

# MANAGING THE MISINFORMATION MARKETPLACE: THE FIRST AMENDMENT AND THE FIGHT AGAINST FAKE NEWS

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*In recent years, fake news has overtaken the internet. Fake news publishers are able to disseminate false stories widely and cheaply on social media websites, amassing millions of likes, comments, and shares, with some fake news even “trending” on certain platforms. The ease with which a publisher can create and spread falsehoods has led to a marketplace of misinformation unprecedented in size and power. People’s vulnerability to fake news means that they are far less likely to receive accurate political information and are therefore unable to make informed decisions when voting. Because a democratic system relies on an informed populace to determine how it should act, fake news presents a unique threat to U.S. democracy.*

*Although fake news threatens democratic institutions, First Amendment protections for false speech present a significant obstacle for regulatory remedies. This Note explores the ways these speech protections interfere with the government’s ability to protect political discourse—the process that enables it to function effectively—and proposes that the government regulate journalists to ensure that people can rely on legitimate news media to receive accurate information.*

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#### INTRODUCTION

On October 30, 1938, the *New York Times* reported panic and mass hysteria throughout New York after radio listeners tuned into a broadcast of Orson Welles's rendition of *The War of the Worlds*, a fictional drama about an alien invasion, and believed it to be true.<sup>1</sup> After hearing the broadcast, families across the state reportedly fled their homes in fear of a gas attack, which led to traffic and communications jams.<sup>2</sup> How was it possible that thousands of people could believe something so absurd?

As it turns out, the broadcast was not the problematic source of misinformation that persuaded multitudes of listeners to adopt a mistaken belief. Rather, the coverage of the hysteria was the “fake news” that deceived people en masse. News media grossly exaggerated the public response to the *War of the Worlds* radio program, expanding on a few anecdotal reports to paint a picture of mass hysteria.<sup>3</sup>

Though the frequent use of the term “fake news” is relatively new, concern over the spread of misinformation is not. In the internet age, false stories have taken a new and troubling hold on the information marketplace. The persisting belief that the *War of the Worlds* broadcast created mass hysteria demonstrates how false news maintains a powerful grip on people's understanding of events, even after such information has been repudiated.

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1. *Radio Listeners in Panic, Taking War Drama as Fact*, N.Y. TIMES, Oct. 31, 1938, at 1, <https://timesmachine.nytimes.com/timesmachine/1938/10/31/issue.html> [<https://perma.cc/7BK8-EJGM>].

2. *Id.*

3. David Emery, *Did the 1938 Radio Broadcast of 'War of the Worlds' Cause a Nationwide Panic?*, SNOPE (Oct. 28, 2016), <https://www.snopes.com/fact-check/war-of-the-worlds/> [<https://perma.cc/28DG-M8FA>].

Technology has empowered false news publishers with the ability to disseminate misinformation cheaply, rapidly, and widely and to use deceptive techniques to shape public opinion.

This Note explores the ways in which false news in the internet age receives broad First Amendment protections, yet ironically undermines a core purpose of the First Amendment: to enable the free exchange of ideas in public debate, which shapes public opinion and informs democratic self-governance. Though the term “fake news” has taken on many meanings in public discourse, in this Note it refers to false statements of fact reported in online media that readers would reasonably believe are true, including both intentional lies and inadvertent falsehoods.<sup>4</sup> Part I of this Note discusses the philosophical beliefs that have shaped jurisprudential understanding of false speech protection and explains how the fake news problem in the internet age presents unprecedented threats to democracy. Part II describes the First Amendment protections for false speech and analyzes the relationship between these protections and the philosophical underpinnings of free speech theory. Part III explains the inability to adequately restrict false speech under First Amendment jurisprudence. Part IV proposes a way that the government can use philosophical theories of free speech protection to reimagine regulating fake news without violating the First Amendment.

#### I. THE GROWING FAKE NEWS PROBLEM AND THE HISTORICAL CONTEXT OF FALSE SPEECH PROTECTION

This Part provides background information on the fake news problem. Part I.A examines the philosophical theories underlying false speech protection and discusses the role of free speech in society. Within the context of these philosophical theories, Part I.B explains why fake news presents unique threats to U.S. democracy by causing confusion among news consumers and sowing distrust in the news media.

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4. The concept of fake news has existed for centuries, with mentions of “false news” stories dating back to the 1500s and the term “fake news” used as early as 1890. *The Real Story of ‘Fake News,’* MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/the-real-story-of-fake-news> [<https://perma.cc/YNT8-QZHA>] (last visited Apr. 10, 2019). More recently, the term “fake news” has become popular after proliferation of the term by President Donald Trump on Twitter. President Trump has reappropriated the term, and has accused reporters of publishing fake news to discredit legitimate stories when they are critical of his actions. See Tamara Keith, *How Trump Tries to Discredit What He Doesn’t Like with ‘Fake’ and ‘Phony’ Labels*, NPR (Aug. 31, 2018, 4:29 PM), <https://www.npr.org/2018/08/31/643798637/how-trump-tries-to-discredit-what-he-doesnt-like-with-fake-and-phony-labels> [<https://perma.cc/S5DU-M68Z>]. Dictionary.com defines “fake news” as “false news stories, often of a sensational nature, created to be widely shared or distributed for the purpose of generating revenue, or promoting or discrediting a public figure, political movement, company, etc.” *Fake News*, DICTIONARY.COM, <https://www.dictionary.com/browse/fake-news> [<https://perma.cc/K42T-VHB8>] (last visited Apr. 10, 2019). This Note adopts Dictionary.com’s definition.

A. *Falsehoods: Philosophical and Historical Context*

The value of protecting false speech has long been the subject of philosophical debate. In *On Liberty*, John Stuart Mill defends false speech protections because he believes that false opinions enable people to ascertain the truth in free and open debate.<sup>5</sup> Mill argues that ideological truth is not innately or universally known but must be unearthed through debate. False opinions have value, Mill says, because they provoke people to investigate the proposition further, thereby leading to discovery of the truth.<sup>6</sup> If misguided ideas are censored, discovery of truth will be stifled.<sup>7</sup> Continuous debate requires people to defend and articulate the truth, thereby reinforcing its vigor.<sup>8</sup> In this way, free speech can furnish a “clearer perception and livelier impression of truth, produced by its collision with error.”<sup>9</sup>

In “On a Supposed Right to Lie Because of Philanthropic Concerns,”<sup>10</sup> Immanuel Kant examines the moral prohibitions against deliberate false speech: lies. Kant argues that all lies are harmful because they undermine others’ dignity by preventing them from acting freely and rationally.<sup>11</sup> When speakers lie, they interfere with their listeners’ right to receive true information and manipulate their ability to make informed decisions based on fact.<sup>12</sup> Furthermore, Kant argues that lies cause broader harm by undermining speakers’ credibility, which, in turn, causes people to distrust each other’s contentions.<sup>13</sup> Together, Mill’s and Kant’s philosophies embrace both a right to communicate ideas and a right to receive information in open discourse.

Drawing on earlier philosophers, U.S. Supreme Court Justice Oliver Wendell Holmes, Jr. enshrined the concept of the “marketplace of ideas” in American free speech principles. He wrote, “[T]he ultimate good desired is better reached by free trade in ideas—that the best of truth is the power of the thought to get itself accepted in the competition of the market . . . .”<sup>14</sup> Under this view, the free trade of ideas promotes a democratic system of governance by allowing people to discover the ultimate truth of what policies best serve society. Encompassing the tenets of both Mill and Kant, the marketplace of ideas posits that individuals cannot expand their knowledge

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5. JOHN STUART MILL, *On Liberty*, reprinted in *ON LIBERTY, UTILITARIANISM AND OTHER ESSAYS* 5, 15, 18–54 (Mark Philip & Frederick Rosen eds., 2015).

6. *Id.* at 19–21, 35.

7. *See id.*

8. *Id.* at 35 (“[I]f [an idea] is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth.”); *see also* Christoph Bezemek, *The Epistemic Neutrality of the “Marketplace of Ideas”*: Milton, Mill, Brandeis, and Holmes on Falsehood and Freedom of Speech, 14 *FIRST AMEND. L. REV.* 159, 166 (2015).

9. MILL, *supra* note 5, at 19.

10. Immanuel Kant, *On a Supposed Right to Lie Because of Philanthropic Concerns*, reprinted in *ETHICAL PHILOSOPHY* 162 (James W. Ellington trans., 2d ed. 1994).

11. *See id.* at 163–65.

12. *Id.*; Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 *UCLA L. REV.* 1107, 1114 (2006).

13. *See* Kant, *supra* note 10, at 163–64.

14. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

unless they can freely assert their ideas and test them against the ideas of others;<sup>15</sup> a functional ideas marketplace presumes both that true ideas can be discovered and that participants in free discourse are trying to uncover the ultimate truth in good faith.<sup>16</sup>

*B. Fake News' Harmful Effects on Democratic Institutions  
and the Electorate*

James Madison wrote, “Public opinion sets bounds to every government, and is the real sovereign in every free one.”<sup>17</sup> Because democratic government, in theory, must be responsive to public opinion,<sup>18</sup> it is crucial that people have the means to form reasoned opinions about public policy. Traditionally, the news media enabled the public to form reasoned opinions that, in turn, informed government action and oversight.<sup>19</sup> However, a growing fake news problem has accompanied the rise of social media and sensationalism of traditional media. While newspaper readership has declined, the amount of information distributed online, including false information, has skyrocketed.<sup>20</sup> The rise of social media has created a world where people are inundated with news, both legitimate and fake—a world that philosophers and scholars of the past never contemplated. Because an informed public is vital to democratic self-governance, the rise of fake news presents unique problems to U.S. democracy.

