Speech Is Free But Lies Will Cost You: A Comparative Constitutional Law Perspective on Prohibiting False Election Speech in Canada and the United States

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Abstract

This Article defends the constitutionality of a statutory prohibition on false election speech using a comparative analysis between Canada and the United States. The Article argues that as the political stability of Western liberal democracies has been tested by the steady flow of misinformation and disinformation, one way to curb this growing problem is to ensure that elections—the hallmark of the democratic process—are insulated against patent falsehoods aimed at disenfranchising eligible voters and undermining the electoral process. Drawing on the constitutional doctrines of Canada and the United States concerning a "right to lie," and distinguishing between the egalitarian and libertarian models of election regulation under the Canadian Charter of Rights and Freedoms and the U.S. Bill of Rights, the Article argues that the protection of the right to vote and preservation of the integrity of election administration are compelling state interests that the government must pursue. Ultimately, while a difference in judicial treatment of a proposed statutory prohibition on false election speech illustrates a more profound theoretical debate about competing approaches to election regulation in Canada and the United States—prioritizing either equality or liberty as the touchstones of a flourishing democracy—safeguarding the democratic process is a universally shared objective that justifies prohibiting false election speech.

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The title of this Article was inspired by remarks made during Mark Bankston's opening statement to jurors in the Sandy Hook defamation trial of Alex Jones, in which Bankston stated: "Speech is free, but lies you have to pay for." *See* Elizabeth Williamson, *Lies for Profit: Can Sandy Hook Parents Shut Alex Jones Down?*, N.Y. Times, July 31, 2022, https://www.nytimes.com/2022/07/31/us/politics/sandy-hook-alex-jones.html [https://perma.cc/D4R8-RWH5].

Table of Contents

Introduction

> *A nation's law is the sum of its history; and a nation's judges give voice to the values that are the sum of that history. I do not advocate that you adopt the Canadian approach to individual rights; nor do I think we will adopt yours. Indeed, we could not if we wished; for better or worse, Canada is a different country. Its national character is shaped by different events and values. I can, however, assure you of this. We will continue to study your jurisprudence, as you are beginning to study ours, continue to learn from it, and continue to admire it as the most absolute and articulate expression of individual rights the world has yet seen.*

This opening quotation from the Right Honorable Beverley McLachlin,[1] Canada's longest serving and first female Chief Justice of the Supreme Court, is a poignant reminder of the profound connection between the Canadian and

[1] Right Honorable Beverley McLachlin, Protecting Constitutional Rights: A Comparative View of the United States and Canada, Remarks at the 2nd Canadian Distinguished Annual Address for the Center for the Study of Canada at Plattsburg State University (April 5, 2004).

American approaches to the protection of civil liberties. Since the inception of Canada's constitutional bill of rights in 1982, known as the Canadian Charter of Rights and Freedoms (the "Charter"), Canada has learned from the United States what to do and what not to do vis-à-vis the development of individual rights.[2] But as Canada has emerged as a relatively more progressive, greater rights-conferring nation, this Article argues that in the face of public harms caused by false speech, the United States can and should learn from Canada's approach to the promotion and regulation of freedom of expression.[3]

Around the world, freedom of expression is fundamental to the integrity of democratic government and the legitimacy of public institutions. Recently, however, the political stability of Western liberal democracies has been tested by the steady flow of mis- and- disinformation, which floods public discourse with false information. In the last few years, especially, much has been written about the harm caused by false speech in public discourse and the best ways to mitigate it. One way to curb this growing harm is to ensure that elections—the hallmark of the democratic process—are insulated against patent falsehoods aimed at disenfranchising eligible voters and undermining the electoral process. To achieve this objective, we must know whether legislative attempts to restrict false election speech are constitutional according to the guarantee of freedom of expression.[4] The purpose of this Article is to answer this question by comparing election regulation in Canada and the United States, which have both experienced—albeit to varying degrees—a loss of trust in the integrity of the electoral process and its results.[5]

Canada and the United States share profound economic, social, and cultural ties, and a common commitment to freedom and equality based on constitutionally enshrined protections for freedom of expression and equal

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[2] *Compare, e.g.*, Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 *being* Schedule B to the Canada Act, 1982, c 11 (U.K.) (enshrining "Fundamental Freedoms" of thought, belief, opinion and expression, including freedom of the press and other media of communication.), *with* U.S. Const. amend. I (protecting freedoms of speech and of the press).

[3] Thomas B. Edsall, *"We Are in a Five-Alarm Fire for Democracy": Does Free Speech Protect Trump's Election Lies?*, N.Y. Times, Aug. 2, 2023, https://www.nytimes.com/2023/08/02/opinion/trump-election-lies-free-speech.html?searchResultPosition=3 [https://perma.cc/867A-ZPNB] (relying on analysis by Dennis Chong to highlight the underlying tension between values of equality and liberty in freedom of expression, who said: "There are signs that the attitudes of younger American cohorts are converging toward the more censorious attitudes of the British, Canadians and Australians, which suggests that the symbolic power of the First Amendment no longer carries as much sway with younger generations of Americans who accord greater priority to egalitarian considerations in their opposition to hate speech").

[4] *See, e.g.*, William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. Penn. L. Rev. 285, 293–96 (2004) (documenting the harms of false speech—and specifically the harms of false election speech—and the arguments in favor of "regulating deceptive campaign speech").

[5] *See, e.g.*, Dean W. Jackson, William T. Adler, Danielle Dougall, & Samir Jain, Ctr. for Democracy & Tech., Seismic Shifts: How Economic, Technological, and Political Trends are Challenging Independent Counter-Election-Disinformation Initiatives in the United States (2023); Paul M. Barrett, N.Y.U. Stern Ctr. for Bus. & Hum. Rts., Spreading The Big Lie: How Social Media Sites Have Amplified False Claims of U.S. Election Fraud (2022); Aengus Bridgman, Mathieu Lavigne, Melissa Baker, & Thomas Bergeron et al., Ctr. for Media, Tech., & Democracy, Media Ecosystem Observatory, Mis- and Disinformation During the 2021 Canadian Federal Election (2022).

protection of the law, respectively.[6] In the context of election regulation, Canadian scholars and judges have long looked to their American colleagues for inspiration,[7] even if this reliance has not always been mutual.[8] When the Charter was adopted in 1982, as scholars argued that Canadians ought to study European human rights cases because of a convergence in similar judicial decision-making, there was a general recognition, albeit reluctantly for some, that Canadian courts should take notice of how the American judiciary developed its doctrine on the limitations placed on enumerated rights, like freedom of expression.[9] For example, the few legal scholars in Canada that make election law and democracy the focal point of their academic research have commented that this discipline has been largely neglected in Canada, whereas the United States has been the locus for this field of study.[10]

But, as both nations confront an era of foreign and domestic election interference,[11] often perpetrated online with the help of social media and

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[6] *See* Paul Bender, *The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: A Comparison*, 28:4 McGill L.J. 811, 813 n.1 (1983). The author's explanation of "constitutional protection" is applicable here as well: "'Constitutional protection' is used here to refer to guarantees of individual rights that are 'entrenched' in a formal constitutional document. Unlike common law or statutory rights, constitutionally protected rights cannot be diminished or eliminated by ordinary legislative action, but only through a specified amendment process. The amendment process applicable to the Canadian *Charter* is spelled out in Part V of Schedule B, *Canada Act* 1982, 1982, c. 11 (U.K.). The amendment procedures for the U.S. *Constitution* are in art. V of that document." *Id.*

[7] *See, e.g.*, Colin Feasby, Libman v. Quebec (A.G.) *and the Administration of the Process of Democracy under the* Charter*: The Emerging Egalitarian Model*, 44 McGill L.J. 5 (1999) [hereinafter Feasby, *The Emerging Egalitarian Model*]; Colin Feasby, *Freedom of Expression and the Law of the Democratic Process*, 29 S.C.L.R. 237 (2005) [hereinafter Feasby, *Law of the Democratic Process*]; Christopher D. Bredt & Laura Pottie, *Liberty, Equality and Deference: A Comment on Colin Feasby's "Freedom of Expression and the Law of the Democratic Process,"* 29 S.C.L.R. 291 (2005); Yasmin Dawood, *Campaign Finance and American Democracy*, 18 Ann. Rev. Pol. Sci. 329 (2015); [hereinafter Dawood, *Campaign Finance and American Democracy*]; Yasmin Dawood, *Democracy and the Freedom of Speech: Rethinking the Conflict between Liberty and Equality*, 26 Can. J.L. & Juris. 293 (2013) [hereinafter Dawood, *Rethinking the Conflict between Liberty and Equality*].

[8] *See* Kent Greenawalt, Fighting Words: Individuals, Communities, and Liberties of Speech 12 (1996) ("[T]he Court [referring to the Supreme Court of Canada] has drawn extensively from the legal materials of other countries, including the United States, and of the international legal order. The Court has regarded itself, to a degree so far uncharacteristic in the United States, as giving meaning to liberties that transcend national boundaries . . . . Canadian free speech scholars are acutely aware of what the U.S. Supreme Court does. Most American scholars have at best a dim idea of Canadian free speech law.").

[9] Errol P. Mendes, *Interpreting the Canadian Charter of Rights and Freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights*, 20 Alta. L. Rev. 383, 392 (1982) (arguing that Canadian courts should look to how international tribunals, rather than just U.S. courts, have interpreted express limitation clauses).

[10] *See* Feasby, *Law of the Democratic Process*, *supra* note 7, at 245.

[11] In Canada, an ongoing investigation into foreign election interference by China, Russia, and other states in the 43rd (2019) and 44th (2021) general elections, as well as the public order commission studying the federal government's declaration of an emergency during the "Freedom Convoy" protests in Ottawa and other Canadian cities, bear some resemblance to U.S. investigations into Russia's interference in the 2016 presidential election and the January 6th attack on the U.S. Capitol following the 2020 presidential election. *Compare* Marie-Josée Hogue, 1 Public Inquiry Into Foreign Interference in Federal Electoral Processes and Democratic Institutions Final Report 121 (His Majesty the King in Right of Canada. 2025) (endorsing the recommendation of the Chief Electoral Officer of Canada "to prohibit false information being spread to undermine the legitimacy of an election or its results . . . [where] (1) the person knew the statement to be false; and (2) the statement was made with the goal of undermining

artificial intelligence,[12] the United States should now look to Canada as both countries consider legislative solutions to limit the spread of false information in the electoral context, yet which may run afoul of freedom of expression. In Canada, for example, while there are currently no specific prohibitions in the Canada Elections Act against making false statements about the electoral process (*i.e.*, statements that mischaracterize the time, place, and means of voting as well as official election results),[13] the country's Chief Electoral Officer, Stéphane Perrault, has recommended prohibiting false statements made knowingly about the voting process that are designed to disrupt the conduct of the election or to undermine the legitimacy of the election or its results.[14] Likewise, in the United States, calls for prohibitions on false election speech have already materialized into legislative proposals. For example, the proposed Deceptive Practices and Voter Intimidation Prevention Act of 2021 would have prohibited any person within 60 days before a federal election from communicating information on voting, if the person knew such information to be materially false and had the intent to impede or prevent another person from exercising the right to vote.[15]

On the basis of a footnote in the Supreme Court of the United States' ("U.S. Supreme Court" or "SCOTUS") 7–2 decision in *Minnesota Voters Alliance v. Mansky*,[16] William Marshall has argued that a restriction on speech in the electoral context could survive constitutional scrutiny under the First Amendment.[17] In the *Mansky* footnote, Chief Justice John Roberts, writing for the majority, seemed to leave the door open to regulating false election speech when he said, "[w]e do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures."[18] Furthermore, David Ardia and Evan Ringel—while reviewing more than 125 statutes regulating the content of "election-related speech" as of 2022—identified 13 states with statutes that bar false speech regarding voting requirements and procedures (*i.e.*, "statements about what is required to vote or register, who can vote, when to

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trust in the election and its results."), *and* Paul S. Rouleau, 1 Report of the Public Inquiry into the 2022 Public Order Emergency 143 (His Majesty the King in Right of Canada. 2023) ("Misinformation and disinformation are inherently destructive and divisive. They undermine the ability of government officials and members of the public to meaningful engage in discussions on policy and governance . . . . How to identify and respond to misinformation and disinformation is a topic worthy of further exploration."), *with* Robert S. Mueller III, 1 Report on the Investigation Into Russian Interference in the 2016 Presidential Election (2019), *and* Select Comm. to Investigate the January 6th Attack on the U.S. Capitol, Final Report, H.R. Rep. No. 117–663, at 691 (2022).

[12] *See, e.g.*, Michael Pal, *Social Media and Democracy: Challenges for Election Law and Administration in Canada*, 19 Election L.J. 200 (2020).

[13] S.C. 2000, c 9 (Can.).

[14] Stéphane Perrault, Elections Canada, Meeting New Challenges: Recommendations from the Chief Election Officer of Canada following the 43rd and 44th General Elections 25 (June 7, 2022), https://www.elections.ca/res/rep/off/rec_2022/rec2022_e.pdf [https://perma.cc/HG6H-YTK6].

[15] S. 1840, 117th Cong. (2021). A similar version of the bill was previously introduced by then-Senator Barack Obama, *see* S. 453, 110th Con. (2007), although it was never adopted into law.

[16] 585 U.S. 1 (2018).

[17] William P. Marshall, *Internet Provider Liability for Disseminating False Information About Voting Requirements and Procedures*, 16 Ohio St. Tech. L.J. 669, 674 (2020).

[18] *Mansky*, 585 U.S. at 15 n.4.

vote, or how to vote").[19] But the mere fact that these statutes exist and that the U.S. Supreme Court has not yet ruled out the possibility of regulating misleading election speech does not obviate the need to develop a clear constitutional basis for these laws to withstand scrutiny under the First Amendment. To that end, the United States should look to Canada's egalitarian model of election regulation and its freestanding constitutional right to vote as pathways to justify a restriction on false election speech.

In this Article, the type of false speech that I propose be prohibited is false *election* speech, which I define as incorrect factual statements about the electoral process (*e.g.*, voter eligibility requirements, polling locations, types of ballots, ballot tabulation methods, and vote reporting and scrutiny mechanisms) and election results (*i.e.*, the winners and losers of a contested race) spread with the intent to undermine the right to vote, the administration of an election, or the results therefrom. False election speech must not be confused with false *campaign* speech, even though in some forums these terms are used interchangeably.[20] While both types of speech take the form of demonstrably untrue statements in the context of an election, in this Article, false election speech pertains to incorrect factual statements regarding electoral procedures and substantive electoral outcomes.[21] In contrast, false campaign speech relates to political opinions that may rely on or refer to facts, but that are limited to statements about candidates and their political records, ballot measures, and policy issues in the course of a campaign itself.[22] This distinction between

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[19] David S. Ardia & Evan Ringel, *First Amendment Limits on State Laws Targeting Election Misinformation*, 20 First Amend. L. Rev. 291, 294, 346 (2022).

[20] The literature often groups together both types of speech as "mis- and- disinformation" depending on the speaker's level of *intention* to create and spread false information. *See, e.g.*, David Ardia, Evan Ringel, & Allysan Scatterday, State Regulation of Election-Related Speech in the U.S.: An Overview and Comparative Analysis 9–12 (2021). In this study, the authors develop a taxonomy that identifies eight different types of election-related speech, but only the third category based on voting requirements and procedures is specifically relevant to this Article as it covers statutory prohibitions adopted at the state level regarding statements about what is required to vote or register, who can vote, when to vote, how to vote, or providing bogus ballots. *Id.*

[21] Although I have defined false election speech to include statements about the results of an election, I spend considerably more time discussing incorrect factual statements about the administration of an election—the *who*, *when*, *where*, and *how* to vote—as these statements are more likely to disenfranchise voters *before* an election, whereas statements that misrepresent the results of an election are made once voters have already cast their ballots and are therefore less likely to justify a prohibition on false election speech in furtherance of protecting the right to vote.

[22] This distinction between false election speech and false campaign speech is my own based on a review of the current literature discussing false speech in the election context. The distinction is also informed by fact-opinion differentiation techniques. *See* Matthew Mettler & Jeffery J. Mondak, *Fact-opinion Differentiation*, 5 Harv. Kennedy Sch. Misinformation Rev. 1, 2 (2024) ("Statements of fact are claims that can be 'proved or disproved by objective evidence' . . . . Objective evidence is often quantifiable (e.g., the number of votes cast in an election and the change in the national unemployment rate from one month to another) and comes from verifiable sources and methods such as official government records . . . . Statements of opinion are claims that cannot be proved true or false with objective evidence because their assessment depends on individual preferences and values . . . . [A] statement of opinion 'reflects the beliefs and values of whoever expressed it.'" (quoting Amy Mitchell, Jeffrey Gottfried, Michael Barthel, & Nami Sumida, *Distinguishing Between Factual and Opinion Statements in the News*, Pew Rsch. Ctr. (June 18, 2018), https://www.pewresearch.org/journalism/2018/06/18/distinguishing-between-factual-and-opinion-statements-in-the-news/ [https://perma.cc/TQN3-HFS6])).

fact and opinion is supported by Canadian case law, in which the dissenting Justices in the authoritative case on false speech, *R. v. Zundel*,[23] clarified that "[e]xpression which makes a statement susceptible to proof and disproof is an assertion of fact; expression which merely offers an interpretation of fact which may be embraced or rejected depending on its cogency or normative appeal, is opinion."[24]

Integral to the study of a proposed prohibition on false election speech is knowing how freedom of expression in the electoral context is conceived of more generally by the people entrusted to rule on the legality of such legislative proposals. In Canada and the United States, judges wield this power through judicial review of state actions, including statutes alleged to violate the Constitution.[25] As a result, through decades of cases litigated before the courts, Canadian and American judges have developed two approaches to regulating elections based on the constitutional guarantee of freedom of expression: egalitarianism in Canada and libertarianism in the United States.[26] In *Harper v. Canada (Attorney General)*,[27] the Supreme Court of Canada ("the SCC") contrasted the two approaches, explaining that the egalitarian model ensures that individuals have an equal opportunity to participate in the electoral process, whereas the libertarian model favors an electoral process subject to as few restrictions as possible. The egalitarian model is concerned with the diversity of speech within the "electoral ecosystem"—a concept explored by Yasmin Dawood—while the libertarian model is fixated on the quantity of speech.[28]

Although the egalitarian and libertarian models of election regulation have been studied by scholars and applied by courts in Canadian and American cases regarding campaign finance legislation, it remains to be fully seen whether and how courts may adhere to these models when ruling on cases about false election speech.[29] In the United States, for example, there are cer-

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[23] [1992] 2 S.C.R. 731 (Can.)

[24] *Id.* at 833.

[25] Canada and the United States, through various provisions in each country's written constitutions and by subsequent judicial pronouncement, have created a judicial branch of government with the power to review and suspend the enforcement of statutes that infringe upon the Constitution. *See* Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.), §§ 96–101, *reprinted in* R.S.C. 1985, app II, no 5 (Can.) (establishing the "Judicature"); Constitution Act, 1982, §§ 24, 52, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.) (guaranteeing the right of individuals to challenge, in "a court of competent jurisdiction," legislation which does not conform to the Constitution, and stipulating that "the Constitution of Canada is the supreme law of Canada" such that laws inconsistent with the Constitution are "of no force or effect."); U.S. Const. art. III, § 1 (vesting the "judicial Power" in "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). Contrary to the power of Canadian courts, the power of U.S. federal courts to declare federal or state government actions unconstitutional was not expressly granted in the U.S. Constitution; rather, that implicit power was recognized by the Supreme Court in Marbury v. Madison, 5 U.S. 137 (1803). For a robust discussion of judicial review and constitutional interpretation in Canada, see Canadian Constitutional Law 17–41 (Carissma Mathen & Patrick Macklem eds., 6th ed. 2022).

