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False Speech and the First Amendment: Constitutional Limits on Regulating Misinformation

Federal and state legislators have expressed interest in regulating online misinformation and disinformation. Such regulatory efforts may implicate the U.S. Constitution's First Amendment. The Supreme Court has said the Free Speech Clause protects false speech when viewed as a broad category, but the government may restrict limited subcategories of false speech without violating the First Amendment. For example, defamation, fraud, political advertisements, and broadcast speech are subject to special considerations. This In Focus highlights some relevant constitutional considerations in crafting new regulations of false speech.

First Amendment Protections for False Speech

The Supreme Court has recognized that false statements may not add much value to the marketplace of ideas. Even so, there is a concern that by prohibiting false speech, the government would also “chill” more valuable speech, meaning it would cause people to self-censor out of fear of violating the law. Consequently, the First Amendment creates “breathing space” protecting the false statements and hyperbole that are “inevitable in free debate.” *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The Court has suggested the government may not regulate false *ideas*, and even false *factual* statements receive some constitutional protection.

As a general rule, if a law targets speech based on its expressive content, that content-based regulation will trigger strict scrutiny analysis. Under strict scrutiny, a law is presumptively unconstitutional unless the government can show the challenged law is the least restrictive means of targeting speech while also serving a compelling governmental interest. Courts have sometimes extended this general principle to laws regulating false speech and concluded that laws prohibiting lies about a certain topic trigger strict scrutiny.

The Supreme Court, however, has split on the exact level of scrutiny applicable to false speech regulation. In *United States v. Alvarez*, 567 U.S. 709 (2012), the Supreme Court invalidated the Stolen Valor Act, a federal law prohibiting false statements about receiving military decorations or medals. The four-Justice plurality opinion clarified “that falsity alone may not suffice to bring the speech outside the First Amendment.” Thus, the plurality opinion applied strict scrutiny to the Stolen Valor Act as a content-based law. The Court held that the law was not sufficiently narrowly tailored: It punished false statements regardless of the context or purpose. There was no “direct causal link” showing the law’s broad scope was necessary to the government’s goal of protecting the integrity of the military

honors system. Two Justices agreed in a concurring opinion that the law was unconstitutional, although they applied an “intermediate” level of constitutional scrutiny. The concurrence suggested laws might satisfy intermediate scrutiny if they regulate “a subset of lies where specific harm is more likely to occur.”

Existing Prohibitions on False Speech

Although content-based laws generally trigger strict scrutiny, possibly including laws regulating false statements, the Supreme Court has historically allowed certain limited categories of speech to be regulated based on their content. These categories include defamation and fraud, both of which entail false speech. Apart from these limited categories, existing federal laws prohibit, for example, perjury or making certain materially false statements to government officials. Other federal laws address misrepresentations in political advertising or in broadcast media.

Defamation

Although the particulars of defamation claims vary state by state, the common law of defamation historically imposed liability for making certain false statements harming a person’s reputation if the speaker acted negligently with respect to whether the statement was true. While the Constitution allows liability for defamatory statements, the First Amendment remains relevant in evaluating the standards for proving defamation. In the landmark 1964 case *New York Times Co. v. Sullivan*, the Supreme Court ruled that statements about public officials enjoy heightened constitutional protection from defamation liability. Public officials cannot win a defamation case unless they show an allegedly defamatory statement “was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” The actual malice standard also extends to defamatory statements about public figures, and lesser constitutional protections apply to defamatory statements on matters of public concern. In addition, lower courts have long held that the First Amendment requires a heightened standard before certain speech distributors such as bookstores may be held liable for circulating material with defamatory statements.

Fraud and False Commercial Speech

The common law of fraud imposes liability on a person who makes a fraudulent misrepresentation for the purpose of inducing someone else to act, detrimentally and justifiably, in reliance on that material misrepresentation. Federal and state governments have also enacted various statutes punishing specific types of fraud. For example, in 1948 the Supreme Court easily rejected a First Amendment

challenge to federal laws prohibiting mail fraud. *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178 (1948). The Court has cautioned, however, that the government may not avoid First Amendment scrutiny by “simply labeling an action one for ‘fraud.’” *Illinois ex rel. Madigan v. Telemarketing Associates*, 538 U.S. 600 (2003).

