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FALSITY AND THE FIRST AMENDMENT

G. Edward White*

ABSTRACT

This Article considers the extent to which the exclusion of forms of speech from the coverage of the First Amendment has turned on the falsity of statements within the excluded categories. It does so, first, by reviewing the Supreme Court's early and mid-twentieth century free speech decisions, to demonstrate that none of the principal cases in which the Court swept a particular category of expression within the First Amendment's coverage involved speech that was false; and, second, by suggesting that when the Court first announced that some "breathing space" was required for factually inaccurate statements about public officials or private citizens associated with matters of public concern, it was less concerned with protecting false speech than with shielding inaccurate comments from being punished because they were provocative. Moreover, in its decisions involving the Court's most prominent recent category swept within First Amendment coverage, commercial speech, the Court has explicitly excluded false and misleading versions of that speech from the protection of the First Amendment.

Recent decisions of the Court, however, have indicated that any form of expression, true or false, is presumed to be within the First Amendment's coverage unless it falls into a category of "historically unprotected" expressions. Although most of those expressions involve factually false speech, the Court's own recent decisions seemed to have blurred the line between true and false speech triggering First Amendment protection, and thus raised the possibility that the regulation of several additional categories of false commercial speech might raise First Amendment concerns. This Article advances two arguments for why that possibility should be resisted.

One is that the exclusion and inclusion of particular forms of speech within the First Amendment's coverage signals the cultural salience of those forms: by identifying forms of speech that are not sufficiently valued to receive constitutional protection, Americans signal what forms of speech they value. Were anyone "free" to say anything on any subject, speech might become the equivalent of noise.

The other is that the distinction between truth and falsity in First Amendment jurisprudence serves as an illustration that truth is not only valued more highly than falsity, it can be objectively ascertained and rendered.

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That epistemological premise resists the claim that “truth” needs to be placed in scare quotes because it is a construction of reality rather than reality itself: that “news” can legitimately be claimed to be “fake” because no one is capable of ascertaining what “true” ideas or information might be. Such a claim, the Article maintains, invites not only incoherence within First Amendment jurisprudence but within the discourse of contemporary American culture more generally.

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I. INTRODUCTION

COMMENTATORS have regularly noted the example given by Justice Oliver Wendell Holmes, in his opinion for the Supreme Court in *Schenck v. United States*,¹ in support of the proposition that protection in the First Amendment against speech being “abridged” did not mean that the protection was limitless. “The most stringent protection of free speech,” Holmes announced, “would not protect a man in falsely shouting fire in a theater and causing a panic.”² Like many of the examples Holmes alluded to in his opinions, the “fire in a theater” example was vivid and arresting, designed to remind readers that although the First Amendment speaks of “no law” permissibly abridging speech,³ that cannot be true. A law imposing criminal penalties for causing panic

1. 249 U.S. 47 (1919).

2. *Id.* at 52.

3. U.S. CONST. amend. I.

among persons in public places could be sustained even if the cause of the panic was speech.

But again, like many of Holmes's celebrated examples, his "shout of fire in a theater" example was cryptic. In concluding that no First Amendment protection would be given to that shout, how much weight was he allocating to the fact that it was *false*? Would an incorrect conclusion on a theatergoer's part that the theater was on fire—perhaps because slanting rays of sunshine coming through a window produced a fiery effect or lingering cigarette smoke was taken as evidence that portions of the theater were burning—have been treated in the same manner as a deliberate lie? And would any *true* statement that there was fire in a theater be protected if the statement caused a panic? Suppose, as the curtain was going up on the first act of a play and patrons were moving out of their seats in the interval, one of those patrons noticed that another had dropped a still-lit cigar whose embers had alighted a seat cushion. His shout of fire resulted in numerous members of the audience suddenly colliding with one another in a race for the exit. If one's intuition is that the patron's accurate observation of the incendiary propensities of cigar embers should not be made a basis for criminal liability just because others "panicked" on hearing it, why should a patron who mistakenly thought he saw fire in a theater when he did not, and caused a comparable panic, be treated differently? One might want persons who believe they see the presence of fire in a theater to inform as many present there as possible.

So Holmes's false shout of fire in a theater can be said to work well in illustrating that protection against the abridgement of speech is not absolute, but less well in clarifying how much work the falsity of an expression is doing in its being placed in a constitutionally unprotected category. Indeed, Holmes and his contemporaries, and at least two additional generations of courts and commentators, contributed comparatively little to the latter inquiry. Virtually all of the First or Fourteenth Amendment cases in which courts or commentators sought to establish boundaries between protected and unprotected speech, from *Schenck* through the early 1960s, involved restrictions on expressions *assumed to be true*. In that time period, false speech *of any sort* was implicitly placed outside the coverage of those Amendments.

A cursory glimpse at a sample of free speech cases since the 1960s, however, reveals a strikingly different treatment of false speech. One of the traditional categories of speech excluded from constitutional protection, false and damaging statements about a person's reputation, has been partially brought within the coverage of the First and Fourteenth Amendments.⁴ Portrayals of persons in a "false light," representing them inaccurately but arguably not so as to damage their reputations, have also been treated as constitutionally privileged.⁵ In one case, the Court asserted that "[u]nder the First Amendment there is no such thing as a false

4. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).

5. *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967).

idea.”⁶ In several cases, the Court has referred to a First Amendment “breathing space” for factual inaccuracies in connection with speech deemed worthy of protection because it was directed toward public officials, public figures, or matters of public concern.⁷

But the falsity of speech has also been advanced as a reason for excluding it from constitutional protection. The same case which asserted that under the First Amendment there was “no such thing as a false idea” also maintained that there was “no constitutional value in false statements of fact.”⁸ Another case stated that false statements of fact were “particularly valueless.”⁹ Still another, after “commercial speech” had been swept within the Amendment’s protection, declared that “false and misleading commercial speech” was not within its coverage.¹⁰ Some factually false and damaging speech, about “private individuals” on matters of “private concern,” receives no protection.¹¹ And a variety of torts in which the falsity of a statement is made a basis for liability, ranging from fraud to warnings on products to disparagement, have not been treated as raising constitutional issues when they affect forms of speech.¹²

Then there is the recent “Stolen Valor Act” case, *United States v. Alvarez*, where a plurality of Justices, and Justice Breyer in concurrence, con-

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

7. *E.g.*, *N.Y. Times Co.*, 376 U.S. at 272; *NAACP v. Button*, 371 U.S. 415, 433 (1963). In *Gertz*, 418 U.S. at 341, the Court said, “The First Amendment requires that we protect some falsehood in order to protect speech that matters.”