[26] *See, e.g.*, Feasby, *The Emerging Egalitarian Model*, *supra* note 7, at 9–26.

[27] 2004 SCC 33, 1 S.C.R. 827 at para. 62 (Can.).

[28] Yasmin Dawood, *Combatting Foreign Election Interference: Canada's Electoral Ecosystem Approach to Disinformation and Cyber Threats*, 20 Election L.J. 10, 11 (2021).

[29] In recent years, many American legal experts in the fields of law of democracy, election law, and the First Amendment have written about the harms caused by false election speech and

tainly libertarian strands in First Amendment thought, but the totality of the doctrine is more nuanced than that. Does the tension arising in the context of campaign finance regulation between maximizing the diversity vis-à-vis the quantity of speech continue to apply in the case of false election speech? Or does protecting the right to vote and preserving the integrity of election administration constitute a unique basis for regulating false election speech? Indeed, as the social and political climate of the present era continues to worsen due to less content moderation from social media platforms and a very politically polarized electorate,[30] researchers have noted our susceptibility to believing lies or distrusting the truth and a related inability to differentiate between facts and opinions.[31] Rather than being seized by the diversity or quantity of speech in the electoral information ecosystem, false election speech forces us to grapple with the *quality* of speech—measured in terms of the accuracy of information—available to voters. This reality has led to the identification of information gaps within the electorate caused by mis- and-disinformation and corresponding calls from experts to restrict false speech through a variety of private and public means.[32] To that end, some state legislatures have responded by enacting outright bans on false election speech, as evidenced by the Ardia, Ringel, and Scatterday report.[33] Similarly, scholars like Richard Hasen advocate for a narrow ban on "empirically verifiable false election speech" that is communicated across any medium, including social media, about when, where, and how people may vote. Hasen writes that this ban could also entail that websites remove demonstrably false election speech, so long as no value judgments about the truth or falsity of the impugned statements are required.[34]

This Article builds on the existing freedom of expression literature and case law concerning a "right to lie" in the context of elections and concludes that prohibiting false election speech is conducive to the egalitarian model of election regulation employed in the context of Canadian campaign finance law. In contrast to the libertarian model, which maximizes the quantity, but not necessarily the diversity, of speech in the "marketplace of ideas," the egalitarian

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false campaign speech and have begun to propose solutions based on the Free Speech Clause of the First Amendment. *See, e.g.*, Marshall, *supra* note 4; Ardia & Ringel, *supra* note 19 (yet, neither of these authors have explicitly relied on a bilateral comparative constitutional analysis with Canada to analyze similarly worded statutory prohibitions on false speech based on the competing libertarian and egalitarian models of election regulation).

[30] *See generally supra* note 5; *see also* Jim Rutenberg & Steven Lee Myers, *How Trump's Allies Are Winning the War Over Disinformation: Their Claims of Censorship Have Successfully Stymied the Effort to Filter Election Lies Online*, N.Y. Times, Mar. 17, 2024, https://www.nytimes.com/2024/03/17/us/politics/trump-disinformation-2024-social-media.html [https://perma.cc/G428-22FH].

[31] Mettler & Mondak, *supra* note 22, at 1 ("Accurate fact-opinion differentiation occurs less frequently than partisan error and unbiased error. Accuracy increases with elements of political sophistication including civics knowledge, current events knowledge, cognitive ability, and education. Affective partisan polarization heightens levels of partisan error.").

[32] *See generally* Richard L. Hasen, Cheap Speech: How Disinformation Poisons Our Politics—And How To Cure It (2022); *see also* Catherine J. Ross, A Right to Lie? Presidents, Other Liars, and the First Amendment (2021); Barbara McQuade, Attack from Within: How Disinformation Is Sabotaging America (2024).

[33] Ardia et al., *supra* note 20.

[34] Hasen, *supra* note 32, at 109–15.

model recognizes the need for some limits on speech in order to preserve other vital state interests like counteracting the sharp rise of polarization and simultaneous decline in electoral integrity.[35] On the egalitarian view, prohibiting false election speech turns off the tap from which flows a stream of misleading speech that has flooded public discourse, compromising the supply of quality information available to voters. The "flooding effect" of false speech in the digital era makes it harder for speakers of accurate information regarding voting requirements and procedures to be heard by distrusting voters and thus resembles the deluge of unrestricted corporate-financed speech that makes it difficult for competing political viewpoints to be heard during an election.

More importantly, however, given the U.S. Supreme Court's previous dismissal of egalitarian interests in *Citizens United v. Federal Election Commission*[36] (overruling *Austin v. Michigan Chamber of Commerce*[37] and *McConnell v. Federal Election Commission*[38]), this Article defends the constitutionality of a prohibition on false election speech based on protecting the right to vote and preserving the integrity of election administration. In the United States, since courts are unlikely to embrace egalitarian interests to limit false election speech based on their aversion to doing so in the regulation of corporate campaign speech, judges ought to consider protecting the right to vote and preserving the integrity of election administration as twin state interests justifying a prohibition on false election speech. Rather than examining the constitutionality of the prohibition in terms of the diversity or quantity of the *sources* of speech, the right to vote and the integrity of election administration are state interests targeting the harmful *content* of speech, and the government can and should legitimately pursue this objective irrespective of overarching egalitarian or libertarian speech interests.

The Article proceeds in two main parts. First, an explanation comparing Canada and the United States is offered based on each country's constitutional protections for a "right to lie" and their different models of election regulation, according to § 2(b) of the Charter and the Free Speech Clause of the First Amendment in the U.S. Bill of Rights (the "Bill of Rights"). Second, building off the doctrinal framework for justifying a *prima facie* violation of freedom of expression, the Article highlights the normatively attractive design elements of a statutory prohibition on false election speech that could withstand constitutional scrutiny as proposed by Nicholas Stephanopoulos.[39] Within this Part, the Article also characterizes the harm caused by false election speech as

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[35] *See* Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections*, 74 Mont. L. Rev. 53, 54 (2013) ("False and misleading speech may be increasing thanks to the proliferation of the internet and a decline in uniform trustworthy sources of news, such as the national news networks and major newspapers. Political polarization also may play a role, with partisans egged on to believe unsupported claims by the modern-day partisan press, in the form of FOX News, MSNBC, and liberal and conservative blogs and websites."); *see also* Emily Bazelon, *The First Amendment in the Age of Disinformation,* N.Y. Times, Oct. 13, 2020, https://www.nytimes.com/2020/10/13/magazine/free-speech.html?searchResultPosition=11 [https://perma.cc/98VG-JEPR].

[36] 558 U.S. 310 (2010).

[37] 494 U.S. 652 (1990).

[38] 540 U.S. 93 (2003).

[39] Nicholas Stephanopoulos, *Liable Lies*, 7 Const. Ct. R. 1 (2018).

a threat to the right to vote and the integrity of election administration.[40] In specific, by building on the academic literature which describes the exchange of information between election participants as an electoral ecosystem, it is argued that false election speech poisons the ecosystem by preventing voters from accessing the requisite information to participate meaningfully in the democratic process and the political life of the state.

I. Canada and the United States: Freedom Of Expression and Models Of Election Regulation

It has been said that when the United States sneezes, Canada catches a cold. The oft-quoted line is meant to express the idea that the United States and Canada are more than just geographic neighbors, but rather close friends with shared interests and strong social and economic bonds. These ties manifest daily in terms of common cultural references, vast amounts of trade in goods and services, and countless cross-border familial relationships.[41] This phenomenon extends to political and legal developments too.

A. A Basis for Comparison: Constitutional Law in Canada and the United States

In broad strokes, the Canadian and American legal systems are committed to the same basic principles of freedom, equality, democracy, and the rule of law, as evidenced by shared constitutional commitments to the same, and the manner in which courts of law, on both sides of the 49th parallel, have expounded upon these commitments in the course of judicial decision-making.[42]

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[40] In the United States, the right to vote has been judicially interpreted based on the First Amendment (understood to generally protect political expression and activity); the Fifteenth, Nineteenth, and Twenty-Sixth Amendments (prohibiting discrimination based on race, gender or age when affording the right to vote); the Twenty-Fourth Amendment (prohibiting poll taxes in federal elections); clause 1 of § 2 of Article I and the Seventeenth Amendment (providing that the U.S. House of Representatives and Senate shall be chosen "by the people"); and finally, § 4 of Article IV (providing that the U.S. "shall guarantee to every State . . . a Republican form of government").

[41] *See Canada-United States Relations*, Gov't of Can., https://www.international.gc.ca/country-pays/us-eu/relations.aspx?lang=eng [https://perma.cc/KF9Z-3GNU] (last modified Sept. 9, 2024) ("Canada and the United States (U.S.) enjoy a unique relationship. The Canada-U.S. partnership is forged by shared geography, similar values, common interests, strong personal connections and powerful, multi-layered economic ties."); U.S. Dep't of State, *U.S. Relations With Canada,* Aug. 19, 2022, https://www.state.gov/u-s-relations-with-canada/ [https://perma.cc/Z2N5-T59C] ("The United States and Canada share the world's longest international border, 5,525 miles with 120 land ports-of-entry, and our bilateral relationship is one of the closest and most extensive. Nearly $2.6 billion a day in goods and services trade cross between us every day. The February 23, 2021, Roadmap for a Renewed U.S.-Canada Partnership highlights the depth and breadth of the relationship. It establishes a blueprint for an ambitious and whole-of-government effort against the COVID-19 pandemic and in support of our mutual prosperity. It creates a partnership on climate change, advances global health security, bolsters cooperation on defense and security, and reaffirms a shared commitment to diversity, equity, and justice.").

[42] Although the political origins and textual basis of the judicial review power in Canada and the United States are different, today the high courts in both countries have considerable say in elucidating the meaning of constitutional texts through judicial interpretation. *See* Bruce

However, as eloquently stated by former Chief Justice McLachlin, "[t]he case can be made that Americans and Canadians have different perceptions of the relationship of the individual to the state and as a consequence, a quite different approach to the fundamental freedoms and liberties our constitutions guarantee to each citizen."[43] This difference in approach applies no less to the specific constitutional protections for freedom of expression.[44]

Differences in the ways Canadian and American courts have "liquidated"[45] meaning in their constitutional texts can be traced to variations in each country's national meta-narrative and self-perception on the world stage.[46] Based on these variations, Ran Hirschl notes how the judiciaries in each of these two countries treat foreign sources of law differently.[47] Whereas Canada has been described as a "comparative constitutional powerhouse"[48] for its reliance on foreign sources of law in crafting its own approach to constitutional law,[49] the same cannot be said for the U.S. Supreme Court, which has been ideologically divided on the question of whether to rely on foreign sources of law,[50] perhaps in part due to the sense that debates about comparative constitutional law are really debates about constitutional interpretation.[51]

Yet, scholars have remarked that the field of "Law of Democracy" can be studied from an international, comparative perspective due to its recognizable

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E. Shemrock, *Infancy and Maturity: A Comparison of the Canadian Charter of Rights and Freedoms and the United States Constitution*, 3 ILSA J. Int'l. & Compar. L. 915, 921 (1997); Bender, *supra* note 6, at 815 ("Moreover, the text of the Canadian *Charter*, like that of the U.S. *Constitution*, is quite general in nature; it, too, will undoubtedly undergo a process of repeated judicial interpretation before the answers to many fundamental questions begin to emerge.").

[43] *See* Right Honorable Beverley McLachlin, Protecting Constitutional Rights: A Comparative View of the United States and Canada, Remarks Delivered at the 2nd Canadian Distinguished Annual Address for the Center for the Study of Canada at Plattsburg State University (April 5, 2004).

[44] R. v. Keegstra, [1990] 3 S.C.R. 697, at 740 (Can.) (In a landmark case regarding the limits of freedom of expression with respect to hate propaganda, the SCC found that First Amendment doctrine could not be imported wholesale into Canada, but still observed that "[i]n the United States, a collection of fundamental rights has been constitutionally protected for over two hundred years. The resulting practical and theoretical experience is immense, and should not be overlooked by Canadian courts.").

[45] *See* William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1 (2019) (explaining the concept of constitutional liquidation as first articulated by James Madison, who wrote that the U.S. Constitution's meaning could be "liquidated" and settled by practice).

[46] *See* Ran Hirschl, Comparative Matters: The Renaissance of Comparative Constitutional Law 142 (2014).

[47] *Id.* at 138 ("No two neighboring democratic countries in the world sport such a stark difference in their attitudes toward comparative constitutional law than Canada and the United States.").

[48] *Id.* at 139.

[49] *Id.* at 141 ("Unlike in Canada's neighbor to the south, the practice of foreign citations by the Supreme Court has never been seriously contested within Canada's legal academia, let alone in the popular media or the broader political sphere. Justice Claire L'Heureux-Dubé of the Supreme Court of Canada (1987–2002) emerged as an international champion of interjurisdictional constitutional cross-fertilization.").

[50] Hirschl, *supra* note 46, at 143 ("The more conservative members of the current Court—Chief Justice Roberts and Justices Alito, Scalia, and Thomas—oppose the citation of foreign law in constitutional cases. By contrast, the Court's more liberal wing tends to be more open toward the practice.").

[51] *Id.* at 147.

patterns across various constitutional frameworks, especially in the United States.[52] So, while there are internal disagreements about whether and how to rely on foreign sources of law when expounding the meaning of one's own constitution, such as the reach and limits of freedom of expression in the context of elections, I remain of the view that Canadian and American approaches to constitutional law are not mutually exclusive. Instead, where there are "joint democratic principles" and similar "historical and social conditions," sufficient common ground will exist between the two countries for a valid comparison.[53]

In the case of Canada and the United States, such common ground does in fact exist as evidenced by the global influence of the U.S. Supreme Court generally, but also by the SCC's citation of SCOTUS decisions since the adoption of the Charter in 1982. Between 1982 and 2010, of the 1,826 foreign citations made by the SCC, over 60 percent were to American cases.[54] Despite the declining reliance on American constitutional jurisprudence worldwide,[55] there is no doubt that, as Hirschl reminds us, "Canadian constitutional jurisprudence has been characterized by extensive 'Americanization' of Canada's rights discourse and of Canada's perception of what makes for a good society."[56] And when conducting a doctrinal analysis of constitutional cases, the key commonality between Canada and the United States is the common law; both countries have a shared tradition of evolving judicial precedents over time.[57] History shows that when the Charter was in its infancy, the SCC often looked to SCOTUS for guidance, but as time has passed foreign countries have regularly looked to Canada for inspiration as well[58]—a reminder for U.S. judges that the Canadian approach to civil liberties offers valuable insights worth considering.

To be sure, the mere fact that Canada and the United States have similar societal values and legal systems is not sufficient for the wholesale importation of Canadian law into the U.S. legal tradition. Instead, "[e]ach time a country looks to the constitutional jurisprudence of another country for inspiration, it must determine whether that jurisprudence is compatible with its domestic

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[52] *See* Feasby, *Law of the Democratic Process*, *supra* note 7, at 246 ("[T]here is a growing international community of scholars examining developments in law and the democratic process from a comparative perspective. The profusion of legal writing on the democratic process has given rise to a growing recognition in the United States and elsewhere that the intersection of constitutional law and the democratic process is a distinct subdiscipline of constitutional law with recognizable parameters.").

[53] *See* Hirschl, *supra* note 46, at 48 (relying on the work of renowned Israeli scholar and jurist, Aharon Barak).

[54] *Id.* at 31.

[55] *See* David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. Rev. 762 (2012).

[56] *See* Hirschl, *supra* note 46, at 32 (citing David Schneiderman, *Exchanging Constitutions: Constitutional Bricolage in Canada*, 40 Osgoode Hall L.J. 401 (2002)).

[57] *See, e.g.*, David Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996).

[58] *See* Hirschl, *supra* note 46, at 48 (describing a passage in a book written by former President of the Supreme Court of Israel Aharon Barak, who "praise[s] the Supreme Court of Canada for being 'particularly noteworthy for its frequent and fruitful use of comparative law. As such, Canadian law serves as a source of inspiration for many countries around the world.'" (quoting Aharon Barak, The Judge in A Democracy 203 (2006))).

constitution, its own political and social context, and its aspirations as a state," so explains former Chief Justice McLachlin.[59] In this Article, by building on existing comparative scholarship regarding freedom of expression and election law, I do not offer a novel justification for comparison.[60] Instead, the specific approach undertaken in this Article comports with Hirschl's description of the comparative reference genre of comparative constitutional inquiry, in which self-reflection or betterment is achieved through analogy, distinction, and contrast.[61]

The "given constitutional challenge" facing not just Canada and the United States, but similarly situated Western liberal democracies around the world, is the universal rise of false speech and the apparent inability of governments to restrict this speech in a constitutionally-compliant manner.[62] To overcome this dilemma, this Article hones in on the doctrinal features of the leading freedom of expression cases from Canada and the United States that pertain to false speech in order to identify points of similarity and difference. This comparison will demonstrate that the high courts in Canada and the United States have the flexibility within their respective legal doctrines to uphold a statutory prohibition on false election speech if they determine that the state's interest in protecting the right to vote and preserving the integrity of election administration outweighs any individual's right to lie under the guise of freedom of expression. However, while the SCC's past reliance on the egalitarian model of election regulation would indicate its likelihood of upholding a prohibition on false election speech, the libertarian model portends a far less certain constitutional fate for the same statutory prohibition if challenged in the United States. For this reason, a state interest premised on enabling citizens to cast their ballots effectively and ensuring election administrators can faithfully oversee the election itself has the benefit of not directly contradicting campaign finance precedents, which American courts would resist overturning. To that end, knowing what the SCC and SCOTUS have already decided in cases of restrictions on false speech is our first inquiry and it is precisely this issue to which I now turn.

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[59] Right Honorable Beverley McLachlin, *The Canadian Charter of Rights and Freedoms' First 30 Years: A Good Beginning*, *in* Canadian Charter of Rights and Freedoms 25, 43 (Errol Mendes & Stephane Beaulac eds., 5th ed. 2013).

[60] I rely heavily on the scholarly works of Justice Colin Feasby, a Canadian jurist currently sitting on the Alberta Court of King's Bench, and Yasmin Dawood, Professor of Law at the University of Toronto and the Canada Research Chair in Democracy, Constitutionalism, and Electoral Law. For a sampling of their key works, see *supra* note 7.

[61] Hirschl, *supra* note 46, at 235 ("Scholarship in this mode may also be spurred by jurists' quests for the 'right' or 'just' solution to a given constitutional challenge their polity has been struggling with . . . . The assumption informing this mode of comparative constitutional law is that although most relatively open, rule-of-law polities face essentially the same constitutional challenges, they may adopt quite different approaches to dealing with them. By referring to constitutional jurisprudence, institutions, and practices of other presumably similarly situated polities, we might gain a better understanding of our own constitutional values and structures and thereby develop a more cosmopolitan or universalist view of our constitutional discourse.").

[62] For a broad discussion of freedom of expression and the regulation of fake news around the world, including in Canada and the United States, see Pierre Trudel, *Canada*, *in* Freedom of Speech and the Regulation of Fake News 73 (Oreste Pollicino ed., 2023); Leslie Gielow Jacobs, *United States*, *in* Freedom of Speech and the Regulation of Fake News 541.

