FACTS AND THE FIRST AMENDMENT

Frederick Schauer*

Each year, the UCLA School of Law hosts the Melville B. Nimmer Memorial Lecture. Since 1986, the lecture series has served as a forum for leading scholars in the fields of copyright and First Amendment law. In recent years, the lecture has been presented by many distinguished scholars. The UCLA Law Review has published these lectures and proudly continues that tradition by publishing an Article by this year's presenter, Professor Frederick Schauer.

INTRODUCTION

President Obama was not born in Kenya. President Bush did not have advance notice of the September 11 attacks. The predictions of astrology have neither scientific basis nor the capacity to forecast the future. AIDS was not created by white physicians and multinational pharmaceutical companies in order to reduce the size of the African and African American populations. The Holocaust is not a myth fabricated by Zionists and their supporters.

Although many people believe that President Obama was born in Kenya and not in Hawaii,[1] that President Bush had advance warning of the September 11 attacks,[2] that AIDS is the product of a government conspiracy,[3] that the prophesies of astrology are reliable,[4] and that the Holocaust did not occur,[5] all of

---

* David and Mary Harrison Distinguished Professor of Law, University of Virginia. This Article is the written version of the Melville B. Nimmer Memorial Lecture delivered at the School of Law, University of California, Los Angeles, on October 6, 2009. I am grateful to the UCLA faculty and students for their generosity, helpfulness, and useful comments and discussion.

1. *See* Jeff Zeleny, *Persistent 'Birthers' Fringe Disorients Strategists*, N.Y. TIMES, Aug. 4, 2009, http://www.nytimes.com/2009/08/05/us/politics/05zeleny.html.

2. *See* Mark Jacobson, *The Ground Zero Grassy Knoll: A New Generation of Conspiracy Theorists Is at Work on a Secret History of New York's Most Terrible Day*, N.Y. MAG., Mar. 27, 2006, at 28.

3. *See* Ta-Nehisi Paul Coates, *Suspicious Minds*, TIME MAG., July 4, 2005, at 36; David France, *The HIV Disbelievers*, NEWSWEEK, Aug. 28, 2000, at 46.

4. *See* Peter Glick, Deborah Gottesman & Jeffrey Jolton, *The Fault Is Not in the Stars: Susceptibility of Skeptics and Believers in Astrology to the Barnum Effect*, 15 PERSONALITY & SOC. PSYCHOL. BULL. 572, 572 (1989).

5. *See generally* DEBORAH E. LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY (1993) (discussing numerous examples of attempts to deny that the Holocaust occurred).

these beliefs are false—plainly, demonstrably, and factually false.[6] Indeed, the falsity of all of these beliefs is widely known, extensively documented, and frequently discussed.[7] Yet despite the ready accessibility of the factual truth negating all of these falsehoods, they persist, and, as is often the case, belief in these and many other falsehoods appears to increase without regard to the actual truth of the matter.[8] Indeed, a significant portion of the weight-loss industry, among others, preys on the phenomenon of persistent and truth-resistant falsity, such that the demonstrable untruth of the beliefs that diet soap can wash off fat and that diet slippers or diet earrings can produce dramatic weight reduction seems to have little effect on consumer desire for these and similar products whose value is entirely dependent on plainly erroneous factual propositions.[9]

That people believe things that are false comes as no surprise. That large numbers of people believe things that are false despite being told the truth is also hardly a revelation. Yet although the resilience of false belief is well-known,[10] the phenomenon of persistent factual falsity should be an occasion for pause or embarrassment to the free speech tradition, and equally so for any country that has embraced strong protections for speech and press. Ever since 1644, when John Milton in the *Areopagitica* asked, rhetorically, "who ever knew Truth put to the wors[e], in a free and open encounter,"[11] the assertion that truth will typically, even if not necessarily, prevail over falsity has been a pervasive feature of free speech rhetoric.[12] And although there is scant evidence that Milton's empirical claim is actually sound—that the truth of a proposition has

6. To provide "supporting authority" for the proposition in the text would be inconsistent with the point of this Article.

7. *See* sources cited *supra* notes 2–6.

8. *See generally* CONSPIRACY THEORIES IN AMERICAN HISTORY: AN ENCYCLOPEDIA (Peter Knight ed., 2003) (listing numerous examples of conspiracy theories in American history which persisted despite a lack of evidence); CHIP HEATH & DAN HEATH, MADE TO STICK: WHY SOME IDEAS SURVIVE AND OTHERS DIE (2007) (discussing the reasons behind why some stories or messages persist in people's memories).

9. *See* Fed. Trade Comm'n, Deception in Weight Loss Advertising: A Workshop 8 (2002), http://www.ftc.gov/bcp/workshops/weightloss/transcripts/transcript-full.pdf.

10. The phenomenon plagues not only lay people, *see supra* note 8, but also experts. *See* Rachel C. Vreeman & Aaron E. Carroll, *Medical Myths*, 335 BRIT. MED. J. 1288 (2007).

11. JOHN MILTON, AREOPAGITICA: A SPEECH OF MR. JOHN MILTON FOR THE LIBERTY OF UNLICENC'D PRINTING 35 (London, W. Johnston 1644).

12. *See, e.g.*, LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 128–29 (2005); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970); ROBERT F. LADENSON, A PHILOSOPHY OF FREE EXPRESSION AND ITS CONSTITUTIONAL APPLICATIONS 32–34 (1983); RICHARD MOON, THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION 9–14 (2000); Tom Campbell, *Rationales for Freedom of Communication*, *in* FREEDOM OF COMMUNICATION 17, 23–33 (Tom Campbell & Wojciech Sadurski eds., 1994).

very much explanatory power in determining which ideas will be accepted and which not[13]—the notion that the "truth will out"[14] is still with us.[15]

Although debates about the empirical accuracy of the "search for truth" and "marketplace of ideas" rationale for the freedoms of speech and press have been around for decades,[16] most of these debates have arisen in the context of the normative, religious, ideological, and political disagreements that have historically dominated the literature of free speech in general and the First Amendment in particular. What has received considerably less theoretical and doctrinal attention is the relationship of the First Amendment to questions of hard fact, and the extent to which, if at all, the standard First Amendment theories, slogans, and doctrines are applicable to questions of demonstrable truth, and, conversely, demonstrable falsity. The goal of this Article is to address these questions in an attempt to examine the relationship, if any, between American free speech culture and legal doctrine, on the one hand, and what appears to be the increasing and unfortunate acceptance of factual falsity in public communication, on the other.

13. *See* ALEXANDER, *supra* note 12, at 133; HEATH & HEATH, *supra* note 8, *passim*; Campbell, *supra* note 12, at 23–29.

14. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 2, sc. 2.

15. *See, e.g.*, Rickert v. State, 168 P.3d 826, 832 (Wash. 2007) (concluding that the best remedy for false speech is more speech); NAT HENTOFF, FREE SPEECH FOR ME—BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER 306 (1992) (asserting that counterspeech is effective against lies and distortions); Franklyn S. Haiman, *The Remedy Is More Speech*, AM. PROSPECT, Summer 1991, at 35 (same); Adam Liptak, *A False Claim of Valor and a Cry of Free Speech*, N.Y. TIMES, Mar. 18, 2008, at A14 (quoting assertions about the effectiveness of true speech to counter falsity).

