinion focused not on the need for showing generic harm but rather establishing some "legally cognizable" harm. Read literally, this would mean that the harm demonstrated would have to come in the form of a personally held interest, protected by a legally enforceable right created by statute or common law. While this position has been advocated by respected scholarly authority,[111] it makes no sense, and therefore, the *Alvarez* opinion should not be construed to reach that conclusion. Why should the compelling nature of a competing interest turn on whether or not that interest has been legally recognized in the form of a personal tort or crime? Conceivably, an interest undermined by speech could be compelling, whether or not it causes injury only to specifically identifiable individuals, simply because it gives rise to substantial real-life injury, even solely at the collective level. Therefore, the Court's reference to legally cognizable harm must be read in the context of the unique facts of *Alvarez*, where no significant harm of any kind was demonstrated. To fully explain why we reach this conclusion, we turn to a more in-depth discussion of the *Alvarez* decision.

We begin by explaining why the facts of *United States v. Alvarez* hardly make for a compelling analogy to the issue of political fraud.[112] *Alvarez* involved a defendant whose only crime was "a pathetic attempt to gain respect that eluded him."[113] Xavier Alvarez, a newly elected board member of the Three Valley Water District, announced at his first meeting that he was "a retired marine of 25 years." He bragged at the meeting: "I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy."[114] This was a blatant lie and therefore a violation of the Stolen Valor Act of 2005, which criminalized "falsely represent[ing], verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States."[115] Alvarez challenged the statute as facially unconstitutional under the First Amendment.

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109. *Alvarez*, 567 U.S. at 731 (Breyer, J., concurring).

110. Fried, *supra* note 53, at 238; *see also* State *ex rel.* Pub. Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691, 697 (Wash. 1998) (adopting this position).

111. *See generally* Fried, *supra* note 53.

112. *Alvarez*, 567 U.S. at 709.

113. *Id.* at 714.

114. *Id.*

115. *Id.* at 716 (quoting 18 U.S.C. § 704(b) (2018)).

In striking down the statute as a violation of the First Amendment, Justice Kennedy expressed the view that the statute constituted a content-based restriction of speech and was therefore subject to "exacting scrutiny."[116] This exacting scrutiny meant that a content-based restriction on speech could only be upheld "when confined to the few historic and traditional categories of expression long familiar to the bar," such as defamation, fraud, or other low-value speech.[117] Not included in this historical category was "any general exception to the First Amendment for false statements."[118] Rejecting the Government's argument that "false statements have no value and hence no First Amendment protection," Justice Kennedy limited language in previous opinions expressing this view by noting that those statements "all derive[d] from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement."[119] These statements could therefore not sustain a statute "that targets falsity and nothing more."[120]

In rejecting the Government's contentions, Justice Kennedy made clear that "actual malice"—the requirement that the false statements in question be uttered with knowledge of falsity or reckless disregard of truth or falsity—was a necessary, rather than a sufficient, condition for the regulation of false speech.[121] Where false speech caused a "legally cognizable harm," the safeguard of actual malice was sufficient.[122] Where it did not, actual malice would not spare a regulation from exacting scrutiny and "near-automatic condemnation."[123] This exacting scrutiny was fatal in *Alvarez* and has proven similarly problematic for statutes that regulate political fraud under an actual malice standard.[124]

The plurality opinion's insistence on a showing of "legally cognizable harm" as a predicate to regulating false speech was, however, undercut by its acceptance of the constitutional validity of three statutes: "first, the criminal prohibition of false statement made to a Government official; second, laws punishing perjury; and third, prohibitions on the false representation that one is speaking as a Government official or on behalf of the Government."[125] In defending these prohibitions, Justice Kennedy rested his analysis largely on the serious risks these harms posed to institutional decision-making.[126] He argued that perjury "undermines the function and province of the law and threatens the integrity of judgments that are the basis of the legal system."[127] Similarly,

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116. *Id.*
117. *Id.* at 717 (quoting United States v. Stevens, 559 U.S. 460, 468 (2010)).
118. *Id.* at 719.
119. *Id.* at 718–19.
120. *Id.* at 719.
121. *Id.* at 719–20.
122. *Id.* at 719, 721.
123. *Id.* at 731 (Breyer, J., concurring).
124. *Id.* at 724–29; *see also* Susan B. Anthony List v. Driehaus, 814 F.3d 466, 473–76 (6th Cir. 2016); Commonwealth v. Lucas, 34 N.E.3d 1242, 1247–57 (Mass. 2015); 281 Care Comm. v. Arneson, 766 F.3d 774, 782–96 (8th Cir. 2014).
125. *Alvarez*, 567 U.S. at 720.
126. *Id.* at 720–21.
127. *Id.*

"[s]tatutes that prohibit falsely representing that one is speaking on behalf of the Government, or that prohibit impersonating a Government officer, also protect the integrity of Government processes."[128] These exceptions led several commentators to suggest that the category of "legally cognizable harms" may extend significantly further than the sorts of tort harms explicitly enumerated by the plurality.[129]

Whether or not one accepts that these harms are "legally cognizable," what is more telling is that none of the statutes restrict their scope to those false statements that actually cause the harms threatened. Instead, such statements are regulable because they create a *risk* of harm—for instance, perjury "*can* cause a court to render 'a judgment not resting on truth.'"[130] Indeed, in the case of perjury "[g]rand jurors are free to disbelieve a witness and persevere in an investigation without immunizing a perjurer."[131] Similarly, in prosecutions for lying to the Government, the defense that "a *disbelieved* falsehood does not pervert an investigation . . . would be exceedingly strange; [and] such a defense to the [] crime of perjury is certainly unheard of."[132] Nonetheless, the plurality does not question the validity of either of these prohibitions on false speech.[133]

Accepting that these statutes are constitutional does not defeat the plurality's main argument: that the Government is not empowered to target "falsity and nothing more."[134] It does, however, require acknowledging that in some class of cases, the "something more" need not be a showing of concrete tortious harm, but rather can include a broad range of likely or even potential systemic harms that collectively make up the category of compelling government interests. Therefore, a separation of false speech into two categories—legally cognizable and legally noncognizable—is artificial and counterproductive. *All* false speech should be deemed regulable when it creates a risk of harm so compelling or serious that we are willing to bear the countervailing risk of chilling truthful speech.

II. POLITICAL FRAUD AS A FIRST AMENDMENT HARM

As the preceding discussion shows, properly construed, the *Alvarez* decision stands for nothing more than this: Even knowingly false speech that gives rise to no significant harm cannot be suppressed consistent with the First Amendment. Thus, as long as we can establish that political fraud, accompanied by a showing of "actual malice" as defined in *New York Times Co. v. Sullivan*,[135] gives rise to significant harm to a compelling interest, then, like defamation, it may

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128. *Id.* at 721.