B. Freedom of Expression: § 2(b) of the Charter and the Free Speech Clause of the First Amendment

Since the adoption of the Charter, legal experts like Paul Bender have noted that the individual rights enumerated in the Charter bear a great deal of similarity to those found in the U.S. Constitution.[63] As such, both Canada and the United States have similar constitutional protections for freedom of expression.[64] In Canada, this fundamental liberty is found in § 2(b) of the Charter: "2. Everyone has the following fundamental freedoms: . . . freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." In the United States, the Free Speech Clause of the First Amendment in the Bill of Rights states: "Congress shall make no law . . . abridging the freedom of speech or of the press."

§ 2(b) of the Charter is subject to such reasonable limits as are "demonstrably justifiable in a free and democratic society," according to § 1 of the Charter,[65] whereas the First Amendment contains no such limitation to permit government intervention. In other words, both Canada and the United States protect free speech, but the Charter expressly enables the Canadian government to limit it in reasonable ways,[66] while the U.S. Supreme Court has had to develop a legal doctrine to permit the U.S. government to infringe upon free speech when practically necessary.[67] From a historical perspective, we know that the drafters of the Charter were aware of the absolute rights conferred in the U.S. Constitution and sought to avoid this absolutism in Canada. Errol Mendes explains that "[f]earful of creating a society that may guarantee its liberty, but lose its values of community and representative democracy, the [Canadian] constitutional drafters sought to wrap the guaranteed rights and freedoms with an extremely flexible limitation clause."[68] To be sure, the U.S. Supreme Court has elaborated a legal doctrine for justifying burdens on the First Amendment, which requires the reviewing court to apply

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[63] Bender, *supra* note 6, at 818.

[64] *Id.* at 858.

[65] Canadian Charter of Rights and Freedoms § 1, Part I of the Constitution Act, 1982 *being* Schedule B to the Canada Act, 1982, c 11 (U.K.) ("The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.").

[66] *See* Canadian Constitutional Law, *supra* note 25, at 775–802 (addressing the limitations of § 1 of the Charter and the establishment of the *Oakes* test).

[67] *See* Deborah Pearlstein, *Democracy Harms and the First Amendment*, Knight First Amend. Inst., at 7 (Oct. 19, 2022), https://knightcolumbia.org/content/democracy-harms-and-the-first-amendment [https://perma.cc/VZG9-YPLA] ("While the First Amendment is written in absolute terms as a constraint on government power—'Congress shall make no law abridging the freedom of speech, or of the press'—the Court has never taken the amendment at its word. As it has with all constitutionally protected rights, the Court has subjected government restrictions on speech to a balancing test."); *see also* Greenawalt, *supra* note 8, at 13 ("Since the U.S. Constitution does not provide grounds for government justification of violations of individual rights, a court's final determination that free speech has been 'abridged' is also a formal decision that a government action was impermissible.").

[68] Errol P. Mendes, *Section 1 of the Charter After 30 years: The Soul or the Dagger at its Heart?*, *in* Canadian Charter of Rights and Freedoms 293, *supra* note 59, at 294.

one of the following three tiers of scrutiny based on the facts of the case and the formulation of the claim: strict, intermediate, or rational basis review.[69]

In many controversial areas of expression, such as pornography, hate speech, and defamation, speech restrictions that would be seen as reasonable limits pursuant to § 1 of the Charter would likely amount to an unreasonable burden in the United States.[70] This observation about the more restrictive Canadian approach to freedom of expression is also true of laws aimed at regulating false speech. Former Chief Justice McLachlin explains: "Canadian law accepts that the goal of getting at the truth may be served by free exchange in the marketplace of ideas. But it also accepts that false words can do great damage to individuals and groups, damage that cannot always be repaired by debate and discussion."[71] And from this belief has emerged an approach to rights in Canada that is less individualistic and more deferential to the larger public interest.[72]

This highlighted difference is more than semantic. When confronted with a content-based restriction on speech, like a prohibition on false election speech, the burden on freedom of expression is obvious. By enacting a law that prevents individuals from uttering certain words, the state has violated those individuals' ability to express themselves freely. To save a law that prohibits false election speech from a declaration of unconstitutionality, a reviewing court must accordingly articulate a compelling state interest that justifies the otherwise impermissible restriction on speech. At this juncture is where different perceptions of the individual-to-state relationship become critical to ascertaining the court's propensity to strike down or uphold a prohibition on false election speech.[73]

In an early comparison of the Charter to the Bill of Rights, Bender aptly noted that many U.S. constitutional rights do yield to governmental justifications.[74] Even with regard to freedom of expression, while there is a libertarian current pushing the American courts toward invalidating restrictions on speech, this current is not irresistible given that the totality of First

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[69] *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 731 (2012) (Breyer, J., concurring) (Justice Breyer commented on the three different levels of scrutiny, saying: "Regardless of the label, some such approach is necessary if the First Amendment is to offer proper protection in the many instances in which a statute adversely affects constitutionally protected interests but warrants neither near-automatic condemnation (as 'strict scrutiny' implies) nor near-automatic approval (as is implicit in 'rational basis' review) . . . . But in this case, the Court's term 'intermediate scrutiny' describes what I think we should do.").

[70] *See* McLachlin, *supra* note 43.

[71] *Id.*

[72] *Id.* (further observing that rights in Canada are guaranteed with a "communitarian dimension" out of "concern for the general public welfare"); *see also* Greenawalt, *supra* note 8, at 14 ("Among political societies, the United States is perhaps the most individualist. In Canadian society respect for groups, itself reflected in other parts of the Charter, and for the whole community, plays a more dominant role").

[73] *See* Greenawalt, *supra* note 8, at 3 ("No one doubts that Canada and the United States are liberal democracies. Observing how these countries treat freedom of speech tells us much about relationships between citizens and government, relationships among citizens, and relationships between branches of government.").

[74] Bender, *supra* note 6, at 817.

Amendment doctrine is not uniquely libertarian.[75] However, if we accept for a moment that the "right to lie" is guaranteed by freedom of expression, whether a court can salvage a restriction on false speech is fundamentally a question concerning "the strength of the justification requirement that the applicable constitution imposes as a condition of governmental interference," says Bender.[76] Both Canada and the United States have adopted relatively stringent requirements to justify prohibitions on false speech, but even the highest standards can be met when confronted with sufficiently compelling social and political facts and a narrowly tailored law.

C. The Right to Lie: Zundel *and* Alvarez

Lurking in the background of any legislative attempt to prohibit false election speech is the question of whether spreading a lie in general can be statutorily barred. The authoritative cases in Canada and the United States on the dissemination of false speech (or the "right to lie") are *R. v. Zundel* and *United States v. Alvarez*, respectively. Contrary to the marked differences in political and legal culture between Canada and the United States, the majority opinions in each of these cases regarding the right to lie demonstrate a cross-border reluctance to attach criminal liability to false speech.

1. Zundel

Zundel struck down § 181 of the Canadian criminal code, which had been used to prosecute infamous Holocaust denier Ernst Zundel. In this case, the SCC recognized that truth and falsity may be obvious in some cases, but much less so when complex social and historical facts are at issue.[77] Out of fear that judges and juries would be required to take judicial notice of historical or political events or to make factual determinations of the same, the SCC expressed concern for § 181's open invitation to decide what is "true or right and an unpopular minority view."[78] § 181 read:

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[75] *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (finding that the Federal Communications Commission's "fairness doctrine" requirements for broadcasting were constitutional because they enhanced rather than infringed the freedoms of speech protected under the First Amendment).

[76] *See* Bender, *supra* note 6, at 817*; see also* Greenawalt, *supra* note 8, at 17 ("Any restriction of protected speech constitutes a limitation under Section 2 [of the Charter]. The critical inquiry in almost all troublesome cases is the test of possible justification under Section 1."); Kent Roach & David Schneiderman, *Freedom of Expression in Canada*, *in* Canadian Charter of Rights and Freedoms 429, *supra* note 59, at 430 ("Thus any analysis of freedom of expression in Canada must be concerned not only with the scope of constitutionally protected expression, but also with the process used to determine whether the government has justified reasonable limits on that right. It is mostly in the context of the section 1 justification process, though not exclusively, where courts seek to reconcile freedom of expression with competing Charter rights . . . .").

[77] R. v. Zundel, [1992] 2 S.C.R. 731, 747–48 (Can.) ("The question of falsity of a statement is often a matter of debate, particularly where historical facts are at issue . . . . The element of the accused's knowledge of falsity compounds the problem, adding the need to draw a conclusion about the accused's subjective belief as to the truth or falsity of the statements.").

[78] *Id.* at 752.

> Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Zundel was not about the dissemination of hate speech, although the Court was reviewing the conviction of someone who had published a pamphlet, entitled *Did Six Million Really Die?*, denying the fact of the Holocaust during World War II. Instead, writing for a bare majority of four Justices—seven members of the Court heard the appeal—Justice McLachlin (prior to becoming Chief Justice) said that this case presented the question of whether false statements deemed likely to injure or cause mischief to any public interest could be saved by § 1 of the Charter, presuming the impugned provision violated § 2(b).[79] Justice McLachlin framed her analysis in two parts, first asking whether § 2(b) protected the impugned publication, and if so, whether the criminal prohibition of the publication could be maintained as a measure "demonstrably justified in a free and democratic society," pursuant to § 1.[80]

In response to the preliminary question of whether § 2(b) of the Charter protected the accused's right to publish the impugned material, the Court had to first determine whether the publication amounted to protected expression, and if so, whether the purpose or effect of § 181 was to restrict that expression.[81] In affirming the Court's position that freedom of expression "serves to preclude the majority's perception of 'truth' or 'public interest' from smothering the minority's perception," Justice McLachlin concluded that "a law which forbids expression of a minority or 'false' view on pain of criminal prosecution and imprisonment, on its face, offends the purpose of the guarantee of free expression."[82] Justice McLachlin provided two reasons for concluding that falsity could not remove the impugned publication from the ambit of § 2(b) as protected expression: "The first stems from the difficulty of concluding that all deliberate lies are entirely unrelated to the values underlying s. 2(*b*) of the *Charter*. The second lies in the difficulty of determining the meaning of a statement and whether it is false."[83] Regarding its purpose and effects, Justice McLachlin also quickly concluded that § 181—through its operative language and attachment of criminal liability—restricted expressive activity.[84]

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[79] *Id.* at 743 (§ 181 was also alleged to infringe § 7 of the Charter, which is akin to the guarantee against deprivations of "life, liberty or property, without due process of law" of the Fifth and Fourteenth Amendments of the U.S. Constitution, but the SCC's determination that § 181 violated § 2(b) of the Charter obviated the need to dispose of the § 7 claim.). For a discussion of § 7 of the Charter, see *generally* Carissima Mathen, *Section 7 and the Criminal Law*, *in* Canadian Charter of Rights and Freedoms 699, *supra* note 59, at 700.

[80] *Zundel*, 2 S.C.R. at 751.

[81] *Id.* at 751–52.

[82] *Id.* at 753 (The Court notably cited an American case, United States v. Schwimmer, 279 U.S. 644, 654–55 (1929), in which Justice Holmes said "the fact that the particular content of a person's speech might 'excite popular prejudice' is no reason to deny it protection for 'if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate.'").

[83] *Id.* at 754.

[84] *Id.* at 759.

Next, to determine whether § 181 could be saved by § 1 of the Charter, the Court applied the doctrinal test first developed in *R v. Oakes*.[85] Broadly speaking, under the *Oakes* test, the government must show "by a preponderance of probability" that:[86] (i) the legislative objective is "pressing and substantial"; (ii) the measures adopted must be "rationally connected to the objective"; (iii) the chosen means should "impair 'as little as possible' the right or freedom in question"; and (iv) there must be "proportionality" between the effects of the chosen means constituting a *prima facie* violation of the Charter and the government's stated objective (*i.e.*, "[t]he more severe the deleterious effects of a measure, the more important the objective must be").[87]

Applying the *Oakes* test, Justice McLachlin identified two main defects in § 181, thus supporting a declaration of unconstitutionality. First, the government failed to articulate a sufficiently precise "pressing and substantial objective" to justify § 181, since the history and wording of the provision did not point to a unique objective not otherwise shared by all other criminal code provisions. Also, while § 181 was used by prosecutors in this case to suppress hate propaganda, other laws that were not so vaguely worded were better placed to address this public harm.[88] Second, Justice McLachlin described the overbreadth of § 181 as the provision's "greatest danger" and "fatal flaw." Even assuming that there was an acceptable government objective, Justice McLachlin found that the vague meaning of "a statement, tale or news" targeted by the provision as well as the amorphous concept of "injury" or "mischief" to any "public interest" precluded § 181 from minimally infringing upon § 2(b).[89] For these reasons, § 181 was a violation of freedom of expression as guaranteed by § 2(b) of the Charter and could not be saved by § 1.

In a co-authored dissent, Justices Peter deCarteret Cory and Frank Iacobucci agreed with the majority that § 181 violated § 2(b) by restricting expressive content, finding that even statements known to be false are located "on the extreme periphery of the protected right."[90] In contrast to the majority though, they concluded that the provision could be justified under § 1 of the Charter. At bottom, Justices Cory and Iacobucci perceived § 181 as a legitimate attempt to limit the spread of false speech. "This appeal concerns the wilful publication of deliberate, injurious lies and the legislation which seeks to combat the serious harm to society as a whole caused by these calculated and deceitful falsehoods," said the dissenting Justices.[91] In their view, § 181 sought to combat false news by "prohibiting the dissemination of false information which strikes at important interests of society as a whole."[92]

While discussing the provision's pressing and substantial objective under the *Oakes* test, the dissenting Justices discussed the harm caused by false

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[85] [1986] 1 S.C.R. 103 (Can.). For a general discussion of the *Oakes* test, see, *e.g.*, Mendes, *supra* note 68.
[86] *Oakes*, 1 S.C.R. at 137.
[87] *Id.* at 138–40.
[88] *Zundel*, 2 S.C.R. at 760–67.
[89] *Id.* at 768–76.
[90] *Id.* at 802 (Cory & Iacobucci, JJ., dissenting).
[91] *Id.* at 778–79.
[92] *Id.* at 801.

speech in a way unexplored by Justice McLachlin: "The evil is apparent in the deceptive nature of publications caught by s. 181. The focus of s. 181 is on manipulative and injurious false statements of fact disguised as authentic research."[93] Similarly, while conceding that the term "public interest" in § 181 was not adequately defined in the legislation, Justices Cory and Iacobucci were content to interpret the term "in light of the legislative history of the particular provision in which it appear[ed] and the legislative and social context in which it [was] used."[94] Under this approach, the dissenting Justices reasoned that the corollary of someone harming the "public interest" through false speech would be the government's aim to vindicate the same public interest in keeping with the rights recognized in the Charter.[95] Specifically, Justices Cory and Iacobucci stated that "[i]t is only if the deliberate false statements are likely to seriously injure the rights and freedoms contained in the *Charter* that s. 181 is infringed."[96] Given the nature of the impugned publication in this case, they characterized the public interest in terms of §§ 27 and 15 of the Charter to encourage tolerance and equality in a multicultural and pluralistic society, respectively.[97] For this reason, and as will be explained below, a prohibition on false election speech that aims to protect the right to vote enshrined in § 3 of the Charter could similarly satisfy the pressing and substantial objective element of the *Oakes* test, which is an important conceptual outlook for explaining the rationale for the position advocated herein, that is, to offer a government justification for adopting a prohibition on false election speech, even though that prohibition would offend freedom of expression on its face. Finally, the dissenting Justices determined that § 181 could be saved by § 1 of the Charter because the provision was rationally connected to the government's objective, minimally impaired § 2(b), and offered greater salutary than deleterious effects when considered on balance. In particular, § 181 minimally impaired § 2(b) because of the "very heavy onus" borne by the prosecutor to prove all the elements of the offense, including the accused's knowledge of falsity.[98]

2. Alvarez

Despite Canada historically placing greater emphasis on collective well-being at the expense of individual liberty in the context of speech regulation, the SCC's approach in *Zundel* bears many similarities to the U.S. Supreme Court's decision in *Alvarez*. Here, the Court found that the Stolen Valor Act

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[93] *Id.* at 808.
[94] *Id.* at 805–06.
[95] *Id.* at 806.
[96] *Id.* at 807.
[97] *Id.* at 819 (§ 27 of the Charter provides that "this Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians," and § 15(1) of the Charter provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.").
[98] *Id.* at 832.

of 2005[99] was unconstitutional under the Free Speech Clause of the First Amendment for making it a crime to falsely claim receipt of military decorations or medals. Although three members of the Court dissented, Justice Anthony Kennedy, writing for a plurality, found that content-based speech restrictions could not survive First Amendment review based on the exacting scrutiny standard on falsity alone. Instead, he found "[t]he statement must be a knowing or reckless falsehood."[100] A plurality of the U.S. Supreme Court shared the SCC's concern that false statements do not automatically fall outside the constitutional guarantee of freedom of expression. Instead, the general presumption that content-based restrictions on speech are invalid ought to apply to false statements as well, except for when the government asserts a compelling interest.[101] According to Justice Kennedy, false speech does not fall within one of the historical categories of unprotected speech since "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conservation, expression the First Amendment seeks to guarantee."[102]

Moreover, much like the four elements of the *Oakes* test, the exacting scrutiny analysis of the First Amendment begins with reciting the state's "compelling interests" (*i.e.*, a pressing and substantial objective), but requires that the government's chosen legislative means be "actually necessary" to achieve its interest (*i.e.*, a minimal impairment). There must also be a "direct causal link" between the chosen means and the injury prevented (*i.e.*, a rational connection).[103]

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[99] 18 U.S.C §§ 704(b)–(c). The provisions read:

> (b) FALSE CLAIMS ABOUT RECEIPT OF MILITARY DECORATIONS OR MEDALS.—Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . . shall be fined under this title, imprisoned not more than six months, or both.
>
> (c) ENHANCED PENALTY FOR OFFENSES INVOLVING CONGRESSIONAL MEDAL OF HONOR.—
>
> (1) IN GENERAL.—If a decoration or medal involved in an offense under subsection (a) or (b) is a Congressional Medal of Honor, in lieu of the punishment provided in that subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both.

[100] United States v. Alvarez, 567 U.S. 709, 719 (2012).

[101] *Id.* at 724.

[102] *Id.* at 717–18 (Examples of such historic and traditional categories are obscenity, defamation, speech integral to criminal conduct, so-called "fighting words," child pornography, fraud, and "speech presenting some grave and imminent threat the government has the power to prevent.").

[103] *Id.* at 725; *see also id.* at 730 (Breyer, J., concurring) (Justice Breyer offered his own explanation of the sort of balancing required to scrutinize a violation of the First Amendment which similarly resembles the *Oakes* test of § 1 of the Charter: "In determining whether a statute violates the First Amendment, this Court has often found it appropriate to examine the fit between statutory ends and means. In doing so, it has examined speech-related harms, justifications, and potential alternatives. In particular, it has taken account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so. Ultimately the Court has had to determine whether the statute works speech-related harm that is out of proportion to its justifications.").