Beyond the category of common-law fraud, the Supreme Court has also said that false or misleading *commercial* speech may be prohibited. For constitutional purposes, commercial speech is speech that does no more than propose a commercial transaction or that relates solely to the speaker’s and audience’s economic interests. Accordingly, the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC) can regulate deceptive commercial speech without violating the First Amendment. For instance, during the COVID-19 pandemic, the FTC sometimes sent cease-and-desist letters to companies falsely advertising that their products treated or prevented COVID-19.

Campaign Speech

A number of federal laws relate to truthfulness in elections. For instance, federal law prohibits false statements related to voting eligibility, fraudulent misrepresentation of authority to act for a federal political candidate, and knowingly defrauding state residents of a fair election by procuring materially false ballots. The Federal Election Campaign Act (FECA) also imposes disclaimer requirements on certain political campaign advertisements: for example, requiring them to identify funding and authorizing sources. For more information on these FECA requirements, see CRS In Focus IF11398, *Campaign Finance Law: Disclosure and Disclaimer Requirements for Political Campaign Advertising*, by L. Paige Whitaker. The First Amendment sometimes treats disclaimers differently than prohibitions, viewing some advertising disclosures as less speech restrictive. Accordingly, the Supreme Court has upheld many of FECA’s disclosure provisions under a heightened scrutiny standard.

Broadcast Media

Broadcast television and radio are subject to special restrictions. Federal regulations require broadcast stations to identify sponsors of paid content, for example, and prohibit knowingly broadcasting false information about a crime or catastrophe causing substantial public harm. Based on standards requiring licensees to serve the public interest, the FCC has also said broadcasters may not intentionally distort the news. While the Supreme Court has not specifically considered the constitutionality of these false-speech restrictions, the Court has long said the First Amendment allows more regulation of broadcast content than other types of media. At the same time, federal law instructs the FCC to avoid censorship.

New Regulation of False Speech

A critical consideration in regulating false statements is the law’s scope. In particular, if the government says it is targeting defamation or fraud, courts have struck down broad prophylactic laws that are not limited to those narrow categories. Further, even laws that only restrict defamation

or fraud could be unconstitutional if they make further *viewpoint*-based distinctions or certain types of speaker- or content-based restrictions.

Supreme Court precedent has largely upheld regulations of false speech only if they fall within these limited categories of defamation or fraud. *Alvarez* leaves open some uncertainty about how courts should review laws regulating other types of false speech, although both opinions suggest some level of heightened scrutiny would apply. Thus, for example, a number of lower courts have applied strict scrutiny to strike down state laws regulating false statements in political advertisements. One federal appeals court struck down an Ohio law prohibiting reckless false statements about candidates in campaign materials, emphasizing that the law too broadly swept in non-material statements and intermediaries who merely transmitted others’ statements. *Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016). In contrast, other lower courts have upheld laws they believed were more narrowly tailored to a compelling state interest, such a federal law prohibiting impersonating a federal officer. *United States v. Bonin*, 932 F.3d 523 (7th Cir. 2019).

The *Alvarez* concurrence suggested regulations may be constitutional if they closely target lies likely to cause specific harms. In this vein, commentators advocating misinformation regulation have sometimes cited Supreme Court dicta suggesting the First Amendment would not protect a person who caused a panic by falsely shouting “fire” in a theater. However, that dicta has not been applied as binding precedent.

Alvarez and lower court cases suggest a court’s constitutional inquiry, even when it does not apply strict scrutiny, may consider whether there are less-speech-restrictive alternatives to a challenged false-speech regulation. For instance, in evaluating a prohibition on private speech, courts may ask whether a less restrictive disclosure requirement could serve the government’s goal. Courts may also require some heightened mental state to ensure mistaken speech is not unduly restricted—similar to requiring actual malice in certain defamation claims.

Additional CRS Resources

For more information on the categories of “unprotected” speech, see CRS In Focus IF11072, *The First Amendment: Categories of Speech*, by Victoria L. Killion.

For an exploration of policy considerations related to regulating social media and misinformation, see CRS Report R46662, *Social Media: Misinformation and Content Moderation Issues for Congress*, by Jason A. Gallo and Clare Y. Cho. For a discussion of First Amendment concerns related to regulating online content moderation, as well as the special treatment of broadcast media, see CRS Report R45650, *Free Speech and the Regulation of Social Media Content*, by Valerie C. Brannon.

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