16. For a sampling of the extensive literature supporting or challenging the underlying empirical assumptions of the claim that a free marketplace of ideas will have truth-identifying tendencies, see CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 155–58 (1987); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 10–33 (1982); Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649 (2006); Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1; Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951 (1997); R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1 (1977); R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384 (1974); Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1 (1964); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1; William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995); Tamara R. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem That Won't Go Away*, 41 LOY. L.A. L. REV. 181 (2007); Cedric Merlin Powell, *The Mythological Marketplace of Ideas*: R.A.V., Mitchell, *and Beyond*, 12 HARV. BLACKLETTER L.J. 1 (1995).

I. FACTS

Throughout this Article, I presuppose a distinction between fact and value, and thus between the normative and the descriptive.[17] In some circles this would be an embarrassing thing to admit, virtually assuring that nothing else I said or wrote could be taken seriously.[18] There is little I can do to persuade the skeptics, however, and even if I could, doing so would not be my task here. Nevertheless, some preliminary clarification is in order.

A fact, the Oxford English Dictionary unhelpfully reveals, is, *inter alia*, "something that has really occurred or is actually the case."[19] Other dictionaries are marginally more useful, telling us, for example, that a fact is "[s]omething put forth as objectively real,"[20] or "the quality of being actual."[21] Better, perhaps, is simply to deploy a few examples: It is a fact that there are more people in China than in New Jersey, that the man named Abraham Lincoln who was the sixteenth President of the United States is dead, that Elvis Presley is dead too, that the square root of eighty-one is nine, and that the earth is approximately ninety-three million miles from the sun.

To believe that there are facts is not to believe that all things claimed to be facts are true. It is not a fact that the earth is flat, even though people once believed that it is. Nor is it a fact that Louisville is the capital of Kentucky, even though many people still believe that to be the case. Perhaps more significantly, and more relevantly here, it is not a fact that chocolate ice cream is better than vanilla, that Picasso was a great artist, and that utilitarianism is morally superior to Kantianism, although all of these evaluative beliefs have numerous adherents. Some of these alleged facts, like the obvious superiority of chocolate ice cream to vanilla, are matters of taste alone, while others, such as the artistic greatness of Picasso or the superiority of one moral theory over another, are so

17. Perhaps unconventionally, I refrain from describing a belief in the distinction between fact and value as "objective." For many people, that term connotes the existence of something plainly identified or a distinction with a crisp demarcation, but such clarity or precision is not necessary to recognize a distinction. That there is no clear line between tadpoles and frogs, for example, says nothing about the viability of the tadpole/frog distinction. *See* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

18. *See, e.g.*, MARTIN HEIDEGGER, BEING AND TIME 133 (Joan Stambaugh trans., 1996) (questioning the fact/value distinction by looking at the phenomenon of when fear becomes alarm, horror, or terror); MARGARET JANE RADIN, REINTERPRETING PROPERTY 9 (1993) (questioning the fact/value distinction); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 364 (1979) (same); R.W. SLEEPER, THE NECESSITY OF PRAGMATISM 141 (1986) (same); Susan H. Williams, *Feminist Theory and Freedom of Speech*, 84 IND. L.J. 999, 1007 (2009) (same).

19. 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 947 (1971).

20. WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 460 (1984).

21. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 416 (10th ed. 1997).

plainly subject to disagreement even among knowledgeable experts that it would be misleading to describe their positions as "facts," even though for many of those experts, the evaluation is based on the application of external (objective) criteria rather than just an assertion of subjective (internal) preference.

Furthermore, to believe that there are facts, and to believe that facts are different from values, is not to deny that values may (or must) influence which facts we think important, which facts we notice, and what words we employ to describe the facts of the world.[22] Moreover, to believe in the existence of mind-independent facts and thus of a mind-independent reality is compatible with still believing that some (or much) of the world we experience and inhabit is socially constructed.[23] That money, law, and the Republican Party are social artifacts is not inconsistent with zebras, copper, and gravity having an existence logically independent of and temporally prior to human creation and comprehension.

It is important to separate the idea of a fact from people's beliefs about facts. It is a fact that the earth is round even if many people believe otherwise, and, indeed, even if everyone believes otherwise. Sometimes, of course, we are not sure about facts, and the existence of disagreement may be a wise caution against too quickly assuming that what we think is a fact really is a fact. Nevertheless, it is crucial to distinguish between what is the case and what people think is the case, and indeed, it is precisely that distinction that provides the motivating force behind this Article and the foundation for its analysis. As the examples with which I opened the Article show, it is a common phenomenon for people to believe things that are false, or not to believe things that are true, and the question on the table is what, if anything, does First Amendment theory and doctrine say about this phenomenon?

II. FACTS AND THE FREE SPEECH TRADITION

It should be obvious that factual truth and knowledge of it are important, even if these are not the only things that are important, and even if their importance does not necessarily trump other valuable attributes. Perhaps it is socially desirable, after all, that many children and some adults believe in Santa Claus and the tooth fairy. More significantly, much of the law of invasion of privacy is based on the sound idea that not everything that is true should be

22. *See generally* NORWOOD RUSSEL HANSON, PATTERNS OF DISCOVERY (1958) (discussing theory-laden observation); HILARY PUTNAM, THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS 3 (2002) (discussing the dependency of observation selection on questions of value).

23. *See* JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY (1995).

known by the maximum number of people.[24] And secrets have their uses, whether in war or in poker. Yet even though we do not accept that truth and knowledge of it have a lexical priority over all other values, it seems relatively uncontroversial to assert that, in general, truth is, *ceteris paribus*, better than falsity, that knowledge is, *ceteris paribus*, better than ignorance, and that a society with more true belief is, *ceteris paribus*, better than one with less belief in the truth or than one with more beliefs that are actually false.[25]

Yet although factual truth is important, surprisingly little of the free speech tradition is addressed directly to the question of the relationship between a regime of freedom of speech and the goal of increasing public knowledge of facts or decreasing public belief in false factual propositions. And a more careful look at Milton—the Milton of "whoever knew Truth put to the worse"—can make this clearer, illuminate features of the larger and longer free speech tradition, and set us on a path of tracing the place of facts in free speech thinking up to the present.

Milton appears to have expressed great confidence in the power of truth, but it is possible he was expressing only confidence in God to *reveal* the truth to us, and in that sense what Milton said almost four hundred years ago may be less separable from his theology than many now believe.[26] But even if Milton is best understood as making a claim about truth and not about the powers of a deity who can reveal it to us, the truth to which Milton was referring was a truth

24. *See* Frederick Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699 (1991).