1. Prevalence and Nature of Fake News

The ease in spreading falsehoods creates a number of serious problems for democratic institutions. Voters’ susceptibility to falsities undermines the ability of the electorate to choose qualified candidates for office.<sup>21</sup> Kant’s objections to lies apply with greater force to the misinformation marketplace: fake news produces a “blanket of fog” that interferes with the electorate’s ability to make informed, rational decisions about candidates by “obscur[ing]

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15. See ROBERT C. POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 6 (2012).

16. Annie C. Hundley, *Fake News and the First Amendment: How False Political Speech Kills the Marketplace of Ideas*, 92 TUL. L. REV. 497, 502–03 (2017). Similar to Kant’s belief that people have a moral duty to tell the truth, Mill believed that people have a moral duty to assert only the opinions that they sincerely believe. MILL, *supra* note 5, at 21 (“It is the duty of governments, and of individuals, to form the truest opinions they can; to form them carefully, and never impose them upon others unless they are quite sure of being right.”); see also SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 141 (2014).

17. *For the National Gazette, [Ca. 19 December] 1791*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-14-02-0145> [<https://perma.cc/28EE-86T2>] (last visited Apr. 10, 2019).

18. POST, *supra* note 15, at 14.

19. *Id.* at 35.

20. Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 201 (2017).

21. Staci Lieftring, Note, *First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech After United States v. Alvarez*, 97 MINN. L. REV. 1047, 1064 (2013).

the real news and information communicated by campaigns.”<sup>22</sup> Falsehoods about elections disrupt voter ability to choose a candidate who represents their interests, and they may also disincentivize voting entirely by confusing voters about polling locations, voting times, and voter eligibility.<sup>23</sup>

Though political misinformation is not a new problem, the mass, targeted distribution of fake news on social media has disrupted the marketplace of ideas in entirely new and troubling ways. Social media allows political actors to overwhelm users and disrupt their sense of reality by disseminating false news and political ads to an unprecedented degree at unprecedented speeds.<sup>24</sup> Because false stories are often more extreme or outrageous than true news, they are more likely to be shared on social media platforms.<sup>25</sup> “Parasitic journalism”—the practice of reporting news produced by another source without additional investigation—can exacerbate this problem.<sup>26</sup> A recent Massachusetts Institute of Technology study of Twitter found that “false stories diffused ‘farther, faster, deeper, and more broadly than the truth in all categories of information’” and that “[t]he truth, in other words, could not rise to the top [of the marketplace of ideas] because the marketplace was packed with lies.”<sup>27</sup>

The ease in uploading and distributing online content means that fake news disguised as legitimate news spreads rapidly and reaches anywhere from hundreds to millions of viewers.<sup>28</sup> On social media, political entities use ads or automated messages sent by bots to mass target specific demographics that are particularly susceptible to deceptive messages, possibly tricking many of these voters into voting against their interests.<sup>29</sup>

The 2016 presidential election demonstrates the ways these techniques can be used to confuse and deceive on a massive scale. Fake news spread rapidly during the 2016 election cycle; false pro-Trump articles were shared 30.3 million times and false pro-Clinton articles were shared 7.6 million times on Facebook alone.<sup>30</sup> A BuzzFeed analysis of top fake news stories during the campaigns found that the twenty most shared false stories—stories that originated from hoax websites or hyperpartisan blogs—generated more user

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22. See Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63, 69 (2017).

23. Lieffring, *supra* note 21, at 1064–65. This disproportionately affects underrepresented populations, including women and minorities. Becky Kruse, *The Truth in Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False Speech Statutes*, 89 CALIF. L. REV. 129, 143, 159 (2001).

24. See Jonathan D. Varat, *Truth, Courage, and Other Human Dispositions: Reflections on Falsehoods and the First Amendment*, 71 OKLA. L. REV. 35, 48–49 (2018).

25. See Carol Pauli, “Fake News,” *No News, and the Needs of Local Communities*, 61 HOW. L.J. 563, 575 (2018).

26. Philip M. Napoli, *What if More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L.J. 55, 69 (2018).

27. Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 863 (2018) (quoting Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCIENCE 1146, 1147 (2018)).

28. Varat, *supra* note 24, at 48–49.

29. *See id.*

30. Hasen, *supra* note 20, at 208.

engagement than the top stories from major news outlets.<sup>31</sup> These stories asserted false claims that Clinton sold weapons to ISIS, the pope endorsed Trump, and Clinton was disqualified from holding any federal office, among other outrageous falsehoods.<sup>32</sup> One fake news author who wrote a false story claiming that thousands of fraudulent Clinton votes were found in an Ohio warehouse admitted that he made up the entire story and took only fifteen minutes to craft the viral piece that was ultimately seen by six million people.<sup>33</sup>

Perhaps because stories with high shock value are more likely to become viral, political conspiracy theories have gained traction in recent years and have harmed individuals and businesses, as well as democratic institutions. The conspiracy theory that the Sandy Hook shooting was a fake story orchestrated by anti-gun lobbyists has led to harassment of victim's families.<sup>34</sup> The "Pizzagate" conspiracy theory that the Democratic Party was running a sex-trafficking ring out of a pizzeria led to the owner receiving death threats and a man firing a gun inside the restaurant.<sup>35</sup> These conspiracies not only harmed specific entities, but also demonstrate the susceptibility of some Americans to fraudulent news, however absurd, and people's growing distrust in their political opponents. After "false flag" conspiracy theorists postulated that pipe bombs mailed to prominent Democrats were sent by other Democrats to make Republicans seem radical before the 2018 midterm election, *New York Times* writer Kevin Roose commented that "[c]onspiratorial thinking has always been with us—the grassy knoll, the moon landing, the Freemasons. But it has been turbocharged . . . as cable news networks and pliant social media networks allow hastily assembled theories to spread to millions in an instant."<sup>36</sup>

The 2016 election also exposed the United States's susceptibility to manipulation by foreign actors. In 2016, Russian agents covertly influenced American voters in the presidential election with the goal of sowing distrust in the presidential candidates and American political system more generally.<sup>37</sup> Russian agents used false reports and automated bots to target specific groups of people who were vulnerable to the deception, including

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31. Craig Silverman, *This Analysis Shows How Viral Election News Stories Outperformed Real News on Facebook*, BUZZFEED NEWS (Nov. 16, 2016, 5:15 PM), <https://www.buzzfeednews.com/article/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook> [<https://perma.cc/JV6F-QJPD>].

32. *See id.*

33. Hundley, *supra* note 16, at 498–99.

34. David S. Han, *Conspiracy Theories and the Marketplace of Facts*, 16 FIRST AMEND. L. REV. 178, 181 (2017).

35. Cecilia Kang, *Fake News Onslaught Targets Pizzeria as Nest of Child-Trafficking*, N.Y. TIMES (Nov. 21, 2016), <https://www.nytimes.com/2016/11/21/technology/fact-check-this-pizzeria-is-not-a-child-trafficking-site.html> [<https://perma.cc/JP9U-LZ3K>].

36. Kevin Roose, *'False Flag' Theory on Pipe Bombs Zooms from Right-Wing Fringe to Mainstream*, N.Y. TIMES (Oct. 25, 2018), <https://www.nytimes.com/2018/10/25/business/false-flag-theory-bombs-conservative-media.html> [<https://perma.cc/M66U-TNL3>].

37. Scott Shane & Mark Mazzetti, *The Plot to Subvert an Election: Unraveling the Russia Story So Far*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/interactive/2018/09/20/us/politics/russia-interference-election-trump-clinton.html> [<https://perma.cc/9MZ8-DHD5>].

journalists who were likely to share the fake stories.<sup>38</sup> The prevalence of bots on social media makes foreign interference even more troubling. Between September 16 and October 21 of 2016, around 20 percent of all tweets about the election were generated by bots.<sup>39</sup> It is impossible to know where these automated messages originated or who deployed them, demonstrating the vulnerability social media users have to foreign fake news content.<sup>40</sup> A single Russian firm with fewer than a hundred agents generated content that reached around 150 million Facebook users on behalf of the Russian state.<sup>41</sup>

## 2. Decline in Legitimate Media

Journalism adds value to society by providing factual information to people who then can make informed decisions and form reasoned opinions. Public policy professor Philip Napoli explains, “Journalism . . . produces value for society as a whole (positive externalities) that often is not captured in the economic transactions between news organizations and news consumers . . . . [T]his leads to market inefficiency in the form of the underproduction of journalism . . . .”<sup>42</sup> This inefficiency threatens an already declining market for legitimate news.<sup>43</sup> Parasitic journalism furthers market inefficiency because republishers draw viewership and revenue away from legitimate sources that incur significant costs while producing high-quality news.<sup>44</sup>

The prevalence of fake news also causes people to distrust and dispense with news more broadly. Bots are often deployed to distribute the same false stories through diverse sources to trick readers by creating the perception that the fake news piece is more widely accepted than its true counterparts.<sup>45</sup> This “flooding” technique can cause people to stop trusting the media entirely; the false-information overload means that people no longer know what to believe and eschew both credible and unreliable sources alike.<sup>46</sup> Professor Seana Shiffrin explains that “deliberate misrepresentations undercut the warrants we have to accept each other’s testimonial speech, . . . interfer[ing] with the aims of free speech culture.”<sup>47</sup> Repeated falsehoods in the media work similarly by undermining viewers’ confidence in news as a source of factual information. The problem is exacerbated by social media companies that

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38. Hasen, *supra* note 20, at 206–07.