8. *Gertz*, 418 U.S. at 339–40.

9. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988).

10. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 593 (1980).

11. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 749, 759 (1985).

12. The speech affected by those torts, which is discussed *infra*, should be distinguished from the “compelled” speech invalidated by the Supreme Court in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018), or challenged before the Ninth Circuit in *American Beverage Ass’n v. San Francisco*, 871 F.3d 884, 889 (9th Cir. 2017). *Becerra* involved a free speech challenge to a California statute requiring private health care centers providing services related to pregnancies to post notices that the state had public programs providing pregnancy-connected services, including methods of abortion for eligible women. *Becerra*, 138 S. Ct. at 2368. A 5-4 Court majority invalidated the statute on the ground that it forced speakers at such centers to advertise the availability of abortion services even though some centers opposed the practice of abortion and did not themselves provide abortions. *Id.* at 2378. There was no suggestion in *Becerra* that the state was seeking to regulate false speech.

In *American Beverage Ass’n*, a trade group of beverage manufacturers challenged a San Francisco ordinance requiring soft drink manufacturers to include a health warning in their billboard advertising that “drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay.” *Am. Beverage Ass’n*, 871 F.3d at 887–88. The manufacturers claimed that the warning was false in that consuming soft drinks in moderation had no adverse health effects, and that a requirement that the warning occupy 20% of the billboard space would overwhelm any advertising messages on the billboards. *Id.* at 895–96. A federal district judge in California denied the group’s request for a preliminary injunction against the display of the warning, and the group appealed to a three-judge panel of the Ninth Circuit, which held that the ordinance violated the manufacturer’s First Amendment rights. *Id.* at 899. That decision was vacated when the Ninth Circuit agreed to hear the case en banc. False speech is arguably involved in *American Beverage Ass’n*, but, if so, it is the government itself speaking falsely rather than trying to regulate the false speech of private parties. In sum, neither case would seem to have any bearing on state laws characterizing various forms of false speech as tortious.

cluded that making false statements, unaccompanied by any concrete harm to a person, could not *in themselves* be regulated without a showing of a compelling governmental interest in doing so.¹³ Both the *Alvarez* plurality¹⁴ and Justice Breyer,¹⁵ in the course of reaching that conclusion, referred to the Court's earlier "breathing space" cases, which had afforded a degree of constitutional protection to factual inaccuracies if they arose in connection with comments about matters of public concern.¹⁶ But *Alvarez* arguably went further, shielding the defendant from criminal prosecution for lying about his possession of the Congressional Medal of Honor, even though the only purpose of the lie was to create a misleading impression of his military record.¹⁷ One commentator has stated that the Court "was on the right track" in *Alvarez*, adding that "[w]e lie to each other not only for gain but to show compassion; sometimes we lie to ourselves to make life bearable; we use lies as a mirror for truth."¹⁸

This Article seeks to trace the evolving status of falsity in First Amendment jurisprudence, and to consider whether a distinction between true and false statements of fact can serve as a coherent basis for including or excluding particular forms of expression from the Amendment's coverage. In its course, it seeks to invite a consideration of whether, by devaluing some forms of speech by excluding them from constitutional protection, we implicitly signal what forms of speech have high social salience, and thus move in the direction of establishing not just jurisprudential but cultural coherence. An alternative—obliterating the truth/falsity distinction on the ground that all "truth" is constructed so there is no objective basis for separating truth from falsity—might well lead, the Article concludes, not only to a failure to accomplish that separation but to a failure to distinguish constitutionally protected and culturally valued speech from noise.

II. FALSITY AND THE CATEGORIES OF UNPROTECTED SPEECH

A. THE CURRENT STATUS OF UNPROTECTED SPEECH CATEGORIES

1. *From Chaplinsky to Alvarez*

The plurality opinion in *Alvarez* represents the Court's most recent effort to catalog categories of unprotected speech. It identified some "his-

13. *United States v. Alvarez*, 567 U.S. 709, 723–30 (2012).

14. *Id.* at 717.

15. *Id.* at 733 (Breyer, J., concurring).

16. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964); *NAACP v. Button*, 371 U.S. 415, 433 (1963).

17. Both Justice Kennedy's plurality opinion and Justice Breyer's concurrence emphasized that previous restrictions on false speech had been when it was associated with a "legally cognizable harm." *Alvarez*, 567 U.S. at 719.

18. Jeff Hermes, *Falsity and the First Amendment: The U.S. Supreme Court Rules on the Stolen Valor Act*, DIG. MEDIA LAW PROJECT (June 28, 2012), www.dmlp.org/blog/2012/falsity-and-first-amendment-us-supreme-court-rules-stolen-valor-act [https://perma.cc/M5JQ-SER9].

toric and traditional” categories, including “advocacy intended, and likely, to incite imminent lawless action”; obscenity; defamation; “speech integral to criminal conduct”; “so-called ‘fighting words’”; child pornography; fraud; true threats; and “speech presenting some grave and imminent threat the government has the power to prevent.”¹⁹ It added that “perhaps there exist ‘some categories of speech that have been historically unprotected . . . but have not yet been specifically identified or discussed . . . in our case law,’”²⁰ quoting from an earlier opinion alluding to unprotected categories of speech. “Before exempting a category of speech from the normal prohibition on content-based restrictions,” it noted, “the Court must be presented with ‘persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription.’”²¹

The Court’s posture in *Alvarez* was to treat any regulation on the content of speech as presumptively within the coverage of the First Amendment, and to require that the government demonstrate a compelling interest in regulating the speech in question. It described the categories of unprotected speech and it listed expressions whose content could be regulated. But that was not how, historically, those expressions had been characterized. In its principal case addressing categories of unprotected speech, a 1942 decision in *Chaplinsky v. New Hampshire*,²² the Court, after noting that “the right of free speech is not absolute at all times and under all circumstances,” had announced that “[t]here are certain well-defined . . . classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”²³ It went on to identify some such classes— “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words”—and to claim that “such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”²⁴

That characterization of unprotected speech categories did not emphasize that they had traditionally been proscribed or the government’s reasons for doing so. The “social interest in order and morality” was hardly a precise enumeration of strong governmental reasons for suppressing the forms of speech *Chaplinsky* identified. Instead, *Chaplinsky*’s emphasis was on the “slight social value” of those forms; their being “no essential part of any exposition of ideas.” In determining what sorts of “speech” the First Amendment forbade from being abridged, *Chaplinsky* suggested

19. *Alvarez*, 567 U.S. at 717 (internal citations omitted).