25. Surprisingly little has been written about just what it is for a society (or any other collection of individuals) to know something, as opposed to what it is for an individual to know something. (A noteworthy exception is ALVIN I. GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD (1999)). The basic problem can best be explained with a simplified hypothetical example. Suppose that in one society of one hundred people, twenty have a true belief in *x*, ten have a false belief in not–*x*, and seventy have no beliefs at all about *x*. And then suppose that in another society (or in the same society at some later time) forty people have a true belief in *x*, fifty people have a false belief in not–*x*, and ten have no beliefs at all about *x*. We can then ask two interrelated questions: First, does the second society have more knowledge about *x* because more people have true beliefs in *x*, or does the second society have less knowledge about *x* because more people have false beliefs about *x*; and, second, apart from the question of how we define collective knowledge, which between the first or second societies is epistemically better off? And even if we could sort out what it was for a population to know something, is a society that believes *n* true propositions and *p* false ones more or less epistemically well off than one that believes *n+1* true propositions but also *p+1* false ones? Much of the free speech tradition, and especially that part of the tradition influenced by Chapter Two ("Of the Liberty of Thought and Discussion") of JOHN STUART MILL, ON LIBERTY (David Spitz ed., Norton & Co. 1975) (1859), appears to have assumed that any society with more beliefs in the truth, or with beliefs in more truths, is better than a society with less, but has done so without considering the tradeoffs between true and false beliefs and the possibility that a process for producing more true beliefs might produce more false beliefs as well.

26. *See* Vincent Blasi, *Milton's Areopagitica and the Modern First Amendment* (Yale Law Sch. Occasional Papers, Paper No. 6, 1995), *available at* http://digitalcommons.law.yale.edu/ylsop_papers/6; *see also* VINCENT BLASI, IDEAS OF THE FIRST AMENDMENT 34–145 (2006).

of a rather unobvious variety. Milton did refer to "truth," but the issues of licensing and censorship with which he was concerned arose entirely in the context of the interrelated (at the time) themes of religion and politics. What appears to have primarily motivated Milton to write the *Areopagitica* was the government's failure to grant a publication license for Milton's (somewhat self-interested) *The Doctrine and Discipline of Divorce*, a pamphlet urging liberalization of the then-prevailing strict Anglican rules about divorce.[27] And so although Milton and others believed that their religious and political views reflected something true about the world, those truths were sufficiently elusive and controversial that even using the words "true" and "false" in that context, let alone "fact," seems somewhat dissonant.

That Milton was not concerned about legal regulation of factual falsity should come as little surprise.[28] In 1644, after all, the state's entire regulatory apparatus was rudimentary, the law of fraud did not yet exist,[29] and the law of defamation was just emerging as a remedy for injury to reputation (as opposed to insult) and was only recently in the process of being transferred from the ecclesiastical courts to the courts of the common law.[30] As a consequence, there was little official regulation of factual falsity during Milton's time, but nor was there any argument that such regulation was beyond the state's powers. The entire topic of freedom from state regulation of factual falsity, at the emergence of the modern free speech tradition, was simply inconceivable, in the most literal sense of the word.

Somewhat more surprising is the nonappearance of factual falsity as a free speech issue even in the three centuries that followed the *Areopagitica*, a period in which the theoretical side of the free speech tradition grew exponentially, as did, in many countries, the legal and constitutional protections that arose from that theory. When we look to the writings of the early eighteenth century, for example, we see that the almost complete focus of controversies about

---

27. J. MILTON, THE DOCTRINE AND DISCIPLINE OF DIVORCE (London, T.P. and M.S. 1643).

28. *See* Stanley Fish, *Driving From the Letter: Truth and Indeterminacy in Milton's* Areopagitica, *in* RE-MEMBERING MILTON 234 (Mary Nyquist & Margaret W. Ferguson eds., 1988) (arguing that Milton was far less of an advocate for freedom of speech in modern terms than many commentators have assumed); *see also* John Illo, *Areopagiticas Mythic and Real*, 11 PROSE STUD. 3 (1988) (arguing that the current understanding of *Areopagtica* is largely a myth which fails to appreciate the narrowness and tactical goals of what Milton actually wrote).

29. *See* Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 182–87 (2001) (tracing the legal remedies for fraud at common law to the beginning of the eighteenth century).

30. *See* R.C. Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99 (recounting the English and American development of defamation law); Colin Rhys Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051 (1962) (same); Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 4 COLUM. L. REV. 33 (1904) (same).

freedom of speech and freedom of the press was with respect to antigovernmental advocacy and numerous allegedly inflammatory critiques of the powers that be.[31] Most of the seditious libel prosecutions, in both England and the North American colonies, were commenced in order to protect the government against criticism, insult, and agitation to uprising,[32] and the very fact that truth did not constitute a complete defense[33] save in exceptional cases[34] provides some evidence for the proposition that freedom of speech was not at the time understood in terms of factual truth or even factual falsity. Campaigns for increased freedom of speech and freedom of the press were largely about the claimed right to criticize and perhaps even insult the monarch, the government, and the officials of the state,[35] but it was scarcely even suggested that freedom of speech encompassed the right to articulate factually false propositions.

Similar conclusions arise from a careful reading of the great nineteenth century works on freedom of speech, especially John Stuart Mill's *On Liberty*, but also the influential and enduring contributions of Walter Bagehot,[36] Albert Venn Dicey,[37] and Frederick Pollock[38] in England and others (whose names are less well remembered) in the United States.[39] Consider *On Liberty*, which is still the most extensive and important discussion of the claimed value of allowing

31. *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 89–172 (1985).

32. *See* FREDRICK SEATON SEIBERT, FREEDOM OF THE PRESS IN ENGLAND, 1476–1776, at 269–75, 380–92 (1952); JEFFERY A. SMITH, PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM (1988); Richard D. Brown, *The Shifting Freedoms of the Press in the Eighteenth Century*, *in* 1 A HISTORY OF THE BOOK IN AMERICA: THE COLONIAL BOOK IN THE ATLANTIC WORLD 368 (Hugh Amory & David D. Hall eds., 2000); William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984).

33. *See* 8 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 343 (1925); LEVY, *supra* note 31, at 121, 129, 132; Thomas A. Green, *The Jury, Seditious Libel, and the Criminal Law*, *in* JURIES, LIBEL, & JUSTICE: THE ROLE OF ENGLISH JURIES IN SEVENTEENTH—AND EIGHTEENTH—CENTURY TRIALS FOR LIBEL AND SLANDER 37, 41 (R.H. Helmholz & Thomas A. Green eds., 1984).

34. Green, *supra* note 33, at 60–61.

35. *See generally* ROBERT W.T. MARTIN, THE FREE AND OPEN PRESS: THE FOUNDING OF AMERICAN DEMOCRATIC PRESS LIBERTY, 1640–1800 (2001) (discussing the dynamic of open press as an avenue for criticism of the government); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983) (exploring the origins of the freedom of the press clause and reexamining Leonard Levy's conclusion that freedom of the press only meant freedom from prior restraint in light of this history).

36. For an example, see 2 WALTER BAGEHOT, *The Metaphysical Basis of Toleration*, *in* LITERARY STUDIES 422 (Richard Holt Hutton ed., 1891).

37. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 238–69 (10th ed. 1959).