39. Persily, *supra* note 22, at 70.

40. *Id.*

41. Evan Osnos, *Can Mark Zuckerberg Fix Facebook Before It Breaks Democracy?*, NEW YORKER (Sept. 17, 2018), <https://www.newyorker.com/magazine/2018/09/17/can-mark-zuckerberg-fix-facebook-before-it-breaks-democracy> [<https://perma.cc/558E-ZCES>].

42. Napoli, *supra* note 26, at 89–90.

43. Hasen, *supra* note 20, at 203.

44. Napoli, *supra* note 26, at 69–70.

45. *Fighting Fake News*, YALE L. SCH. 5, [https://law.yale.edu/system/files/area/center/isp/documents/fighting\\_fake\\_news\\_-\\_workshop\\_report.pdf](https://law.yale.edu/system/files/area/center/isp/documents/fighting_fake_news_-_workshop_report.pdf) [<https://perma.cc/E2U9-PSBL>] (last visited Apr. 10, 2019). This tactic is so powerful it has even caused certain fake stories to “trend” on social media. *Id.*

46. Varat, *supra* note 24, at 48–49.

47. SHIFFRIN, *supra* note 16, at 117.

cater news to their viewers. Technology allows these companies to use algorithms to promote content they believe their viewers will like, which creates echo chambers where users are exposed to the same information repeatedly, without exposure to contradicting sources.<sup>48</sup>

Use of traditional media sources has already declined sharply in the internet age, and distrust in such sources will likely contribute to the continuance of this troubling trend.<sup>49</sup> Fake news has already caused confusion and distrust by flooding the news marketplace with falsehoods. In a recent Gallup poll surveying Americans' beliefs about the prevalence of false news, on average respondents said that 39 percent of the news they see on traditional news media is misinformation.<sup>50</sup> In another poll, 58 percent of respondents reported that the increase in news sources makes it harder to be well-informed.<sup>51</sup> These statistics demonstrate the growing trends of distrust and confusion that result from the misinformation marketplace.

Distrust in traditional media harms the press's role as a stabilizing democratic institution.<sup>52</sup> If people lose trust in traditional media because of fake news, the press will be unable to serve its watchdog role as a check on government. Because government accountability is largely motivated by a watchful press, a decline in coverage or consumption could result in greater corruption.<sup>53</sup> Americans are already skeptical of the media. Although 84 percent of polled Americans agree that news media is "critical" or "very important" to democracy, only 28 percent reported that it supports democracy "well" or "very well."<sup>54</sup>

A decline in traditional news media in favor of social media may also harm democracy by allowing fake news propagated by politicians and their supporters to flourish unchecked, which could potentially lead to higher

48. *Fighting Fake News*, *supra* note 45, at 4.

49. Hasen, *supra* note 20, at 202–03.

50. Jeffrey M. Jones, *Americans: Much Misinformation, Bias, Inaccuracy in News*, GALLUP (June 20, 2018), <https://news.gallup.com/opinion/gallup/235796/americans-misinformation-bias-inaccuracy-news.aspx> [<https://perma.cc/6AJ8-BJA4>]. In this poll, traditional media included TV, radio, and newspapers. *Id.* Respondents reported that they believe 65 percent of news they see on social media is misinformation. *Id.* In 2016, Gallup reported that only 32 percent of Americans responded that they trusted the mass media "to report the news fully, accurately and fairly," in contrast with a peak level of confidence at 72 percent in 1976, following coverage of the Vietnam War and the Watergate scandal. Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP (Sept. 14, 2016), <http://www.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx> [<https://perma.cc/9AQW-WZ25>].

51. Jeffrey M. Jones & Zacc Ritter, *Americans Struggle to Navigate the Modern Media Landscape*, GALLUP (Jan. 23, 2018), <https://news.gallup.com/poll/226157/americans-struggle-navigate-modern-media-landscape.aspx> [<https://perma.cc/NV6T-LAZR>].

52. Hasen, *supra* note 20, at 201–05.

53. *Id.* at 209–10 (explaining that higher levels of corruption in state and local governments are directly correlated with newspaper coverage of those governments).

54. Zacc Ritter & Jeffrey M. Jones, *Media Seen as Key to Democracy but Not Supporting It Well*, GALLUP (Jan. 16, 2018), <https://news.gallup.com/poll/225470/media-seen-key-democracy-not-supporting.aspx> [<https://perma.cc/459P-T8GY>]. An additional 27 percent of people agreed that the news media is performing "acceptably" in supporting democracy. *Id.*

levels of political corruption.<sup>55</sup> While traditional news organizations once served as intermediaries between the government and people, with “the fostering of a well-informed and civically minded electorate” as their primary purpose, now, social media organizations have overtaken the intermediary role.<sup>56</sup> But, unlike traditional news organizations, social media networks do not have a principal purpose of safeguarding democracy or enabling truth-seeking in the ideas marketplace.<sup>57</sup>

Furthermore, while political candidates and leaders in the past could communicate with constituents only through TV, radio, and newspapers, they now can reach the public directly through social media. Provocateurs can use Twitter and Facebook to spread false messages and inflammatory comments without filtration by legitimate media sources, which have historically corrected fallacious and exaggerated claims.<sup>58</sup> Without legitimate news as a necessary intermediary, the government has a greater ability to use false speech for nefarious purposes.<sup>59</sup> Political leaders can use false speech to discredit their critics, manipulate public opinion, or distract the public from investigating government activities.<sup>60</sup> In November, the White House tweeted a doctored video involving an altercation between a CNN reporter often critical of the president and a White House intern to legitimize its revocation of the reporter’s press pass.<sup>61</sup> Just two days before the 2018 midterm elections, gubernatorial candidate Brian Kemp, who was also Georgia’s secretary of state at the time, claimed without evidence that Democrats tried to hack Georgia’s voter registration files amidst claims that he was trying to suppress the minority vote to win his race.<sup>62</sup>

Fake news undermines democracy by inhibiting voters’ ability to make informed political decisions and sowing distrust in legitimate media. Because fake news is easy to produce and free to distribute on a wide scale, the problem is unlikely to go away on its own.

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55. Hasen, *supra* note 20, at 209.

56. Persily, *supra* note 22, at 74.

57. *See id.*

58. Hasen, *supra* note 20, at 212–14.

59. *See generally* Helen Norton, *The Government’s Manufacture of Doubt*, 16 FIRST AMEND. L. REV. 342 (2017).

60. *Id.* at 355.

61. Lukas I. Alpert & Rebecca Ballhaus, *White House Posted Video That Exaggerated Incident with CNN Reporter, Social-Media Firm Says*, WALL ST. J. (Nov. 8, 2018, 1:59 PM), <https://www.wsj.com/articles/white-house-accused-of-posting-edited-video-that-exaggerated-incident-involving-cnn-reporter-1541703579> [<https://perma.cc/E2WD-2GJ2>].

62. *See* Richard Fausset & Alan Blinder, *Brian Kemp’s Office, Without Citing Evidence, Investigates Georgia Democrats over Alleged ‘Hack,’* N.Y. TIMES (Nov. 4, 2018), <https://www.nytimes.com/2018/11/04/us/politics/georgia-elections-kemp-voters-hack.html> [<https://perma.cc/2G9L-QDWN>]. Kemp did not use social media to make this announcement, so legitimate media—acting as intermediary between Kemp’s office and the public—was able to qualify his claims of hacking by saying that they were unsubstantiated. *See id.*

## II. FIRST AMENDMENT PROTECTIONS FOR FALSE SPEECH

Although fake news presents a number of threats to democracy, it is protected by the First Amendment. This Part examines constitutional protections for false speech. Part II.A explains the purpose of the First Amendment and describes how false speech has been deemed valueless, yet still worthy of protection by the Supreme Court. Part II.B analyzes *United States v. Alvarez*,<sup>63</sup> a case that struck down a statute that criminalized false statements about receipt of military honors, to demonstrate the numerous ways that the First Amendment protects false speech. Finally, Part II.C discusses the ways in which First Amendment protections incorporate the philosophical theories, described in Part I.A, that underpin free speech values.

### A. Constitutional Background

Because an informed public is crucial to democratic self-governance, a primary purpose of the First Amendment is to protect public debate, the means through which public opinion develops.<sup>64</sup> U.S. democracy “depends on [the public’s] joint engagement with and evaluation of competing visions.”<sup>65</sup> The First Amendment prohibits Congress from making any law “abridging the freedom of speech”<sup>66</sup> because public opinion is formed through free and open discourse. Encompassing Millian principles, this broad protection ensures that “everything worth saying shall be said” so that knowledge can grow free from government suppression and people can assert their collective will over their leaders.<sup>67</sup> But, to ensure that free speech is safeguarded, some things not worth saying, such as falsehoods, receive incidental protection.<sup>68</sup>

Understanding First Amendment protections for false speech requires knowing what constitutes a false statement of fact. In *Milkovich v. Lorain Journal Co.*,<sup>69</sup> the Court held that, if a reasonable factfinder would conclude that an expression of opinion implies a piece of information that is “sufficiently factual to be susceptible of being proved true or false,” it is a statement of fact.<sup>70</sup>

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63. 567 U.S. 709 (2012).