20. *Id.* at 722 (alterations in original) (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)).

21. *Id.* (quoting *Brown v. Entm’t Merch. Ass’n.*, 564 U.S. 786, 792 (2011)).

22. 315 U.S. 568 (1942).

23. *Id.* at 571–72.

24. *Id.* at 572.

those categories of speech played no part. They were altogether outside the coverage of the Amendment.

Chaplinsky's enumeration of "certain well-defined . . . classes of speech" is interesting in two other respects. First, it did not include some additional categories of speech outside the Amendment's coverage, such as fraudulent speech, commercial speech, or speech that invaded a person's privacy or intentionally subjected a person to emotional distress. But a Supreme Court case decided around the same time as *Chaplinsky* held that commercial advertisements received no constitutional protection, and no free speech challenges to the torts of fraud, misrepresentation, invasion of privacy, or intentional infliction of emotional distress had been advanced.²⁵ Indeed one might have concluded, around the time *Chaplinsky* was decided, that a fair number of categories of speech remained outside the First Amendment's coverage and could be regulated without raising any constitutional issues.

2. *Constitutionally Unprotected Categories and False Speech After Chaplinsky*

Second, of the categories of speech whose "prevention and punishment" was treated by *Chaplinsky* as having "never been thought to raise any Constitutional problem," only one of the listed categories, "libelous" speech, involved expressions that were false.²⁶ At common law, both slander and libel actions contained a complete defense of truth. The gravamen of a defamation action was not only that a statement had lowered another's reputation, but that the statement was false. No matter how injurious comments about others might be, if they could be shown to be true, they were not actionable in slander or libel.²⁷ And when one extends the list of unprotected categories of speech to include those enumerated in *Alvarez*, only one additional unprotected category, fraud, can be said to regularly, although not exclusively, be based on false statements of fact. All of the other categories treated by *Alvarez* as capable of being regulated on the basis of their content without generating First Amendment concerns involve expressions presumed to be factually true.

The small number of unprotected categories of speech in which an essential dimension of the category is that the speech is false should not be surprising, given the evolution of twentieth and twenty-first century free speech jurisprudence since *Schenck* and *Abrams*. The overwhelming number of First Amendment challenges to government regulations that came to the Court in the years between the 1920s and the late 1960s were subversive advocacy cases. In cases such as *Gitlow v. New York*,²⁸

25. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

26. See *Chaplinsky*, 315 U.S. at 571–72.

27. See Bertram Harnett & John V. Thornton, *The Truth Hurts: A Critique of a Defense in Defamation*, 35 VA. L. REV. 425, 425 (1949).

28. 268 U.S. 652 (1925).

Whitney v. California,²⁹ *DeJonge v. Oregon*,³⁰ *Herndon v. Lowry*,³¹ *Dennis v. United States*,³² *Yates v. United States*,³³ *Scales v. United States*,³⁴ and *Brandenburg v. Ohio*³⁵—a sequence that marked the emergence of a progressively speech-protective definition of the Court’s test for criminalizing subversive advocacy—there was no issue of the truth or falsity of the defendant’s comments. The issue was simply whether the comments, taken as true, could be made the basis for a criminal prosecution because, depending on the Court majority’s existing standard for criminalizing subversive advocacy, they had a “natural tendency” to cause evils that a state had a right to prevent,³⁶ or represented a “clear and present” danger to the security of the state,³⁷ or were “directed to inciting or producing imminent lawless action and [were] likely to incite or produce such action.”³⁸ Subversive advocacy cases, and a smattering of other cases where states or the federal government sought either to compel particular forms of speech³⁹ or to prohibit speech on the ground that it interfered with the movement of citizens on public streets,⁴⁰ constituted a threat to the integrity of the judicial process,⁴¹ precipitated a hostile audience reaction,⁴² amounted to a breach of the peace,⁴³ or was “obscene,”⁴⁴ constituted most of the Court’s free speech docket from *Chaplinsky* through the early 1960s. None of those cases involved efforts to regulate speech on the ground that it was false.

29. 274 U.S. 357 (1927).

30. 299 U.S. 353 (1937).

31. 301 U.S. 242 (1937).

32. 341 U.S. 494 (1951).

33. 354 U.S. 298 (1957).

34. 367 U.S. 203 (1961).

35. 395 U.S. 444 (1969) (per curiam).

36. *Debs v. United States*, 249 U.S. 211, 216 (1919). Holmes employed the “natural tendency” (typically known as “bad tendency”) test in *Debs* and in *Frohwerk v. United States*, 249 U.S. 204, 208–209 (1919), despite maintaining in *Schenck* that the “question in every [subversive advocacy] case” was “whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” *Schenck v. United States*, 249 U.S. 47, 52 (1919). Beginning with *Abrams*, he was to insist that “clear and present danger” was the appropriate test and it was substantively more demanding than “bad tendency.” *Abrams v. United States*, 250 U.S. 616, 628 (1919).

37. *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937). Court majorities had adopted the clear and present danger test and continued to employ it until *Brandenburg*, 395 U.S. at 447–49.

38. *Brandenburg*, 395 U.S. at 447.

39. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943) (compulsory flag salutes in public schools); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 592–93 (1940), *overruled by W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

40. *Schneider v. State*, 308 U.S. 147, 164 (1939) (distribution of leaflets).

41. *Bridges v. California*, 314 U.S. 252, 273 (1941) (threat to call a strike by defendant in response to contempt proceeding).

42. *Cantwell v. Connecticut*, 310 U.S. 296, 302–03 (1940).

43. *Terminiello v. Chicago*, 387 U.S. 1, 5 (1949).

44. *Roth v. United States*, 354 U.S. 476, 479 (1957).