38. Frederick Pollock, *The Theory of Persecution*, *in* ESSAYS IN JURISPRUDENCE AND ETHICS 144 (1882).

39. *See* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 79–134 (2004).

the circulation of that which appears to be false, on the grounds that such a course of action will, in the long run, increase a society's knowledge and decrease its belief in falsity.[40] But even here, Mill's examples are telling. He talks of the wrongness of suppressing advocacy of "Tyrannicide,"[41] of the importance of being able to discuss "open questions of morals,"[42] of the value of "professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered,"[43] of the freedom to challenge "belief in a God,"[44] and of "religious opinions" in general.[45] Indeed, later on in Chapter Two of *On Liberty*, Mill makes clear that his conclusions about the liberty of thought and discussion pertain to issues of "morals, religion, politics, social relations, and the business of life."[46] Although Mill acknowledges that even in science (what he and his era called "natural philosophy") there are likely to be multiple explanations of the same facts,[47] he concedes that "on a subject like mathematics . . . there is nothing at all to be said on the wrong side of the question."[48]

Mill may or may not have been right about whether there is value to saying something on the wrong side of the question even in mathematics,[49] and he may have been wrong to distinguish much but not all of science from most nonscientific subjects, but at this point my principal concern is not whether Mill was correct or mistaken in distinguishing mathematics and the similarly exact sciences from morals, politics, and religion, or whether he was too chary or too promiscuous in his views about freedom of discussion in general. Rather, the point here is only to observe that even in this most epistemically focused of free speech arguments, and indeed even in this most influential of the epistemic arguments for freedom of speech, Mill was not to any appreciable extent addressing issues of demonstrable and verifiable fact. Instead he was concentrating overwhelmingly on what to him were debatable matters of religious, moral, and political truth.

---

40. An important exchange about Mill's analysis of the relationship between open discussion and the advancement of knowledge is H.J. McCloskey, *Liberty of Expression: Its Grounds and Limits*, 13 INQUIRY 219 (1970); D.H. Monro, *Liberty of Expression: Its Grounds and Limits*, 13 INQUIRY 238 (1970). *See also* Alan Ryan, *Mr. McCloskey on Mill's Liberalism*, 14 PHIL. Q. 253 (1964); C.L. Ten, *Mill and Liberty*, 30 J. HIST. IDEAS 47 (1969).

41. MILL, *supra* note 25, at 17 n.2.

42. *Id.*

43. *Id.*

44. *Id.* at 24.

45. *Id.* at 28.

46. *Id.* at 36.

47. *Id.*

48. *Id.* at 34.

49. Mill did, after all, argue that confronting even that which is false is valuable in helping produce a better understanding and deeper appreciation of the truth. *Id.* at 50–51.

If we take this truncated history of free speech thinking forward into the twentieth century, the picture is not much different, at least for the first three quarters of that century. For Learned Hand,[50] for Oliver Wendell Holmes,[51] for Louis Brandeis,[52] and for the nonjudicial free speech theorists of the first half of the twentieth century,[53] the issue that dominated the foreground of their First Amendment phenomenology was advocacy and not description.[54] Although the radical and anarchist political advocacy with which such free speech luminaries were most concerned was replete with inflammatory and exaggerated factual assertions about capitalist bosses, international arms cartels, and political/economic conspiracies, the basic issue was repeatedly one of antiwar, antidraft, prounion, and anticapitalist advocacy.[55] As with earlier periods of history, virtually none of the most prominent First Amendment writings and judicial opinions of the era even touched on the issues of verifiable factual truth or demonstrable factual falsity.

There would be little point in pursuing this brief historical survey any further. For by the time we arrive at the latter part of the twentieth century,

50. *See* Int'l Bhd. of Elec. Workers v. NLRB, 181 F.2d 34 (2d Cir. 1950); United States v. Nearing, 252 F. 223 (S.D.N.Y. 1918); Masses Publ'g Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917); GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994); Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment:* Masses Publishing Co. v. Patten, 61 U. COLO. L. REV. 1 (1990); Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 726, 728–29, 741, 744 (1975); Learned Hand, *Sources of Tolerance*, 79 U. PA. L. REV. 1 (1930); Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335 (2003).

51. *See* Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919); HARRY KALVEN, JR., A WORTHY TRADITION 130–36 (Jamie Kalven ed., Harper and Rowe 1988); Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1; Sheldon M. Novick, *The Unrevised Holmes and Freedom of Expression*, 1991 SUP. CT. REV. 303; Yosal Rogat & James M. O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349 (1984); Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209; G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391 (1992).

52. *See* Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring); Ashutosh A. Bhagwat, *The Story of* Whitney v. California: *The Power of Ideas*, *in* CONSTITUTIONAL LAW STORIES 407 (Michael C. Dorf ed., 2004); Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653 (1988).

53. *See* ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES (1946); MORRIS L. ERNST, THE FIRST FREEDOM (1946); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

54. For general discussions of the free speech issues of the era, see CHAFEE, *supra* note 53, at 36–108; RICHARD POLENBERG, FIGHTING FAITHS: THE *ABRAMS* CASE, THE SUPREME COURT, AND FREE SPEECH (1987); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983).

55. *See* Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159 (1982).

issues of fact, the ones I am concerned with here, have become an increasingly large part of First Amendment doctrine and writings.[56] Moreover, I make no claim that there was absolutely nothing to be found about questions of demonstrable fact in any of the writings of the periods I have just scanned. The emergence of the defense of truth to an action for seditious libel,[57] for example, certainly touches on the relationship of facts to free speech. Still, the overview just provided is designed to reinforce what may be an obvious point, even if it is one we rarely consider. And the point is that nearly all of the components that have made up our free speech tradition, in the United States and abroad, in the cases and in the literature, and in the political events that inspired free speech controversies, have had very little to say about the relationship between freedom of speech and questions of demonstrable fact. Implicit in much of that tradition may have been the belief that the power of the marketplace of ideas to select for truth was as applicable to factual as to religious, ideological, political, and social truth, but rarely is the topic mentioned. And perhaps implicit in the tradition, as Mill subtly suggested with his reference to there being

56. To a significant extent, the increased focus on facts, rather than advocacy or criticism of government, is a consequence of mid to late twentieth century doctrinal and political developments. Starting with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the constitutionalization of defamation law made factual accuracy a First Amendment concern in the context of what was said or printed about identifiable individuals, and starting with *New York Times Co. v. United States (Pentagon Papers Case)*, 403 U.S. 713 (1971) (per curiam), the First Amendment value of factual reporting became more salient. Most importantly, however, the commercial speech revolution that started with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), highlighted the First Amendment importance of information for information's sake, and consequently made the world of fact more important in free speech debates.

A related development, starting in the latter years of the twentieth century (perhaps with *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), *mandamus denied sub nom.* Morland v. Sprecher, 443 U.S. 709 (1979)) and substantially heightened by the events of September 11, 2001, was the increasing recognition of the way in which the disclosure of hard facts was often a far more effective way of causing unlawful action than was mere advocacy alone. To be sure, one way of getting someone else to commit a crime is to urge him to do it, but often a far better way is by providing the facts and instructions that will make it possible or easier for someone to do what they might in any event have been inclined to do. Intriguingly, the standard advocacy/incitement formula from *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), has nothing to say about the question (*see* United States v. Moss, 604 F.2d 569 (8th Cir. 1979); United States v. Buttorff, 572 F.2d 619 (8th Cir. 1978)), and thus courts have been left to wrestle with the difficult question of fact-based advocacy and fact-based instructions for crime with virtually no authoritative guidance. *See* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 260–80 (1989); Marc Rohr, *Grand Illusion? The* Brandenburg *Test and Speech That Encourages or Facilitates Criminal Acts*, 38 WILLAMETTE L. REV. 1 (2002); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1128 (2005); Leslie Kendrick, Note, *A Test for Criminally Instructional Speech*, 91 VA. L. REV. 1973 (2005). Especially in the age of the Internet, the applicability of the First Amendment in general and the *Brandenburg* standard in particular to facts and instructions is an increasingly important topic of First Amendment doctrine and theory, but because this topic is largely about the potential dangers of accurate information rather than about public falsity, it is a topic that is somewhat peripheral to my primary concerns in this Article.