64. POST, *supra* note 15, at 14.

65. Seana Valentine Shiffirin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1160 (2003).

66. U.S. CONST. amend. I.

67. See POST, *supra* note 15, at 14–16.

68. Shiffirin, *supra* note 65, at 1160 (“We want speakers to have full freedom in the construction and dissemination of their intent. [Democratic] legitimacy depends on it. Protection of the bitter alongside the sweet, then, may be a necessary condition of protecting those valuable processes and outcomes provoked by insightful speech.”).

69. 497 U.S. 1 (1990).

70. See *id.* at 21.

The Court has oft repeated that false statements of fact have no constitutional value.<sup>71</sup> In *Hustler Magazine, Inc. v. Falwell*,<sup>72</sup> the Court noted that “[f]alse statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas.”<sup>73</sup> In *Gertz v. Robert Welch, Inc.*,<sup>74</sup> the Court reiterated that no false statement has constitutional value because “[n]either the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”<sup>75</sup> However, the Court noted that while constitutionally valueless, some falsehoods require First Amendment protection to ensure that the ideas marketplace flourishes.<sup>76</sup> These protections for false speech, explained in Parts II.B and II.C, protect the creation and distribution of fake news.

### B. United States v. Alvarez

While fake news presents serious threats to democratic institutions, First Amendment jurisprudence raises substantial obstacles to regulation. The Supreme Court’s decision in *Alvarez* demonstrates the constitutional conflicts that arise from false speech prohibitions.<sup>77</sup> In *Alvarez*, the Court struck down the Stolen Valor Act, a law that criminalized stated falsehoods about receiving military honors.<sup>78</sup> The plurality articulated two justifications. First, the Act could not be justified because the government failed to demonstrate that false claims of military valor caused provable harm.<sup>79</sup> In defending the Act, the government asserted that it was common

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71. Though the Court has stated this in absolute terms, it has, at other times, noted various ways that falsehoods do have constitutional value. See *infra* note 73 and accompanying text. In *United States v. Alvarez*, discussed in depth in Part II.B, the concurring justices specify many contexts in which false statements of fact have social importance. 567 U.S. 709, 733 (2012) (Breyer, J., concurring in the judgment) (“False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child’s innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger . . .”).

72. 485 U.S. 46 (1988).

73. *Id.* at 52. The Court, however, distinguished between believable falsehoods and falsehoods that the public would not reasonably believe, like parodies, which have constitutional importance as instruments used to critique public officials and figures. *Id.* at 50, 54.

74. 418 U.S. 323 (1974).

75. *Id.* at 340 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

76. *Id.* at 340–41.

77. See generally *United States v. Alvarez*, 567 U.S. 709 (2012).

78. *Id.* at 730 (plurality opinion). The statute read, “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.” 18 U.S.C. § 704 (2012). While the statute broadly criminalized false representations, the Court read a scienter requirement into the statute. See *Alvarez*, 567 U.S. at 725–26 (plurality opinion) (discussing the harms caused by lies by “pretenders”); *id.* at 736 (Breyer, J., concurring in the judgment) (“[The statute] may be construed to prohibit only knowing and intentional acts of deception about readily verifiable facts within the personal knowledge of the speaker . . .”).

79. *Id.* at 725–26 (plurality opinion).

knowledge that an aggregate of misrepresentations about military honors would dilute the value of the awards.<sup>80</sup> The Court, concerned about establishing a precedent that would permit the government to restrict false speech without any showing of palpable harm, struck down the statute.<sup>81</sup> The concurring justices agreed that the Act could be written more narrowly to require a showing of specific or material harm, which would “help to make certain that the statute does not allow its threat of liability . . . to roam at large, discouraging or forbidding the telling of the lie in contexts where harm is unlikely or the need for the prohibition is small.”<sup>82</sup>

Second, the plurality worried that the Act would create a dangerous precedent for overly broad regulation of lies without a judicial backstop.<sup>83</sup> The *Alvarez* plurality took issue with the fact that the Stolen Valor Act applied to virtually all false statements about military valor without regard to time, location, audience, or purpose and noted that it applied equally to false claims made in public and to “personal, whispered conversations within a home.”<sup>84</sup> The Court’s fear was primarily one of second order. The plurality opinion was not concerned with the protection of false speech but rather with the ability of the government to declare entire categories of false speech unconstitutional.<sup>85</sup> The Court feared that it would not be able to draw lines about which categories of false speech are constitutionally regulable when these laws are challenged.<sup>86</sup> The Court noted that:

Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth.<sup>87</sup>

Granting the government a “broad censorial power” to regulate falsehoods, the Court continued, would chill true speech because people would fear selective prosecution.<sup>88</sup> Avoiding a potential slippery slope where any

80. *Id.*

81. *See id.* The dissenting justices found that false claims about military service had caused tangible harm and noted that, in one region of the United States, “12 men defrauded the Department of Veterans Affairs out of more than \$1.4 million in veteran’s benefits.” *Id.* at 743 (Alito, J., dissenting).

82. *Id.* at 736, 738 (Breyer, J., concurring in the judgment).

83. *Id.* at 723 (plurality opinion).

84. *Id.* at 722–23.

85. Abner S. Greene, *The Concept of the Speech Platform: Walker v. Texas Division*, 68 ALA. L. REV. 337, 383 (2016).

86. *Id.*

87. *Alvarez*, 567 U.S. at 723 (plurality opinion) (citing GEORGE ORWELL, NINETEEN EIGHTY-FOUR (Centennial ed. 2003) (1949)). While the two concurring justices were concerned with protecting false speech, they also agreed that regulating false speech without substantial limitations set a dangerous precedent: “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.” *Id.* at 734 (Breyer, J., concurring in the judgment).

88. *Id.* at 723 (plurality opinion).

category of false speech could be regulated, including those that invite potential for government abuses of power, the Court erred on the side of caution and found it impermissible for the government to restrict any falsehoods unconnected with a provable harm.<sup>89</sup>

The *Alvarez* Court left open the question of what standard of scrutiny should be applied to false speech regulations. The plurality analyzed the Stolen Valor Act—a content-based regulation that distinguished between speech about military honors and all other speech—under a “most exacting scrutiny” standard, which requires that the statute be actually necessary to achieve a compelling government interest.<sup>90</sup> In contrast, the concurrence applied a “proportionality review” standard, which weighs the regulation’s harm to free speech against the regulation’s justifications.<sup>91</sup> The concurrence chose this intermediate scrutiny standard of review because the restriction did not present a “grave and unacceptable danger of suppressing truthful speech” as it concerned only false statements about “easily verifiable facts.”<sup>92</sup>

The Supreme Court has not defined the standard of review applicable to general false speech restrictions—one not limited to a particular topic. Such a standard would likely hinge on whether a regulation on all false statements of fact would be considered content-based. In *Police Department v. Mosley*,<sup>93</sup> the Supreme Court outlined two types of content-based speech regulation: regulation based on viewpoint and regulation based on subject matter.<sup>94</sup> Viewpoint-based regulations involve restrictions that favor one opinion over another, while subject-matter-based regulations involve restrictions on certain topics, regardless of the viewpoints being expressed.<sup>95</sup>

However, in *Reed v. Town of Gilbert*,<sup>96</sup> the Court held that strict scrutiny must be applied to any content-based speech regulation and that a regulation is content-based if it makes distinctions based on the speaker’s message on its face or if it “cannot be ‘justified without reference to the content of the regulated speech.’”<sup>97</sup> Under this rule, lies could be regulated under a lesser standard based on the speaker’s intent to deceive rather than the content of his message.<sup>98</sup> For example, if two speakers made identical false statements, one in error and the other in malice, the latter could be prosecuted without strict scrutiny review because malicious intent to deceive, not the content of his words, would subject him to liability. But, because any prohibition on all falsehoods—whether made erroneously or deceitfully—would refer to the

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89. *See id.*; *see also* Greene, *supra* note 85, at 383.

90. *Alvarez*, 567 U.S. at 724–25 (plurality opinion).

91. *Id.* at 730 (Breyer, J., concurring in the judgment).

92. *Id.* at 731–32.

93. 408 U.S. 92 (1972).

94. *Id.* at 95–96.

95. *See id.*

96. 135 S. Ct. 2218 (2015).