Similar to Justice McLachlin's concern in *Zundel* about § 181's overbreadth, Justice Kennedy expressed doubt over the Stolen Valor Act's "sweeping, quite unprecedented reach," potentially applying at any time, in any place, to any person without regard to whether the lie was made for the purpose of material gain.[104] Akin to Parliament's use of the broad term "public interest" in § 181, Justice Kennedy said that if upheld, the Stolen Valor Act "would give government a broad censorial power" that would chill free speech, thought, and discourse.[105] Frederick Schauer describes the "chilling effect" as occurring when "individuals seeking to engage in activity protected by the first amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity."[106] On this basis alone, Justice Kennedy found that the Act conflicted with principles of free speech,[107] and could not satisfy exacting scrutiny under the First Amendment, despite the government's legitimate objective to protect the integrity of the Medal of Honor.[108] Applying the standard of exacting scrutiny to the statute, Justice Kennedy concluded that no causal link could be maintained since "[t]he Government point[ed] to no evidence to support its claim that the public's general perception of military awards is diluted by false claims such as those made by Alvarez."[109] Furthermore, the statute was not necessary to achieve the state's interest since counterspeech remained a viable alternative to achieving the state's interest.[110]

The concept of counterspeech as an antidote to false speech has dominated judicial and academic discussions of free speech since U.S. Supreme Court Justice Oliver Wendell Holmes Jr. first developed the "marketplace of ideas" framework in his dissent in *Abrams v. United States*.[111] Quoting the dissent in *Abrams*, Justice Kennedy was inspired by this theory of the First Amendment when he said, "[t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uniformed, the enlightened; to the straight-out lie, the simple truth."[112] Yet, unlike in *Alvarez*, counterspeech is not a panacea to the virus that is false election speech due to the amount and rate at which false speech can be spread online, the vast audience exposed to the speech in real

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[104] *Alvarez*, 567 U.S. at 721; *see also id.* at 736 (Breyer, J., concurring) (sharing his concern about overbreadth, saying: "The statute before us lacks any such limiting features . . . . But it still ranges very broadly. And that breadth means that it creates a significant risk of First Amendment harm.").

[105] *Alvarez*, 567 U.S. at 723.

[106] Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. Rev. 685, 693 (1978).

[107] *Alvarez*, 567 U.S. at 724.

[108] *Id.*

[109] *Id.* at 726.

[110] *Id.* at 726–27.

[111] 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct the ultimate good desired is better reached by *free trade in ideas*—that the best test of truth is the power of the thought to get itself accepted in the *competition of the market*, and that truth is the only ground upon which their wishes safely can be carried out." (emphasis added)). For a discussion of the rise, but also criticism, of the marketplace of ideas framework, *see, e.g.*, David S. Ardia, *Beyond the Marketplace of Ideas: Bridging Theory and Doctrine to Promote Self-Governance*, 16 Harv. L. & Pol'y Rev. 275, 282–94.

[112] *Alvarez*, 567 U.S. at 727.

time, and the inability or ineffectiveness of trying to "correct" the false speech with accurate information during an active election campaign.[113] Mary Anne Franks describes speech which cannot be counteracted with more speech due to the chilling effect of the initial harmful expression as "unanswerable."[114] Franks explains the intuitive but often overlooked fact that when a speaker exercises their freedom of speech it may cause the listener to limit their speech because of the harmful effects of the initial expression, thus undermining their ability to respond.[115]

In his concurrence, Justice Stephen Breyer began by applying intermediate scrutiny instead of the exacting or strict scrutiny standard used by Justice Kennedy. In Justice Breyer's view, the Stolen Valor Act did not inherently target subjective matters of speech like philosophy, religion, history, the social sciences, or the arts. Instead, consistent with Justices Cory and Iacobucci's comments in *Zundel* regarding the fact-opinion distinction, Justice Breyer explained that the concern over suppressing valuable ideas is lower where "the regulations concern false statements about easily verifiable facts," which are less likely to contribute to the "marketplace of ideas."[116] Nevertheless, Justice Breyer ultimately agreed with the plurality that false statements fall within the First Amendment's protection,[117] and the statute could not withstand even intermediate scrutiny since a more finely tailored statute—designed to limit overbreadth by requiring proof of injury—would catch only the subset of lies where specific harm is more likely to occur.[118]

The dissenting opinion, authored by Justice Samuel Alito, accepted the premise of those concerns identified by Justices Kennedy and Breyer, but simply disagreed that they existed in this case: "The statute reaches only knowingly false statements about hard facts directly within a speaker's personal

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[113] *See* Hasen, *supra* note 32, at 23 ("Much of the Court's First Amendment doctrine is premised on an outmoded 'marketplace of ideas' model in which citizens debate ideas publicly and the truth rises to the top. Whether this marketplace vision ever accurately represented political speech in the United States—and today many First Amendment scholars believe it never did—it does not do so now . . . . Voters have a harder time distinguishing legitimate news and analysis from propaganda and lies. Voter confidence in traditional media is deteriorating, especially among voters on the right. *Much communication now takes place in private social media groups, where counterspeech and fact checking are impossible. The marketplace of ideas is experiencing market failure*." (emphasis added)).

[114] Mary Anne Franks, *The Free Speech Black Hole: Can the Internet Escape the Gravitational Pull of the First Amendment?*, Knight First Amend. Inst. at 5–6 (Aug. 21, 2019), https://knightcolumbia.org/content/the-free-speech-black-hole-can-the-internet-escape-the-gravitational-pull-of-the-first-amendment [https://perma.cc/8YQF-R37U] (Besides false speech, two other examples of "unanswerable speech" are 'revenge porn' (the unauthorized disclosure of private, sexually explicit imagery) and 'doxing' (the online publication of personally identifying information about an individual)).

[115] *Id.* at 5.

[116] *Alvarez*, 567 U.S. at 732 (Breyer, J., concurring).

[117] *Id.* at 733–34 (Justice Breyer offered three reasons for including false factual statements within the First Amendment's protection: (i) "[f]alse factual statements can serve useful human objectives, for example: . . . examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth"; (ii) "the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements"; and (iii) "the pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more.").

[118] *Id.* at 736.

knowledge."[119] In contrast to the plurality and concurrence, Justice Alito emphasized the social context in which Congress adopted the Stolen Valor Act: "Congress passed the Stolen Valor Act in response to a proliferation of false claims concerning the receipt of military awards."[120] In his view, the state interest should have been viewed in light of this reality, wherein lies about military honors inflict substantial, tangible harm.[121] Furthermore, although Justice Alito expressed overall support for the Court's free speech doctrine, he disagreed with the plurality's decision to extend First Amendment protection to false factual statements. "[T]he right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest,"[122] said Justice Alito. In detail, he then identified the many instances in which the Court "ha[d] recognized that as a general matter false factual statements possess no intrinsic First Amendment value,"[123] except when conferring First Amendment protection would be necessary to avoid a chilling effect. In his view, however, the Stolen Valor Act did not suppress potentially protected speech that would engage the chilling-effect doctrine: "The speech punished by the Act is not only verifiably false and entirely lacking in intrinsic value, but it also fails to serve any instrumental purpose that the First Amendment might protect."[124]

3. Lessons From Zundel *and* Alvarez

Although it may seem as though the SCC and the U.S. Supreme Court have severely limited the viability of a content-based restriction on false speech, *Zundel* and *Alvarez* were closely decided (4–3 and 4–2–3, respectively) and stand to be distinguished on the basis of the novel harm caused by false election speech. Indeed, in the Canadian context, the late Kent Greenawalt reasoned that "[t]he nuanced, contextualized approach encouraged by Section 1 can yield relative flexibility of result under fairly stable open-ended criteria of evaluation."[125] Notably, the presence of dissenting opinions in both cases, which unequivocally affirmed that false statements of fact do not enjoy § 2(b) and First Amendment protections, suggests that unambiguous realities or "hard facts", to borrow Justice Alito's words,[126] about voting requirements and

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[119] *Id.* at 739 (Alito, J., dissenting).
[120] *Id.* at 741.
[121] *Id.* at 742–44.
[122] *Id.* at 739.
[123] *Id.* at 746–750; *see, e.g.*, Gertz v. Robert Welch Inc., 418 U.S. 323, 340 (1974) ("But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. They belong to that category of utterances which '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.'" (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942))).
[124] *Alvarez*, 567 U.S. at 752 (Alito, J., dissenting).
[125] Greenawalt, *supra* note 8, at 69.
[126] *Alvarez*, 567 U.S. at 739 (Alito, J., dissenting).

procedures should be immunized from knowingly and intentionally harmful misrepresentations through a narrowly tailored statutory prohibition.[127]

As evidenced by *Zundel* and *Alvarez*, no matter the tier of scrutiny applied, the need to account for harm factors into every proportionality analysis. The points of departure stemmed from different conceptions of the harm at stake. In *Zundel*, the majority and dissenting opinions framed the harm in terms of hate speech, which led the majority to conclude that § 181 did not satisfy a sufficiently important state interest that was not already vindicated by another provision of the criminal code. Similarly, in *Alvarez*, while the plurality, concurrence, and dissent all substantially agreed on the nature of the harm caused by lying about receiving the Medal of Honor, only the dissent was convinced that the statute was not overly broad in its written formulation. Thus, the door remains open for a prohibition on false speech to pass constitutional muster. But the train of analysis adopted by the SCC and SCOTUS dictates that success will hinge on (i) the precise written formulation of the statutory prohibition—to ensure that only the targeted false speech is caught by the prohibition—and (ii) the compelling nature of the state's interest to justify the burden on freedom of expression.

D. Models of Election Regulation: Egalitarianism and Libertarianism

To overcome the precedents established in *Zundel* and *Alvarez*, it is also essential to grapple with the conventional approaches to election regulation that have developed in the context of campaign finance regulation, namely egalitarianism in Canada and libertarianism in the United States.[128] Relying on the work of Cass Sunstein, Dawood describes the two approaches as follows:

> Proponents of the libertarian approach argue that the state should not restrict electoral speech by imposing limits on independent contributions and expenditures. Advocates of the egalitarian

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[127] Hasen, *supra* note 32, at 121. Hasen lends support for this view, saying: "Perhaps a narrower law could survive, like the proposed ban on empirically verifiable false election speech, on the basis of the unique need to protect a healthy democracy by shielding voters from political disinformation and promoting democratic legitimacy." *Id.*; *see also* James Weinstein, *Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibition of Lies*, 71 Okla. L. Rev. 167, 222 (2018) ("In contrast, narrower laws directly promoting the fairness and efficiency of elections might well pass constitutional muster. An example of such narrowly focused laws are those prohibiting false statements about election procedures, such as the day the election will be held, the proper place to cast one's vote, or voting requirements.").

[128] Note that some have argued variations of the egalitarian and libertarian models or have attempted to narrow the conceptual gap between them. *See, e.g.*, Dawood, *Rethinking the Conflict between Liberty and Equality*, *supra* note 7, at 294 (arguing that the "libertarian/egalitarian distinction is better conceived of as a 'libertarian-egalitarian spectrum'"); Jay Makarenko, *Fair Opportunity to Participate: The* Charter *and the Regulation of Electoral Speech*, 3 Can. Pol. Sci. Rev. 38, 39 (2009) (arguing that instead of the SCC adopting the egalitarian approach as described by Colin Feasby, "Rawls and the Court may be more clearly understood as endorsing a liberal fair opportunity model of elections" in which the focus is on the 'liberal ideal of procedural fairness, and ensuring that all citizens have an equal opportunity or chance to influence political outcomes'").

> approach, by contrast, argue that the state regulation of speech is required in some instances to support the freedom of speech by preventing the wealthy from monopolizing political discourse. *The debate over the state's treatment of electoral speech is, at heart, a debate about the central values in a democratic system . . . . The choice between these two approaches should be understood as a choice between liberty and equality*.[129]

When he was a practicing lawyer, Justice Colin Feasby of the Alberta Court of King's Bench also wrote about the egalitarian and libertarian distinction, relying on the work of Schauer, saying:

> [B]roadly defined, there are two conceptions of democracy: libertarian and egalitarian. The libertarian conception eschews State controls and permits those with greater resources or abilities to express themselves disproportionately in the so-called 'marketplace of ideas'. . . . In contrast, the egalitarian conception of democracy is an extension of the 'one person-one vote' principle which stands for the proposition that each person's voice in the democratic process is of equal worth.[130]

Justice Feasby draws a direct comparison between the egalitarian and libertarian models in terms of the relationship between Canada and the United States, and the justification requirement set out in § 1 of the Charter and the First Amendment's Free Speech Clause, saying:

> While it is true that discussions of the problems of the United States First Amendment are not always applicable to the Canadian constitutional protection of freedom of expression, *the arguments advanced in favour of an egalitarian approach to election regulation are clearly relevant to the consideration of any justification of government actions under section 1 of the Charter*.[131]

Therefore, when considering the justification for a prohibition on false election speech, the distinction between the egalitarian and libertarian models of election regulation are salient. And although the distinction has primarily been studied in the context of campaign finance regulation, the underlying democratic values of liberty and equality are transferable to the study of false election speech regulations insofar as the proposed restriction interferes with freedom of expression in pursuit of a greater, public purpose.[132] For example,

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[129] Dawood, *Rethinking the Conflict between Liberty and Equality, supra* note 7, at 293–94 (emphasis added) (citing Cass R. Sunstein, Democracy and the Problem of Free Speech at 1–51 (2d ed. 1995)*; see also* Yasmin Dawood, *Democracy, Power, and the Supreme Court: Campaign Finance Reform in Comparative Perspective*, 4 Int'l J. Const. L. 269, 285–87.

[130] Feasby, *The Emerging Egalitarian Model*, *supra* note 7, at 7–8 (citing Frederick Schauer, *Judicial Review of the Devices of Democracy*, 94 Colum. L. Rev. 1326, 1340 (1994)).

[131] *Id.* at 9 (emphasis added).

[132] *See* Hasen, *supra* note 32, at 25 (expressly sharing that his study of false election speech has been informed by the "debate over the desirability and constitutionality of laws regulating money in politics").

in what he has called the "paradox of political expression,"[133] Justice Feasby observes that the egalitarian approach inherently requires *some* restrictions on liberty in order for equality of liberty to prevail. "Under such a conception of electoral expression, restrictions that enhance the democratic process, including those that promote the egalitarian qualities of elections, are justifiable,"[134] explains Justice Feasby. In specific, the distinction between the values of equality and liberty reflects the prevailing view that Canada and the United States, while they share a common commitment to liberal democratic government, perceive the individual-to-state relationship very differently.[135] This difference in perception is starkly borne out in the case law.

1. American Libertarianism

Through successive cases decided by the U.S. Supreme Court, the Free Speech Clause of the First Amendment has received broad, albeit not absolute, protection in the context of campaign finance regulation, thus placing primacy on the value of liberty.[136] For example, in *Buckley v. Valeo*, the U.S. Supreme Court in a per curiam opinion, underscored its concern for the quantity of speech available to voters, stating: "In the free society ordained by our Constitution, it is not the government, but the people—individually, as citizens and candidates, and collectively, as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign."[137] Justice Feasby elaborates on this idea, saying, "[t]he libertarian view, which is called the 'individual-choice' argument by Dworkin, holds that the citizen as voter has a right to uncontrolled access to information. Only the voter can decide what is or is not relevant to that voter's decision. Any manipulation of the flow of information affects the ability of the electorate to be sovereign."[138] For this reason, the U.S. Supreme Court in *Buckley* famously rejected the egalitarian approach, saying, "the

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[133] Feasby, *Law of the Democratic Process*, *supra* note 7, at 238.

[134] Feasby, *The Emerging Egalitarian Model, supra* note 7, at 16; *see also* Dawood, *Rethinking the Conflict between Liberty and Equality, supra* note 7, at 296 (confirming that based on the egalitarian approach, government regulation of speech is understood to promote liberty and freedom of expression in general by preventing the monopolization of the marketplace of ideas).

[135] *See* Feasby, *The Emerging Egalitarian Model*, *supra* note 7, at 17–19 (discussing the development of the egalitarian approach in Canada based on early forms of campaign finance legislation (citing The Royal Commission on Electoral and Party Financing, 1 Reforming Electoral Democracy (1991))).

[136] The U.S. Supreme Court has guaranteed broad, but not absolute protection, for expression under the First Amendment. In the campaign finance context, for example, the current Court has upheld contribution limits, outright bans on corporate donations, mandatory disclosure, bans on solicitation by judicial candidates, and bans on foreign contributions and expenditures. *But see* Feasby, *The Emerging Egalitarian Model*, *supra* note 7, at 21–22 (Justice Feasby describes *Buckley* as the "spiritual father of the American electoral morass" and states that "[t]he story of American electoral regulation is one of the almost complete triumphs of the libertarian conception of democracy.").

[137] 424 U.S. 1, 57 (1976); *see also* Feasby, *The Emerging Egalitarian Model*, *supra* note 7, at 20 ("The seminal United States Supreme Court decision in *Buckley* endorses the libertarian view that free speech is the pre-eminent concern in a democratic society and allows only the limitation of speech where corruption is a demonstrable risk.").

[138] Feasby, *The Emerging Egalitarian Model*, *supra* note 7, at 19.

concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[139] If American courts equated a prohibition on false election speech to a campaign finance regulation, that prohibition would likely be struck down as unconstitutional, pursuant to the First Amendment, for disturbing the "flow of information" within the electorate, and thereby, violating freedom of expression.

Yet, despite this rebuke of the egalitarian approach, the U.S. Supreme Court has since flirted with egalitarian interests for restricting speech in the election context, namely the anti-voter alienation and anti-campaign distortion rationales.[140] In *McConnell v. Federal Election Commission*, the Court endorsed an "equalizing" anti-corruption rationale,[141] upholding the constitutionality of the "soft money" and issue-advertising provisions of the Bipartisan Campaign Reform Act of 2002. The Court also reaffirmed its holding in *Buckley* that the prevention of corruption was the only permissible justification for campaign finance regulations. Dawood notes a "departure from *Buckley*," however, where the Court found that corruption did not simply mean "cash-for-votes exchanges," but also encompassed the "undue influence on an officeholder's judgment, and the appearance of such influence."[142]

In *McConnell*, the Court found that Congress was justified in preventing political parties from selling access to federal officeholders in exchange for large soft money donations, which could give rise not just to the reality but the appearance of corruption.[143] The Court explained that regulating corporate expenditures could be justified to preserve "the individual citizen's confidence in government" and to sustain "the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government."[144] Marshall characterizes these statements as anti-voter alienation concerns,[145] and in practical terms, describes a phenomenon in which ill-informed citizens forgo participating in the political life of the state when they are lied to in a manner that robs them of their agency to vote—a form of expression in its own right.[146]

Regarding the anti-campaign distortion rationale, Marshall recalls the U.S. Supreme Court's concern for "corrosive and distorting effects" caused by "immense aggregations of wealth,"[147] and likens the misaligning character of big money in politics to what today has become known as the "big lie" in

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[139] *Buckley*, 424 U.S. at 48–49.

[140] Dawood, *Rethinking the Conflict between Liberty and Equality, supra* note 7, at 301 (citing FEC v. Mass. Citizens for Life, 479 U.S. 238, 257 (1986); Austin v. Mich. Chamber of Com., 494 U.S. 652, 660 (1990); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 401 (2000) (Breyer, J., concurring); Randall v. Sorrell, 548 U.S. 230, 262 (2006)).

[141] McConnell v. FEC, 540 U.S. 93 (2003).

[142] Dawood, *Rethinking the Conflict between Liberty and Equality*, *supra* note 7, at 302 (citing *McConnell*, 540 U.S. at 143, 150).

[143] *McConnell*, 540 U.S. at 154.