57. *See supra* notes 32–35 and accompanying text.

nothing worth saying on the other side of mathematical truths,[58] is that the question of demonstrable factual falsity, whether public or private, is simply not the same subject as that of free speech and the First Amendment. But although the causes may be unclear, the consequences are more plain, and we have, perhaps surprisingly, arrived at a point in history in which an extremely important social issue about the proliferation of demonstrable factual falsity in public debate is one as to which the venerable and inspiring history of freedom of expression has virtually nothing to say.

III. THE MARKETPLACE OF IDEAS AND THE SEARCH FOR FACTUAL TRUTH

It is tempting to relegate Milton's claims about the intrinsic strength of truth to the dustbin of First Amendment history. Numerous commentators, after all, have picked apart the epistemic rationales for a free speech principle, often starting with Holmes's claim that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[59] The initial attack on Holmes's influential observation is a conceptual one, for, under one interpretation, he is adopting a consensus or survival theory of truth, one in which truth is *defined* in terms of victory in the marketplace of ideas.[60] But except to a resolute epistemological skeptic (of which Holmes may indeed have been an example), such a view is implausible.[61] That the claims of astrology have succeeded in the (public) marketplace of ideas does not make them any more true than are the claims of phrenology, which also succeeded gloriously in the public and scientific marketplace of ideas in the nineteenth century even though they are now widely understood to be plainly false.[62] Under one reading of Holmes's claim, arguably an uncharitable one but not one totally excluded by the words he chose, the marketplace of ideas is the best (even if not the sole) criterion for truth, but such a view defies common sense. Time and again, the marketplace appears to have accepted, and not only for very short periods of time, demonstrably false factual propositions, and any account of truth that takes

58. MILL, *supra* note 25, at 48.
59. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
60. *See* Schauer, *supra* note 17, at 20–22.
61. *See* GOLDMAN, *supra* note 25; Campbell, *supra* note 12, at 24–28.
62. *See* CHARLES COLBERT, A MEASURE OF PERFECTION: PHRENOLOGY AND THE FINE ARTS IN AMERICA (1997); MARTIN GARDNER, FADS AND FALLACIES IN THE NAME OF SCIENCE, ch. 7 (Dover Publications 1957) (1952); David L. Faigman, *Anecdotal Forensics, Phrenology, and Other Abject Lessons From the History of Science*, 59 HASTINGS L.J. 979 (2008); Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877 (1997).

acceptance, survival, or consensus as the definition of truth, at least in the domain of fact, cannot be taken seriously.

Alternatively, the metaphor of the marketplace of ideas can be understood as an empirical claim about the methods of increasing knowledge and not a conceptual one about the nature of truth. Under this alternative understanding, an understanding that resonates more with Milton's and Mill's language and arguments than with Holmes's, an open market in ideas, or, more accurately, an open market in propositions, will select for true propositions, and thus enable us to locate more truths and identify and reject more falsehoods, than would any other available procedure for determining which propositions are true and which are false. In other words, the marketplace of ideas, understood instrumentally and empirically, is alleged to be the best available method for increasing human knowledge, a claim that rests on the further assumption that the truth of a proposition has substantial explanatory power in determining which propositions will be accepted and which will be rejected within some population.

When put this way, it is easy to see why this empirical and instrumental claim has fared little better in the literature than has the Holmesian conceptual one.[63] Once we fathom the full scope of factors other than the truth of a proposition that might determine which propositions individuals or groups will accept and which they will reject—the charisma, authority, or persuasiveness of the speaker; the consistency between the proposition and the prior beliefs of the hearer; the consistency between the proposition and what the hearer believes that other hearers believe; the frequency with which the proposition is uttered; the extent to which the proposition is communicated with photographs and other visual or aural embellishments; the extent to which the proposition will make the reader or listener feel good or happy for content-independent reasons; and almost countless others—we can see that placing faith in the superiority of truth over all of these other attributes of a proposition in explaining acceptance and rejection requires a substantial degree of faith in pervasive human rationality and an almost willful disregard of the masses of scientific and marketing research to the contrary.[64] As a result, the free speech

63. *See, e.g.*, Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1 (1996) (exposing and challenging the view that a free market in ideas is systematically truth conducive).

64. To give just one example, numerous experiments have shown that presenting some proposition with images of various kinds will lead people to attribute more to the proposition than when the proposition is expressed in words alone. *See* David A. Bright & Jane Goodman-Delahunty, *Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making*, 30 LAW & HUM. BEHAV. 183 (2006); Jessica R. Gurley & David K. Marcus, *The Effects of Neuroimaging and Brain Injury on Insanity Defenses*, 26 BEHAV. SCI. & L. 85 (2008); Aura Hanna & Roger Remington, *The*

literature appears increasingly to have detached itself from the empirical and instrumental epistemic arguments, either by relying increasingly on arguments from democratic decisionmaking or deliberation or participation,[65] or on arguments from individual autonomy[66] and self-expression,[67] or on some number of other less-prominent free speech rationales.[68] To the same end, we often see the traditional search-for-truth rationale folded into a free speech justification sounding more in democratic theory, where the implicit or explicit claim is then that whatever we might think about epistemic truth, political truth is what the people decide through democratic processes, without regard to whether what is politically true happens to be epistemically true.[69]

Although it has thus become almost *de rigeur* in academic circles to treat the empirical instrumental epistemic claims of the marketplace of ideas metaphor as a relic that has not survived exposure to modern science,[70] it retains a surprising resilience in public civil libertarian rhetoric.[71] Indeed, the persistence of the belief that a good remedy for false speech is more speech, or that truth will prevail in the long run, may itself be an example of the resistance of false

---

Representation of Color and Form in Long-Term Memory, 24 MEMORY & COGNITION 322 (1996); David P. McCabe & Alan D. Castel, *Seeing Is Believing: The Effect of Brain Images on Judgments of Scientific Reasoning*, 107 COGNITION 343 (2008); Deena Skolnick Weisberg et al., *The Seductive Allure of Neuroscience Explanations*, 20 J. COGNITIVE NEUROSCIENCE 470 (2008).

65. *See, e.g.*, HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (Jaime Kalven ed., 1988); ROBERT C. POST, CONSTITUTIONAL DOMAINS (1995); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451 (1988); William Marshall, *Free Speech and the "Problem" of Democracy*, 89 NW. U. L. REV. 191 (1994) (reviewing SUNSTEIN, *supra*).

66. *See, e.g.*, Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991); Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105 (1979); Irving Younger, *The Idea of Sanctuary*, 14 GONZ. L. REV. 761 (1979).

67. *See, e.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Sheldon Nahmod, *The GFP (Green) Bunny: Reflections on the Intersection of Art, Science, and the First Amendment*, 34 SUFFOLK U. L. REV. 473, 475 n.11 (2001); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

68. *See, e.g.*, LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986); STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA (1999); STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990); Daniel A. Farber, Commentary, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554 (1991).