B. DEVELOPMENTS IN FIRST AMENDMENT JURISPRUDENCE
AFTER THE MID-1960S

Beginning in the middle of the 1960s, the Court's interpretation of the First Amendment began to move in some unexpected directions. One came in a recognition that symbolic communicative conduct, such as picketing or protesting refusals of service in restaurants or burning a draft card as a political protest, was a form of protected "speech."⁴⁵ Another was a tendency to narrow the scope of certain unprotected speech categories, such as obscenity,⁴⁶ "fighting" words,⁴⁷ and true threats,⁴⁸ along with the sweeping of other categories, such as nonobscene "lewd" or "profane" expressions, into the ambit of First Amendment protection.⁴⁹ In one case, when the wearer of a jacket with the message, "Fuck the Draft," was convicted of disturbing the peace by "offensive conduct" for displaying the jacket in a courthouse, the Court concluded that the message was "speech" although worn on an article of clothing,⁵⁰ that it was not speech that provoked a "violent reaction"⁵¹ or constituted a true threat because it was not directed at any particular individual,⁵² that it was not "obscene" because it lacked erotic content,⁵³ and that its "offensiveness" was not imposed upon a captive audience.⁵⁴ Five years after that decision, the Court added "commercial speech," which it defined as speech proposing a commercial transaction, to the list of expressions to which the First Amendment accorded some protection.⁵⁵

And early in that sequence of developments, the Court had concluded that at least one historically unprotected category of false speech, "libelous" speech, would also be given constitutional protection under some circumstances.⁵⁶ It would subsequently extend that protection to nondefamatory statements that placed persons in a "false light,"⁵⁷ and, by analogy, to false or misleading statements of fact in political campaigns.⁵⁸ The principal basis for the Court's partial constitutionalization of false statements of fact directed at "public officials," "public figures," or associated with "matters of public concern" was that speech about those subjects was highly valued in a democracy and thus should receive an ample measure of constitutional protection. Consequently, factual errors in that

45. *United States v. O'Brien*, 391 U.S. 367, 382 (1968); *Edwards v. South Carolina*, 372 U.S. 229, 235–36 (1963); *Garner v. Louisiana*, 368 U.S. 157, 173–74 (1961).

46. *Memoirs v. Massachusetts*, 383 U.S. 413, 420 (1966).

47. *Street v. New York*, 394 U.S. 576, 592 (1969).

48. *Watts v. United States*, 394 U.S. 705, 707 (1969).

49. *Cohen v. California*, 403 U.S. 15, 20 (1971).

50. *Id.* at 18.

51. *Id.* at 20.

52. *Id.*

53. *Id.*

54. *Id.* at 21–22.

55. *Va. State Bd. of Pharm. Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748, 761 (1976).

56. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964).

57. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

58. *Brown v. Hartlage*, 456 U.S. 45, 58–59 (1982).

form of speech should be given a “breathing space” to ensure its survival.⁵⁹ The result of those decisions has been that false and damaging statements about public officials or public figures,⁶⁰ false statements of fact made in the course of political campaigns, or statements portraying other individuals in a “false light” are only actionable under the common or statutory law of a respective jurisdiction, if the statements are either intentionally false or made with reckless disregard to their truth or falsity.⁶¹ Moreover, false statements of fact made about private citizens on matters of public concern are only actionable under state law if they are made negligently, grossly negligently, or intentionally.⁶²

Even after commercial speech has been brought within the First Amendment’s coverage, however, false statements of fact made in the course of commercial speech remain unprotected.⁶³ The reason advanced for that treatment underscores why the Court has chosen to protect some false speech: it currently treats commercial speech as of “lower value” for First Amendment purposes than the forms of speech which it believes require a “breathing space” for inaccurate factual comments.⁶⁴ The Court’s conclusions that “[a]lthough the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate,”⁶⁵ and “[t]he First Amendment require[ments] that we protect some falsehood in order to protect speech that matters”⁶⁶ apparently do not extend to false and misleading commercial speech.

C. THE CURRENT STATUS OF FALSE SPEECH

1. False “Opinions”

The above overview of developments in First Amendment jurisprudence omits one sequence of cases that serves to complicate what is meant by “false speech” for constitutional purposes. The sequence began with the declaration in *Gertz* that “[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction . . . on the competition of other ideas.”⁶⁷ Coupled with the assertion in the same case that “there is no constitutional value in false statements of fact,”⁶⁸ the declaration gave some courts the impression that the Court was seeking to distinguish between statements of “opinion,” which were completely protected, and false statements of fact, which were usually not. The juxtaposition of the terms

59. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); *N.Y. Times Co.*, 376 U.S. at 271–72; *NAACP v. Button*, 371 U.S. 415, 433 (1963).

60. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 153 (1967).

61. *N.Y. Times Co.*, 376 U.S. at 279–80.

62. *Gertz*, 418 U.S. at 347.

63. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

64. *Id.* at 563.

65. *Gertz*, 418 U.S. at 340.

66. *Id.* at 341.

67. *Id.* at 339–40.

68. *Id.* at 340.

“idea” and “opinion” in the declaration could have been taken as saying that “ideas” could not, at least for constitutional purposes, be determined to be “false.”⁶⁹

That reading of the declaration turned out to be erroneous. For an interval, some lower courts concluded that the Court meant to be carving out something like an absolute privilege for “opinion,” determining that the value of ideas could only be determined in competition with other ideas.⁷⁰ Although that view seemed consistent with one of the established rationales for protecting free speech—that allowing expressions into the “marketplace of ideas” fostered a “search for truth” in that marketplace as ideas competed with one another—it threatened to give speakers the ability to secure complete protection for comments that would otherwise be actionable in slander or libel merely by prefacing the comments with “in my opinion.”

In *Milkovich v. Lorain Journal Co.*,⁷¹ a 1990 decision, the Supreme Court addressed the issue of whether there was a First Amendment privilege for “opinion” and concluded that, where a statement couched as an opinion appeared to be predicated on underlying defamatory facts, there was not.⁷² The *Milkovich* case involved a statement by a newspaper columnist that a high school wrestling coach, whose conduct in allegedly starting a brawl at a wrestling match was being investigated at a disciplinary hearing, had “lied at the hearing after . . . having given his solemn oath to tell the truth . . . [and] got away with it.”⁷³ A majority of the Court concluded that, where a statement couched as an opinion implied an underlying “knowledge of facts” whose falsity could be determined, the statement was not necessarily privileged in a defamation action. Its being privileged did not turn on its asserted status as an “opinion” but on the whether it could be shown to be false, the status of the person allegedly being defamed, and the subject matter of the defamation.⁷⁴

By the opening of the twenty-first century, defamatory speech remained the principal area of protected speech whose earlier exclusion from First Amendment coverage had been based on falsity.⁷⁵ In bringing

69. It was taken as such by the District of Columbia Circuit in *Ollman v. Evans*, 750 F.2d 970, 975–76 (D.C. Cir. 1984) (en banc).