129. *See* Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 179 (2012) (arguing that the *Alvarez* opinion's carve-outs could be fit into the general term of "legally cognizable harm").

130. *Alvarez*, 567 U.S. at 720 (emphasis added) (quoting *In re* Michael, 326 U.S. 224, 227 (1945)).

131. Brogan v. United States, 522 U.S. 398, 402 n.1 (1998) (quoting United States v. Abrams, 568 F.2d 411, 421 (5th Cir. 1978)).

132. *Id.* at 402.

133. *Alvarez*, 567 U.S. at 721 ("This opinion does not imply that any of these targeted prohibitions are somehow vulnerable.").

134. *Id*. at 719.

135. 376 U.S. 254, 280 (1964).

be regulated consistent with the First Amendment. The need to deter political fraud, however, is far more than a competing compelling interest. It is, rather, intertwined with the heart and soul of the democratic goals that are foundational to free expression: ultimate governing power exercised by an informed electorate. To be sure, as the Court has wisely stated, there is no such thing as a false *idea*. But surely there are false statements of fact that pervade political dialogue and that are likely to influence an election's outcome. These statements, when made with "actual malice," must be deterred, at least to a certain extent, to save the democratic system of which the First Amendment is a central element.

Political fraud is a unique case because the risks of either over- or under-regulation are the same: impairment of democratic self-government. As Justice Breyer observed in his *Alvarez* concurrence: "[I]n the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result)."[136] In other words, regulation of political fraud "involves democracy on both sides of the ledger."[137]

The common taxonomy sketches out a large number of harms attributable to political fraud: distortion of the electoral process; lowered quality of discourse; voter alienation and distrust; and deterrence of qualified candidates from seeking office.[138] While all of these consequences may or may not grow out of political fraud, we disagree that all of them should factor into the First Amendment calculus used to determine the constitutionality of regulation. Governmental regulation of political fraud creates the risk of chilling core political speech, the "essence of self-government."[139] These risks should not be accepted lightly, but only where political fraud creates the very real risk of truly serious harm. The only harm that should be considered sufficiently compelling to justify regulating political fraud is the first of these: the risk of affecting the ability of citizens to "vote wise decisions."[140] For it is solely that harm that directly attacks the heart of the fundamental democratic goal of the First Amendment's guarantee of free expression. Because this harm is of the same First Amendment nature as the chilling harm created by regulating false speech, it should, in theory at least, be deemed sufficiently compelling to justify regulating political speech. By presenting a unique case where both regulating and not regulating political fraud risks harm to democratic self-government, the effective voting harm requires us to consider the balance of risks. In other words, our goal is to fashion an approach that manages to resolve the First Amendment's internal civil war over how best to promote voters' ability to make democratic decisions.

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136. *Alvarez*, 567 U.S. at 738 (Breyer, J., concurring).

137. James Weinstein, *Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibitions of Lies in Political Campaigns*, 71 OKLA. L. REV. 167, 220 (2018).

138. *See* Marshall, *supra* note 51, at 294–96; Lieffring, *supra* note 51, at 1062–63; Goldman, *supra* note 52, at 895–97.

139. Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964).

140. FREE SPEECH AND SELF-GOVERNMENT, *supra* note 6, at 25.

The very real risk posed by political fraud to the proper functioning of the democratic process amounts to a First Amendment harm because in order to function, democracy requires an informed citizenry able to make governing decisions on the basis of full information. The premise of this process harm can be found in a number of theories about the First Amendment that root the protection of speech in the necessities of the democratic process.

While democratic theories of the First Amendment abound,[141] far and away the most prominent theory is the one fashioned by Alexander Meiklejohn.[142] Meiklejohn argued that the First Amendment's protection of free speech "springs from the necessities of the program of self-government."[143] This is because "[t]he welfare of the community requires that those who decide issues shall understand them. They must know what they are voting about."[144] Political speech was to be protected, Meiklejohn reasoned, because it was the primary mechanism through which voters could gain the knowledge necessary to "vot[e] . . . wise decisions."[145] The protection of political speech is not, therefore, "a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."[146]

These Meiklejohnian principles underlie the Supreme Court's formative case law on the relationship between false speech and the First Amendment, most notably the Court's decisions in *New York Times Co. v. Sullivan*[147] and *Garrison v. Louisiana*.[148] Justice Brennan, writing for the Court in both cases, summarized the thesis of those two decisions as essentially Meiklejohnian: The First Amendment was intended to protect activities of "governing importance."[149] Among these is "first the freedom to vote; this is the concrete activity by which self-governing men express their judgments on issues of public policy."[150] Deriving from this freedom was protection for "the vast range of forms of thought and expression by which the voter might equip himself to exercise a proper judgment in casting his ballot."[151]

We therefore choose to protect political speech not solely because of its intrinsic value to the speaker, but also because of its informative value to listeners

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141. *See generally id.*; *see also* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 7 (1995); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 23 (1971) ("[T]he Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies.").

142. FREE SPEECH AND SELF-GOVERNMENT, *supra* note 6.

143. *Id.* at 26.

144. *Id.* at 25.

145. *Id.*

146. *Id.* at 26–27.

147. 376 U.S. 254, 268–83 (1964).

148. 379 U.S. 64, 67–79 (1964); *see also* Brennan, *supra* note 4 (explaining the Meiklejohnian roots of *New York Times* and *Garrison*).

149. Brennan, *supra* note 4, at 13.

150. *Id.*

151. *Id.*

in their exercise of self-government.[152] The First Amendment prohibits government from selectively regulating political speech on its assumption that certain speech contributes less to wise decisions than other speech, because to allow those in power to exercise such an authority would gut the very notion of democracy.[153]

Meiklejohn believed that the First Amendment's prohibition of government regulation of the content of political speech was absolute.[154] One might therefore question how we can rely on Meiklejohn's philosophy of free expression to justify the very action that he categorically rejected—namely, the regulation of a category of political speech. But as wise as his foundational insight was, Meiklejohn often failed to recognize the logical implications of his own fundamental premise, as one of us has pointed out on more than one occasion.[155] In any event, Meiklejohn's concern was with avoiding governmental interference with political debate out of the government's paternalistic concern that the electorate would be unable to process the arguments properly. No one, however, could reasonably expect the electorate to make wise decisions on the basis of unambiguously false information, knowingly disseminated. To the contrary, Meiklejohn's fundamental goal—"the voting of wise decisions"—is directly undermined by allowance of such a practice.