69. *See generally* Schauer, *supra* note 17 (suggesting a relationship between epistemic arguments and arguments from democracy).

70. *Id.*

71. *See* sources cited *supra* note 15.

factual propositions to argument and counterexample. No matter how many examples and how much serious scientific research refute the view that falsity typically yields to truth, or that the truth of a proposition is the dominant factor in determining which propositions will be accepted and which rejected, free speech claimants, sometimes in legal proceedings but far more often in public advocacy, trot out the tired old clichés that are little more than modern variants on Milton's now-legendary but almost certainly inaccurate paean to the pervasiveness and power of human rationality.

I have been focusing primarily on the truth-identifying arguments for a free speech principle not because they are the only arguments, and not because they are more important in the case law than are other free speech justifications,[72] and not because they dominate academic exploration of free speech issues,[73] and not even because they retain vitality in civil libertarian advocacy in the public sphere.[74] Rather, the importance of these arguments in the present context stems from their particular relevance to the relationship between factual falsity and the free speech tradition, and that is because, of all of the justifications for a free speech principle, the epistemic arguments are the only ones that are even in the vicinity of addressing the question of factual falsity. Arguments from democratic deliberation or decisionmaking,[75] from autonomy,[76] and from self-expression,[77] to take the most prominent alternatives to the arguments from truth, do not even purport to assist in the identification of truth or the elimination of falsity, although they may accept false speech and its detrimental effects as a price worth paying in order that people may express themselves or in order that democratic decisionmaking may remain unfettered. And thus my focus here on the alleged epistemic advantages of a free speech regime is prompted by the view that only with respect to this cluster of justifications, if at all, does the free speech tradition claim to help us address the problem, if it is a problem at all, of factual falsity. But once we see that even this branch of the free speech tradition, however prominent it remains in contemporary civil libertarian discourse, rests on shaky conceptual foundations and even shakier empirical ones, we are left with the conclusion that the seemingly increased pervasiveness of falsity in public discussion is a phenomenon that may possibly be a consequence of a strong free speech culture,

72. Although they are. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

73. There are noteworthy exceptions, such as Marshall, *supra* note 16.

74. *See, e.g.*, Nadine Strossen, *Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality?*, 46 CASE W. RES. L. REV. 449 (1996).

75. *See* sources cited *supra* note 65.

76. *See* sources cited *supra* note 66.

77. *See* sources cited *supra* note 67.

but is certainly not a phenomenon that a free speech regime is likely to be able to remedy. The embarrassment to the free speech tradition, therefore, comes not only from the tradition's complicity in exacerbating a culture of public falsity, and not only from the way in which such a culture is a negation of what was historically one of the tradition's strongest claims on our attention, but also, and most importantly, from the fact that the widespread existence of public falsity is a topic about which the tradition has essentially nothing to say.

IV. DOCTRINAL QUESTIONS

The historical and conceptual inapplicability of the rationales for a free speech principle to questions of hard fact is not only a theoretical problem, but is also a practical one. And it is a practical problem because doctrinal questions about the application of First Amendment rules, principles, and cases to questions of fact are becoming increasingly prevalent. Some of these questions arise, not surprisingly, in the context of government regulation of factual inaccuracy. When the Federal Trade Commission attempted to regulate factually (and dangerously) false weight-loss advertising, for example, the publishing and advertising industries, not unexpectedly, launched the familiar barrage of First Amendment slogans and, occasionally, even legal doctrines in an attempt to forestall regulation.[78] Much the same has happened with respect to the regulation of false and misleading statements in food and drug advertising, on labels, and in the sale of securities, where the traditional irrelevance of the First Amendment, still largely true as a matter of constitutional doctrine,[79] remains under persistent attack.[80]

Thus, we can directly ask the question of what the First Amendment has to say about the power of a state or federal regulatory agency to prohibit the distribution of false information about goods, services, and financial instruments. And one of the things that the foregoing survey of the marketplace of ideas tradition told us was that the tradition either did not address the question, or, to the extent that it did address the question, it provided an answer that

78. *See* Chester S. Galloway, *The First Amendment and FTC Weight-Loss Advertising Regulation*, 37 J. CONSUMER AFF. 413 (2003); Jennifer E. Gross, *The First Amendment and Diet Industry Advertising: How "Puffery" in Weight-Loss Advertisements Has Gone Too Far*, 20 J.L. & HEALTH 325 (2007).

79. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004) (surveying and explaining the vast area of "speech" that is entirely uncovered by First Amendment doctrine).

80. *See, e.g.*, George W. Evans & Arnold I. Friede, *The Food and Drug Administration's Regulation of Prescription Drug Manufacturer Speech: A First Amendment Analysis*, 58 FOOD & DRUG L.J. 365 (2003); Michael E. Schoeman, *The First Amendment and Restrictions on Advertising of Securities Under the Securities Act of 1933*, 41 BUS. LAW. 377 (1986).

was based on faulty empirical premises. Thus, if we inquire whether a governmental agency—the Securities and Exchange Commission, the Federal Trade Commission, the Food and Drug Administration, or any other—has the constitutional power under the First Amendment to restrict factually false representations in advertisements or solicitations to buy, one answer, from Milton's quote, would be that these restrictions would be constitutionally impermissible, and the "Miltonian" argument for this conclusion would be that such a restriction is unnecessary. If truth is mighty and consequently prevails,[81] then the truth about the claims of the effectiveness of diet earrings, for example, would be sufficient, and there would be no need for regulation.

With respect to commercial advertising and securities regulation, the Miltonian premise, of course, is not the law today. Yet although the existing doctrine is moderately clear with respect to the permissibility of restricting false or misleading advertising of securities[82] or commercial products,[83] the issue is different when we turn to questions of factual falsity in political debate. In *Brown v. Hartlage*,[84] the Supreme Court addressed a provision of the Kentucky Corrupt Practices Act,[85] which appeared to prohibit a candidate from making certain types of campaign promises. In overturning the law, with Justice Brennan writing, the unanimous Court[86] made clear that the only remedies available against false or misleading campaign speech would be those that satisfied the "actual malice" standard of *New York Times v. Sullivan*.[87] Accordingly, it is not falsity alone that, after *Brown*, may justify constitutionally

81. "Great is Truth, and mighty above all things" is the common translation of *magna est veritas et praevalebit*, attributed to THOMAS BROOKS, THE CROWN AND GLORY OF CHRISTIANITY (1662), and to be found as *magna est veritas et praevalet* in 1 *Esdras* 4:41. JOHN BARTLETT, FAMILIAR QUOTATIONS 36b (Emily Morison Beck ed., 14th ed. 1968). As is so often the case, Mark Twain had the last (and best) word: "Truth is mighty and will prevail. There is nothing wrong with this, except that it ain't so." MARK TWAIN'S NOTEBOOK 345 (Albert Bigelow Paine ed., 2d ed. 1935).

82. *See* SEC v. Wall St. Publ'g Inst., Inc., 851 F.2d 365, 373 (D.C. Cir. 1988) (reaffirming the inapplicability of the First Amendment to the sale of securities). In fact, restricting the advertising of securities is not and need not be limited to controlling that which is false or misleading. The entire scheme of securities regulation, including as it does elaborate controls on what can be said when, and by whom, goes far beyond the false and the misleading, and remains sufficiently far from even the coverage of the First Amendment that almost (*see* Lowe v. SEC, 472 U.S. 181 (1985)) all dimensions of the control of communication in securities are not subject to any level of First Amendment scrutiny. *See Wall St. Publ'g Inst., Inc.*, 851 F.2d at 373.