70. See, e.g., *McCabe v. Rattiner*, 814 F.2d 839, 841 (1st Cir. 1987); *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302 (8th Cir. 1986); *Mr. Chow of N.Y. v. Ste. Jour Azur S.A.*, 759 F.2d 219, 223 (2d Cir. 1985).

71. 497 U.S. 1 (1990).

72. *Id.* at 21.

73. *Id.* at 5.

74. *Id.* at 18–20.

75. There were two other examples. One was cases where plaintiffs alleged that non-defamatory statements of fact had portrayed them in a “false light,” thus violating their privacy. The tort of false light privacy had been adopted by several jurisdictions in the early twentieth century, some in common law decisions and some by statute. See, e.g., N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2019); *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68 (Ga. 1905). Beginning in 1967, the Court treated the *New York Times Co.* standard of constitutional malice as applying to all false light privacy cases, although in a 1974 decision, it suggested that in light of its creation in *Gertz* of a lower standard in cases where a private citizen was defamed on a matter of public concern, a parallel treatment might occur for

defamatory speech partially within the Amendment's ambit, the Court had retained falsity as an essential element of defamation actions but had carved out a "breathing space" for inaccurate and damaging statements of fact in certain contexts. Where "public officials" or "public figures" were the plaintiffs in defamation actions, that breathing space was ample; only false and damaging statements made with *New York Times Co. v. Sullivan* malice were actionable. Where private citizens were allegedly defamed in connection with matters of public concern, the breathing space was narrower: negligently false statements could result in liability. And, in 1985, the Court created another category of defamation actions, cases where a private citizen plaintiff (in that instance a corporation) was allegedly defamed on a matter of "private" concern: the dissemination of information about the corporation's financial health to a limited group of prospective investors.⁷⁶ In that category of defamation actions, a majority of the Court concluded there was no First Amendment privilege at all: the state common law of defamation governed.⁷⁷ This meant, depending on state law, that a defendant in a "private"/"private" defamation suit might be liable even for a non-negligent false and damaging statement of fact.⁷⁸ Thus, after *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, speech defaming a private citizen on a matter of private concern was placed outside the boundaries of First Amendment coverage.

2. Currently Unprotected Categories of Speech

When the *Alvarez* decision totaled up "historic and traditional" categories of speech that remained unprotected by the First Amendment, it also referred to "some categories of speech that have been historically unprotected . . . but have not yet been specifically identified or discussed . . . in

false light privacy. *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 250 (1974); *Time, Inc. v. Hill*, 385 U.S. 374, 387 (1967). In that decision, however, where a newspaper was sued by a private citizen under the Ohio common law of false light privacy for portraying her in a feature article, the Court found that the trial court had instructed the jury that the *New York Times Co.* standard applied, and the jury found that the newspaper had violated it, so the case "present[ed] no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for . . . false statements injurious to a private individual under a false-light theory of invasion of privacy." *Cantrell*, 419 U.S. at 250.

The other example was false or misleading speech in political campaigns. In *Brown v. Hartlage*, 456 U.S. 45 (1982), the Court invalidated a section of the Kentucky Corrupt Practices Act that prevented candidates in political campaigns from offering material benefits to voters in exchange for their votes, as applied to a candidate for a county commissioner's seat in an election who had promised to lower his salary if elected, even though his salary had been "fixed by law." *Id.* at 46. When the candidate learned that his promise could not be fulfilled, he retracted it and subsequently won the election. His opponent sued to have the election declared void because of the violation, and the Kentucky Court of Appeals agreed. After granting certiorari, the Supreme Court reversed, holding that there should be a breathing space for false and misleading statements in political campaigns and requiring that such statements could only be punished if they violated the *New York Times Co.* standard. *Id.* at 60–62.

76. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985).

77. *Id.* at 761.

78. *Id.*

our case law.”⁷⁹ That list is quite a long one. It includes three regimes of legal regulation: securities law,⁸⁰ antitrust law,⁸¹ and most of labor law,⁸² where much of the regulated activity is expressive conduct or “pure” speech. It also includes sexual harassment,⁸³ copyright law,⁸⁴ and trademark law.⁸⁵ It includes professional regulation,⁸⁶ most of the law of evidence,⁸⁷ and large segments of tort law in addition to fraud.⁸⁸ To those “unprotected categories of speech” one might think of two others where the regulation of expressive activities seems incontrovertibly outside the ambit of First Amendment concerns: speech in the formation of contracts⁸⁹ and speech soliciting criminal activity.⁹⁰ No current court would find that the First Amendment shields false or misleading speech affecting the creation of a contract from exposing the speaker to contract damages, or speech asking another to commit a murder from criminal sanctions.⁹¹ Although there has been commentary raising the potential applicability of the First Amendment to some of those unprotected cate-

79. *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (alterations in original) (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)).

80. *SEC v. Wall St. Pub. Inst., Inc.*, 851 F.2d 365, 373 (1988).

81. *See, e.g.*, *State v. Blyth*, 226 N.W.2d 250, 262–63 (Iowa 1975) (the Court summarily dismissed an argument that price-fixing, made generally illegal under the Sherman Antitrust Act, should receive a First Amendment privilege where it involved speech).

82. In *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940), the Court invalidated a statute prohibiting all forms of picketing. But courts have regularly treated speech made in connection with labor activities as capable of being regulated more extensively than the same form of speech could be regulated outside the labor context. *See, e.g.*, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616–20 (1969) (treating the announcement of a plant closure as a threat which could be sanctioned under NLRB procedures); *Farris Fashions v. NLRB*, 32 F.3d 373, 376 (8th Cir. 1994) (sustaining the determination that a statement by a company that it would close if employees voted to unionize constituted a true threat).

83. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

84. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

85. *Friedman v. Rogers*, 440 U.S. 1, 15–16 (1979).

86. *Lowe v. SEC*, 472 U.S. 181, 210–11 (1985); *Accountant’s Soc’y of Va. v. Bowman*, 860 F.2d 602, 603–04 (4th Cir. 1988).

87. *See* Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 *UCLA L. REV.* 705, 709 (2004).

88. Those include negligent instructions or advertisements on products and product disparagement. *See generally* Frederick Schauer, *Mrs. Palsgraf and the First Amendment*, 47 *WASH & LEE L. REV.* 161 (1990).