An analogy may be drawn to government's responsibility and ability to punish economic fraud. Consumers' economic choices will naturally be distorted by knowingly false information interfering with the individual's control over self-governing decisions—often to the individual's substantial detriment. Presumably, it is for this reason that government may suppress, punish, and deter such fraudulent expression. Knowingly false political speech can similarly distort the self-governing process—the very process whose smooth operation Meiklejohn deemed central to the First Amendment's function in the constitutional democratic system. However, unlike in the case of commercial fraud, the harm caused by political fraud does not exist to a significant degree at the individual level. Unlike economic self-government, democratic self-government is inherently a collective decision-making endeavor where "electoral outcomes govern the entire polity, the losers as well as the winners."[156] This means that even if individuals are defrauded into voting against their preferred outcome, they may still get the outcome they prefer. In these cases, there is effectively no serious voting harm because while some persons have likely been misled into voting against their best interests, the

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152. FREE SPEECH AND SELF-GOVERNMENT, *supra* note 6, at 25 ("[T]he point of ultimate interest is not the words of the speakers, but the minds of the hearers.").

153. *See* Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CALIF. L. REV. 267, 281 (1991).

154. POLITICAL FREEDOM, *supra* note 4, at 20, 27.

155. Redish & Mollen, *supra* note 9; Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971) (arguing that the premises of Meiklejohn's argument ineluctably lead to protections for commercial speech).

156. Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1765 (1999).

democratic process has still produced the overall intended outcome. This squares with the common law rule that for fraud to be actionable, it must cause an injurious change in the victim's position.[157] In an election, a person's standard position is to be bound by the correctly ascertained will of the majority, regardless of personal preference.[158] Therefore, to the extent that the outcome of an election continues to reflect true majoritarian preferences, the effective voting harm is absent at the critical collective level.[159] Thus, the effective voting harm becomes troubling only when it reaches a sufficiently critical mass of voters that it threatens to subvert majoritarian preferences. While individual fraud remains troubling to notions of autonomy that are deeply ingrained within the First Amendment, it is categorically less problematic than more pervasive frauds, absent a collective impact so great as to impact the actual outcome.

The difficulty of proof in the context of political fraud underscores one of many significant problems in shaping a proper standard for determining when and when not to exclude political fraud from the scope of First Amendment protection. In short, the devil is in the details. We now turn to these complex and difficult issues.[160]

III. DEVELOPING A STANDARD FOR EXCLUDING POLITICAL FRAUD FROM THE SCOPE OF FIRST AMENDMENT PROTECTION

We now turn to the task of devising a standard that effectively captures those situations where the voting harm to self-government should be deemed to outweigh the competing harm to self-government caused by the chilling of factually truthful political speech. Fashioning this standard can be analogized to walking a tightrope. In shaping a test to determine under exactly what circumstances political fraud may constitutionally be suppressed, we risk entering into a zero-sum game: Every attempt to protect the democratic process by suppressing political fraud risks correspondingly hurting the democratic process by potentially chilling political expression. It might, therefore, be seductively simple to categorically prohibit governmental suppression of political fraud because of this corresponding danger to free speech interests. But such a resolution would amount to a constitutional cop-out because it effectively places one's head in the sand. Timidity grounded in a fear of chilling speech is likely to counterproductively undermine the very values sought to be protected by the First

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157. *See* Strategic Diversity, Inc. v. Alchemix Corp., 666 F.3d 1197, 1210 n.3 (9th Cir. 2012) (quoting Staheli v. Kauffman, 595 P.2d 172, 175 (Ariz. 1979)).

158. Redish & Mollen, *supra* note 9, at 1354 ("Although adversary democracy requires the losers to consent to majority rule, it does not force losers to adopt majority preferences as their own.").

159. *See* FREE SPEECH AND SELF-GOVERNMENT, *supra* note 6, at 26 ("It is the mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.").

160. Redish & Mollen, *supra* note 9, at 1355 ("[A]dversary democracy . . . values and protects individual autonomy. In this manner, adversary democracy reflects the Kantian notion that the individual is an integral unit worthy of respect, not a means to an end."); *see also* David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 355 (1991).

Amendment in the first place. Extending full constitutional protection to political fraud has long been viewed as dangerously pathological to the operation of the democratic process, and the invention of the Internet has seriously compounded the problem. It is therefore untenable to leave a rigid constitutionally protective ring around political fraud. To do so would give rise to the sad irony that the First Amendment would then be used to undermine achievement of its fundamental goal.

This in no way means that we need not be extremely careful in drawing the constitutional calculus between the need to suppress political fraud on the one hand and the desire to avoid chilling truthful political speech on the other hand. Our model imposes important limitations, both substantive and procedural, on any exception to First Amendment protection for political fraud, in an effort to confine the reach of any chilling effect as much as reasonably possible. We characterize those limitations under the following six headings: (1) fact/opinion dichotomy; (2) lack of ambiguity; (3) actual malice requirement; (4) materiality; (5) restriction to speech directly involved in election campaigns; and (6) procedural restrictions. Each of these limitations, in different ways, sacrifices potential benefits to the democratic process flowing from the regulation of political fraud, in an effort to limit the potential chill on free and open expression of truthful information.

A. Fact/Opinion Dichotomy

There is, as the Supreme Court has wisely stated, no such thing as a false idea.[161] Consistent with the First Amendment, government may never punish a speaker for nothing more than the expression of an unpopular or offensive idea. Thus, to constitute political fraud, a statement must be the assertion of a false fact or set of facts. The statements must assert a proposition of factual reality that can, as an objective matter, be proven inaccurate.

B. Lack of Ambiguity

In order to constitute political fraud for purposes of an exception to First Amendment protection, a statement must be more than simply incomplete, misleading, or the expression of only one side of an argument. To exempt such statements from First Amendment protection would undermine the essential nature of political controversy, central to a healthy democratic dialogue. One could argue, we suppose, that misleading statements—i.e., technically accurate statements, stated in a manner designed to confuse or trick the listener—should fall under the heading of political fraud. After all, such misleading statements are generally deemed to constitute punishable fraud in the economic context. But because we seek to be especially sensitive to the need to avoid chilling expression in the midst of a heated political campaign, we choose to err on the side of under-regulation of speech, rather than risk the danger of over-regulation.

For much the same reasons, our model of political fraud requires that the falsity of the statement be unambiguous. This is particularly of concern in debate over scientific issues—e.g., climate change or the potential success of a new drug in treating disease where the dominant view has subsequently been found to be

161. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

incorrect.[162] Here, too, First Amendment doctrine should be shaped to err on the side of under-regulation, for fear of chilling free and open debate.