83. *See* Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980); Commodity Trend Serv. v. Commodity Futures Trading Comm'n, 233 F.3d 981, 993 (7th Cir. 2000) (concluding that regulation of fraudulent speech is constitutionally constrained when protected speech is also regulated, but not otherwise).

84. 456 U.S. 45 (1982).

85. KY. REV. STAT. ANN. § 121.055 (West 1982).

86. Justice Rehnquist concurred only in the result, questioning the Court's reliance on the constitutional defamation cases. *Id.* at 62 (Rehnquist, J., concurring).

87. 376 U.S. 254 (1964).

permissible state intervention against factually false campaign speech, but only intentional falsity.[88] Moreover, the basic lesson of *Brown v. Hartlage* appears to have been recently reinforced in *Republican Party of Minnesota v. White*.[89] On the existing state of the law, therefore, a negligent or even nonnegligent statement of a demonstrably false fact about cigarettes,[90] diet products,[91] or securities,[92] for example, could constitutionally ground a civil, criminal, or regulatory remedy, but even a grossly negligent false statement about a candidate in an election would seem to remain under First Amendment protection,[93] although several lower courts appear to have adopted a narrower reading of *Brown v. Hartlage* and have consequently permitted state election commissions to regulate for factual falsity.[94]

The distinction between commercial advertising and speech in political campaigns can, of course, be explained by the lower protection granted to commercial speech,[95] or by the fact that most regulation of misleading advertising has been assumed simply to lie entirely outside the coverage of the First Amendment,[96] the pleas of advertisers and others notwithstanding. And the distinction could also be explained by the special First Amendment protection granted to political speech,[97] or by an understanding of the First Amendment based in substantial part on distrust of government,[98] especially with respect to

88. *Sullivan* does allow "reckless disregard" for the truth to substitute for actual knowledge of falsity, but the Supreme Court subsequently emphasized that the reckless disregard standard would be satisfied only upon showing disregard by the speaker or publisher of actual suspicion of falsity, *see* St. Amant v. Thompson, 390 U.S. 727 (1968). Consequently, the "reckless disregard" alternative is now very close to the intentional falsity alternative that the Court in *Sullivan* misleadingly labeled "actual malice."

89. 536 U.S. 765 (2002) (striking down a law prohibiting candidates in judicial elections from announcing their views on disputed legal issues).

90. *But cf.* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

91. *See supra* notes 79–83 and accompanying text.

92. *See supra* notes 79–83 and accompanying text.

93. *See* Lee Goldman, *False Campaign Advertising and the "Actual Malice" Standard*, 82 TUL. L. REV. 889 (2008); William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285 (2004); Geoffrey R. Stone, *The Rules of Evidence and the Rules of Public Debate*, 1993 U. CHI. LEGAL F. 127, 137–41.

94. *See* Pestrak v. Ohio Elections Comm'n, 926 F.2d 573 (6th Cir. 1991); *see also* Tomei v. Finley, 512 F. Supp. 695 (N.D. Ill. 1981) (permitting an injunction against a misleading campaign slogan). It is impossible to determine whether these courts would have reached the same conclusion after *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

95. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

96. *See* Schauer, *supra* note 79.

97. *See* Lillian R. BeVier, *An Informed Public, An Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482 (1980).

98. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 111 (1998). *But see* LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 145 (2005)

those partisan political matters in which the party in power could too easily use the regulatory power of the state to entrench its own power and effectuate sanctions against challengers. And thus it is hard to quarrel with the constitutional immunity of even demonstrably false factual statements in the political arena, for this is an area in which it is easy to suspect that any cure could be substantially worse than the disease.

Although it seems implausible and misguided to extend to commercial advertising the First Amendment protection for unintentional factual falsity in political disputes, there is a universe of public factual falsity that is neither directly electoral nor commercial, and many of the examples with which I commenced this Article—AIDS conspiracy theories and Holocaust denial, for example—would seem to fit this characterization. So too would claims, to offer another prominent example, about the authenticity of the *Protocols of the Elders of Zion*.[99] Yet although such examples are remote from electoral campaigns, they are equally remote from straight commercial advertising. Nevertheless, in a doctrinal world in which the Supreme Court easily extended *New York Times v. Sullivan* to public figures who were not public officials,[100] it would be difficult to deny that the general weight of the American free speech tradition is such as to keep these matters beyond the reach of constitutionally permissible government regulation. Whatever the harms of public noncommercial factual falsity (and it seems hard to deny that they are many and substantial), there is, in the United States, little basis for arguing that dealing with these harms through government restriction is constitutionally permissible.

V. THE LARGER QUESTION

Thus, public noncommercial factual falsity will likely remain constitutionally protected for the foreseeable future. In large part this is because the existing doctrine, although less clear than it might be, almost certainly does not permit regulation.[101] Moreover, in a culture of pervasive distrust of government,

(questioning whether distrust of government is more of an issue for speech regulation than for regulation generally); Jan Narveson, *Freedom of Speech and Expression: A Libertarian View*, *in* FREE EXPRESSION: ESSAYS IN LAW AND PHILOSOPHY 59 (W.J. Waluchow ed., 1994) (same).

99. *See* STEVEN LEONARD JACOBS & MARK WEITZMAN, DISMANTLING THE BIG LIE: THE PROTOCOLS OF THE ELDERS OF ZION (2003); Michael J. Polelle, *Racial and Ethnic Group Defamation: A Speech-Friendly Proposal*, 23 B.C. THIRD WORLD L.J. 213, 219 (2003).

100. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967). *See generally* Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905 (1984) (examining differences between commentary about public figures and commentary about public officials).

101. The lack of total clarity on the issue is substantially a function of the absence of any case directly on point. We know that false and misleading commercial advertising may be regulated, we know that false and misleading campaign advertising may not be regulated unless the "actual malice"

and with a First Amendment tradition in which distrust of government looms large as a free speech justification,[102] the likelihood of any change in the doctrine is remote. The Supreme Court's statement in *Gertz v. Robert Welch, Inc.*[103] that "[u]nder the First Amendment there is no such thing as a false idea"[104] is a statement not only about the *Gertz* case, and not only about defamation, which was the issue in *Gertz*, but also, and more importantly, about the American free speech tradition. This is a tradition in which distrust of government to decide which ideas are true and which are false has been extended not only to the kinds of social, political, moral, religious, and cultural ideas that we actually do label as "ideas," but also to propositions of fact. As is well known and frequently analyzed, the willingness to sanction Holocaust denial in numerous liberal and open democratic societies is in stark contrast to American practice,[105] but what is perhaps most interesting is the absence of anything even close to a Supreme Court case directly on point.[106] *Brown v. Hartlage* is highly relevant, and so is the implication in defamation cases starting with *Sullivan* that reputational harm to an individual or discrete entity is the only justification for restricting even that narrow range of factual falsity that remains unprotected by the *Sullivan* rules. And the Supreme Court's well-known footnote in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[107] about the "commonsense differences" between commercial advertising and other kinds of public speech appears to affirm by implication that the "truth" of speech not relegated to a lower degree of First Amendment protection is beyond the reach of government regulation.