89. Although the formation of contracts obviously involved speech, the Supreme Court has never even entertained a case in which common law restrictions on contract formation were challenged as impermissible under the First or Fourteenth Amendments. As Frederick Schauer has put it, “The speech with which we make contracts is, in general, not within the scope of ‘the freedom of speech’ and thus not covered by the First Amendment.” Frederick Schauer, *The Boundaries of the First Amendment*, 117 *HARV. L. REV.* 1765, 1773 (2004).

90. *See generally* KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* (1989); David A. Anderson, *Incitement and Tort Law*, 37 *WAKE FOREST L. REV.* 957 (2002).

91. As Frederick Schauer put it in a 2004 article: “‘Speech’ is what we use to enter into contracts, make wills, sell securities, warrant the quality of the goods we sell, fix prices, place bets, bid at auctions, enter into conspiracies, commit blackmail, threaten, [and] give evidence at trials.” Schauer, *supra* note 89, at 1773. The content of all of those forms of speech can be regulated, in all but a narrow category of circumstances, without raising First Amendment issues at all.

gories of speech,⁹² and numerous efforts on the part of litigants to argue that they ought to receive First Amendment protection,⁹³ it seems appropriate to conclude that the principal reason why they have not “been specifically identified or discussed” as constitutionally unprotected in the Supreme Court’s case law is the perceived implausibility of regulation of their content raising any First Amendment concerns.

3. *Falsity and Unprotected Categories*

How many of the content-based regulations of unprotected categories of speech can be said to be primarily driven by an effort to sanction factually false expressions? Several illustrations come to mind. The regulation processes for securities offerings and proxy selections are persistently concerned with identifying false or misleading speech in those ventures. Regulations on representations made in union certification and representation elections seem largely designed to ensure that false or misleading promises about the future consequences of unionization will not taint those elections. Copyright and trademark regulations are designed in part to ensure accurate representations about the ownership and consequent legal rights of holders of intellectual property. And, in tort law, the imposition of sanctions on enterprises who inaccurately advertise products or inaccurately warn about their risks, or on commercial speakers who disparage their competitors’ products, seems principally associated with penalizing false speech in those areas. Thus, a negligent, or in some instances even a nonnegligent, false statement about securities, diet products, the risks of chainsaws, or the content of cigarettes can be sanctioned without any First Amendment concerns being raised.

To be sure, unprotected categories of speech remain where the content of true speech is regulated. All of the historically unprotected categories enumerated in *Alvarez*, save defamation and fraud, involve true speech. But two dimensions of the Court’s enumeration of unprotected categories should be noted. One is that the scope of some of the unprotected catego-

92. For illustrations, see C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 905–15 (2002); Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223, 278–323 (1990); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn’t Bark*, 1994 SUP. CT. REV. 1, 21–28; James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941, 949–57 (1999). Eugene Volokh’s casebook, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES, AND POLICY ARGUMENTS* (2001), is perhaps the most prominent example of commentary premised on the assumption that content regulation of speech presumptively raises First Amendment challenges and that unprotected categories of speech, such as obscenity, are “exceptions.” *Id.* at xvii–xix.

93. For illustrations, see *Full Value Advisors, LLC v. SEC*, 633 F.3d 1104, 1108 (D.C. Cir. 2011) (requiring financial disclosures); *Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 6 (1st Cir. 2007) (contracts for advertising and other services); *Elli v. City of Ellisville*, 997 F. Supp. 2d 980, 984 (E.D. Mo. 2014) (penalizing motorist for flashing lights warning oncoming motorists of presence of police); *Genesee Cty. Emps. Ret. Sys. v. Thornburg Mortg. Sec. Tr.*, 825 F. Supp. 2d 1082, 1236 (D.N.M. 2011) (credit ratings); *Rosenburg v. Harwood*, No. 100916536, 2011 WL 3153314 (D. Utah, May 27, 2011) (erroneous instructions on maps and charts by Google Maps).

ries has been narrowed over time. Examples are obscenity,⁹⁴ “fighting” words,⁹⁵ and speech posing a “grave and imminent threat” to government.⁹⁶ As the content of true speech deemed to fall outside the coverage of the First Amendment is progressively restricted, the importance of speech in an unprotected category being false may be said to have been implicitly enhanced.

That conclusion leads to the second dimension of the Court’s listing of unprotected categories of speech. Once one considers historically unprotected categories that have not yet been “specifically identified or discussed” in the Court’s cases, one finds, we have seen, that a fair number of those categories involve false speech. On the other hand, it is plain from the Court’s defamation and privacy decisions from *Brown v. Hartlage*, and from *Alvarez* itself, that the falsity of speech does not in itself serve to place an expression in an unprotected category. There are not only “breathing spaces” for false speech allegedly lowering the reputation of another, placing another in a false light, or violating campaign practice laws, but *Alvarez* concluded that false speech may only be regulated where it is associated with some activity that, outside the arena of commercial speech, the government can demonstrate a compelling interest in regulating.⁹⁷

Thus, the current status of falsity in First Amendment jurisprudence seems to be as follows. False commercial speech falls outside the coverage of the First Amendment and can be regulated with impunity. This means, among other things, that varieties of false commercial speech deemed tortious, ranging from intentional or negligent misrepresentations of material facts in commercial settings to negligent warnings on products to defamatory comments about private citizens about private matters to disparaging statements about competitors’ products, receive no constitutional privileges. On the other hand, public, noncommercial false speech receives considerable First Amendment protection. The “breathing” spaces accorded false speech made about public officials, public figures,

94. Compare *Roth v. United States*, 354 U.S. 476, 489 (1957) (test for obscenity is “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest”), with *Miller v. California*, 413 U.S. 15, 24 (1973) (adding the requirements that a work “depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law,” and that, “taken as a whole, lacks serious literary, artistic, political, or scientific value”).

95. Compare *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), with *Hess v. Indiana*, 414 U.S. 105 (1973), where the Court emphasized that for a “fighting words” conviction to be sustained, the language in question needed to be directed at a person or group in particular. *Hess*, 414 U.S. at 108. In *Hess*, the defendant had been convicted under a disorderly conduct statute for saying, “We’ll take the fucking street again,” after demonstrators blocking the path of vehicles on a public street had moved to the sidewalks after being confronted by police. *Id.* at 107.