C. Actual Malice

A synthesis of *New York Times Co. v. Sullivan* with the more recent *Alvarez* decision demonstrates that, at least as a doctrinal matter, the so-called "actual malice" standard constitutes a necessary but not sufficient condition for excluding false speech from the scope of First Amendment protection.[163] For both doctrinal and normative reasons, then, we include a showing of actual malice as a prerequisite for a finding of unprotected political fraud.[164]

It must be continually emphasized what the Court means by the phrase "actual malice." True malice, in the sense of ill will, is completely irrelevant to the finding. As defined by the Court, the phrase means only knowledge of falsity or reckless disregard of truth or falsity.[165] And "reckless disregard" has been consistently defined to demand something approaching virtual knowledge of falsity, rather than merely a total lack of inquiry into the issue of truth.[166]

Our analysis is rooted in the premise that actual malice is a fundamentally required safeguard for regulating political fraud. While there is at least one suggestion for a negligence standard in some cases of political fraud, the predominant view is based on either accepting or adding to actual malice.[167] Anything less than a standard demanding actual knowledge or recklessness would give rise to a prohibitive risk of chilling, as the Court in *New York Times* explicitly recognized. From this baseline, we consider both polar views on harm: either actual malice alone or actual malice and a showing of actual voting harm. Finding these extremes create undue risk of over- and under-regulating political fraud, we reject both. Instead, the best balance of risks is the middle-ground position—namely, that political fraud should be regulated upon a showing of both actual malice and "materiality," a standard of proof less demanding than a requirement of a demonstration of actual impact on the election's outcome. Therefore, we now turn to a discussion of the all-important materiality requirement.

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162. *See generally* Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 VAND. L. REV. 1433 (1990).

163. *See supra* text accompanying notes 100–08.

164. As in the case of defamation protected under the *New York Times* doctrine, the burden of establishing actual malice in our political fraud model would be imposed on the plaintiff, whether private individual or government. Also, the burden of proof in civil cases would be proof by clear and convincing evidence, rather than merely by preponderance of the evidence. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

165. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–83 (1964).

166. *E.g.*, St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

167. *See* Goldman, *supra* note 52, at 891. *But see* Colin B. White, *The Straight Talk Express: Yes We Can Have a False Political Advertising Statute*, 13 UCLA J.L. & TECH. 1, 52 (2009) (actual malice); Lieffring, *supra* note 51, at 1076–77 (same); Becky Kruse, *The Truth in Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False Speech Statutes*, 89 CALIF. L. REV. 129, 166 (2001) (same).

D. Materiality

While the use of materiality is a common delimiting device in regulating false speech, it is still ill-defined.[168] Much of this ambiguity is demonstrated by seeing where commentators place the "material" modifier. Some would regulate "false campaign speech of material fact,"[169] while others would limit regulation "to statements that are material."[170] Some would go both belt and suspenders and restrict only "materially false statements of material facts."[171] Thus, a potentially growing consensus around materiality may actually mask underlying disagreement, which could have harmful consequences when it comes to applying regulations to false speech. We seek to provide a clearer standard for determining materiality. Not only would such a standard advance the debate, but also it would provide an important level of First Amendment protection because "vague laws may cause people to steer far wider of the unlawful zone than clear laws, and may thus deter more speech than they ultimately punish."[172] More precisely defining materiality, therefore, has the additional benefit of mitigating unnecessary chill.

In the days before the Internet, because of the extremely high costs of political advertising, the presumption that such advertising had a material effect on election outcomes was at least plausible.[173] After all, why spend a significant amount of money disseminating intentionally false speech unless you believe that such speech would materially advance political goals? Thus, under the pre-Internet paradigm of political fraud, the significantly lower risk of chilling and the significantly higher risk of material impact on effective voting arguably combined to shift the presumption in favor of less stringent First Amendment protective safeguards when it came to regulating political fraud.

Today, in the words of a respected scholar, the "Internet has democratized the ability to reach a mass audience . . . . [A]nyone with a smart phone—or even just access to a library where there is a modem—can reach a huge audience instantaneously."[174] Having drastically expanded the number of people who can plausibly commit political fraud, the Internet has also expanded the number of

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168. United States v. Alvarez, 567 U.S. 709, 734 (2012) (Breyer, J., concurring); *see also* Lieffring, *supra* note 51, at 1077.

169. Jason Zenor, *A Reckless Disregard for the Truth? The Constitutional Right to Lie in Politics*, 38 CAMPBELL L. REV. 41, 67 (2016).

170. Joel Timmer, *Fighting Falsity: Fake News, Facebook, and the First Amendment*, 35 CARDOZO ARTS & ENT. L.J. 669, 682 (2017) (quoting Lieffring, *supra* note 51, at 1073).

171. Lieffring, *supra* note 51, at 1073.

172. Eugene Volokh, *Deterring Speech: When is it "McCarthyism"? When is it Proper?*, 93 CALIF. L. REV. 1413, 1449 (2005) (quoting Grayned v. City of Rockford, 408 U.S. 104, 109 (1972)).

173. In addition to the plausibility of this assumption in the abstract—i.e., a candidate would only expend significant funds if they thought there was at least some effect from this expense—there is also some empirical support for this proposition. *See* Clay Calvert, *When First Amendment Principles Collide: Negative Political Advertising and The Demobilization of Democratic Self-Governance*, 30 LOY. L.A. L. REV. 1593, 1544 (1997) (noting that political advertisements have had a material effect on reducing voter turn-out).

174. Chemerinsky, *supra* note 19, at 4.

people who will be chilled by a statute regulating even intentionally false political speech. In addition, it has drastically lowered the cost of reaching a large audience, meaning that spreading political fraud can be cost-effective even if it is highly unlikely to significantly affect voters.[175] Therefore, the risks we undertake when we regulate political fraud, even with the shield of actual malice, are far different from the pre-Internet days. As a political fraud statute would now have the same sweeping breadth as the Stolen Valor Act in *Alvarez*, we should be willing to bear that risk only on a showing that leads us to believe that the targeted fraud creates a serious risk of an effective voting harm.[176]

On the other hand, the opposite rule, requiring dispositive proof of causally-related harm impacting the election's outcome would strike the balance of the competing risks too far in the other direction. Some courts have leaned in this direction, holding that the government cannot merely rely on "common sense," but rather must make some empirical showing of harm flowing from the political fraud in question before speech can be regulated.[177] However, even in these cases they acknowledge that such harm may be "amorphous and difficult to detect."[178] Academic writings have echoed this sentiment, arguing that "[n]arrowing [false statement] statute[s] to those false statements with a material effect on a campaign may be too hard a test for the courts to implement. It would be very difficult for a candidate to show harm, or even determine what harm is necessary in terms of polling numbers."[179] This same difficulty with actually proving the effect of widespread fraud in complex markets has been dealt with in the securities market through adoption of the theory of "fraud on the market."[180] Fraud on the market provides a powerful analogy for understanding why an actual harm standard unduly insulates political fraud. In securities fraud, courts have eschewed absolutes and instead chosen to manage fraud through the use of *ex ante* presumptions "[a]rising out of considerations of fairness, public policy and probability," to "manag[e] circumstances in which direct proof, for one reason or another, is rendered difficult."[181] These presumptions are not intended to remove the burden of proof on those seeking to hold perpetrators of fraud accountable, but merely reflect that when a fraud is widespread, there is a "virtual certainty that some unidentified, and perhaps unidentifiable, individual has been hurt."[182] This statistical, if not verifiable, certainty of harm causes us to believe that "well-developed markets reflect[] all publicly available information, and, hence any material misrepresentations."[183] Therefore, we presume that despite lack of direct

175. *See id.*

176. United States v. Alvarez, 567 U.S. 709, 719, 723 (2012) (noting that the Stolen Valor Act would allow the government to regulate speech whether "shouted from the rooftops or made in a barely audible whisper" and that regulation was therefore only appropriate to prevent a "defamation, fraud or some other legally cognizable harm").