[144] *Id.* at 206 n.88 (relying on First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978)).

[145] Marshall, *supra* note 4, at 304.

[146] *Id.* at 318*; see also* Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 Yale L. & Pol'y Rev. 471 (2016).

[147] *McConnell*, 540 U.S. at 695–96 (quoting Austin v. Mich. Chamber of Com., 494 U.S. 652, 660 (1990)).

politics. In both instances, there are "skewing effects" wrought by external factors, be it money or falsity, which distort our political reality.[148] Prior to *Citizens United*, Marshall compared the reasons for and against the regulation of "deceptive campaign speech," not false election speech, with the arguments for and against the regulation of campaign financing, and argued that "the differences are not so substantial as to justify a different result in the constitutional balance."[149] He found that if the Court upheld the restrictions on corporate expenditures in *McConnell* based on the anti-voter alienation and anti-campaign distortion rationales, it could also uphold restrictions on deceptive campaign speech for the same reasons. Unfortunately, however, Marshall's position predates *Citizens United*, which has rendered egalitarian interests like anti-voter alienation and anti-campaign distortion a dead letter. In this landmark ruling, Justice Kennedy, writing for a bare 5–4 majority, held that corporate funding of independent political broadcasts in candidate elections cannot be limited under the First Amendment.[150] Justice Kennedy, demonstrating his utmost concern for preserving unrestricted political speech, said:

> Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it . . . For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'[151]

That said, attempts to "equalize" the First Amendment's application in the context of election and campaign speech have not stopped. For example, Hasen has called for a changed approach to the First Amendment doctrine in the face of the grave harms caused by false election speech—instead of just false campaign speech—saying:

> While we cannot dismiss the risk of censorship as an unintended consequence of reform, *the greatest danger today is a public that cannot determine truth or make voting decisions that are based on accurate information*, and a public susceptible to political manipulation through repeatedly amplified, data-targeted, election-related content, some of it false or misleading . . . *Modern First Amendment doctrine should reflect radically changed circumstances, albeit duly sensitive of the real dangers posed by government regulation*.[152]

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[148] Marshall, *supra* note 4, at 304.

[149] *Id.* at 287.

[150] Citizens United v. FEC, 558 U.S. 310, 348 (2010) (citations omitted) (rejecting the "antidistortion interest" articulated in *Austin* in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas").

[151] *Id.* at 339–40.

[152] Hasen, *supra* note 32, at 24 (emphasis added).

Executing this shift in the First Amendment doctrine is unlikely to occur based purely on the egalitarian approach because of the U.S. Supreme Court's decision in *Citizens United* and its path dependence, but I argue it could be achieved through the advancement of a compelling state interest in protecting the right to vote and preserving the integrity of election administration.

2. Canadian Egalitarianism

In Canada, the courts have interpreted campaign finance regulation consistently with the egalitarian approach by placing primacy on the value of equality.[153] In the SCC's first campaign finance decision after the adoption of the Charter, *Libman v. Quebec (Attorney General)*,[154] the SCC incorporated the principle of "fairness" into its understanding of election regulation. In *Libman*, the applicant was a politically active resident of the province of Quebec and wished to advocate in favor of abstaining from a referendum question that had been posed throughout the province. The provincial legislation, however, required that regulated expenses be incurred through a national committee, which ostensibly meant that individuals who supported abstaining from the vote were limited to unregulated expenses. Among several claims, the applicant argued that these restrictions infringed upon his freedom of expression because any individual or group should have the right to receive public funding and to incur regulated expenses. The SCC held, per curiam, that the impugned legislation violated freedom of expression and could not be saved by § 1 of the Charter because it did not satisfy the minimal impairment element of the *Oakes* test. In sharp contrast to the reasoning employed in *Buckley* and its progeny, the SCC endorsed the egalitarian approach through incorporation of the principle of fairness:

> The *principle of electoral fairness* flows directly from a principle entrenched in the Constitution: that of the *political equality of citizens*. If the principle of fairness in the political sphere is to be preserved, it cannot be presumed that all persons have the same financial resources to communicate with the electorate . . . . To ensure a right of equal participation in democratic government, laws limiting spending are needed to preserve the *equality of democratic rights* and ensure that one person's exercise of the freedom to spend *does not hinder the communication opportunities of others*. Owing to the competitive nature of elections, such spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity

[153] *See* Ontario (Att'y Gen.) v. Working Families Coalition (Canada) Inc., 2025 SCC 5 at para. 32 (Can.) (upholding the SCC's longstanding endorsement of the egalitarian model of election regulation, the SCC said, "[e]quality and fairness in elections are essential to the meaningful exercise of the vote and encourage public confidence in the electoral system. The egalitarian model of elections thus aims to balance the rights and privileges of the participants in the electoral process: candidates, political parties, third parties and voters, so that voters may be better informed." *Id.* (citations and internal quotation marks omitted)).

[154] Libman v. Quebec (Att'y Gen.), [1997] 3 S.C.R. 569 (Can.).

> to speak and be heard . . . . Thus, the principle of fairness presupposes that certain rights or freedoms can legitimately be restricted in the name of a healthy electoral democracy.[155]

By adopting this approach, the SCC bucked the American wisdom that if some liberty is good, surely more is better.[156] While drawing contrasts between libertarianism in the United States and egalitarianism in Canada, Justice Feasby considers the SCC's adoption of the egalitarian approach as a guiding path for the sustainability of other electoral regulations including, as I would argue, regulations on false election speech:

> The idea of fairness in elections is important and has the potential to blossom into a theoretical framework for the judgment of all electoral regulations. Indeed, after *Libman*, *the challenge before the courts is to flesh out the meaning of fairness in consideration of other aspects of electoral regulation*.[157]

Seven years later, in *Harper v. Canada*, the SCC wholly and explicitly adopted the egalitarian model and directly cited Justice Feasby's prior work in doing so.[158] In this case, Justice Michel Bastarache, writing for a 6–3 majority, found that the limits on third party election advertising expenses set out in the Canada Elections Act violated the right to freedom of political expression guaranteed by § 2(b) of the Charter, but were saved by § 1. Importantly, while affirming the Court's approbation of the egalitarian model, Justice Bastarache extended a margin of deference to Parliament on issues regarding the electoral process, a position that Justice Feasby has now notably criticized. According to Justice Bastarache:

> Under the egalitarian model of elections, Parliament must balance the rights and privileges of the participants in the electoral process: candidates, political parties, third parties and voters. Advertising expense limits may restrict free expression to ensure that participants are able to meaningfully participate in the electoral process . . . . Given the right of Parliament to choose Canada's electoral model and the nuances inherent in implementing this model, the Court must approach the justification analysis with deference . . . . In the end, the electoral system, which regulates many aspects of an election, including its duration and the control and reimbursement

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[155] *Id*. at para. 47 (emphasis added).

[156] *See* Bazelon, *supra* note 35, at 2 ("It's an article of faith in the United States that more speech is better and that the government should regulate it as little as possible.").

[157] Feasby, *The Emerging Egalitarian Model*, *supra* note 7, at 37–38 (emphasis added).

[158] Harper v. Canada (Att'y Gen.), 2004 SCC 33, [2004] 1 S.C.R. 827 (Can.). The SCC recently renewed its support and recognition of the egalitarian model in contrast to the libertarian model employed in the United Stated in Ontario (Att'y Gen.) v. Working Families Coalition (Canada) Inc., 2025 SCC 5, at para. 76 (Can.) (Wagner, C.J. & Moreau, J., dissenting, but not on this point) ("The approach to electoral fairness under Canadian law lies in stark contrast to that taken in the United States, where the promotion of equal participation in the electoral process was considered under the First Amendment not to be a compelling interest capable of justifying restrictions on third party election spending." (citation omitted)).

> of expenses, reflects a political choice, the details of which are better left to Parliament.[159]

Justice Bastarache frames the state interest justifying the expense limits as the ability "to meaningfully participate in the electoral process." Rather than prioritizing the quantity of speech that could be available if no expense limits applied, he valorizes diverse sources of speech and uses the term "electoral process" when describing the relationship between candidates, political parties, third parties, and voters; terminology that resembles Dawood's concept of an electoral ecosystem, which is further explained below.

3. Lessons from the Libertarian and Egalitarian Models

In the campaign finance context, I have demonstrated that the libertarian model of election regulation prevents the state from enacting otherwise good faith regulations because doing so would burden freedom of expression. Conversely, the egalitarian model perceives these regulations to ensure greater freedom of expression for all by limiting the expression of a few. The firm establishment of egalitarianism in Canada provides a gateway into thinking about equality as an animating principle for other election regulations, such as prohibitions on false election speech. Similar commentary from American scholars arguing in favor of a more egalitarian conception of the First Amendment,[160] optimistically supports a reconsideration of state efforts to regulate speech in the electoral context. But, as mentioned, attempting to resurrect egalitarian interests as a basis for upholding a prohibition on false election speech in the United States will prove difficult in light of *Citizens United*, which prioritized liberty over equality when regulating speech in the electoral context.

In Canada, though, when explaining the core precepts of the egalitarian model in the context of campaign finances based on the work of John Rawls, Justice Feasby noted that "individuals should have equal opportunity to exercise their liberty to participate in the political life of the State . . . . The main obstacle to equal opportunity to participate in the political process is private wealth."[161] Applied to the context of false election speech, rather than campaign finance regulation, one ought to consider the unequal distribution of accurate information, in lieu of financial resources, as a source of inequality within the political process. The scarcest resource of all in the twenty-first century may well be credible information. Like wealth inequalities which prevent low-income citizens from having their voices equally heard in the marketplace of ideas, informational asymmetries prevent less-informed citizens from communicating effectively with one another, thus contributing to a form of market

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[159] *Harper*, 2004 SCC at para. 87.

[160] *See* Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 Colum. L. Rev. 1953, 1981–84 (2018); Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 1 U. Illinois L. Rev. 599 (2008).

[161] Feasby, *The Emerging Egalitarian Model, supra* note 7, at 9–10.

distortion. Commodification of information in the digital era—via the collapse of local journalism, distrust of mainstream media, ubiquity of social media, and monetization of online advertising and acute microtargeting—resembles the unequal flow of wealth between private parties such that knowledge, rather than money, is power, and less-informed citizens are predisposed to making poorer decisions about when, how, and if they can vote.[162]

In the context of false campaign speech, rather than false election speech, Marshall has expressed support for the view that campaign finance regulations and campaign speech regulations satisfy the same state interest in preventing a form of corruption. He notes that "[t]he only difference is that in campaign speech regulation, the concern is with the skewing effects of deception, whereas in the corporate expenditure context, it is with the skewing effects of wealth."[163] And although false election speech and false campaign speech are different in terms of what or who are the subject of the lies, the "skewing effects of deception" are the same. False election speech erodes the common factual ground required for informed decision-making, thereby segregating citizens into information silos of well-informed and ill-informed voters. This stratification of the electorate creates precisely the sort of inequality in which ill-informed voters cannot reliably or confidently cast their ballots because of informational asymmetries about when, how, and if they can vote. In the next half of this Article, let us accordingly turn to the central question of whether a prohibition on false election speech could withstand constitutional scrutiny in Canada and the United States.

II. Speech Is Free But Lies Will Cost You: Prohibiting False Election Speech

With the bulk of the theoretical groundwork regarding a general right to lie under § 2(b) of the Charter and the First Amendment, as well as the broader models of election regulation, laid down in Part I, Part II of this Article completes the comparative analysis by commenting on whether a statutory prohibition on false election speech would pass constitutional muster in Canada and the United States. Based on the existing doctrinal framework for the right to lie and the underlying liberty and equality interests furthered through the egalitarian and libertarian approaches, respectively, I argue that a prohibition on false election speech would likely survive constitutional scrutiny in Canada, but that it would face harsher—albeit not insurmountable—opposition in the United States.[164] In the Canadian context, the SCC's decision in *Zundel* suggests that the prohibition would violate § 2(b), but it could be saved

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[162] Marshall, *supra* note 4, at 316 (explaining that most voters engage in low-level reasoning, "a process that involved both rational and nonrational, informed and uninformed behavior").

[163] *Id.* at 304.

[164] Recall that in the U.S. context, the same balancing exercise that would occur under the Canadian *Oakes* test of § 1 under the Charter, would be carried out under the "exacting scrutiny" test used by Justice Kennedy in *Alvarez* to determine whether the law is narrowly tailored to serve a compelling state interest.

by § 1 of the Charter. And, since finding a Charter breach is bifurcated into first determining whether a violation has occurred, and if so, whether that violation is justifiable by a state interest pursuant to § 1, a reviewing court could honestly identify a violation of freedom of expression, while still refraining from invalidating the law as unconstitutional.[165]

In order for the prohibition to be justifiable, a reviewing court would need to: (i) be satisfied that the prohibition is viewpoint neutral and does not suffer from overbreadth based on its textual formulation; and (ii) perceive the urgent and intense harm to the public interest caused by false election speech in terms of a burden on the right to vote guaranteed by § 3 of the Charter. While these two conceptual pivots are likely to lead a Canadian court to uphold a prohibition on false election speech, a reviewing court in the United States would need to resist the First Amendment's libertarian current,[166] especially given the existence of several state laws already banning false election speech.[167] And, while American courts do not need to fully embrace Canada's egalitarian election model, they must at least be amenable to a compelling state interest in protecting the right to vote and preserving the integrity of election administration.

A. The Prohibition Is Viewpoint Neutral and Does Not Suffer from Overbreadth

At the outset of this Article, I drew a distinction between election speech and campaign speech in order to highlight the fundamental difference between technical statements made about the conduct of an election and its results and political statements regarding candidates and issues. The distinction is crucial, but it is only one element of a statutory prohibition on false election speech. Stephanopoulos has identified the remaining features of a "normatively attractive regulatory framework" for such a prohibition as follows:

> (1) liability only for false statements made with knowledge of, or recklessness as to, their falsity; (2) liability only for statements whose falsity and effects are material; (3) liability only for candidates,

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[165] *See* Greenawalt, *supra* note 8, at 14 ("[O]ne would expect the flexibility that Section 1 introduces to lead Canadian courts to invalidate fewer laws and practices as unconstitutional than do American courts . . . because the Section 1 justification of exceptions appears by its language to grant more latitude to the political branches of government than does the language of the First Amendment.").

[166] *See* Bazelon, *supra* note 35, at 2–3 ("But increasingly, scholars of constitutional law, as well as social scientists, are beginning to question the way we have come to think about the First Amendment's guarantee of free speech. They think our formulations are simplistic—and especially inadequate for our era . . . . These scholars argue something that may seem unsettling to Americans: that perhaps our way of thinking about free speech is not the best way. At the very least, we should understand that it isn't the only way. Other democracies, in Europe and elsewhere, have taken a different approach. Despite more regulations on speech, these countries remain democratic; in fact, they have created better conditions for their citizenry to sort what's true from what's not and to make informed decisions about what they want their societies to be. Here in the United States, meanwhile, we're drowning in lies.").

[167] *See, e.g.*, Ardia & Ringel, *supra* note 19.

> political parties and political committees; (4) a usual remedy of compulsory retraction and correction; (5) a restriction of harsher penalties to false statements about election administration; and/or (6) enforcement by an independent agency responsible for initiating its own investigations.[168]

Stephanopoulos settles on these specific features to balance the competing interests of the "core dilemma," which requires restricting some individuals' speech for a greater collective good like the preservation of electoral integrity.[169] But, as he and others like Hasen have pointed out, while some lies are about *campaign* speech, attempting to affect voters' political values or choices, other lies are about the *election* itself, seeking to disenfranchise voters altogether and undermine the very foundations of democracy.[170] A few examples bear this distinction out:

> Consider false statements that the election is on Wednesday rather than Tuesday, that voters' polling places have been moved, that voters lacking photo identification will be unable to vote, that authorities will arrest voters with criminal records, and so forth. These sorts of untrue claims, if credited, can do more than merely shift the preferences of the electorate. They can change who is in the electorate to begin with.[171]

The six design elements that Stephanopoulos has identified—mens rea, subject matter, materiality, identity of speakers, remedies, and enforcement—operate in tandem to quell the fear expressed in *Zundel* and *Alvarez* that the government will police *all* speech if it is allowed to regulate *false* speech. Taken together, these limitations embedded in the text of the proposed prohibition narrow the type of speech that could inadvertently fall within the provision's ambit due to potential overzealous enforcement. Several statutes adopted at the state level in the U.S hew close to Stephanopoulos' formulation of the prohibition, and some lower courts have even had the opportunity to judicially review such legislation.

For example, in their comprehensive assessment of state laws limiting false election and campaign speech, Ardia and Ringel determined that 13 states have statutes prohibiting false statements about voting requirements or procedures.[172] They note that "California, Maryland, Minnesota, Oklahoma, Tennessee, and Virginia prohibit false information about voter registration

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[168] Stephanopoulos, *supra* note 39, at 3, 18.

[169] *Id.* at 3 ("The core dilemma is that the government is damned if it does too much, and damned as well if it does too little. Do too much and speech critical to the functioning of democracy is suppressed. Do too little and speech that undermines the very foundations of democracy is permitted to flourish.").

[170] *See* Hasen, *supra* note 35, at 56; *see also* Ardia & Ringel, *supra* note 19, at 348.

[171] *See* Stephanopoulos, *supra* note 39, at 4.

[172] Ardia & Ringel, *supra* note 19, at 346; *see also id.* at 346 n.263 (citing Cal. Elec. Code § 18543 (West 2021); Conn. Gen. Stat. § 9-135 (2021); Conn. Gen. Stat. § 9-363 (2021); Haw. Rev. Stat § 11-391 (2021); Haw. Rev. Stat. § 19-3 (2021); Md. Code Ann., Elec. Law § 16-101 (West 2021); Minn. Stat. § 204C.035 (2021); Mo. Rev. Stat. § 115.631(7)–(26) (2021); Mont. Code Ann. § 1335-235 (2021); N.M. Stat. Ann. § 1-20-9 (2021); N.Y. Elec.

or qualifications, targeting misrepresentations about a prospective voter's eligibility to vote in an election," whereas "Hawaii, Minnesota, Tennessee, and Virginia prohibit false information regarding the time, place, or manner of an election."[173] They single out New York for going further by "broadly prohibit[ing] '[a]ny acts intended to hinder or prevent any eligible person from registering to vote, enrolling to vote or voting.'"[174] In support of these statutes, Ardia and Ringel conclude that "the state does have a compelling interest in preserving fair and honest elections."[175] And, in terms of the elements of the statutory prohibitions, all 13 states impose liability only if the speaker had knowledge of, or reckless disregard for, the falsity of their statement; nine of the 13 states also require a second form of mens rea, namely the intent to interfere with an election.[176]

Regarding U.S. Supreme Court jurisprudence, James Weinstein concludes that "the Court is uncertain about the constitutionality of narrowly crafted laws targeting lies particularly injurious to the fairness or integrity of the electoral process."[177] Since the start of the twenty-first century, Weinstein says that lower courts "have uniformly found broad bans on lies in political campaigns to violate the First Amendment . . . . whether the challenged laws govern[ed] ballot measures, candidate elections, or both."[178] But, the U.S. Supreme Court has yet to encounter a law that clearly bans knowingly made false statements with the intent to mislead voters about voting requirements and procedures, the type of which Chief Justice Roberts alluded to in the *Mansky* footnote and is proposed in this Article. Therefore, in order for a prohibition to withstand scrutiny, the throughline among these cases seems to call for an extremely narrow law that infringes as little as possible upon the speaker's freedom of expression, while still serving the state's compelling objective to limit harmful speech. The emphasis on a precisely, if not perfectly, drawn "fit" on the basis of exacting or strict scrutiny (especially post-*Alvarez*) between the state's objective and the prohibition stems from what is likely the greatest source of apprehension for most judges reviewing limitations on election or campaign speech, namely providing enough breathing room to

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Law § 3-106(d) (McKinney 2021); Okla. Stat., tit. 26, § 16-109 (2021); 17 R.I. Gen. Laws § 19-46 (2021); Tenn. Code Ann. § 2-19-133(a) (2021); Va. Code Ann. § 24.2-1005.1 (2021)).