96. In *United States v. Alvarez*, 567 U.S. 709, 717 (2012), Justice Kennedy indicated that restrictions on speech in that category were “most difficult to sustain,” citing the Court’s per curiam opinion in *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam) (the “Pentagon Papers” case).

97. *Alvarez*, 567 U.S. at 717.

private citizens associated with matters of public concern, and candidates in elections mean that persons injured by that speech need to show, depending on its context, that it was intentionally false, recklessly false, or negligently false. And when a false noncommercial statement is sought to be regulated simply because of its falsity, the effort at regulation falls afoul of the First Amendment.

III. THE TRUTH/FALSITY DISTINCTION IN FIRST AMENDMENT JURISPRUDENCE

A. DOCTRINE

Why have we arrived at a situation in which most efforts to regulate false public noncommercial speech are likely to run up against considerable First Amendment barriers? One might, of course, point to the very high value accorded speech about public officials in cases such as *New York Times Co.*, and the capacity of defamation suits, which can include punitive damage awards, to chill such speech. One might also treat as presumptively correct the observation in *New York Times Co.* that erroneous statements are inevitable if debate in a democratic society is to be “uninhibited, robust and wide-open,” and connect the presumption up with an assertion of the public’s abiding interest in, and “right to know” about “matters of public concern,” thereby creating a First Amendment breathing space for numerous inaccurate “public” statements.⁹⁸ But the *Alvarez* decision seems to go farther than that. Although one could easily posit an interest on the part of members of the public in knowing about the authenticity of recipients of the Congressional Medal of Honor, the defendant in *Alvarez* lied about his having received the award for private reasons: he wanted to impress members of an organization about his military record. It is hard to see why there should be a breathing space for that sort of inaccuracy. Yet the Court concluded that *Alvarez*’s statement could not be criminalized at all. Why should that sort of lie be valued?

One potential way to clarify matters would be to emphasize that many of the categories of expression that remain outside the coverage of the First Amendment involve versions of false commercial speech. Why should those expressions be regarded as subject to regulation without raising constitutional difficulties but false public noncommercial speech be treated differently? One reason apparently given doctrinal weight by the Court is its conceptualization of speech proposing a commercial transaction as “lower value” speech. But the Court’s own rationale in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, in which it brought commercial speech within the ambit of the First Amendment on the ground that members of the public might well have a greater interest in the price of prescription drugs than in “the day’s most urgent

98. *N.Y. Times Co.*, 376 U.S. at 270.

political debate,”⁹⁹ would seem to raise the question of to whom commercial speech can be said to have a “lower value.”

Another possibility might explore the implications of *Milkovich*’s conclusion that “ideas” premised on underlying false and defamatory facts should not receive First Amendment protection as “opinions.” That conclusion was based on a theory that false facts can “taint” the ideas associated with them, and since one of the purposes of the First Amendment is to further a “search for truth” in the “marketplace of ideas,” the tainting of an idea by exposing its false premises can be a way in which the idea gets devalued in the marketplace. If one says, “Don’t vote for Jones for mayor because he is an embezzler,” and Jones is not an embezzler, the idea that one should not vote for Jones gets tainted and devalued. This is another way of expressing the dictum in *Gertz* that “there is no constitutional value in false statements of fact.”

The difficulty with that argument is that under the Court’s current First Amendment jurisprudence, there may be “no constitutional value” in false statements of fact made in the course of commercial speech, but there is plenty of value in false statements made in public noncommercial speech. Even if after *Milkovich* the proposition that “under the First Amendment there is no such thing as a false idea” seems dubious, lots of false speech is constitutionally privileged. And it is hard to see, after *Virginia Pharmacy* and *Milkovich*, why false commercial speech can be regulated with impunity but false noncommercial speech not. If members of the public’s interest in commercial transactions can be said to be as keen, or even keener, than their interest in urgent political issues, and the falsity of factual premises underlying ideas can be said to taint those ideas in the marketplace, why should the assumption that false statements of fact can be excluded from commercial marketplaces, but need to remain included in noncommercial ones, remain in place?

B. FIRST AMENDMENT COVERAGE AND CULTURAL SALIENCE

There is, however, another way to think about unprotected categories of speech and the role falsity plays in their construction. One can ask what role unprotected categories of expression play in a culture that strongly values freedom of speech as a general matter. Suppose that all forms of speech were constitutionally privileged, so that speakers were “free” to say anything about any subject with impunity. If that were the case, how would one be able to determine what forms of speech were valued in American culture? “Speech,” for constitutional purposes, would become the equivalent of noise. Thus, one can think of the process by which certain categories of speech are excluded from the First Amendment’s coverage to be a way of signaling that the categories of speech included within that coverage are culturally salient. Inaccurate speech

99. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 763 (1976).

about public officials receives a measure of constitutional protection because speech about those officials is generally regarded as of very high cultural salience. In contrast, speech that meets the Court's current test for obscenity receives no constitutional protection because it is generally regarded as offensive to many persons and forming "no essential part of any exposition of ideas," and therefore has low cultural salience.¹⁰⁰

Placing some forms of false speech outside the coverage of the First Amendment can be thought of as a signal that such speech lacks cultural salience. It also signals that the false speech included within the Amendment's coverage has some salience. The *Alvarez* decision appears to amplify that signal, concluding that false speech not associated with any activity that the state has an interest in regulating or suppressing *must* receive constitutional protection. In a free society, *Alvarez* suggests, it is permissible to lie as long as the lie does not countenance anything that the state has the power to restrict. The difficulty that conclusion raises for First Amendment jurisprudence is that it places pressure on the boundary between protected and unprotected false speech. If the defendant in *Alvarez* may not be convicted because the government lacks the power to criminalize lies in themselves, what justifies the regulation of inadequate warnings about the risks of products?

It may be that the Court's currently different treatment of public false noncommercial and public false commercial speech is vulnerable because the Court's own commercial speech decisions serve to demonstrate that commercial speech has high cultural salience, and thus false commercial speech, instead of being excluded from the protection of the First Amendment, should be accorded some breathing space. But that approach seems to ignore the central issue at stake when some forms of false speech are given constitutional protection and others are not. That issue is why false speech should have cultural salience at all. *Milkovich* suggests that ideas premised on false underlying facts become tainted and thus contribute less to any search for truth in the marketplace. It may be that there is some other First Amendment rationale for protecting false statements of fact, such as their potential contribution to self-governance or as expressions of personal autonomy, but at first blush neither rationale seems intuitively attractive. Why should ideas premised on false facts be given cultural salience as contributions to public affairs or statements of individual tastes or preferences?