177. 281 Care Comm. v. Arneson, 766 F.3d 774, 790 (8th Cir. 2014).

178. *Id.*

179. Lieffring, *supra* note 51, at 1073.

180. Basic Inc. v. Levinson, 485 U.S. 224, 241 (1988).

181. *Id.* at 245.

182. Richard A. Epstein, *A Common Law for the First Amendment*, 41 HARV. J.L. & PUB. POL'Y 1, 44 (2018).

183. *Basic*, 485 U.S. at 246.

proof, material frauds have a material effect on market outcomes in well-developed markets.

While the metaphor is often called into question, it is not unreasonable to presume that the First Amendment is predicated on the idea that the marketplace of ideas is well developed, and that additional information will be processed by self-governing citizens in a way that furthers their ability to make wise decisions.[184] In light of this assumption, where a political fraud is material, sanctioning it does not, in the words of the *Alvarez* plurality, "target falsity and nothing more."[185] It instead targets the significant risk that pervasive political fraud causes an effective voting harm, even where direct proof is impossible.[186] Requiring actual proof in these situations would insulate political fraud to a significantly higher degree than commensurate economic fraud. There is little justification for leaving our political decision-making less protected against fraud than our economic decision-making, but requiring a showing of actual harm to justify regulation of political fraud does just that. Remedying this discrepancy requires acknowledging that regulating fraud on complex markets necessitates abandonment of a required showing of actual harm for a class of intentionally false statements. The risk posed by fraud on political markets requires an equivalent move away from a strict actual harm standard in order to accommodate the risk, rather than certainty, of harm from material political frauds.

When a fraud is widely disseminated, the risk that some people will be misled is virtually certain.[187] When this number reaches a sufficiently critical mass, it seems reasonable to infer a presumption of materiality. Although regulating by means of both the actual malice and materiality safeguards nevertheless still risks chilling a certain amount of truthful speech, once this critical point of dissemination is reached, bearing that risk is preferable to bearing the risk that political fraud will defeat the entire self-governing project sought to be protected by the First Amendment.[188] Where political fraud determines an election, true self-government is nonexistent.[189] In these cases, all true speech is for nothing: it has not fulfilled its instrumental purpose of enabling us to vote wise decisions. A correct definition of materiality limits the scope of political fraud regulation to those frauds that create a significant risk of impacting an election's outcome. While these narrowly targeted statutes will still risk chilling a certain amount of true speech, that risk must be borne in order to avert the more compelling risk posed by pervasive political frauds.

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184. *See generally* Thomas W. Joo, *The Worst Test of Truth: The "Marketplace of Ideas" as Faulty Metaphor*, 89 TUL. L. REV. 383 (2014) (describing and questioning the assumption that the marketplace of ideas is a well-developed market for using information to reach correct outcomes).

185. United States v. Alvarez, 567 U.S. 709, 719 (2012).

186. Epstein, *supra* note 182, at 44.

187. *See id.*

188. *See* Jack Winsbro, Comment, *Misrepresentation in Political Advertising: The Role of Legal Sanctions*, 36 EMORY L.J. 853, 863 (1987).

189. Redish & Mollen, *supra* note 9, at 1307 (noting that self-government is predicated on the ability of citizens to vote in accordance with their understanding of their own best interests).

Although materiality as an effective constraint has become a growing consensus in regulating political fraud, significant uncertainty remains over what it means for a political fraud to be material.[190] This uncertainty is compounded by the fact that there are varying definitions of materiality in First Amendment case law.[191] For instance, it can mean "having a natural tendency to influence or being capable of influencing, the decision of the decision-making body to which it was addressed."[192] Alternatively, "Supreme Court decisions sometimes distinguish materiality—defined as the possibility that the false speech could cause injury—from reliance—whether the false speech did have an injurious effect."[193] Lastly, and perhaps most closely related to the concept of political fraud, "the most straightforward reading of the materiality requirement is that some fraudulent misrepresentations, even if deliberate, believed, believable, and acted on in fact, should not have legal consequences. In other words, materiality is a *de minimis* limitation, marking off a zone in which proven fraud is tolerated by law."[194]

In light of our analysis of the competing interests, the best definition of materiality in the context of political fraud is a combination of both the capable-of-influencing and non-*de minimus* standards. As discussed earlier, the mere "possibility that the false speech could cause injury" is necessary, but not sufficient, to justify regulating political fraud because it does not sufficiently account for the competing risk of injury caused by chilling truthful speech.[195] The appropriate balance of these risks is a materiality standard that captures fraud both capable of influencing the electorate and disseminated widely enough that this influence gives rise to a meaningful risk of having a deleterious effect on an election outcome.

For a fraud to be material, then, it clearly must be capable of influencing voters. Even the most broadly disseminated intentional lie cannot give rise to an effective voting harm if it is disbelieved by voters. The ability to determine categorically the likelihood that a political fraud will influence election outcomes is challenging because such inquiries are contextual and require reference to what sorts of information are relevant to the deliberative body.[196] For instance, whether lies told in an immigration proceeding were "material" depended on whether "those facts were themselves relevant to [] qualifications for citizenship."[197] Such an inquiry breaks down in the context of political fraud because "[g]iven the realities of our political life, it is by no means easy to see what statements . . . might be altogether without relevance."[198] Instead, a more helpful

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190. *See supra* text accompanying notes 170–91.

191. Guzelian, *supra* note 50, at 64–67.

192. *Id.* at 64 (quoting Kungys v. United States, 485 U.S. 759, 770 (1988)) (alterations omitted).

193. *Id.* at 65 (citing United States v. Wells, 519 U.S. 482, 501 (1997)) (emphasis omitted).

194. Emily Sherwin, *Nonmaterial Misrepresentations: Damages, Rescission, and the Possibility of Efficient Fraud*, 36 LOY. L.A. L. REV. 1017, 1021 (2003).