97. *Id.* at 2222 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

98. *See* SHIFFRIN, *supra* note 16, at 126, 132.

false content of the speech, any restriction would almost certainly be subject to strict scrutiny.<sup>99</sup>

Assuming the Court would apply strict scrutiny, it would require a false speech regulation to be narrowly tailored to achieve a compelling government interest.<sup>100</sup> In *Alvarez*, the Court held that the protection of the integrity of military awards was a compelling government interest but that the statute could not be upheld because there were less restrictive alternatives to achieving that goal.<sup>101</sup> There, both the plurality and the concurrence agreed that true counterspeech is an adequate remedy to false speech.<sup>102</sup> Drawing on Millian principles, Justice Anthony Kennedy asserted, “The 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 uninformed, the enlightened; to the straight-out lie, the simple truth.”<sup>103</sup> Chastising the Stolen Valor Act as paternalistic, Justice Kennedy declared that “[o]nly a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication.”<sup>104</sup>

The requirement that a false speech regulation be narrowly tailored to the compelling government interest it purports to serve presents a major obstacle to enacting such a regulation because “[n]o legislature could ever draft a statute that invades an individual’s freedom of speech rights less than allowing for discourse to blossom and thrive in free and open debate.”<sup>105</sup> To survive strict scrutiny review, “[t]he final constitutional hinge, therefore, swings upon the effectiveness of truth.”<sup>106</sup>

### C. *Understanding False Speech Regulations from Two Perspectives*

Though strict scrutiny review makes false speech regulation difficult, there are a number of laws that constitutionally restrict false speech. In *Alvarez*, the concurring justices stated that “many statutes and common-law doctrines make the utterance of certain kinds of false statements unlawful.”<sup>107</sup> Such statutes do not suffer from the same constitutional defects as the Stolen Valor Act, which lacked a provable-harm requirement and failed to establish any limiting principle.<sup>108</sup> Justice Breyer described several speech restrictions that are permissible, including defamation and intentional infliction of

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99. *See Reed*, 135 S. Ct. at 2222.

100. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

101. *United States v. Alvarez*, 567 U.S. 709, 724–26, 729 (2012) (plurality opinion) (“[W]hen the Government seeks to regulate protected speech, the restriction must be the ‘least restrictive means among available, effective alternatives.’” (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004))).

102. *Id.* at 727; *id.* at 738 (Breyer, J., concurring in the judgment).

103. *Id.* at 727 (plurality opinion).

104. *Id.* at 729.

105. Note, *Victory Through Deceit: The Constitutional Collision Between Free Speech and Political Lies*, 50 SUFFOLK U. L. REV. 717, 740–41 (2017).

106. *Id.* at 741.

107. *Alvarez*, 567 U.S. at 734 (Breyer, J., concurring in the judgment).

108. *See supra* Part II.A.

emotional distress torts; consumer fraud and perjury statutes; and statutes that bar false claims about terrorist attacks or other disasters.<sup>109</sup> Regulations narrowing the scope of liability do so in three general ways: (1) “by requiring proof of specific harm to identifiable victims”; (2) “by specifying that the lies be made in contexts in which a tangible harm to others is especially likely to occur”; and (3) “by limiting the prohibited lies to those that are particularly likely to produce harm.”<sup>110</sup>

Defamation, consumer protection, and intentional infliction of emotional distress laws fall into the first category of requiring specific proof of harm and cover reputational, economic, physical, emotional, and privacy harms to individuals.<sup>111</sup> Perjury is an example of a prohibition in the second category, as falsehoods in a courtroom are particularly likely to harm one party’s liberty or property unjustly, in addition to harming the functionality of the judicial system.<sup>112</sup> Prohibitions on falsehoods about terrorist attacks are in the third category, as they limit a narrow topic that is particularly likely to produce public harms like panic.<sup>113</sup>

There are additional ways the law describes false speech protections. High barriers for false speech liability can be understood as protecting speakers, while the regulations themselves may be understood as protecting listeners. Part II.A.1 explores the “actual malice” standard, which shields speakers from liability for many false claims. Part II.A.2 then analyzes certain false-claims regulations under a listener-based approach that seeks to shield listeners from fallacious information.

### 1. Millian Protections for Speakers

The Supreme Court has safeguarded false claims by requiring a high mens rea standard for liability. In *New York Times Co. v. Sullivan*<sup>114</sup>—one of the inaugural cases regarding First Amendment protections for false political speech—the Court found that defendants can only be required to pay damages to a public official for libel if a plaintiff proves that the false statement was published with “actual malice,” that is, knowledge that the claim was false or with reckless disregard as to whether the statement was false.<sup>115</sup> The *Sullivan* Court shared the same second-order concerns that the *Alvarez* Court raised nearly fifty years later—that fear of liability for false speech without significant barriers for plaintiffs to overcome would chill true speech by “dampen[ing] the ardor of all but the most resolute, or the most irresponsible,” speakers.<sup>116</sup> In this way, *Sullivan* protects speakers from limitless liability over inadvertent false claims, and recognizes that the

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109. *Alvarez*, 567 U.S. at 734–35 (Breyer, J., concurring in the judgment).

110. *Id.* at 734.

111. *See id.*

112. *See id.*

113. *See id.* at 734–35.

114. 376 U.S. 254 (1964).

115. *Id.* at 279–80.

116. *Id.* at 282 (quoting *Barr v. Matteo*, 360 U.S. 564, 571 (1959)).

“erroneous statement is inevitable in free debate.”<sup>117</sup> The Court emphasized that protecting speakers, even at a cost to others, is fundamental to preserving open discourse.<sup>118</sup> In a later defamation case, *Gertz v. Robert Welch, Inc.*, the Court explained that *Sullivan* recognized a strict liability standard but that requiring defendants to warrant that every published statement was accurate to defend against liability would result in “intolerable self-censorship.”<sup>119</sup> Defendants, fearing expensive litigation costs and damages awards, would be unable to make any assertions absent personal knowledge of their truth.<sup>120</sup> This approach draws on the Millian principle that laws should enable speakers to engage in free debate and should eliminate barriers to such participation.<sup>121</sup>

Since *Sullivan*, “actual malice” has been considered a quintessential element of liability for false claims. In *Alvarez*, the plurality reaffirmed that “falsity alone may not suffice to bring the speech outside the First Amendment” and that “[t]he statement must be a knowing or reckless falsehood” for a court to impose money damages or criminal liability.<sup>122</sup> Because actual malice is difficult to prove, this precedent often allows speakers to make harmful false claims with impunity.

*Gertz* left open the possibility of more restrictive false speech laws. While an actual malice standard is required to impose liability for defamation targeting a public official, the *Gertz* Court held that a negligence standard may apply in cases brought by private individuals provided that they can prove actual injury.<sup>123</sup> The Court reasoned that private persons, as compared with public figures, have less access to channels of communication that would allow them to correct lies and falsehoods and are therefore less able to mitigate resulting reputational harms.<sup>124</sup> Because private persons are more susceptible to these harms, the state has a greater interest in protecting private individuals than it does in protecting public figures.<sup>125</sup> *Gertz* ties the ineffectiveness of true counterspeech and resulting harm to the state’s latitude in restricting speech.

## 2. Kantian Protections for Listeners

Though not directly addressed by the *Alvarez* plurality, the government may constitutionally regulate falsehoods by looking to the effect on listeners. Inherent in the conception of the marketplace of ideas is the ability of people to rely on factual assertions to form reasoned opinions. Freedom of opinion

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117. *Id.* at 271.

118. *See id.* at 281–82.

119. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

120. *See id.*

121. *See supra* Part I.A.

122. *United States v. Alvarez*, 567 U.S. 709, 719 (2012) (plurality opinion).

123. *Gertz*, 428 U.S. at 349. The Court thus created a negligence floor for defamation. *Id.* at 361 (Brennan, J., dissenting) (“States may impose all but strict liability for defamation . . .”).

124. *Id.* at 344 (majority opinion).

125. *Id.*

cannot exist without a factual basis for those opinions because “factual truth informs political thought.”<sup>126</sup> Protections for listeners are essential to enable their participation in democratic discourse.<sup>127</sup> Although Kant objected specifically to lies, his reasoning can be extrapolated to falsehoods more generally. From the listener’s perspective, a lie is indistinguishable from an error, but both inhibit her right to receive information and her ability to develop informed opinions.

Under a listener-based approach, listeners’ interests in receiving accurate information are placed above speakers’ interests in speaking freely when there is a power imbalance or unequal access to information.<sup>128</sup> This approach can be “characterized as involving those circumstances in which speakers have special access to (or special authority about) information, rendering listeners reliant on speakers’ testimony because they cannot easily or readily verify what is said in another way.”<sup>129</sup> This inequality occurs when speakers create information or hold a monopoly over information.<sup>130</sup>

Of the false claims regulations discussed by the *Alvarez* concurrence, consumer fraud and perjury exemplify where a listener-based approach justifies the speech restrictions. Consumer protection statutes recognize that commercial actors have far more information about their products and services than consumers.<sup>131</sup> Because of this informational imbalance, consumers rely on commercial actors’ statements when deciding what to purchase as they often cannot distinguish between high and low value products or services.<sup>132</sup> Consumers’ inability to determine whether a commercial actor’s claims are true renders them particularly vulnerable to deception, manipulation, and harm resulting from false claims, whether made deceptively or mistakenly.<sup>133</sup>

Perjury statutes similarly consider inequalities of information between speakers and their listeners. Judges, juries, and other government actors rely on the statements made by people under oath to properly administer justice. Often, those testifying have a monopoly over the information sought, which underscores the importance of protections for listeners who rely on the truth of speakers’ testimony in making important determinations.

Where the actual malice standard invokes a Millian approach to false speech regulation by favoring speakers, a listener-based approach is more Kantian, and recognizes that falsehoods interfere with listeners’ abilities to freely make rational, informed decisions.<sup>134</sup> Though both ways of

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126. POST, *supra* note 15, at 29; *see also supra* notes 64–65 and accompanying text.