Why, in short, is false speech being afforded cultural salience in First Amendment jurisprudence? The ambiguous status of protection for false public noncommercial speech hovers ominously over contemporary public discourse. That discourse features numerous comments by public officials, most notably the President of the United States, that can be shown to be factually false, and equally numerous labeling of the media's reporting of events as "fake news," implying that the reports are inaccurate

100. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

constructions of evidence designed to further the agendas of the reporting institutions. It is common for commentators to deplore those tendencies in the discourse and to suggest that as less and less attention is given to factual reliability in discussions of public affairs, those discussions will be coarsened.

But the epistemological message conveyed by increasing factual inaccuracies, and increasing claims of “fake news” reporting, in the discourse of public affairs is that a distinction between factual truth and factual falsity is elusive. It is elusive, the message suggests, because objective reality cannot adequately be distinguished from constructions of that “reality” by humans experiencing it. Truth needs to be placed in scare quotes to emphasize its constructed quality. Once that suggestion takes hold, it follows that constitutionally or culturally privileging true speech, and affording far less protection or salience to false speech, becomes harder to justify, especially in a culture that values freedom of expression and distrusts efforts on the part of the state to restrict it.

Seen in this fashion, the use of the truth/falsity distinction in First Amendment jurisprudence as a way of establishing boundaries between protected and unprotected speech, and between expressions that are valued for their cultural salience and those that are devalued, seems a way of shoring up the following propositions. There is such a thing as objective truth. Truth is capable of being empirically observed and analyzed. There is also such a thing as factual falsity. And it is beneficial, especially in a society that encourages widespread freedom of expression, to have the extent to which a particular form of speech received constitutional protection turn, in important part, on whether it is factually false or true. If the truth/falsity distinction were to become obliterated in the Court’s First Amendment jurisprudence, that jurisprudence might not only become doctrinally incoherent, it would fail to signal what forms of speech Americans value and what forms they do not.

IV. CONCLUSION

In his shout of fire example in *Schenck*, Holmes may have characterized the shout as false to give the impression that it was intentionally designed to cause a panic. As such, the example served to underscore his claim that constitutional protection for speech was not limitless. His characterization of the shout as false may thus not have meant to imply that a true shout of fire which caused a panic would necessarily have been protected. Since the speech being criminalized in *Schenck* was true, a distinction between true and false speech was not vital to Holmes or his colleagues in *Schenck*. Nor was it vital, we have seen, to any of the free speech cases the Court decided between *Schenck* and *New York Times Co.*

It may well have been that for the entire interval of cases it decided between 1919 and 1964, the Court’s Justices were assuming that false statements of fact were not within the coverage of the First Amendment.

No cases suggesting that they might be had come to the Court in that time frame. And *New York Times Co.* was heard by the Court, and decided in the manner it was decided, not because the Justices in the majority believed that false statements of fact were worthy of constitutional protection, but because the inaccuracies in the advertisement in *New York Times Co.* were comparatively trivial, the subject matter of the ad was a protest against violations of the civil rights of African Americans, and some of the "southern violators" named in the ad were public officials. In addition, defamation law, in some jurisdictions, allowed punitive damages to be assessed for non-negligent and comparatively small factual inaccuracies, allowed local juries to determine whether false statements of fact were damaging to the reputations of persons, and conditioned the defense that a statement was true on its having been made "with good motives and justifiable ends." It was an ideal device by which to punish less than fully accurate comments that provoked members of a community, and the Justices recognized it as such.

So the Court's sweeping defamation law within the First Amendment may have had, despite the majority opinion in *New York Times Co.*'s effort to create a breathing space for inaccuracies in comments about public officials, little or nothing to do with a judgment that false statements of fact at times had cultural salience. It may have simply been a response to the fact that defamation law required expressions to be false statements of fact to be actionable. The advertisement in *New York Times Co.* was provocative to some persons in Alabama primarily because of its critical comments about "southern violators," not because it was inaccurate in places. But to punish, in the form of compensatory and punitive civil damages, those who took out the ad and the newspaper that published it, defamation suits were required, and successful defamation actions required proof that false and damaging statements of fact had been made. Hence in order to protect the sort of statements made about public officials in *New York Times Co.*, it was incumbent on the Court to give false speech a measure of constitutional protection.

Once the "breathing space" theory of protection for factual inaccuracies made in the comments about matters of high public concern was launched in *New York Times Co.*, it was there to be drawn upon in a number of additional defamation and privacy cases, reaching the point, before *Gertz* and *Milkovich*, where any false statement of fact made about a matter of public concern needed to be intentionally or recklessly false before it could be regulated, and where any allegedly false "opinion" was entirely protected by the First Amendment. The Court pulled back from those positions in its defamation decisions, stating that false statements of fact had "no constitutional value" and were "peculiarly valueless." In making those statements the Justices may have been dimly aware that in bringing false statements of fact within the protection of the First Amendment they were undermining one of the principal boundaries between protected, culturally salient forms of speech and other forms.

But doctrinally speaking, that recognition came a bit late. It now seems as if *New York Times Co.*-level, or at least *Gertz*-level protection, applies to any form of false public noncommercial speech, and under *Alvarez* factually false speech itself, unconnected to any appropriately sanctioned activity, enjoys full First Amendment protection.

I do not believe that those engaged in fashioning the Court's current First Amendment jurisprudence anticipated or welcome this state of affairs, and if they did, or do, a reconsideration seems in order. For applying the truth/falsity distinction to determine whether a particular form of speech is within or outside the First Amendment's coverage, and, if within, what level of constitutional protection the form of speech should be accorded, helps Americans determine what speech they value and what speech they do not. As such, the distinction serves to separate culturally salient speech from noise and also serves to separate the cultural respect given to truth from that given to falsity. Taking seriously the difference between factually true and factually false speech, and using First Amendment law to shore up that distinction, helps Americans fend off the nightmarish prospect that all "truth" is thought to be constructed and thus one cannot tell fake from real news or truths from lies. A culture ostensibly dedicated to freedom of speech should not lose sight of the fact that not all speech is equal or should be equally valued. Nor should it lose sight of the distinction between recognizing that sometimes lies may not constitutionally be criminalized and treating truth and falsity as moral, or constitutional, equivalents.