195. *See supra* Part II.

196. *See* Kungys v. United States, 485 U.S. 759, 771–72 (1988).

197. *Id.* at 774.

198. Monitor Patriot Co. v. Roy, 401 U.S. 265, 275 (1971).

inquiry may be the extent to which a fraud is disseminated by those seeking to influence political decisions. The nature of the Internet as a contributor to shaping the perceived political reality means that the same fraud, repeatedly disseminated, is likely to be far more convincing than if told in a one-off fashion.[199] The willingness of a disseminator of political fraud to repeat a fraud is therefore critical to the fraud's ability to invade the political zeitgeist, and much of this willingness possesses a reverse correlation with the effective checking produced by counter-speech. For example, it is unlikely that Xavier Alvarez ever repeated his claim of having won a medal of honor after he was "ridiculed online, his actions were reported in the press, and a fellow board member called for his resignation."[200] Conversely, where a particular lie, or variant thereof, is consistently repeated by interested actors, it is reasonable to infer that they believe that it is not being effectively rebutted by internal free speech checks. In the same way that subjective doubts as to truth can establish actual malice, subjective perceptions of how believable a fraud is should be deemed strong evidence of actual persuasiveness.[201] However, even the most believable lie should not be subject to regulation if it is communicated only to a relatively trivial number of listeners or readers.

In the context of fraud on the market, whether a fraud presumably impacted market outcomes is generally determined by considering whether false information is made "publicly available."[202] Where fraud is communicated only to a *de minimis* number of listeners or readers, it may change votes but is unlikely to change voting outcomes. In these cases, the risk posed by not regulating is low. Although *de minimis* fraud causes little First Amendment harm, regulating such fraud raises massive risk of both government overreach and the chilling of speech because it drastically extends regulatory reach.[203] Because of this, materiality should constrain regulation of small-scale fraud even where it is "deliberate, believed, believable, and acted on in fact."[204] The two materiality constraints therefore work as a pair of thresholds. First, a court must look to whether the fraud was perpetrated on a non-*de minimis* number of readers or listeners. While this threshold may not be perfectly ascertainable, it should exclude, as a matter of law, nearly every personal conversation including publicly posted ones such as on a personal Facebook or Twitter account. This would exclude most political speech except that proffered by public figures and situations where deliberate social media strategies are used to amplify the reach of false speech.[205] While some close calls on the issue of the *de minimis* nature of a fraud may need to go to a jury, judges should be in a position to readily exclude most (though probably not all) cases in which the speaker is not a political actor or operative. This insulates from the

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199. DiResta, *supra* note 21 (explaining that the Internet "doesn't just reflect reality anymore; it shapes it.").

200. United States v. Alvarez, 567 U.S. 709, 727 (2012) (citations omitted).

201. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 n.6 (1974).

202. Basic Inc. v. Levinson, 485 U.S. 224, 246 (1988).

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

204. Sherwin, *supra* note 194, at 1021.

205. *See* Shane, *supra* note 41 (reporting that a single individual reached six million Americans through the deliberate use of multiple Facebook accounts to amplify a fake news story about voter fraud perpetrated by the Hilary Clinton campaign).

potential chill of a political fraud statute much of the grassroots organizing and political debate that is most likely to be chilled by the risk of potential liability.[206]

Second, even where a deliberate lie reaches a significant number of people, legal intervention should still be stayed unless there exists a reasonable likelihood that it would persuade those people. Where the internal checks of our adversarial democratic system can defuse the harm of a political fraud, additional governmentally-authorized intervention increases risk of chilling speech or selective prosecution with little countervailing benefit.[207] In most cases, unless a fraud is both persistent and pervasive, the equities will cut against regulating political speech. A properly limited materiality requirement captures both of these elements.

When combined with the other limitations we propose on the reach of a political fraud exception to the First Amendment, materiality properly allocates the relative risks. With these constraints, the risk of chilling valuable, truthful speech is not unduly high. To fall within the scope of the political fraud exception to the First Amendment, then, a speaker would need to insist upon repeating a knowing political fraud from either an *ex-ante* position of political influence or through a deliberate strategy of social media amplification. The number of deliberate actions that are required to raise the risk of liability provides satisfactory "breathing space" for political speech at both the individual and institutional level.[208] Though some truthful speech might still be chilled, that risk is outweighed by the fact that where fraud is both persistent and pervasive, there exists a significant likelihood that it has worked an effective voting harm because the "market[place of ideas] reflects all publicly available information, and, hence, any material misrepresentations."[209] In these cases, it is unreasonable to bear the risk that political fraud will cause an election to "turn on rumors, innuendo, and outright fabrication, [and] in effect defeat[] the entire democratic process."[210] Where political fraud subverts majoritarian preferences, it does far more than possibly chill some true speech; it effectively nullifies majoritarian preferences by disabling the ability of voters to discover their true preferences and vote accordingly. No valid democratic theory should be deemed to protect speech when the risk of this harm outweighs the

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206. *See* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 164 (2014) (noting that broad reaching political fraud laws make those "who intend to criticize candidates for political office . . . easy targets").

207. *See* Redish & Mollen, *supra* note 9, at 1361–62. In a system of adversarial democracy there are strong incentives for parties to "accumulat[e] and disseminat[e] relevant information that supports the position of the speaker and thereby helps persuade the public." *Id.* at 1361. These incentives make the counter-speech checks on political fraud particularly compelling. Additionally, adversarial democracy "strips away the rhetoric of impartiality and bares self-interest to the public in a way that permits the public to discount it." *Id.* at 1362. This adds further insulation of public opinion from self-serving lies. However, these systems are not perfect, and where they fail to check fraud, intervention remains necessary.

208. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964) (describing appropriately balanced regulation of false speech as providing sufficient "breathing space" to true speech).

209. Basic Inc. v. Levinson, 485 U.S. 224, 246 (1988).

210. Winsbro, *supra* note 188, at 863.

countervailing danger of chilling truthful speech.[211] This breakpoint is where frauds are material, i.e., said with knowledge of falsity, and non-*de minimis*. In this class of cases, regulation of political fraud is necessary, not in spite of the First Amendment's protection of free speech, but because of it.

