



POINT: Truthfully, be careful what you wish for

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Should the law do more to punish lying about elections? Careful: Such proposals can curtail legitimate speech and give the government power it's likely to misuse.

Last term, Congress came close to passing a bill that would have prohibited individuals from knowingly deceiving others about various topics relating to federal elections, including eligibility and voter registration rules. Other schemes would punish some false statements about whether a given election was rigged or stolen. Despite urgings from Gov. Jay Inslee, Washington state lawmakers last year declined to pass a bill forbidding candidates from making knowingly false statements about an election's legitimacy if those statements were intended to and did lead to lawlessness.

In the name of protecting democracy, other lawyers and advocates seek to go even further. Some favor banning false online assertions that might discourage people from voting — an idea that could expose a wide range of current election discussions to criminal sanction.

Such proposals are bad as policy and unconstitutional under the First Amendment. While combating lies is a worthy goal, we can do without George Orwell's Ministry of Truth.

Some restrictions on election speech are relatively innocuous. Most of us can live with a law against telling voters the wrong time or place for an election, provided the intent is to lead them astray.

But official efforts to combat so-called disinformation quickly run into controversy. Last year word got out that the Biden administration had created something called the Disinformation Governance Board, tasked with combating falsehoods in the name of homeland security. An uproar followed, not least because the appointee chosen to run the panel, who soon resigned, turned out to have voiced strong views on politically contentious topics.

The public appears divided. A 2021 Pew survey found 48% of Americans agreed that "the U.S. government should take steps to restrict false information online, even if it limits people from freely publishing or accessing information," while 50% preferred the statement, "People's freedom to publish and access information should be protected, even if it means false information can also be published."

It's true there are many kinds of lies the law doesn't protect. Principles of free speech won't get you off the hook if you lie to carry out fraud in business, use false pretenses to raise charitable funds, impersonate a police officer or mislead a government agency. There are other examples, too, perhaps the most important among them defamation. The First Amendment does not protect false statements about someone that harm their reputation.

As David Ardia of the University of North Carolina points out in an article in the *Journal of Free Speech Law*, 16 states have laws banning false statements about candidates for public office. To the extent these laws track the law's definition of defamation, there's a good chance courts will uphold them, Ardia writes, since that speech is already marked out as lacking legal protection. But many of the laws go further by banning false statements about ballot measures such as referendums. Those are more likely to be struck down if challenged in court.

The same is true of laws that seek to shield candidates from untruths that wouldn't meet the law's test for defamation — say, claims they supported a certain bill when they didn't.

In a 2012 case called *U.S. v. Alvarez*, the Supreme Court held that the First Amendment protects much untruthful speech, even the kind that is morally inexcusable and socially worthless. The court, in that case, struck down a law Congress had passed making it a federal offense to lie about having received military honors. While the justices were divided on the details, most saw it as simply too dangerous to entrust the government with a free-floating power to forbid lying.

The justices were right. At one point in American history, Congress passed a law banning “false” and “malicious” statements intended to expose to “contempt or disrepute” or “hatred” the nation's elected officials. A Supreme Court justice then wrote approvingly that to “destroy confidence in government” was to “induce disobedience to every act of it.” But that was the notorious Sedition Act of 1798, which the Adams administration soon used as a tool to harass its enemies.

If telling the occasional whopper was a bar to taking office, our halls of government might be depopulated on both sides. We can and should counter lies by telling truths — but we can never get rid of them altogether.

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