127. *See* POST, *supra* note 15, at 34 (“Cognitive empowerment is necessary both for intelligent self-governance and for the value of democratic legitimation.”).

128. *See* Helen Norton, *Powerful Speakers and Their Listeners*, 90 U. COLO. L. REV. 441, 441–42 (2019).

129. SHIFFRIN, *supra* note 16, at 131.

130. Norton, *supra* note 128, at 446.

131. *Id.*

132. Napoli, *supra* note 26, at 61.

133. *See* Norton, *supra* note 128, at 446.

134. *See supra* Part I.A.

understanding false speech prohibitions emphasize actual injury or potential harm, *Sullivan* and *Gertz* made clear that mens rea is required for liability. This requirement means that there is currently a dearth of legal remedies for some forms of false speech that result in considerable harm.

### III. IS FAKE NEWS REGULATION COMPATIBLE WITH THE FIRST AMENDMENT?

Because fake news is created easily, dispersed rapidly, and consumed in massive quantities, it is likely to persist absent regulation. Scholars, legislators, and others have already set forth a number of proposals that aim to combat the fake news problem. Part III.A analyzes proposed solutions to the fake news problem both practically and constitutionally, and Part III.B debates whether a speech-restrictive regulation would realistically fit into the First Amendment jurisprudence described in Part II.

#### *A. Inadequacy of Already-Proposed Solutions*

In this Part, this Note examines why proposed solutions to the fake news problem are inadequate in fighting false news. Part III.A.1 explains why proposals that do not restrict false speech are unlikely to have a major effect on the false news market, while Part III.B describes the ways proposed false speech restrictions would fail strict scrutiny review.

#### 1. Non-Speech-Restrictive Proposed Remedies Are Inadequate

While remedies that do not restrict speech on the basis of falsity would almost certainly survive a constitutional challenge, they are unlikely to have a major effect on fake news. Some have suggested that the harms caused by fake news can be alleviated with educational programs devoted to media literacy or increased academic emphasis on the importance of fact-checking.<sup>135</sup> Such programs could encourage skepticism toward online news content and teach people to critically analyze its accuracy.<sup>136</sup> But efforts to educate people about the importance of fact-checking are unlikely to work because news consumers are already aware of the prevalence of misinformation in the news.<sup>137</sup> Furthermore, efforts to educate people to more readily tell when a story is false would probably fail because readers are flooded with the same fake news from many different sources, which often outnumber their legitimate counterparts, making fact-checking an onerous and confusing process.<sup>138</sup>

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135. Clay Calvert & Austin Vining, *Filtering Fake News Through a Lens of Supreme Court Observations and Adages*, 16 *FIRST AMEND. L. REV.* 153, 171 (2017); *Fighting Fake News*, *supra* note 45, at 11.

136. Calvert & Vining, *supra* note 135, at 171.

137. *See supra* note 50 and accompanying text.

138. *See supra* notes 45–46 and accompanying text.

Others have floated the idea of an ethics code for political candidates to encourage honesty in campaigns.<sup>139</sup> Candidates who pledge to uphold a code of ethics would either self-enforce or voluntarily subject themselves to ethics determinations by a self-appointed body.<sup>140</sup> Such an ethics code would similarly fail to provide an adequate fake news remedy because, although some fake news originates from leaders or candidates themselves, many false stories about elections are created by third parties.<sup>141</sup> Further, candidates who already use their speech platforms to spew falsehoods would have little incentive to pledge to uphold a campaign ethics code, particularly one that has no enforcement mechanism.<sup>142</sup>

A number of legal scholars agree that amending § 230 of the Communications Decency Act (CDA),<sup>143</sup> which immunizes online content providers from liability for unlawful user-generated content, would be a prudent way to affect the ways in which online content is published and distributed.<sup>144</sup> Where print republishers of tortious or criminal speech would be subject to liability, social media companies enjoy total immunity under the CDA, even when their platforms are designed to encourage users to post illegal content.<sup>145</sup> A modified § 230 could shield social media services from liability only if they take reasonable steps to prevent or address unlawful content posted by their users.<sup>146</sup> The threat of civil liability might alleviate the fake news problem by incentivizing online content providers to remove false, defamatory stories.<sup>147</sup> Amending § 230 of the CDA to limit immunity currently enjoyed by social media companies that actively encourage or passively permit unlawful speech on their platforms would be a good start to fighting the fake news problem.

Originally, § 230 was designed to encourage internet publishers to take good faith measures to regulate their content, without liability for either underscreening or overscreening content in efforts to filter unlawful, illegal, or otherwise objectionable content.<sup>148</sup> An amendment requiring these companies to take reasonable efforts to screen and remove unlawful content would revitalize § 230's original goal by creating statutory incentives for republishers to undertake remedial efforts to remove criminal or tortious speech on their platforms for fear of republisher liability.<sup>149</sup> Good faith

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139. See Lieffring, *supra* note 21, at 1069.

140. *See id.*

141. *See supra* Part I.B.1.

142. *See Lieffring, supra* note 21, at 1068.

143. 47 U.S.C. § 230 (2012 & Supp. 2017).

144. *See, e.g.,* Danielle Keats Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453, 453–55 (2018).

145. *Id.* at 455–56; Benjamin C. Zipursky, *The Monsanto Lecture: Online Defamation, Legal Concepts, and the Good Samaritan*, 51 VAL. U. L. REV. 1, 4–6 (2016).

146. Citron & Wittes, *supra* note 144, at 471.

147. Joel Timmer, *Fighting Falsity: Fake News, Facebook, and the First Amendment*, 35 CARDOZO ARTS & ENT. L.J. 669, 687 (2017).

148. Citron & Wittes, *supra* note 144, at 457–58.

149. Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 420 (2017).

requirements to censor content implicate fake news because they would compel online publishers to remove reported defamatory speech. These publishers would be incentivized to discourage users from posting such speech in the first instance. Because online platforms can build their sites in ways that protect both privacy and expression,<sup>150</sup> reasonableness requirements, coupled with the overscreening protections that already exist, could plausibly encourage social media firms to develop ways to block bots or known hoax websites from posting content.

However, it is doubtful that amending § 230 alone would eliminate fake news distribution online. Though fear of expensive litigation might be enough to persuade social media companies to remove defamatory content after users report it, the actual malice requirement presents an obstacle. In practice, only sizeable private actors with substantial financial resources would initiate lawsuits against a social media giant because proving malice is so difficult. Moreover, current tort law limits the power of a CDA revision to stop fake news that is not defamatory: while false speech that harms specific individuals would subject republishers to liability, falsehoods creating general harm are currently unactionable.<sup>151</sup> Fake news that causes harm by distorting election issues or creating conspiracy theories is not covered by current law, so an amended § 230 would do nothing to compel online entities to block such content.

Another idea targeting online publishers directly is to enact source-disclosure requirements for online advertisements.<sup>152</sup> This type of law would require hosts of paid third-party content to provide viewers with information about their sponsors.<sup>153</sup> Much like the commercial sponsorship identification laws that already regulate broadcast media, disclosure requirements for paid online content might enable viewers to make more accurate inferences about its truth.<sup>154</sup> Online social media users seeing paid content could better assess “where information is coming from, what values it might be representing, [and] whose interests it might be serving” if they had more information about its sponsors.<sup>155</sup>

Though useful, disclosure requirements for paid online advertisements alone would fail to provide a full remedy to the fake news problem. Although information about content sources would help viewers make better inferences about content’s validity,<sup>156</sup> the fake news stories that spread broadly and rapidly across social media are often unpaid content.<sup>157</sup> Sponsorship

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150. Danielle Keats Citron, *Section 230’s Challenge to Civil Rights and Civil Liberties*, KNIGHT FIRST AMEND. INST., <https://knightcolumbia.org/content/section-230s-challenge-civil-rights-and-civil-liberties> [https://perma.cc/YE6Q-JMQG] (last visited Apr. 10, 2019).

151. Kruse, *supra* note 23, at 156.

152. See Hasen, *supra* note 20, at 217–18.

153. See Lili Levi, *A “Faustian Pact”? Native Advertising and the Future of the Press*, 57 ARIZ. L. REV. 647, 685–89 (2015).

154. Stanislav Getmanenko, Note, *Freedom from the Press: Why the Federal Propaganda Prohibition Act of 2005 Is a Good Idea*, 114 PENN ST. L. REV. 251, 282 (2009).

155. Levi, *supra* note 153, at 665.

156. Getmanenko, *supra* note 154, at 282.

157. Levi, *supra* note 153, at 690–91.

disclosures could potentially prevent manipulation by foreign actors using paid content to influence elections but would otherwise have little effect. Furthermore, protections for anonymous speech are strong,<sup>158</sup> and it is unclear whether this kind of requirement would survive a constitutional challenge.