[173] *Id.* at 346–47.

[174] *Id.* at 347–48.

[175] *Id.* at 348 n.271 (citing Eu v S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process."); Bluman v. FEC, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012) (concluding that the government has a "compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process").

[176] *Id.* at 349.

[177] Weinstein, *supra* note 127, at 171–84 (discussing Brown v. Hartlage, 456 U.S. 45 (1982); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); United States v. Alvarez, 567 U.S. 709 (2012); and List v. Driehaus, 573 U.S. 149 (2014)).

[178] *Id.* at 203; *see id.* at 184–202 (discussing Vanasco v. Schwartz, 401 F. Supp. 87 (E.D.N.Y. 1975); DeWine v. Ohio Elections Comm'n, 399 N.E.2d 99 (Ohio Ct. App. 1978); State *ex rel.* Pub. Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691 (Wash. 1998); Rickert v. State *ex rel.* Pub. Disclosure Comm'n, 168 P.3d 826 (Wash. 2007); 281 Care Comm. v. Arneson, 766 F.3d 774 (8th Cir. 2014); Commonwealth v. Lucas, 34 N.E.3d 1242 (Mass. 2015); List v. Ohio Elections Comm'n, 45 F. Supp. 3d 765 (S.D. Ohio 2014)).

prevent the chilling of political speech during a campaign. Fortunately, a question that remains is whether a narrowly focused prohibition on intentionally false statements about voting requirements and procedures, such as the proposed Deceptive Practices and Voter Intimidation Prevention Act of 2021, could comport with the First Amendment.[179] The fact that 13 states have statutes prohibiting false statements about voting requirements or procedures provides assurance that the federal government could adopt a similar law conforming to Stephanopoulos' formulation of the prohibition as these state laws may already respect the limits set by SCOTUS and the SCC in *Alvarez* and *Zundel*, respectively.

In Canada, at the provincial and territorial level, only two provinces have a prohibition on false election speech that resembles the proposal discussed in this Article.[180] On Canada's west coast, § 234.3 of British Columbia's Election Act states:

> During a pre-campaign period or a campaign period, an individual or organization must not, with the *intention of affecting the results* of an election, transmit by any means any material or information, regardless of its form, that provides *false or misleading information about voter eligibility, voter registration procedures or election proceedings*, including voting options and voting opportunities available to the voter.[181]

Notably, this prohibition does not require that the speaker know of, or have reckless disregard as to, the falsity of their statement, thus rendering the provision liable to a finding of unconstitutionality for its overbreadth. An individual or organization that has been notified of non-compliance with § 234.3 can be fined a penalty of up to $20,000 CAD.[182] At the other end of the country, on the east coast, § 128 of Prince Edward Island's Election Act states: "Every one is guilty of an offence who knowingly makes or publishes a false statement concerning the electoral process."[183] Individuals convicted of this offense face a penalty ranging from $500 to $2,000 CAD.[184] Contrary to British Columbia's provision, this prohibition requires knowledge of falsity but does not require

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[179] *Id.* at 203.

[180] Having canvassed the election laws in all of Canada's provinces and territories, these jurisdictions create offenses for false statements regarding a potpourri of items such as erroneous financial disclosure, impersonation of an election official, and the mistaken death, conduct, citizenship, withdrawal, or character of a candidate. Only the provinces of British Columbia and Prince Edward Island, however, strictly prohibit false or misleading information about voting requirements or procedures. *See* Election Act, R.S.A. 2000, c E-1 (Can. Alta.); The Election Act, 1996, S.S. 1996, c E-6.01 (Can. Sask.); The Elections Act, C.C.S.M. 2006, c E30 (Can. Man.); Election Act, R.S.O. 1990, c E.6 (Can. Ont.); Election Act, C.Q.L.R. c E-3.3 (Can. Que.); Elections Act, R.S.N.B. 1973, c E-3 (Can. N.B.) (although not a general prohibition on false election speech, § 112.2 of New Brunswick's Elections Act creates an offense for "knowingly caus[ing] incorrect information to be given to an elector respecting the polling station where that elector may vote"); Elections Act, S.N.S. 2011, c 5 (Can. N.S.); Elections Act, 1991, S.N.L. 1992, c E-3.1 (Can. Nfld.); Elections Act, R.S.Y. 2002, c 63 (Can. Yukon); Elections and Plebiscites Act, S.N.W.T. 2006, c 15 (Can. N.W.T); Nunavut Elections Act, C.S.Nu., c N-60 (2003) (Can. Nun.).

[181] Election Act, R.S.B.C. 1996, c 106 (Can. B.C.) (emphasis added).

[182] *Id.* § 234.6(2) (Can. B.C.).

[183] Election Act, R.S.P.E.I. 1988, c E-1.1 (Can. P.E.I.).

[184] *Id.* § 137 (Can. P.E.I.).

that the speaker intend to harm the integrity of the election or its results. Also, the provision is not limited to false speech regarding voting requirements and procedures, but more broadly captures false speech "concerning the electoral process." If challenged, these deficiencies would likely lead a reviewing court to invalidate § 128 as well.

At the federal level in Canada, Chief Electoral Officer Stéphane Perrault has recommended that Parliament amend the Canada Elections Act to incorporate a prohibition on false election speech mostly consistent with Stephanopoulos' criteria:

> To protect against inaccurate information that is intended to disrupt the conduct of an election or undermine its legitimacy, amend the Act to prohibit a person or entity, including foreign persons and entities, from knowingly making false statements about the voting process, including about voting and counting procedures, in order to disrupt the conduct of the election or to undermine the legitimacy of the election or its results.[185]

Two elements of Perrault's recommended prohibition overlap with Stephanopoulos' criteria and deserve closer examination: mens rea and subject matter. First, the proposed prohibition would require a double mens rea requirement for conviction, in which the speaker must knowingly make the false statement, or with reckless disregard for its falsity, and intentionally seek to undermine the electoral process or the results thereof. The requirement for a two-fold mens rea comports with Seana Valentine Shiffrin's argument that "a lie is an assertion that the speaker knows she does not believe, but nevertheless deliberately asserts, in a context that, objectively interpreted, represents that assertion as to be taken by the listener as true and as believed by the speaker."[186] To emphasize the importance of the mens rea requirement, consider *Canadian Constitution Foundation v. Canada (Attorney General)*[187]—a 2021 decision from the Ontario Superior Court of Justice. Here, the judge struck down § 91(1) of the Canada Elections Act, which prohibited anyone from making or publishing false statements about the personal character or conduct of a candidate before or during an election period with the intention of affecting the results of the election. While the judge noted the parties' agreement that protecting the integrity of the electoral process against the threat of false information was a pressing and substantial objective under the *Oakes* test,[188] the prohibition was still unconstitutional since the offense did not require proof that the person *knew* that their statement was false.[189] As will be

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[185] Perrault, *supra* note 14, at 25 (Parliament has not yet heeded the recommendation, and notably absent from the recommendation is a limitation of liability only for materially false statements uttered by key election participants like candidates and parties.).

[186] Seana Valentine Shiffrin, Speech Matters: On Lying, Morality, and the Law 116 (2014).

[187] [2021] O.N.S.C. 1224 (Can.). For a discussion of C.C.F., *see* Erin Crandall & Andrea Lawlor, *Freedom of Expression in an Age of Disinformation:* Charter *Considerations for Regulating Political Speech in Canadian Elections*, *in* Dilemmas of Free Expression 76–90 (Emmett MacFarlane ed., 2022).

[188] C.C.F., 2021 O.N.S.C. at para. 6.

[189] *Id.* at paras. 8–10.

discussed in terms of the harm caused by the reprehensible conduct of lying, *deceiving* the listener of a statement is what attracts legal liability—and for such deceit to exist, the speaker must have knowledge of, or be reckless as to, the falsity of their statement.[190]

The second element of Perrault's proposed prohibition that deserves further explanation is the subject matter requirement, which provides that only those materially false statements that have a significant impact on the right to vote or the administration of the election should attract liability.[191] The right to vote will be canvassed in more detail in the following section to contextualize the harm caused by false election speech in relation to the electoral information ecosystem. But for now, what is noteworthy is the prohibition's focus on factually false statements with the ability to disenfranchise voters.[192] Consequently, to be caught by the prohibition, such false statements must be assertions of *fact* regarding the administration of the election or its results, not mere submissions of *opinion*. Recall that in *Zundel*, Justices Cory and Iacobucci, albeit in dissent, differentiated between fact and opinion, even drawing on U.S. case law, stating:

> Expression which makes a statement susceptible to proof and disproof is an assertion of fact; expression which merely offers an interpretation of fact which may be embraced or rejected depending on its cogency or normative appeal, is opinion . . . . *This analysis is supported by the distinctions employed in the Canadian and United States laws of defamation* (see R. E. Brown, *The Law of Defamation in Canada* (1987), vol. 1, at p. 678, and *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (*en banc*), *certiorari* denied, 471 U.S. 1127 (1985)). Four helpful criteria have been identified in order to distinguish fact from opinion: *specificity of the terms used, verifiability, linguistic context and social context*. All criteria are unified by the theme of exploring the response of a reasonable reader.[193]

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[190] Shiffrin, *supra* note 186, at 21 ("The morally relevant form of deception seems either to involve a *directed effort to influence another's mental contents* or the frustration of an epistemic expectation of the listener or observer that the speaker or observed agent will not permit or facilitate, whether directly or indirectly, *a false impression of the facts*." (emphasis added)).

[191] *See* Stephanopoulos, *supra* note 39, at 12–13 (advocating a slightly broader meaning of materiality that would also include statements which could influence a citizen's vote choice, whereas I would limit my proposal to statements that actually disenfranchise a critical mass of citizens. He does however agree that "[i]t is simply worse to lie about the *administration* of an election, thus potentially stopping citizens from voting, than about the candidates running or the issues featured in a race").

[192] *See* Pearlstein, *supra* note 67, at 22 ("There is certainly evidence that suggests organized disinformation campaigns are harmful not only to public confidence in election administration but also the actual function of election administration. At least one important study found that Americans' sharply polarized beliefs about the dangers of voter fraud in the 2016 election were the result of an organized disinformation campaign, a campaign that capitalized on standard mass media conventions to focus attention on elite opinion, and that was amplified by social media. By the 2020 election, Gallup opinion polling showed that 41 percent of Americans doubted that votes would be cast and counted accurately, a precipitous deterioration in voter confidence compared to the same poll just two years earlier—a decline pollsters believed to be driven largely by widespread but unsubstantiated claims in 2020 that have now left roughly two-thirds of Republicans convinced that President Biden's election was the product of fraud.").

[193] R. v. Zundel, [1992] 2 S.C.R. 731, 833 (Can.) (Cory & Iacobucci, JJ., dissenting) (emphasis added).

Again, the fact-opinion distinction is at the core of the difference between false election speech and false campaign speech; the former targeting significantly less political expression than the latter. Another key difference is with respect to the kind of harm; whereas false election speech results in voter disenfranchisement, false campaign speech distorts voter preferences. Echoing the sentiments expressed by the majority in *Zundel* and the plurality and concurrence in *Alvarez*, freedom of expression is crucial to maintaining a democratic society, and for this reason, even awful statements that could influence a citizen's vote choice must not be caught by the prohibition. Instead, only those empirically verifiable false factual statements about the administration of the election that have the potential to disenfranchise voters or undermine the election itself ought to be prohibited. To understand why, I now turn to the constitutional protection for the right to vote.

B. The Prohibition Protects the Right to Vote

In *Zundel*, Justices Cory and Iacobucci argued in their dissent that the term "public interest" in § 181 of Canada's criminal code could have been defined based on the state's legitimate interest in promoting the protection and preservation of Charter rights.[194] The Justices proceeded to define § 181's public interest in terms of multiculturalism and equality, as codified in §§ 27 and 15 of the Charter, respectively.[195] The SCC previously employed this approach—analyzing when a violation of freedom of expression is reasonably justifiable based on the judiciary's commitment to other enumerated rights and freedoms of the Charter—in *R. v. Keegstra*, where, the SCC determined that the act of entrenching the right to equality in the Charter did not limit the Court's consideration of equality only to those instances where an individual claims the state has violated their right to equality.[196] Instead, the SCC found that it could legitimately consider the government's furtherance of equality under § 15 when doing so was relevant to assessing the aims of the impugned law, which was alleged to violate freedom of expression but also restrict the promotion of hatred against members of socially vulnerable and identifiable groups.[197] Drawing from this approach, the constitutionality of a prohibition on false election speech must not be evaluated just in terms of its cost to an individual's freedom of expression, but also in relation to the state's proactive interest in protecting the right to vote and preserving the integrity of election administration pursuant to § 3 of the Charter.

To be sure, even a cursory review of the judicial decisions and scholarly work considering prohibitions on false election or false campaign speech would reveal that many are alive to the importance of ensuring electoral integrity.[198]

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[194] *Id.* at 806–07 (Cory & Iacobucci, JJ., dissenting).
[195] *Id*. at 814–19.
[196] *See* R. v. Keegstra, [1990] 3 S.C.R. 697, at 755–56 (Can.).
[197] *Id*.
[198] *See, e.g.*, Brown v. Hartlage, 456 U.S. 45, 52 (1982) (writing for the majority, Justice William Brennan agreed that the states have a legitimate interest "in preserving the integrity of their electoral processes"); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 378–379 (1995) (writing in dissent, Justice Antonin Scalia acknowledged that "protection of the election process

However, due to the very nature of the *Oakes* test and exacting scrutiny review under the First Amendment, the state's interest in protecting the right to vote and preserving the integrity of election administration is regularly presumed to hinder, rather than help, vindicate freedom of expression during the proportionality or "fit" analysis. For this reason, I articulate the state's interest in prohibiting false election speech as necessary to protect the right to vote, such that the prohibition is consistent with the government's commitment to ensure that voters can meaningfully participate in the political life of the state. To reprise the language employed by the SCC in *Keegstra*, and adjust it to the present context, "[i]n light of the *Charter* commitment to equality [here, the right to vote], and the reflection of this commitment in the framework of s. 1, the objective of the impugned legislation is enhanced insofar as it seeks to ensure the equality of all individuals in Canadian society [here, the unfettered democratic participation of all eligible voters]."[199]

1. § 3 of the Charter: The Right to Vote

Hasen has plainly said that "[l]aws barring false election speech, such as false statements about where and when to vote, protect the right to vote and the integrity of the electoral process."[200] A strong argument, however, against regulating false election speech is the potential for the state to abuse its power to identify problematic speech based on a vague notion of falsity.[201] For those who subscribe to the libertarian approach to the First Amendment, this argument should prevail.[202] Yet, advancing this argument concedes that the reason for affording First Amendment protection to false speech is not because those false factual statements convey any valuable meaning in a free and democratic society.[203] Rather, the argument rests on a fear that government abuse could result in an Orwellian-like institution policing our speech.[204] I am sensitive to this slippery-slope argument, but insofar as prohibiting false election speech seeks to maintain a viable electoral ecosystem, in which campaign speech relating to political candidates and issues can thrive, a reviewing court should find that the incursion onto freedom of expression is only as deep as is necessary for the state to protect the right to vote and preserve the integrity of election

justifies limitations upon speech that cannot be imposed generally" and emphasized that "no justification for regulation is more compelling than protection of the electoral process"); *see generally* Hasen, *supra* note 35, at 55 ("In this highly charged partisan atmosphere, in which each side cannot agree upon the basic facts, mudslinging has become terribly common, and the media are not able to meaningfully curb candidates' lies and distortions, it is tempting to consider federal and state legislation to deter and punish false campaign speech.").

[199] Keegstra, 3 S.C.R. at 756.

[200] Hasen, *supra* note 35, at 56.

[201] Marshall, *supra* note 4, at 312 (reasoning that citizens, rather than the government, should be the "arbiters of truth," and that even politically neutral election regulations can always be subject to partisan abuse).

[202] *See generally* Jeff Kosseff, Liar In A Crowded Theater: Freedom of Speech in a World of Misinformation (2023).

[203] *See* Marshall, *supra* note 4, at 307 (citing Gertz v. Robert Welch Inc., 418 U.S. 323 (1974) for the proposition that false factual statements have "slight social value as a step to truth").

[204] United States v. Alvarez, 567 U.S. 709, 723 (2012).

administration. As Bazelon explains, in the European Union, Canada, and New Zealand, "[d]espite more regulations on speech, these countries remain democratic; in fact, they have created better conditions for their citizenry to sort what's true from what's not and to make informed decisions about what they want their societies to be."[205] On this view, laws which prohibit lying about voting requirements and procedures should fall within what Weinstein calls the "Domain-Specific Approach." According to this approach, which is similar to the deference Justice Bastarache showed to Parliament in *Harper*, the government must benefit from some leeway to regulate speech because of its inherent authority to oversee the logistics of an election (*e.g.*, providing the voting apparatus, counting the ballots, and announcing the results).[206] Viewed within the "election domain," prohibiting false election speech would directly protect the right to vote and should be upheld by a reviewing court.[207]

In Canada, the right to vote in federal and provincial elections is guaranteed by § 3 of the Charter, whereas in the United States, the right to vote has been inferred by courts based on a combined reading of various provisions of the U.S. Constitution. § 3 of the Charter provides: "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." A review of the case law suggests that violations of § 3 may take the form of direct interference with the right to vote or of indirect interference with the conditions under which the right to vote is exercised. Recently, the SCC had an opportunity to reevaluate much of its § 3 jurisprudence in *Ontario (Att'y Gen.) v. Working Families Coalition (Canada) Inc* (hereinafter, the "*Working Families SCC Decision*").[208] At issue was the constitutionality of amendments to Ontario's Election Finances Act,[209] which limited third-party spending on political advertising in the twelve months before a provincial election period. Writing for a 5–4 majority, Justice Andromache Karakatsanis struck down the legislation as unconstitutional, finding that it violated Ontarians' right to cast an informed vote pursuant to § 3. The decision also included two dissents, each upholding the legislation based on competing frameworks for the appropriate § 3 analysis. The approaches to § 3, in the context of third-party political advertising, do not much matter for present purposes, but what makes the *Working Families SCC Decision* relevant is its consideration of the interplay between §§ 2(b) and 3 of the Charter—*i.e.*, the relationship between freedom of expression and the right to vote.

In 2021, after the Ontario legislature extended the pre-election period for third-party advertising from six months to twelve months, without increasing the spending cap, several labor groups successfully challenged the legislation as a breach of freedom of expression guaranteed by § 2(b) of the Charter

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[205] Bazelon, *supra* note 35, at 3.

[206] Weinstein, *supra* note 127, at 169, 215–21 (arguing that elections are a government-managed domain by relying on the foundational work of Robert Post; *see, e.g.*, Robert C. Post, Constitutional Domains: Democracy, Community, Management (1995)).

[207] *Id.* at 170.

[208] 2025 SCC 5.