IV. PROCEDURAL SAFEGUARDS ON THE POLITICAL FRAUD EXCEPTION

Even a regulatory scheme that targets material political fraud disseminated with actual malice may still do more harm than good to election integrity if it lacks adequate procedural safeguards. Procedural safeguards are necessary to avoid "allow[ing] courts and/or other regulatory bodies to be used as political weapons."[212] A claim of political fraud "is not always only about correcting the record or remedying injury to reputation. It is often also about inflicting political damage."[213]

The political fraud law ultimately struck down by the Sixth Circuit in *Susan B. Anthony List v. Driehaus* raises a troubling example of this potential for abuse.[214] When the plaintiff's challenge to the law went up to the Supreme Court on a question of justiciability, Justice Thomas's opinion for a unanimous court pointed out significant procedural problems.[215] For instance, power to file a complaint was granted to "any person with knowledge of the purported violation."[216] This complaint was not filed in a court, but rather with a commission, which "ha[d] no system for weeding out frivolous complaints."[217] These procedural deficiencies created a situation where those "who intend to criticize candidates for political office, are easy targets."[218] Lower courts have found similar deficiencies to be "immensely problematic."[219] The tendency of political fraud claims to create strategic litigation means that any statute aimed at truly balancing the risks of regulating political fraud must contain procedural as well as substantive safeguards. Hence it is necessary to rein in the exception, lest it cause more harm than good.

A. Election Speech Limitation

While this first safeguard is decidedly substantive, it lies somewhere between an absolute necessity and a functional safeguard. Limiting regulation to speech immediately preceding an election—usually by 60 to 90 days—serves as a common safeguard when attempting to regulate election-related speech.[220] Whether or not elections are thought to involve First Amendment concepts distinct from the more traditional categories, limiting a political fraud law to election

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211. Redish & Mollen, *supra* note 9, at 1307.
212. Marshall, *supra* note 51, at 300.
213. *Id.*
214. *See* Susan B. Anthony List v. Driehaus, 814 F.3d 466 (6th Cir. 2016).
215. *See* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 164–65 (2014).
216. *Id.* at 164.
217. *Id.*
218. *Id.*
219. 281 Care Comm. v. Arneson, 766 F.3d 774, 790 (8th Cir. 2014).
220. *See* Citizens United v. FEC, 558 U.S. 310, 337 (2010).

speech adds little substantively to the balance of the risks. This is because our First Amendment commitments reflect a deliberative or "thick" model of electoral campaigns.[221] In this model, "the campaign plays an indispensable role in the process of democratic self-governance because it is the period when voters actually consider and formulate their political opinions, opinions upon which they subsequently act when casting their votes."[222]

Because we think of election campaigns as the time where voters are most likely to shape their opinions on voting, any election standard would normally collapse into our definition of materiality as statements "capable of influencing" the electorate. Given the difficulty of defining the scope of elections, attempting to limit a statute based on election speech may add more confusion than value.[223] Determining whether speech is likely to influence voters may do a better job of defining the contours of elections than defining elections in terms of some arbitrarily chosen time frame. On the other hand, a clearly defined, time-based "election" limitation may add value by functioning as a safe harbor. Limiting liability to those statements made within 60 days of an election would allow those uncertain about the veracity of their claims to put them out into the world without fear of recrimination, provided they do not do so proximate to an election. While this approach is highly likely to under-protect the electorate against political fraud, the additional clarity arguably mitigates the chilling of speech.[224] Therefore, the assurance provided by a clear safe harbor may provide a path to market entrance for controversial ideas in a way that the more facially vague materiality requirement does not. Despite the unregulated harm that use of this approach would allow, the clarity provided by an election safe harbor likely alleviates some of the chilling effect of a political fraud statute. Further, limiting regulation to election speech is compatible with every other limiting factor suggested in this section. Therefore, while it is likely not constitutionally mandatory to limit a political fraud statute to election speech, doing so may be worth the risks of under-regulation to which it no doubt gives rise.

B. Choosing the Plaintiff

Limiting procedural abuse of political fraud regulations begins with identifying the appropriate plaintiff to vindicate the communal interest in effective voting. Although the government is the typical plaintiff in vindicating such

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221. James A. Gardner, *Deliberation or Tabulation? The Self-Undermining Constitutional Architecture of Election Campaigns*, 54 BUFF. L. REV. 1413, 1426 (2007) ("[L]egal actors adhere overwhelmingly to the deliberative model of election campaigns. Indeed, a rhetorical commitment to the importance of persuasion in electoral campaign suffuses our legal institutions.").

222. *Id.* at 1419.

223. *See* Weinstein, *supra* note 137, at 222 (providing a framework for determining whether speech is in the "election domain" by inquiring into "the extent to which the law in question advances the core purposes of the election domain to promote fair and efficient elections; as compared to . . . the extent to which the law in question impairs the core democratic purposes of the domain of public discourse to promote political legitimacy and to provide the public with useful information and perspectives.").

224. *See* Volokh, *supra* note 172, at 1449 (noting that vague laws chill more speech than clear ones).

interests, there may be concern that doing so raises an undue risk of partisan enforcement and government overreach.[225] Often when political speech causes harm, we prefer the government to act through the "neutrality of . . . background systems of tort, property and criminal law."[226] These systems are preferable because they operate "at the instance of a private party, not the state."[227] On this view, while the government can and should establish regulations of political fraud, enforcement should be conducted through private actors in order to avoid either the appearance or the actuality of partisan enforcement, because both are extremely problematic for political speech.

Courts have, however, expressed a countervailing concern with statutes that "allow any person with knowledge of the purported violation to file a complaint."[228] Broadly delegating enforcement of political fraud to private plaintiffs creates a significant risk of both duplicative and harassing litigation. Aside from these concerns, because the effective voting harm is suffered primarily at a communal level, there may be some uncertainty about any particular individual's Article III standing to bring a suit in federal court.[229] While state court suits are certainly a possible alternative, leaving enforcement of political fraud regulations to the heterogeneity of state court standing doctrines may be troubling to those who wish to see uniform enforcement or where widespread frauds cross state lines.[230]

A potential middle-ground solution is to have political fraud claims brought by the losing candidates themselves. This mitigates both the inherently partisan nature of government enforcement and the risk of duplicative litigation created by broad private enforcement. In addition, it resolves any latent uncertainty over standing.[231] Lastly, while candidates may not be "constrained by explicit guidelines or ethical obligations," there are potentially significant reputational costs to bringing a frivolous lawsuit.[232] While these constraints may be insufficient to eliminate all strategic litigation, they likely go a long way towards doing so. All

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225. United States v. Alvarez, 567 U.S. 709, 723 (2012); *see also* Fried, *supra* note 53, at 234 ("[T]he pressing problems [in the First Amendment] center around government restrictions on speech by others. Indeed, some of the cases in which government might be seen as acting on the Kantian principle—punishing false or misleading speech, or speech designed to circumvent rational evaluation—are just those in which free speech objections to government interference are typically made.").

226. Fried, *supra* note 53, at 234–35.

227. *Id.* at 235.

228. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 164 (2014).

229. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) ("Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.").