It is of some interest that this stance appears less connected to the landmarks of the free speech tradition than is commonly supposed. Almost none of the variants on the search for truth and marketplace of ideas rationales for a free speech principle arose in contexts even remotely connected with verifiable factual truth and falsity, and indeed even the array of arguments and justifications premised on self-expression, individual autonomy, democratic deliberation, and political decisionmaking appear to have little to say about

standard of *New York Times Co. v. Sullivan* is satisfied, and we know that the same applies to defamation actions brought by public officials and public figures. The clear implication is that false and misleading speech not about identifiable individuals may not be regulated at all, or again may be regulated only where the *Sullivan* standard, however poor a fit in this context, is satisfied, but all of this is still implication and not the consequence of any clear and direct holding by the Supreme Court.

102. *See supra* note 98.

103. 418 U.S. 323 (1974).

104. *Id.* at 339.

105. *See* Frederick Schauer, *The Exceptional First Amendment*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29 (Michael Ignatieff ed., 2005).

106. *See supra* note 101.

107. 425 U.S. 748, 771 n.24 (1976).

plainly false factual propositions. If factual falsity is protected, it must be less because of the history of free speech thought, and more because of a distrust of government that pervades the American variety of free speech thought as much as, as the recent debates about health care have made so clear, it pervades the American variety of much else.

Whatever the justifications, however, the doctrinal consequences seem clear, and thus it would be pointless to argue for a change in doctrine that would allow the regulation of noncommercial and nondefamatory public falsity, even were such regulation considered a good idea as a matter of policy. But the important point here is not about the doctrine or even about the likelihood of its change. Rather, it is about the extent to which, consistent with the First Amendment, there is anything that might be done to deal with this seemingly increasing problem of public and influential factual falsity.

There is no easy answer to this question, but any answer should start where the First Amendment leaves off. The First Amendment plainly does not permit restriction of noncommercial and nondefamatory factual falsity in the public sphere, but the First Amendment is largely silent about other possible approaches. To the occasional exasperation of commentators,[108] for example, the First Amendment is largely inapplicable to government speech.[109] This is not to deny that the government may sometimes be persuasive,[110] even though it appears to be becoming less so day by day. Rather, it is that the First Amendment, understood in its traditional, largely negative aspect,[111] remains almost completely unconcerned with market failure in the marketplace of ideas and with imbalance among speakers, their resources, and their persuasive power. Perhaps ironically and perhaps importantly, the same First Amendment that has persistently ignored the epistemic failings of the marketplace of ideas is the First Amendment that leaves dealing with such failings to the discretion of the government so long as the methods the government employs stay clear of restrictions on private speakers.

Thus, not only does neither First Amendment theory, nor history, nor doctrine significantly restrict the government's ability to attempt to correct

108. *See, e.g.*, MARK G. YUDOF, WHEN GOVERNMENT SPEAKS (1983); Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104 (1979); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983 (2005); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980).

109. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring); Rust v. Sullivan, 500 U.S. 173 (1991); Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1 (2000); Frederick Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373 (1983) (reviewing YUDOF, *supra* note 108).

110. *See* Lee, *supra* note 108.

111. *See* Frederick Schauer, *Hohfeld's First Amendment*, 76 GEO. WASH. L. REV. 914 (2008).

widespread public factual inaccuracy, nor does that theory, history, and doctrine disable any number of other approaches, whether through education or even, and here the issues are trickier, through funding or supporting certain points of view.[112] Existing First Amendment doctrine would not disable government librarians from using their book selection discretion to reinforce the truth and try to rebut widely believed falsehoods, nor would it disable public school teachers and university professors from doing the same in the classroom, and numerous other possibilities are imaginable. In some respects the limitations of the First Amendment are also its strengths. The First Amendment may be embarrassed by the proliferation of public falsity, because presumably, from Milton to Madison to Mill to Holmes to the present, that is part of what the idea of free speech and its particular embodiment in the First Amendment was designed to prevent. But the First Amendment may have been toothless to deal with the problem of public factual falsity not only because of the empirical shortcomings of the marketplace of ideas model, but also because it was designed to serve a quite limited purpose in preventing government suppression, rather than serving as a guarantor of the accuracy (or quality in general) of public debate. Insofar as that is so, therefore, the First Amendment that has been powerless to deal with the issue of widespread public factual falsity is also the First Amendment that may be desirably powerless to prevent the government from dealing in other ways with exactly that problem. Exploring in detail what those ways might be is beyond the scope of this Article, for that would take us fully into the entire realm of public rhetorical and communications policy, and that enterprise must be the work of a lifetime, not of a single Article.

CONCLUSION: THE SMALLNESS OF THE FIRST AMENDMENT

Although I have been addressing the specific issue of increasingly widespread public acceptance of consequential (and thus dangerous) factual falsity, the lessons are even larger. However much the First Amendment has become a doctrinally inaccurate phrase to describe a wide range of approaches

112. *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), arguably in some tension with *Rust v. Sullivan*, 500 U.S. 173 (1991), seems to disable the government from using viewpoint-based criteria to allocate federal funds, and would thus seem to stand as an impediment to funding groups that would seek to combat Holocaust denial while not funding the Holocaust deniers. If this outcome seems implausible, then it is perhaps better to understand *Finley* as being largely about the autonomy of artistic institutional decisionmaking and not as about a broad-based ban on viewpoint-based government funding. *See* Schauer, *supra* note 98; *see also* Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 UCLA L. REV. 1747 (2007); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005).

to communication control that it does not, legally, reach,[113] the First Amendment can be understood to be a specific solution to a specific problem, and a problem related largely to government restriction of a relatively small but vitally important domain of nongovernmental communications. That this is so, however, leaves much outside the First Amendment. Not only is the First Amendment applicable to only a small segment of government regulation of or sanctions on communicative behavior, but in its negative aspect it is applicable to an even smaller segment, proportionately, of communication policy in the broadest sense. Who or what should say what to whom is a question slightly about regulation of speech, but it is much more a question involving the politics, economics, and sociology of who speaks, who writes, who publishes, and who broadcasts, among other ways of communicating, and of who listens, who reads, who buys, and who watches, among other ways of obtaining the information and ideas supplied by others. This is a huge domain of public life, and not only of public regulatory life, and recognizing that the First Amendment is only a tiny sliver of communications policy leaves numerous questions of communications policy untouched by the First Amendment. One of these questions is that of the increasing acceptance of patent factual falsity, and it is a question whose economic, psychological, sociological, cultural, scientific, political, and policy dimensions are far more important than the legal and constitutional ones. This may disappoint some lawyers and constitutionalists, but when they discover that the First Amendment they so properly cherish has done little to prevent the problem of widespread factual falsity, they may come to realize as well that the same First Amendment can also do very little to solve it. Just as neither the law nor the Constitution can be the cure to all of the policy problems of our day, neither can the First Amendment be the cure for all of the communications and informational problems of our day. Far more than First Amendment freedoms have created a society in which truth seems to matter so little, and far more than First Amendment freedoms will be necessary to do anything about it.

113. *See* Schauer, *supra* note 111, at 921.