## 2. Speech-Restrictive Proposed Remedies Are Unconstitutional

While the proposals outlined above seek to remedy the fake news problem by addressing its effects or the forums where it is dispersed, others aim to restrict the false speech itself. Some states have sought to address the harmful effects fake news has on democracy by restricting false speech surrounding elections.<sup>159</sup> Bans on false paid political advertisements or campaign materials have been advanced as a potential solution to the fake news problem and have been enacted in several states.<sup>160</sup> One proposed law would prohibit campaign slander.<sup>161</sup> Another would deter false speech about ballot initiatives by imposing criminal punishments.<sup>162</sup> Another speech-restrictive idea is a proposed ban on false speech concerning election administration, such as falsehoods about the time, place, or manner of voting.<sup>163</sup> These types of laws would aim to protect voters from manipulation that would otherwise depress voter turnout.<sup>164</sup>

These proposed restrictions on false speech are unworkable in the context of fighting fake news because they are powerless to stop its circulation and are vulnerable to constitutional challenges as they fall outside the First Amendment framework described above in Part II. Bans on false political advertisements, already enacted in several states, are similar to proposals for source disclosures in paid political advertisements in that they are insufficient to remedy the harms caused by fake news. As stated above, the fake news problem is not largely concerned with false advertising because false stories usually come in the form of unpaid content that is disguised as real news.<sup>165</sup> False political advertising bans have included malice or a specific intent standard, which makes it difficult to hold its creators legally accountable.<sup>166</sup> The ultimate downfall of these statutes, though, is their imposition of criminal liability.<sup>167</sup> *Alvarez* was clear that criminal liability for false political speech is impermissible because of the potential for government

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158. *Id.*

159. See Kruse, *supra* note 23, at 158–61.

160. See Lieffring, *supra* note 21, at 1058–59.

161. Thomas Kane, Note, *Malice, Lies, and Videotape: Revisiting New York Times v. Sullivan in the Modern Age of Political Campaigns*, 30 RUTGERS L.J. 755, 791–93 (1999).

162. Kruse, *supra* note 23, at 169–70.

163. James Weinstein, *Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibitions of Lies in Political Campaigns*, 71 OKLA. L. REV. 167, 222–23 (2018).

164. See *supra* note 23 and accompanying text.

165. See *supra* Part I.B.

166. See Joshua S. Sellers, *Legislating Against Lying in Campaigns and Elections*, 71 OKLA. L. REV. 141, 149–50 (2018).

167. See *id.* at 149–50 nn.53–56.

abuse.<sup>168</sup> The looming threat of criminal sanctions on speakers using paid advertisements to convey political messages—particularly those without a demonstrated material harm—would chill true speech and therefore fail a constitutional challenge. Thus far, courts have struck down these statutes in states where challenges have been brought.<sup>169</sup>

Likewise, false election speech statutes will likely meet a similar constitutional demise. Criminalizing malicious and false political speech, including falsehoods about ballot measures or matters of election administration, is unconstitutional under an *Alvarez* analysis because it would give the government leverage to prosecute only its critics,<sup>170</sup> though a demonstrated material harm to listeners might save these statutes from judicial nullification.<sup>171</sup> Even so, false claims about ballot initiatives and election administration are only a small part of the problem; a false speech restriction would need to apply far more broadly to fight fake news.

Some of the proposals outlined in this section—like amending the CDA, enacting disclosure requirements for online advertisements, and prohibiting false election speech where constitutionally permissible—should be enacted because they provide a partial remedy for the fake news problem. But scholars’ inability to come up with a constitutionally permissible and complete remedy invites the question: Is it possible to directly regulate fake news given the powerful First Amendment protections for free speech?

#### *B. Inability to Restrict Fake News Directly*

The strict confines of *Alvarez* leave little room for fake news regulation. In *Alvarez*, the Stolen Valor Act ultimately failed because the government believed that false speech about military honors was less troublesome than a “Ministry of Truth” regulating falsehoods.<sup>172</sup> Regulating fake news, then, involves “choosing the lesser evil” between the harms caused by false speech and the chilling effects restrictions might produce.<sup>173</sup> So, a regulation is more likely to pass constitutional muster where the harms caused by fake news are “particularly acute and where the risk of government abuse is significantly limited in some manner.”<sup>174</sup>

Because the maliciously deceitful and carelessly erroneous publishers of fake news are indistinguishable to viewers and cause the same confusion and distrust, a viable fake news remedy must address all falsehoods in the news. A fake news regulation restricting speech on the basis of its falsity would be subject to strict scrutiny review. The Supreme Court acknowledges that “it

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168. *See supra* note 89 and accompanying text.

169. *See Sellers, supra* note 166, at 150.

170. *See supra* note 88 and accompanying text.

171. *See supra* notes 81–82 and accompanying text.

172. *See supra* note 87 and accompanying text.

173. *See Han, supra* note 34, at 195.

174. *See id.*

is the rare case in which we have held that a law survives strict scrutiny,”<sup>175</sup> but there are a number of false speech restrictions, described in Part II.B, that have survived this review.<sup>176</sup> The state has many compelling interests that would justify regulation, including ensuring that voters choose qualified candidates, protecting voters from fraud that might otherwise prevent them from voting, shielding elections from foreign interference, maintaining a strong press as a check on government corruption, and preserving a lively ideas marketplace, all of which are threatened by fake news.<sup>177</sup> To meet strict scrutiny, then, the statute must be narrowly tailored to serve those compelling state interests. As stated earlier, true counterspeech is a less restrictive remedy, so the constitutionality of a false speech restriction would depend on the efficacy of truth.

The *Alvarez* Court overestimated the power of true counterspeech. Although the plurality and concurrence in *Alvarez* both noted that the Stolen Valor Act was not narrowly tailored because there was an available remedy less restrictive than a criminal statute—creating a database of those awarded military honors—their assertion that true counterspeech is an effective remedy is misguided.<sup>178</sup> Justice Kennedy fortifies his defense of the truth as an effective remedy by citing to Justice Holmes’s conception of the marketplace of ideas: “The theory of our Constitution is ‘that the best test of truth is the power of the thought to get itself accepted in the competition of the market.’”<sup>179</sup> But this mischaracterizes the ideas marketplace: it is the free trade of *ideas*, not facts, that enriches debate and allows the public to make informed voting decisions.<sup>180</sup> The concurring justices, too, misunderstood both Justice Holmes and Mill when contending that false statements of fact add value to political debate.<sup>181</sup> The reasoning underlying the Court’s defense of true counterspeech as an adequate remedy to false speech is not only predicated on misinterpreted philosophical theories, but it also ignores the problem that, in a marketplace of facts, the truth does not always prevail.<sup>182</sup>

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175. *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (holding that a statute prohibiting solicitation of votes and display or distribution of campaign materials within 100 feet of a polling place met strict scrutiny requirements).

176. *See supra* Part II.B.

177. *See supra* Part I.B.

178. *See United States v. Alvarez*, 567 U.S. 709, 729 (2012) (plurality opinion).

179. *Id.* at 728 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

180. *See supra* Part I.A.

181. Justice Breyer writes that “false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas.” *Alvarez*, 567 U.S. at 732 (Breyer, J., concurring in the judgment). Later, Justice Breyer cites to Mill in support of his assertion that examination of a false statement of fact can “promote a form of thought that ultimately helps realize the truth.” *Id.* at 733. Not only does this misunderstand the free trade of ideas as a truth-seeking mechanism, but it also ignores long-held precedent that false statements of fact that a reasonable person would believe to be true do not have *any* constitutional value. *See id.* at 746–47 (Alito, J., dissenting); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340–41 (1974).

182. *See supra* Part I.B.

True counterspeech has proven an ineffective remedy to fake news because people do not “buy” more truth than false news. While free exchange of ideas might lead to discovery of ideological “truth” as Mill once contemplated,<sup>183</sup> free exchange of facts obscures it. Because fake news appears to be true, targets people susceptible to deception, and spreads more widely than legitimate news, true counterspeech is powerless in the facts marketplace: How can truth prevail over falsehoods when people cannot distinguish one from the other? The counterspeech doctrine fails to address the ways that technological advancements have affected news consumption and that psychological predispositions cause people to hold onto incorrect beliefs, even when presented with evidence to the contrary.<sup>184</sup> Much like in a marketplace of goods, a marketplace of facts might persuade viewers to “buy” information “packaged” in ways that appeal to their superficial preferences rather than the information’s actual value.<sup>185</sup> In fact, a wealth of scientific evidence indicates that many factors wholly unrelated to the quality of information affect which statements of fact people “buy” in the information marketplace.<sup>186</sup> The marketplace of ideas metaphor is also a flawed way of understanding free speech because of its inherent assumption that participants are seeking to find “truth” in good faith.<sup>187</sup> In reality, many bad faith self-interested speakers promote ideas for personal gain rather than to benefit the public good. These inefficiencies, much like in economic markets, lead to market failure in the ideas marketplace.

Moreover, true counterspeech fails to address other harms caused by fake news. In justifying the counterspeech doctrine, the *Alvarez* Court failed to consider the ways that protections for listeners further the goals of the ideas marketplace—namely, to enable the public to form reasoned opinions in a democratic society. Because false stories undermine readers’ basis for trust and reliance on news,<sup>188</sup> the unchecked distribution of false stories online will continue to cause distrust in the media. Counterspeech cannot restore

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183. *See supra* Part I.A.