230. *See* Peter N. Salib & David K. Suska, *The Federal-State Standing Gap: How to Enforce Federal Law in Federal Court Without Article III Standing*, 26 WM. & MARY BILL RTS. J. 1155, 1169–70 (2018) (discussing differences between state court standing doctrines).

231. *See* Brown v. Hartlage, 456 U.S. 45, 49 (1982) (political fraud claim brought by defeated candidate against his opponent).

232. *Susan B. Anthony List*, 573 U.S. at 164.

of these benefits lead us to suggest candidate enforcement as the constitutionally required enforcement mechanism for a political fraud statute.

C. Litigation Timing

The most straightforward way to eliminate nearly all strategic litigation is to allow claims to be brought exclusively post-election. Although it will likely be less effective than a pre-election remedy, a *post-facto* remedy still has a deterrent effect on political fraud.[233] In addition, delaying adjudication of claims allows litigants to bring forward a complete picture of the election, improving the ability of a factfinder to answer questions of materiality.[234] Finally, a post-election remedy avoids a worst-of-both-worlds situation, where a claim is filed pre-election, but judgment is not reached until after the election is decided.[235]

The downside of this approach, however, is that it may incentivize a particularly problematic form of efficient fraud, where a person is willing to bear a post-election sanction in order to employ fraudulent speech to win the election. This particularly distasteful cost-of-doing-business approach would subvert the entire value of a political fraud statute, absent a wholly unworkable rescission remedy. Concerns over this sort of efficient fraud may necessitate pre-election claims, with all of the problems associated with such a scheme. A conceivable alternative that would avoid both the cynical cost-of-doing-business strategic behavior and the disruptive and unpredictable impact of pre-election remedies would be to allow post-election rescission as a potential remedy. To be sure, this approach brings its own obvious baggage in terms of the added costs and burdens of an entirely new election. But at least in certain instances, it may turn out to be the preferable—indeed, perhaps only—effective alternative.

D. Anti-SLAPP Protections

Another way of dealing with the strategic litigation concerns of a pre-election claim would be to include various tools that have been used to mitigate the harm of "Strategic Lawsuits Against Public Participation" or "SLAPPs," meritless suits aimed at silencing a plaintiff's opponents, or at least at diverting their resources."[236] These motions exist to protect public participation by providing additional remedies to plaintiffs who are targeted by lawsuits predicated on exercise of their First Amendment rights. While anti-SLAPP provisions range from requiring specific fact pleading[237] to "SLAPP-back" claims for damages against those who file frivolous suits,[238] "quick and early resolution of litigation is

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233. Epstein, *supra* note 182, at 14.

234. *See supra* text accompanying notes 224–27.

235. Susan B. Anthony List v. Driehaus, 814 F.3d 466, 474 (6th Cir. 2016) (noting that where a claim is filed pre-election "[a] final finding that occurs *after* the election does not preserve the integrity of the election.").

236. John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395, 396 (1993).

237. *Id.* at 407–08.

238. *Id.* at 431–38.

the single most important component of any court or statutory scheme to prevent SLAPPs."[239]

To this end, California provides "special motion to strike" causes of action brought "against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . . in connection with a public issue."[240] This motion allows for immediate dismissal of such a claim "unless the court determines that the plaintiff has established there is a probability that the plaintiff will prevail on the claim."[241] In making this determination, a court is empowered to consider both the pleadings and "supporting and opposing affidavits stating the facts upon which the liability or defense is based."[242] A similar motion, and additional anti-SLAPP protections, may provide an effective way to avoid strategic litigation or at least minimize its chilling effect on protected speech.

E. Burden of Proof

Finally, a traditionally employed method of protecting the speaker in a false speech case is through allocation and adjustment of the burden of proof. As far back as the Court's decision in *New York Times Co. v. Sullivan*, the Court recognized the need to employ a standard of proof more demanding than the traditionally used civil standard of "more probable than not." Instead, the Court made clear that the plaintiff must prove knowledge of falsity or reckless disregard by a showing of clear and convincing evidence. It also established that the burden of proof is to be placed squarely on the plaintiff alleging falsity of the defendant's speech. There is no reason to depart from this protective procedural standard in the context of suits designed to punish political fraud.

CONCLUSION

While political fraud is certainly not a new phenomenon, the Internet has exponentially increased the risk that deliberate lies can affect voting outcomes and undermine democratic self-government. In this important sense, political fraud undermines the democratic goals central to the First Amendment right of free expression. Just as the First Amendment fosters the democratic goals of facilitating the democratic process by informing the electorate, political fraud undermines those very same goals by distorting the electoral decision-making process.

As the need to regulate political fraud increases, so too does the need for balance against the fear of chilling truthful speech. There is always a risk that a political fraud statute can create a cure worse than the disease by chilling more true speech than it suppresses false speech.[243] Legislatures attempting to find this balance have had difficulties navigating the Supreme Court's false speech

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239. *Id.* at 408.
240. CAL. CIV. PROC. CODE § 425.16(b)(1) (West, Westlaw through Ch. 1 of 2020 Reg. Sess.).
241. *Id.*
242. *Id.* § 425.16(b)(2).
243. Volokh, *supra* note 172, at 1449.

quagmire, which provides "no consistent answer as to whether false speech is protected by the First Amendment."[244]

This Article demonstrates that much of this inconsistency can be resolved when regulating false speech by revisiting the understanding of "harm" as a delimiter on when false speech can be regulated. By viewing sufficiently compelling harms as more than merely those that arise in conventional false speech torts such as defamation, we can strike the appropriate balance between protecting valuable, true speech and allowing false speech to run rampant. This analysis is particularly compelling in the context of political fraud because it presents an intra-First Amendment problem. That is, the harm of both over- and under-regulation is the same: damage to political self-government. Applying this framework, we conclude that society should be unwilling to bear the risk posed by false and material political statements made with knowledge of falsity. In such situations, the risk of harm posed by political fraud outweighs the countervailing risk of chilling speech created by a narrowly focused political fraud statute. This substantive baseline must be buttressed by procedural constraints aimed at ensuring regulatory effectiveness and mitigating the risk of strategic litigation that can weaponize political fraud statutes to the detriment of electoral campaigns.[245] Because this can be achieved through a number of different systems, we leave judgment on the best combination of procedural safeguards to the laboratories of democracy rather than mandating a particular scheme.

Any valid democratic theory of the First Amendment must protect the ability of self-governing citizens to discover and vote in line with their true best interests. Because both regulating and not regulating political fraud creates risks to the self-governance goals of the First Amendment, protecting self-government requires balancing these competing harms. When political frauds are both pervasive and persuasive, the balance of these risks requires sanctioning political fraud in order to most effectively actuate the guarantees of the First Amendment.

244. Chemerinsky, *supra* note 19, at 5.
245. Marshall, *supra* note 51, at 300.