[209] R.S.O. 1990, c E.7 (Can. Ont.).

(hereinafter, the "*First Working Families ONSC Decision*").[210] The application judge, Justice Edward Morgan of the Ontario Superior Court of Justice, found that the legislation could not be saved by § 1 of the Charter since the government's own expert witnesses provided evidence that the original six-month pre-election period was reasonable, thereby forcing the twelve-month period to fail *ipso facto* the minimal impairment element of the *Oakes* test.[211] Then, relying on § 33 of the Charter, familiarly known in Canada as the "Notwithstanding Clause," the Ontario legislature re-enacted the identical legislation to override the § 2(b) breach.[212] In turn, the legislation was challenged anew as a violation of § 3, which is not subject to the legislative override of the Notwithstanding Clause.

Then, Justice Morgan heard a second application and decided that the legislation did not violate § 3 because it was carefully tailored to the government's objective of fostering egalitarian elections (hereinafter, the "*Second Working Families ONSC Decision*").[213] While the diluted spending limit would likely hinder third parties from affording expensive television advertisements, such communications are just one medium of political advertising, and several other channels exist to communicate with voters.[214] On appeal, a 2–3 majority of the Court of Appeal for Ontario reversed Justice Morgan, finding that the legislation was not carefully tailored and restricted voters' access to political information.[215] The Ontario government appealed this decision regarding the second application to the SCC.

In the *Second Working Families ONSC Decision*, Justice Morgan wasted no time in acknowledging what he called the "interplay between voting rights and political advertising."[216] Preempting concerns that I have sought to air myself, Justice Morgan, while commenting on the flow of information, albeit in the context of political advertising, stated that "[c]ontemporary voters may be subject to data overload—a flood of information that seems to produce more pain than gain. They may also be subject to misinformation – the American Bar Association note[d] that lying in political advertising is also perfectly legal, while the Supreme Court of Canada has asserted that the constitution protects the expression of both truths and falsehoods."[217] Yet interplay is not overlap, and Justice Morgan found that while the challengers had succeeded in the *First Working Families ONSC Decision* to show that the spending limit

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[210] *See* Working Families Ontario v. Ontario, 2021 O.N.S.C. 4076 (Can.).

[211] *Id.* at para. 66 ("Without meaning to stress the obvious, it is hard to see how 12 months is minimal if 6 months will do the trick.").

[212] In Canada, § 33 of the Charter allows Parliament and the provincial legislatures to derogate from certain sections of the Charter, namely § 2 (fundamental freedoms), §§ 7 to 14 (legal rights) and § 15 (equality rights), even in the face of an adverse court ruling. However, certain rights, like democratic rights enshrined in § 3, can never be overridden using the Notwithstanding Clause due to their special importance as recognized by the framers of the Charter. *See* Frank v. Canada (Att'y Gen.), 2019 SCC 1, [2019] 1 S.C.R. 3 at para. 25 (Can.).

[213] *See* Working Families Coalition (Canada) Inc. v. Ontario, 2021 O.N.S.C. 7697 (Can.).

[214] *Id.* At paras. 82–87.

[215] *See* Working Families Coalition (Canada) Inc. v. Ontario (Att'y Gen.), 2023 O.N.C.A. 139 (Can.).

[216] 2021 O.N.S.C. at para. 1.

[217] *Id.* at para. 3 (cleaned up).

violated freedom of expression, a breach of § 3's right to vote required a different showing.[218]

In the *Working Families SCC Decision*, this interplay between §§ 2(b) and 3 was canvased in greater detail, especially by the dissenting Justices who feared that the majority, in striking down the legislation under § 3, erred by importing § 2(b)'s protection for freedom of expression into § 3's right to vote.[219] Perhaps most crucial, though, is that the majority and the dissenting Justices all expressed support for the longstanding holding that § 3 protects citizens' right to meaningful participation in the electoral process.[220] When seeking to illustrate the dangers of false election speech to the citizenry's ability to engage in the democratic process, no right is arguably more important.[221] Dawood summarizes the threat posed by false speech to § 3 in terms of a voter's capacity to cast an informed ballot: "Electoral disinformation could undermine electoral fairness and public confidence in the election. Like the ban on misleading publications, the prohibition on false statements is meant to prohibit a constrained category of fake news that could mislead voters about the essential information necessary for informed voting."[222] Canadian courts have interpreted § 3 to contain an "informational component," thereby affording each citizen the right to exercise their vote in an informed manner.[223] To that end, denying electors sufficient information to enable them to make an informed choice in voting may compromise the right to vote guaranteed by § 3.[224] Of course, false election speech causes precisely this mischief when it supplies voters with inaccurate information about voting requirements and procedures. The likelihood of such disenfranchising speech is not so remote. During the 2021 federal election in Canada, for instance, social media users in British Columbia and Quebec "incorrectly claimed that Canadians who weren't fully vaccinated would be unable to enter polls to vote and encouraged unvaccinated Canadians to vote early."[225] In the United States, the threat of false election speech has been further amplified through media outlets and

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[218] *Id*. at paras. 69–71.

[219] *See* Ontario (Att'y Gen.) v. Working Families Coalition (Canada) Inc., 2025 SCC 5 at paras. 117–19 (Can.) (Wagner, C.J. & Moreau, J., dissenting) ("The fact that the right to meaningful participation includes expressive and information components does not collapse the distinction between ss. 2(b) and 3 of the *Charter* . . . . In order to respect the basic structure of the *Charter*, the content of one right should not be imported into another, nor be used to modify the scope of another right."), 214–15 (Côté & Rowe, JJ., dissenting) ("Our Court has repeatedly emphasized that ss. 2(b) and 3 are distinct rights with independent meaning. Yet the majority's inquiry imports the s. 2(b) protections into the realm of s. 3 . . . . Respectfully, in our view, the majority's concerns regarding the nature of political discourse, and its actors, properly fall within s. 2(b). They do not belong to s. 3." (citations omitted)).

[220] *See id.* at para. 9 (Karakatsanis, J.); *id.* at para. 112 (Wagner, C.J., & Moreau, J., dissenting); *id.* at para. 194 (Côté & Rowe, JJ., dissenting).

[221] Note, however, the substantial disagreement between two of the dissenting Justices and the rest of the court over what the right to meaningful participation in the electoral process entails, namely if, in addition to its "informational" component, the right also contains an "expressive" component. *See id.* at paras. 229–38 (Côté & Rowe, JJ., dissenting).

[222] Dawood, *supra* note 28, at 22–23.

[223] *See* Harper v. Canada (Att'y Gen.), 2004 SCC 33, [2004] 1 S.C.R. 827 at para. 71 (Can.).

[224] *See* Thomson Newspapers Co. v. Canada (Att'y Gen.), [1998] 1 S.C.R. 877 at paras. 82–84 (Can.).

[225] Bridgman et al., *supra* note 5, at 37.

was recently acknowledged by members of the Select Committee to Investigate the January 6th Attack on the United States Capitol. Members of the Committee found that those involved in the attack were provoked to act by false information about the 2020 election repeatedly reinforced by legacy and social media, which had the effect of radicalizing their consumers.[226]

To be sure, protecting the right to vote and preserving the integrity of election administration as rationales for prohibiting false election speech do not mean that a private actor has violated § 3 merely through their harmful expression. Rather, protecting the right to vote and preserving the integrity of election administration are twin justifications for the government's violation of freedom of expression. While the right to vote is understood to be a negative right that is held against the government, which means the government shall not act in a way that hinders the right to vote, the purpose of a prohibition on false election speech would be to give life to the kinds of principles that underlie § 3 of the Charter, which includes the value of citizens having information that allows them to vote.[227]

Michael Karanicolas has relied on the SCC's decisions in *R v. Bryan*[228] and *Thomson Newspapers Co v. Canada (Att'y Gen.)*,[229] to further elucidate how § 3 operates to improve the quality of information made available to the electorate.[230] Karanicolas explains that in *Bryan*, the SCC "followed a strongly egalitarian model of election fairness to uphold the constitutionality of a law that prohibited the transmission of election results between one electoral district and another before polls had closed in the latter."[231] By upholding the prohibition on the release of election results, the Court sought to ensure "informational equality across the country."[232] If the same logic applied to a prohibition on false election speech, a reviewing court would uphold the prohibition as a means for the government to safeguard voters' access to accurate information about voting requirements and procedures.[233]

But the SCC's approach in this regard has been nuanced and should not be taken to imply that prohibiting false election speech would escape any skepticism from the Court. Karanicolas explains that in *Thomson Newspapers*, the SCC invoked the "maturity and intelligence"[234] of voters and their ability to "learn from experience and make independent judgments about the value of

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[226] Select Comm. to Investigate the January 6th Attack on the U.S. Capitol, Final Report, H.R. Rep. No. 117–663, at 691 (2022).

[227] *See* Ontario (Att'y Gen.) v. Working Families Coalition (Canada) Inc., 2025 SCC 5 at para. 115 (Can.) (Wagner, C.J., & Moreau, J., dissenting, but not on this point) ("The right to meaningful participation under s. 3 ensures that each citizen has a reasonable opportunity to hear others' perspectives *and access information in order to exercise their right to vote in an informed manner*." (emphasis added)).

[228] 2007 SCC 12, [2007] 1 S.C.R. 527 (Can.).

[229] Thomson Newspapers Co. v. Canada (Att'y Gen.), [1998] 1 S.C.R. 877 (Can.).

[230] Michael Karanicolas, *Subverting Democracy to Save Democracy: Canada's Extra-Constitutional Approaches to Battling "Fake News,"* 17 Can. J. L. & Tech. 201, 209–12 (2019).

[231] *Id.* at 209.

[232] *Id.* at 210, 224.

[233] *See* Edmonton Journal v. Alberta (Att'y Gen.), [1989] 2 S.C.R. 1326, 1339–40 (Can.) (The Charter safeguards the public's right to "information pertaining to public institutions[,]" albeit in the context of freedom of the press and the openness of the courts.).

[234] Karanicolas, *supra* note 230, at 210 (quoting *Thomson Newspapers*, 1 S.C.R. at para. 101).

particular sources of electoral information,"[235] in order to strike down a prohibition on opinion survey results during the final three days of a federal election campaign. Karanicolas explains that the Court was not persuaded by the government's justification for the prohibition, namely that "inaccurate polls published so close to the election would have the potential to mislead voters, since there would be no time to correct the record before people voted."[236]

Viewed through a contemporary lens though, we are presently living in what Hasen calls a "post-truth era" for election law, in which rapid technological change and hyperpolarization are "call[ing] into question the ability of people to separate truth from falsity."[237] Consequently, I question whether we ought to remain as optimistic today about the voters' ability to make informed decisions about voting requirements and procedures as the SCC was when it decided *Thomson Newspapers* more than 25 years ago. Ardia and Ringel have called this failure to adapt traditional accountability mechanisms for changing technologies, including the proliferation of underregulated social media platforms, the "internet blind spot.[238] For example, as of 2022, the United States did not have a strategy for managing online election misinformation, and specifically, did not regulate election-related speech anywhere except for in the broadcast context.[239]

Therefore, it is obvious that greater regulation is needed to curb the online spread of false election speech, and in Canada, the courts have provided a way for doing so by already interpreting § 3 of the Charter to include "the right of each citizen to play a meaningful role in the electoral process."[240] Taken together, federal authorities ought to see a well-informed citizenry as a prerequisite to securing a healthy democracy. And the informational component of the Canadian right to vote is helpful to understanding the detrimental

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[235] *Thomson Newspapers*, 1 S.C.R. at para. 112.

[236] Karanicolas, *supra* note 230, at 211.

[237] Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a "Post-Truth" World*, 64 St. Louis U. L.J. 535, 536 (2020)*; see also* Berisha v. Lawson, 141 S. Ct. 2424, 2427 (2021) (Gorsuch, J., dissenting from the denial of certiorari) (discussing the new media landscape which could justify reconsidering the actual malice standard as it applies to public figures in defamation claims, Justice Neil Gorsuch says, "[a]nd thanks to revolutions in technology, today virtually anyone in this country can publish virtually anything for immediate consumption virtually anywhere in the world. The effect of these technological changes on our Nation's media may be hard to overstate. Large numbers of newspapers and periodicals have failed. With their fall has come the rise of 24-hour cable news and online media platforms that 'monetize anything that garners clicks.' No doubt, this new media world has many virtues—not least the access it affords those who seek information about and the opportunity to debate public affairs. At the same time, some reports suggest that our new media environment also facilitates the spread of disinformation. A study of one social network reportedly found that 'falsehood and rumor dominated truth by every metric, reaching more people, penetrating deeper . . . and doing so more quickly than accurate statements.' All of which means that 'the distribution of disinformation'—which 'costs almost nothing to generate'—has become a 'profitable' business while 'the economic model that supported reporters, fact-checking, and editorial oversight' has 'deeply erod[ed].'" (citations omitted)).

[238] Ardia & Ringel, *supra* note 19, at 369.

[239] *Id.* at 371.

[240] *See* Figueroa v. Canada (Att'y Gen.), 2003 SCC 37, [2003] 1 S.C.R. 912 at para. 33 (Can.). While greater regulation is needed, it is still far from obvious, and I do not claim, that a positive rights claim could exist against the government for *failing* to prohibit false election speech.

effects of false election speech that justifies the state's compelling interests in defending the franchise and regulating the democratic process writ large.

Although opponents of a statutory prohibition on false election speech may argue that such a law infringes upon freedom of expression, proponents may rely on the informational component of the right to vote to justify the same law's legitimacy under § 1 of the Charter or the First Amendment's "exacting scrutiny" test. Cast in terms of the state's interest in protecting the right to vote through limiting false speech that risks disenfranchising voters by lying about when, where, and how to vote, a statutory prohibition on false election speech can thus be said to vindicate § 3 as much as it violates § 2(b) of the Charter.[241]

In the United States, even if the Bill of Rights does not explicitly provide for a constitutional right to vote akin to § 3 of the Charter, the U.S. Supreme Court has interpreted a variety of provisions of the U.S. Constitution to codify the right to vote,[242] namely: the First Amendment (understood to generally protect political expression and activity); the Fifteenth, Nineteenth, and Twenty-Sixth Amendments (prohibiting discrimination based on race, gender or age when exercising the right to vote); the Twenty-Fourth Amendment (prohibiting poll taxes in federal elections); clause 1 of § 2 of Article I and the Seventeenth Amendment (providing that the U.S. House of Representatives and Senate shall be chosen "by the people"); and finally, § 4 of Article IV (providing that the United States "shall guarantee to every State . . . a Republican form of government"). Moreover, in *Mansky*, Chief Justice Roberts spoke clearly of the right to vote as a "civic duty" when he acknowledged the difficulty of adjudicating cases which pit freedom of expression against the right to vote, saying, "[c]ases like this 'present[] us with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote.'"[243] There is little doubt that both Canada and the United States have constitutionalized protection for the right to vote, whether through direct enshrinement in the Canadian Charter or judicial pronouncement in

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[241] *See, e.g.*, Ontario (Att'y Gen.) v. Working Families Coalition (Canada) Inc., 2025 SCC 5 at para. 119 (Can.) (Wagner, C.J., & Moreau, J., dissenting, but not on this point) ("[A]n electoral spending limit can limit freedom of expression under s. 2(b) yet facilitate meaningful participation in the electoral process under s. 3." (citation omitted)).

[242] Bender, *supra* note 6, at 819 n.19 (citing Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (voting); Williams v. Rhodes, 393 U.S. 23 (1968) (candidacy); San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)); *see also* Weinstein, *supra* note 127, at 215 nn.320–21 (arguing that the government has an affirmative duty to provide for elections in a fair and equitable manner). While the discussion of libertarianism herein has focused on how we regulate speech under the First Amendment, much of the United States' legal theory of voting rights has developed via efforts to make voting more equal based on, *inter alia*, the Fourteenth Amendment, the Voting Rights Act, 52 U.S.C. Subtitle I, and the Twenty-Fourth Amendment. However, given the weakened state of the Voting Rights Act post Shelby Cnty. v. Holder, 570 U.S. 529 (2013), the Fourteenth Amendment route is likely a dead-end, constitutionally speaking, for justifying a statutory prohibition on false election speech without recourse to a doctrinal pivot that casts the right to vote in terms of a voter's access to accurate and reliable information.

[243] Minn. Voters All. v. Mansky, 585 U.S. 1, 23 (2018) (quoting Burson v. Freeman, 504 U.S. 191, 198 (1992) (plurality opinion)).

the United States, and we should accordingly remain vigilant to safeguard the franchise against harms caused by false election speech.[244]

2. The Electoral Ecosystem and the Harms of False Election Speech

Besides the potential violation of the right to vote, to fully understand the prejudicial impact of false election speech, one must understand the democratic process as occurring in an electoral information ecosystem. Although writing about the impact of a specific source of false election speech—foreign election interference—Dawood has described what she calls the "electoral ecosystem" as follows:

> Under an electoral ecosystem approach, *the electoral system is viewed as an interconnected network of institutions, processes, and actors, all of which must coordinate together to ensure electoral effectiveness and legitimacy*. An electoral ecosystem is comprised of multiple institutions and actors, including governments, political parties, voters, third parties, online platforms, and electoral management bodies. Given the interdependent and interconnected nature of an electoral system, there are multiple points of vulnerability that must be defended. An electoral ecosystem approach does not depend on any single line of defense but instead relies on a multiplicity of strategies that protect the institutions and individuals that comprise the ecosystem.[245]

Simply put, false election speech is a threat to the ecosystem. With the popularization of the internet since the 1990s—or as Eugene Volokh calls it, the "cheap speech era"—where speech is produced and transmitted at very little cost in great quantity without verification,[246] erroneous information competes with accurate information in the public square such that voters now treat all sources of information as potentially unreliable. Hasen says that this phenomenon undermines democratic governance since voters must have access to reliable and accurate information in order to have confidence in a fair and

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[244] *See* Dawood, *supra* note 28, at 22 (citation omitted) ("While it is impossible to precisely measure the effect of legislative responses to disinformation, argued the government, it is reasonable to infer, based on the existing evidence, that disinformation poses a significant danger and that Parliament's response is justifiable . . . . Given current concerns about disinformation and foreign interference, the court could be persuaded that the prohibition is a necessary protection against the harm of false election information.").

[245] *Id.* at 11 (emphasis added) (Dawood says that the electoral ecosystem approach can be a helpful model for other nations as well, thus legitimizing its use in a comparative study).

[246] *See* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 Yale L.J. 1805 (1995); Eugene Volokh, *What Cheap Speech Has Done: (Greater) Equality and Its Discontents*, 54 U.C. Davis L. Rev. 2303, 2308 (2021) ("Cheap speech also allows people to forward hoaxes, false conspiracy theories, and generally 'fake news' at the click of a button. Nonprofessional speakers are just as protected by the First Amendment as is the institutional media. But they may, on average, lack the professional skepticism that mainstream media editors and reporters tend to cultivate. They may lack (again, on average) the background knowledge that helps them sift the true from the false. They often need not worry much about professional or reputational sanctions (or libel lawsuits if those hoaxes also malign someone in particular). To be sure, many social media users may be much more cautious and thoughtful; but plenty aren't.").

impartial election system.[247] Similar to the marketplace of ideas framework, within the electoral ecosystem, information is understood to flow between various parties to facilitate timely and effective decision-making. The flow of information transpires through communication, and "sincere communication," writes Shiffrin, is "crucial to our ability to live together and to pursue our joint moral aims."[248]

Viewed in terms of the electoral information ecosystem, the harm caused by false election speech is twofold. The first type of harm is when the speech deceives the voter based on the content of the communication itself. For example, if college students who are registered to vote in a competitive electoral district receive a chain text message from a party volunteer informing students that their university polling station has been temporarily closed on election day and has been relocated to a more remote part of the campus, recipients of this message are left with a false factual impression about the availability and location of their polling station and risk being deceived into forgoing their ballot (*e.g.*, the polling station is only open during a time when the student has class or the new polling location is no longer within a reasonable walking distance). In this way, the *content of the false speech*—when and where to vote—has disenfranchised the voter and compromised the administration of the election.