184. Napoli, *supra* note 26, at 67–68.

185. Hundley, *supra* note 16, at 503.

186. *See* Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 909–10 (2010). Professor Schauer notes that

[o]nce we fathom the full scope of factors other than the truth of a proposition that might determine which propositions individuals or groups will accept and which they will reject—the charisma, authority, or persuasiveness of the speaker; the consistency between the proposition and the prior beliefs of the hearer; the consistency between the proposition and what the hearer believes that other hearers believe; the frequency with which the proposition is uttered; the extent to which the proposition is communicated with photographs and other visual or aural embellishments; the extent to which the proposition will make the reader or listener feel good or happy for content-independent reasons; and almost countless others—we can see that placing faith in the superiority of truth over all of these other attributes of a proposition in explaining acceptance and rejection requires a substantial degree of faith in pervasive human rationality and an almost willful disregard of the masses of scientific and marketing research to the contrary.

*Id.* at 909.

187. *See supra* note 16 and accompanying text.

188. *See* SHIFFRIN, *supra* note 16, at 139.

readers' trust and confidence in the news. A failure to address this problem allows the decline in traditional media to continue, thereby decreasing its power as a check on government.<sup>189</sup> Because true counterspeech has failed to prevent widespread deception and distrust, a more restrictive alternative is constitutionally permissible.

In theory, a statute could be narrowly tailored by limiting liability in a number of ways that would prevent government abuse. A regulation might require a showing of material harm.<sup>190</sup> In *Alvarez*, the Court found that while the aggregate of lies about military honors may dilute their value, a single lie may not have a significant harmful effect.<sup>191</sup> Similarly, while every piece of fake news contributes to broad harms to democracy, not every false story causes significant harm. A fake news restriction might be limited to false stories that generate a particular amount of engagement on social media under a presumption that a certain number of likes, shares, or comments evidences significant disruption of political speech.

A regulation might also be narrowed in scope by limiting liability based on time or forum. In 2016, fake news was particularly prevalent during the final three months of the presidential campaign,<sup>192</sup> so false speech restrictions might be confined to the months before major elections. Because errors are unavoidable in open discourse,<sup>193</sup> only published false statements could be restricted. Beyond this, the forums might be limited to social media platforms or websites with a certain number of subscribers.

Though a fake news regulation might square with the *Alvarez* understanding of the First Amendment in theory, practical concerns make it highly unlikely that any restriction on fake news would be both constitutional and effective. Imposing civil or criminal liability on fake news publishers would require a finding of actual malice, which would be impracticable for fake news shared by many unknown sources online. In the abstract, a statute could avoid the actual malice standard and impose strict liability on false news without chilling true speech<sup>194</sup> by imposing symbolic damages: for example, a court might issue a decree of falsity.<sup>195</sup> However, such a regulation would be unlikely to deter publishers from creating and hosting false stories and would not be able to reverse the harm caused by multitudes of social media users seeing and believing the content. Furthermore, judicial hurdles beyond the First Amendment also create barriers to any direct prohibition on fake news. Without a concrete and particularized harm, plaintiffs would not have standing to bring actions against fake news

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189. See *supra* Part I.B.

190. See *supra* note 82 and accompanying text.

191. *United States v. Alvarez*, 567 U.S. 709, 725–26 (2012) (plurality opinion). Consider the lie “made in a barely audible whisper.” See *supra* note 87 and accompanying text.

192. *Silverman*, *supra* note 31.

193. See *supra* note 117 and accompanying text.

194. See *supra* Part II.C.1.

195. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 768 n.2 (1985) (White, J., concurring) (“I can therefore discern nothing in the Constitution which forbids a plaintiff to obtain a judicial decree that a statement is false—a decree he can then use in the community to clear his name and to prevent further damage . . .”).

publishers in federal court, which means general harms to democratic institutions would not be legally actionable.<sup>196</sup> State action against online republishers would likely be preempted by § 230, which makes liability in states with lenient standing requirements untenable.<sup>197</sup>

Given the Supreme Court's failure to afford substantial protections for listeners in its First Amendment jurisprudence and the government's inability to restrict false news following *Alvarez*, an entirely new approach is necessary to fight fake news.

#### IV. LICENSING PROFESSIONAL JOURNALISTS

A solution to the fake news problem should enhance the truth-seeking function of the marketplace of ideas by incorporating both Millian protections that enable speakers to feel comfortable contributing to public discourse without fear of liability and Kantian protections that allow listeners to receive credible information to help inform their opinions. By encompassing both protections for speakers and listeners, fake news regulation should ensure that "everything worth saying shall be said"<sup>198</sup> while eliminating market inefficiencies caused by bad faith speakers who seek to manipulate and deceive listeners rather than participate in the search for ideological truth and public good.<sup>199</sup>

One plausible way to achieve this balance between protections for speakers and listeners would be to license professional journalists in the same way as other professionals. Journalists' special access to information justifies regulation of this sort. As nonlawyers and nondoctors are unable to access specialized information about law or medicine, lay people are unable to independently evaluate the quality of information in the facts marketplace.<sup>200</sup> Because professionals serve important roles that are inaccessible to others, clients of professionals "are *entitled* to rely on the truth and accuracy of the professional's judgment."<sup>201</sup> Similarly, journalists often have investigatory resources and press privileges bestowing them with information that others cannot access; like clients of other professionals, media consumers should be able to trust journalists and rely on information they distribute as intermediaries between information sources and media consumers.<sup>202</sup> Lawyers and doctors are expected to put the well-being of their clients over their own interests because they serve important roles that enhance the public good.<sup>203</sup> It follows that journalists could put the interests

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196. *See* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–62 (1992).

197. 47 U.S.C. § 230(e)(3) (2012) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.").

198. *See supra* note 67 and accompanying text.

199. *See supra* note 16 and accompanying text.

200. *See supra* notes 47–51 and accompanying text.

201. *See* POST, *supra* note 15, at 47.

202. *See supra* note 56 and accompanying text.

203. *See* POST, *supra* note 15, at 47–48.

of their listeners over their own because of their essential role as guardians of democratic discourse.<sup>204</sup>

Regulation of journalists as professionals would enhance protections for listeners while maintaining the same level of participation from speakers in the ideas marketplace. First, professional journalists would be subject to statutory disciplinary rules that ensure ethical reporting. These rules would require journalists, when acting in their professional capacities, to reasonably investigate facts and accurately convey reported information. An ethics code of this sort would help alleviate the fake news problem by providing the public with trusted sources of factual information. Because people have difficulty identifying fake news and fact-checking their sources, a group of state-approved, but not public, professional journalists and legitimate news organizations would enable people to rely on the information they receive from these sources. Restored trust in legitimate media would also bolster its ability to act as a watchdog of government and combat the deleterious effect that fake news has on influencing public opinion.<sup>205</sup>

Second, professional journalists would be required to continue journalistic education throughout their careers in order to maintain their special status. Continuing education in information gathering using new technology and best practices on how to avoid manipulation by malevolent actors would ensure that the public receives high-quality factual information from journalists. This information would better serve democracy by giving the public an enhanced ability to develop informed opinions.<sup>206</sup>

Finally, these regulations would not preclude nonjournalists from publishing news. This means that lay people would be able to contribute as much speech, valuable or otherwise, to the ideas marketplace without fear of government prosecution or oversight.<sup>207</sup> Speakers would retain broad freedoms in sharing information. But listeners would no longer be as susceptible to manipulation by deceitful speakers because they would have reliable, state-licensed sources to turn to in order to better inform their decisions. To ensure that journalists are able to speak freely as citizens as well as professionals, they would be required to disclose that they are not speaking in their professional capacities when making statements directed to the public at large.

Licensed journalists who violate the ethics code or fail to meet their continuing education requirements could be reported to state boards for investigation. If found to have negligently violated state licensing rules, these professional journalists would not be subject to civil fines or criminal punishments that would be construed as burdens on free speech.<sup>208</sup> They would instead lose their professional licenses, but they would be free to continue publishing their stories as laypersons.

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204. *See supra* note 52 and accompanying text.

205. *See supra* note 53 and accompanying text.

206. *See supra* note 19 and accompanying text.

207. *See supra* notes 84–89 and accompanying text.

208. *See supra* notes 87–88, 122 and accompanying text.

Although regulation of professionals is typically considered outside the purview of the First Amendment,<sup>209</sup> it is possible that this regulatory regime could be considered a content-based speech regulation because it discriminates against false content. But it would likely survive strict scrutiny review. Ethical oversight of journalists serves compelling government interests of enabling free and open discourse and protecting election integrity.<sup>210</sup> Because true counterspeech is ineffective in countering fake news,<sup>211</sup> this slightly more restrictive remedy is permissible. It is narrowly tailored to achieving the compelling government interests described above because it addresses provable harms to democracy and does not chill speech by threatening civil or criminal liability to speakers who assert false political claims.

#### CONCLUSION

The fake news problem presents a number of threats to U.S. democracy because it undermines people's ability to rely on information sources and interferes with their ability to form reasoned opinions and make rational decisions as citizens. Both an informed public and a strong press are crucial to democratic self-governance. Fake news threatens democracy by making citizens vulnerable to manipulation that could cause them to vote against their interests, adopt unfounded beliefs, or distrust legitimate media. Although the First Amendment protects false speech, the broad protections for constitutionally valueless and harmful fake news are inconsistent with its goals of ensuring that the marketplace of ideas is robust and efficient. Statutory rules licensing professional journalists would be one permissible way to fight fake news within the confines of the First Amendment.

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209. *See* POST, *supra* note 15, at 53.

210. *See supra* Part I.B.

211. *See supra* Part III.B.