The second type of harm is more subtle, but applies to all lies more generally, and cuts deeper into the voter's mind by robbing them of their ability to trust novel sources of accurate information. For example, if the same college students who received the disenfranchising text message in their first year of college subsequently receive another communication about the time and location of their polling station during the next election cycle, this time by registered mail from an election official, these college students may not trust the source of the information, and in turn, risk inadvertently not voting on time or in the right location. Rather than by its content, the *deception caused* by the false speech—not knowing which sources of election information to trust—has disenfranchised the voter and compromised the administration of the election. Equally damaging, this harm can be inverted to directly benefit the liar. Hasen has relied on what Danielle Citron and Robert Chesney have coined the "Liar's Dividend" to explain the phenomenon in which falsehoods are so pervasive that liars are able to discount the truth as false to avoid liability for actual wrongdoing.[249] Regarding the prevalence of false election speech, bad actors are able to deny personal wrongdoing for an erroneous statement or refuse to accept the accuracy of a true statement about the election (*e.g.*, the rightful winner or loser) because public discourse has been flooded by speech that cannot be verified in real time.[250]

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[247] Hasen, *supra* note 32, at 30–31 (discussing the threats posed by electoral mis- and-disinformation to the integrity of the democracy process).

[248] Shiffrin, *supra* note 186, at 1.

[249] Hasen, *supra* note 32, at 64.

[250] *Id.* at 65; *see also* Tim Wu, *Is the First Amendment Obsolete?*, 117 Mich. L. Rev. 547, 548 (2018) ("Flooding" tactics are described as techniques for speech control that "distort or drown out other speech through the payment of fake commentators or the deployment of propaganda robots.").

For these reasons, false election speech does not abide by the "truth discovery justification" of the First Amendment—the belief that liberty of expression contributes to the discovery of truth[251]—originally advanced as a reason for a broad freedom of expression by former U.S. Supreme Court Justices Holmes and Louis Brandeis. And, just as the courts have found that there are certain types of harmful or low-value speech that the government is not obligated to protect nor that is worthy of protection under the First Amendment, namely libelous speech, where that speech has been uttered with "actual malice,"[252] a prohibition on false election speech that statutorily requires two forms of mens rea—knowingly or recklessly making the statement with the intent to undermine the right to vote, the administration of the election, or the results therefrom—should likewise draw the courts' attention to this highly relevant doctrinal distinction about libelous speech when drawing boundaries around the limits of election speech regulation.[253] Beyond the first type of harm caused by the content of the false election speech, if administered in high and regular doses overtime, the second type of harm compromises the very factual basis needed to *communicate effectively* and exercise the right to vote.[254] And as Andrew Moshirnia has observed, voters lacking media literacy may be especially vulnerable to false election speech, thus creating an environment ripe for "electoral malfeasance."[255] In 2007, when Congress was considering a previous iteration of the Deceptive Practices and Voter Intimidation Prevention Act, Douglas Gansler testified in support of the bill by directly explaining that it was not targeted at statements of political persuasion, but rather voter suppression (*i.e*, "keeping people away from the polls"). Gansler described the bill as a "measured approach" addressing deceptive communications that had to be uttered knowing the information was false with the intent to prevent another person from exercising the right to vote in an election."[256] This approach he said, "respect[ed] the First Amendment's guarantee of freedom of speech while recognizing the strong [f]ederal interest in safeguarding the right to vote and prohibiting tactics that have frequently been employed in racially discriminatory ways."[257] During the same committee hearing, Richard

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[251] *See* Greenawalt, *supra* note 8, at 3–4 ("In essence, the claim is that if people are exposed over a period of time to various assertions, they are likely to sort out which are more nearly true. Accompanying this cautious optimism about the human capacity to discern what is true is a strong skepticism that governments deciding which assertions to suppress will do a good job of protecting truth.").

[252] New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (One can only recover damages for a defamatory falsehood if the impugned statement was uttered with actual malice—"that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

[253] Prevention of Deceptive Practices and Voter Intimidation in Federal Elections: Hearing before the Committee on the Judiciary, United States Senate, 110th Congress, first session, on S. 453, at 13 (June 7, 2007) (Douglas F. Gansler, the former Attorney General of Maryland, described one category of speech targeted by the bill as "really akin to libel; that is, it is knowingly making a false statement in an effort to sway a particular voter or voters.").

[254] *See* Greenawalt, *supra* note 8, at 5 ("Communication is a prerequisite for autonomy. It is also a crucial way for people to relate to each other, an indispensable outlet for emotional feelings, and a vital aspect of the growth of one's character and ideas.").

[255] Andrew Moshirnia, *Who Will Check the Checkers? False Factcheckers and Memetic Misinformation*, 4 Utah L. Rev. 1029, 1035 (2020).

[256] *Supra* note 253, at 14.

[257] *Id.*

Briffault endorsed the bill as "entirely consistent with the First Amendment's protection of freedom of speech," noting as well that the U.S. Supreme Court has found 'there is no constitutional value in false statements of facts' and "Congress has a compelling interest in protecting voters from confusion and undue influence and in ensuring that an individual's right to vote is not undermined by fraud in the election process."[258] The bill, therefore, was "not only constitutional but actually promot[ed] the values of political participation and personal autonomy that are at the heart of the First Amendment."[259]

Echoing Hasen's sentiment that voters must be able to receive and rely on accurate information to make informed choices during an election, the most important one being to exercise the right to vote, Shiffrin says that a moral prohibition on lying is justified to "protect the ability of listeners to rely on speech to develop understandings of one another and of the world . . . , and to enable us to act well, in concert, and pursue our collective moral ends."[260] Shiffrin's justification for freedom of speech, as a means to sustain sincere communication, lends credence to the argument that prohibiting lies, or at least limiting them, serves an important societal aim independent of eliminating any individual falsehood. That aim, in the discussion of prohibiting false election speech, is the creation of a common factual basis upon which election administrators can preserve the integrity of the electoral process and its results in order to ensure vigorous political debate in the short term and successful democratic governance in the long term. Consequently, if lies interfere with the successful transmission of quality information about voting requirements and procedures, regulations aimed at defending the electoral ecosystem from these lies ensure greater liberty and freedom of expression for everyone.[261]

Conclusion

The U.S. federal government has thus far failed to adopt comprehensive legislation to tackle mis- and- disinformation in the electoral context. Accordingly, dealing with false election speech has devolved to the states, but these efforts have been described as "piecemeal and inconsistent."[262] Although U.S. states have independent legislative authority to adopt laws which prohibit false election speech, federal election campaigns attract a heightened degree of national and international media attention that sub-national and local political races simply do not achieve.[263] Fortunately, the dearth of federal legislation targeting false election speech has not prevented law enforcement

[258] *Id.* at 24.
[259] *Id.* at 25.
[260] *See* Shiffrin, *supra* note 186, at 79*; see also* Wu, *supra* note 221, at 554 ("If it was once hard to speak, it is now hard to be heard. Stated differently, it is the attention of listeners that is now scarce. Unlike in the 1920s, information is abundant and speaking is easy, while listener time and attention have become highly valued commodities. It follows that one important means of controlling speech is targeting the bottleneck of listener attention, instead of speech itself.").
[261] *See* Shiffrin, *supra* note 186, at 126.
[262] Ardia & Ringel, *supra* note 19, at 371.
[263] The same can be said of the independent legislative authorities of the federal and provincial governments in Canada.

from cracking down on this harmful speech in the wake of intense mis- and-disinformation campaigns during the 2016 Presidential Election.

Recently, the U.S. Court of Appeals for the Second Circuit heard an important false election speech case that addresses several of the ideas unearthed in this Article. In the district court decision,[264] the U.S. Attorney's Office for the Eastern District of New York accused Douglass Mackey, also known as "Ricky Vaughn," of engaging in a conspiracy to deprive people of their right to vote by intentionally making false statements with the aim of tricking Hillary Clinton supporters into "voting" by text instead of casting their ballots at the polls during the 2016 election.[265] The government alleged that Mackey's conduct violated 18 U.S.C. § 241, which prohibits individuals from engaging in a conspiracy against voting rights.[266] Mackey was eventually convicted and sentenced to seven months in prison for his crime.[267]

Now on appeal before the Second Circuit, spectators have commented that "Mackey's prosecution appears to be the first instance in which the Justice Department has used § 241 to combat the distribution of election disinformation."[268] During oral argument, counsel for the accused pressed precisely this point; never before have federal officials attempted to use § 241 to punish deceptive conduct resulting in the denial of the constitutional right to vote, notwithstanding the acknowledged ubiquity of this nefarious practice.[269] Importantly, none of the parties nor the judges hearing the appeal disputed that the right to vote was constitutionally protected. Instead, although the accused conceded that he knew his speech was false and that it deceived voters, the two main issues arising out of oral argument were: (i) whether intentional deception resulting in disenfranchisement is a recognized form of injury bringing the accused's conduct within the scope of § 241; and (ii) if so, whether imposing criminal liability for that conduct runs afoul of the First Amendment as articulated in *Alvarez*.[270] This Article has addressed both these issues. First, I have argued that intentionally deceptive false speech regarding voting requirements and procedures inflicts harm punishable by law, namely the loss of the right to vote and damage to the integrity of election

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[264] United States v. Mackey, 652 F.Supp.3d 309 (E.D.N.Y. 2023).

[265] *Id.* at 319–22.

[266] *Id.* at 321 (citing 18 U.S.C. § 241). § 241 originates from the 1870 Enforcement Act, passed by Congress to thwart the violent suppression of Black voters from exercising the franchise during the Reconstruction era. It criminalizes conspiracies to "injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." 18 U.S.C. § 241.

[267] *See* U.S. Att'y's Office for E.D.N.Y., *Press Release: Social Media Influencer Douglass Mackey Convicted of Election Interference in 2016 Presidential Race* (Mar. 31, 2023), https://www.justice.gov/usao-edny/pr/social-media-influencer-douglass-mackey-convicted-election-interference-2016 [https://perma.cc/XE2S-MGY5]; U.S. Att'y's Office for E.D.N.Y., *Press Release: Social Media Influencer Douglass Mackey Sentenced after Conviction for Election Interference in 2016 Presidential Race* (Oct. 18, 2023), https://www.justice.gov/usao-edny/pr/social-media-influencer-douglass-mackey-sentenced-after-conviction-election [https://perma.cc/Y3EG-HHV7].

[268] Quinta Jurecic, *Does a Civil Rights Law Prohibit Lies About Voting?*, Lawfare (Apr. 10. 2024), https://www.lawfaremedia.org/article/does-a-civil-rights-law-prohibit-lies-about-voting [https://perma.cc/F3LM-VM9H].

[269] Oral Argument at 50:14, United States v. Mackey, No. 23-7577 (2d Cir. 2023), https://www.courtlistener.com/audio/91493/united-states-v-mackey/ [https://perma.cc/2MUG-TQFJ].

[270] *See generally id.*

administration.[271] Second, when such a law is narrowly tailored to only prohibit false election speech as opposed to false campaign speech, and requires the prosecution to prove the speaker had knowledge of the statement's falsity and intent to harm the election, the law can survive constitutional scrutiny under § 2(b) of the Charter and the First Amendment based on *Zundel* and *Alvarez*, respectively.

Therefore, while the *Mackey* case demonstrates to what extent the federal government can successfully use existing laws to prosecute harmful election disinformation, it is a harbinger of the difficulty law enforcement officials and courts will encounter without a targeted federal law banning false election speech.[272] Notably, counsel for the accused relied on the congressional hearings for the proposed Deceptive Practices and Voter Intimidation Prevention Act of 2021, to argue that § 241 could not be used to prosecute false election speech since members of Congress stated that no federal law presently addressed false election speech.[273]

Consistent with Hirschl's comparative reference genre of comparative constitutional inquiry, this Article has sought to understand different approaches to solving the same constitutional challenge faced by similarly situated polities. To that end, Canada and the United States share remarkably similar outlooks regarding the right to lie as a corollary to free expression, but these countries diverge in their respective egalitarian and libertarian approaches to election regulation in the context of campaign financing. Commenting on the differences between Canadian and American approaches to constitutional law generally, former Chief Justice McLachlin asked:

> Why should two countries sharing the same continent with roughly the same sorts of people and activities and industries and enjoying an enormous amount of bilateral communication and trade, have a different view of what is important, a different set of values? The answer lies in our distinct national character, which in turn is based on our distinct histories and national experience.[274]

True, Canada and the United States have "distinct national characters" built over the course of history. According to former Chief Justice McLachlin,

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[271] For a brief discussion of the type of harm caused in terms of tort injury, see Tobin Raju & Catherine Chen, *Threading the Needle in* United States v. Mackey, Lawfare (Apr. 5, 2024), https://www.lawfaremedia.org/article/threading-the-needle-in-united-states-v.-mackey [https://perma.cc/JC6N-3HYL].

[272] *See* Jurecic, *supra* note 268 ("Even if the court takes a narrower view of § 241, that would leave open the possibility of future legislation. As this case shows, the First Amendment is not an absolute prohibition here. Mackey's argument does not 'necessarily foreclose[] a narrowly tailored law to combat knowingly false statements about the time, place, and manner of an election,' he acknowledges in the briefing. Likewise, in his amicus brief, Volokh suggests that 'narrow, clear statutes that target knowingly false speech concerning the time, place, and manner, or other technical mechanics of an election' would likely be permissible under the First Amendment. As Volokh notes, some states have already adopted statutes along these lines. Federal legislation along those lines passed the House of Representatives in 2007, and another iteration was introduced in the Senate in 2021.").

[273] *Supra* note 269 at 61:15.

[274] McLachlin, *supra* note 39.

whereas Canada slowly emerged more or less peacefully as a sovereign nation, still maintaining strong ties with the United Kingdom by virtue of its Westminster parliamentary democracy, the United States was born out of a bloody conflict with a determination to protect the individual citizen against the tyranny of the state.[275] Since then, Canadians more so than their American friends have come to accept, if not expect, the state to create and maintain the necessary conditions for a flourishing democracy. In contrast, the American approach has cast the individual and the state as potential adversaries whose interests may routinely come into conflict.[276]

Bearing this history and approach to government in mind, this Article has sought to demonstrate that a statutory prohibition on false election speech would burden freedom of expression in both Canada and the United States based on case law regarding § 2(b) of the Charter and the Free Speech Clause of the First Amendment, respectively. However, where the violation could be justified in Canada under § 1 of the Charter, the same violation likely would not be tolerated in the United States under the exacting scrutiny of the First Amendment. This difference in judicial treatment of the same statutory prohibition on false election speech thus illustrates a more profound theoretical debate about competing approaches to election regulation in Canada and the United States, prioritizing either equality or liberty as the touchstones of a flourishing democracy. But this debate arising from the context of campaign finance regulation need not extend to combating false election speech, since prohibiting such speech is necessary to protect the right to vote and preserve the integrity of election administration—an equally shared objective in Canada and the United States.

Transcending egalitarian and libertarian models of election regulation, the informational component of the right to vote elucidates how lies exacerbate pre-existing informational asymmetries within the electorate by preventing members of the electoral ecosystem from communicating effectively with one another. Regardless of where one lives, false election speech works to erode the common factual ground required for informed decision-making.[277] This phenomenon prevents voters from having an equal opportunity to participate in the political life of the state. Like the wealth factor in campaign finance regulation, which permits those with more financial resources to express themselves in the marketplace of ideas at a disproportionate rate than those who actually hold those views, lying about voting requirements and procedures

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[275] *See also* R. v. Keegstra, [1990] 3 S.C.R. 697, at 740 (Can.) ("Canada and the United States are not alike in every way, nor have the documents entrenching human rights in our two countries arisen in the same context. It is only common sense to recognize that, just as similarities will justify borrowing from the American experience, differences may require that Canada's constitutional vision depart from that endorsed in the United States.").

[276] *See id.*

[277] *See* Shiffrin, *supra* note 186, at 117 (Deliberate misrepresentations "damage the rational basis supporting our testimonial practices . . . . If the wrong of the lie is as insidious as I have argued, that wrong supports a strong *prima facie* case for identifying and marking that wrong through the signal of legal regulation and for using some of the powers of legal regulation to rebuke (and perhaps deter) its occurrence.").

risks flooding public discourse at a rate and volume which counter-speech cannot remedy, thus jeopardizing the ability to cast an effective ballot.

Indeed, while the marketplace of ideas framework first articulated in Justice Holmes' dissent in *Abrams* is a powerful rhetorical device often employed by free speech absolutists, his remarks are rarely quoted in full, thus leading to an inaccurate portrayal of the marketplace of ideas framework in the first place. In his dissent, Justice Holmes described the marketplace of ideas as an "experiment," saying:

> Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[278]

Two final points must be made. First, Justice Holmes was concerned about the expression of *opinions*, not factual statements. Based on the foregoing discussion of facts versus opinions, while distinguishing the two can be difficult, judges and juries are charged with drawing these distinctions all the time. Indeed, after noting several criteria which judges can use to discern fact from opinion, Justices Cory and Iacobucci in *Zundel* squarely declared: "Courts deal with the question of truth and falsity of statements on a daily basis."[279] And as advised by Hasen earlier, the type of statements targeted by a prohibition on false election speech is that which can be empirically verified without recourse to an assessment of personal value judgment. Second, even while Justice Holmes established the marketplace of ideas framework, he explicitly qualified his theory by calling for an "immediate check" on speech that threatens the "lawful and pressing purposes of the law." The work of this Article has been to show that the perils of the present moment—in keeping with Justice Holmes' admission that his theory of the First Amendment was an "experiment"—justify a prohibition on false election speech in order to protect the right to vote and preserve the integrity of election administration as compelling state interests.

Achieving greater symmetry or alignment between Canada's and the United States' approaches to regulating false election speech in the digital era is vital on two counts. First, the means by which mis- and- disinformation spreads know no borders. Rather, online platforms and social media networks permit an infinite amount of data and information to be freely communicated between Canadians and Americans. Second, in the specific context of Canada and the United States, these allied nations share many common social, political, and economic objectives, and in this way their destinies as Western liberal democracies are intertwined. When lies are allowed to erode the common

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[278] Abrams v. United States, 250 U.S. 616, 619–20 (1919) (Holmes, J., dissenting).
[279] R. v. Zundel, [1992] 2 S.C.R. 731, 836 (Can.) (Cory & Iacobucci, JJ., dissenting).

factual basis upon which members of society-at-large communicate, fulfilling these shared objectives becomes increasingly difficult, if not impossible. Therefore, to safeguard future peace and prosperity for both countries, the integrity of the electoral process and election results must be protected against patent falsehoods which undermine confidence in the public institutions charged with managing the affairs of the state. In turn, adopting a prohibition on false election speech that can withstand constitutional scrutiny in both countries based on a compelling state interest in protecting the right to vote and preserving electoral integrity is essential to achieving that aim.