

SAY THIS, NOT THAT: GOVERNMENT REGULATION AND CONTROL OF SOCIAL MEDIA

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INTRODUCTION

Fake news, a term virtually unheard of before the 2016 presidential election, now dominates headlines.¹ President Donald Trump uses it to describe truthful news stories that he simply dislikes, but in reality fake news is a media product fabricated and disguised to look like credible

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1. See James Carson, *What is Fake News? Its Origins and How it Grew in 2016*, TELEGRAPH (Mar. 16, 2017), <http://www.telegraph.co.uk/technology/0/fake-news-origins-grew-2016/>; Daniel Chaitin, *Reporter: FTC Can Regulate What's Real News, What's 'Fake News'*, WASH. EXAMINER (Jan. 30, 2017), <http://www.washingtonexaminer.com/reporter-ftc-can-regulate-whats-real-news-whats-fake-news/article/2613392>.

news that is posted online and circulated via social media.² And a major theme of the election, of course, was the abundance of fake news and its effect on the election's outcome.³

In late September, for example, one fake news headline read: "BREAKING: 'Tens of thousands' of fraudulent Clinton votes found in Ohio warehouse."⁴ Six million people shared the article, the work of a recent college graduate on the hunt for cash, via social media.⁵ And some of those people took it seriously: the Franklin County, Ohio, board of elections immediately announced it was investigating the issue (and later announced the allegations were untrue).⁶

Another fake news story, which generated nearly a million likes and engagements on Facebook in the three months before Election Day, reported that Pope Francis endorsed Trump.⁷ BuzzFeed later found that in those months the top-performing fake stories generated more engagements on Facebook than the top-performing stories from *The New York Times*, *The Washington Post*, *The Huffington Post*, and NBC News.⁸ And that is no surprise—the majority of U.S. adults (sixty-two percent) today get some or all of their news from social media.⁹

Although third parties generated the false or otherwise misleading news stories, social media was accused of polluting the political discourse by providing sanctuary for the stories.¹⁰ The threat they posed was that voters would be less informed, undermining citizens' ability to self-govern.¹¹ And that threat led some to conclude that the proper response

2. Carson, *supra* note 1; Chaitin, *supra* note 1.

3. Carson, *supra* note 1; Chaitin, *supra* note 1.

4. Scott Shane, *From Headline to Photograph, a Fake News Masterpiece*, N.Y. Times (Jan. 18, 2017), <https://www.nytimes.com/2017/01/18/us/fake-news-hillary-clinton-ronald-reagan-harris.html>.

5. *Id.*

6. *Id.*

7. Craig Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook*, BuzzFeed (Nov. 16, 2016), https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm_term=.qIV6WgEWrl#.io7wOeVOMz.

8. *Id.*

9. Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, Pew Res. Ctr. (May 26, 2016), <http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016/>.

10. See Silverman, *supra* note 7; Craig Timberg, *Russian Propaganda Effort Helped Spread 'Fake News' During Election, Experts Say*, Wash. Post (Nov. 24, 2016), https://www.washingtonpost.com/business/economy/russian-propaganda-effort-helped-spread-fake-news-during-election-experts-say/2016/11/24/793903b6-8a40-4ca9-b712-716af66098fe_story.html?utm_term=.dabbea6a1312.

11. See Timberg, *supra* note 10.

to fake news was regulation.¹²

The Honest Ads Act, introduced in October 2017, would require online platforms that accept political ads to disclose certain information about those ads—similar to current FEC and FCC regulations for broadcast networks.¹³ The findings of the bill make clear that it is a direct response to Russian interference in the 2016 election.¹⁴ Previously, Harvard Law School’s Noah Feldman argued in December 2016 that Congress could “craft a legal remedy for victims of fake news that would be consistent with the First Amendment[] . . . [to] authorize a judicial order to bar the publication—and maybe searchability—of specific, libelous statements that have been shown to be false in court.”¹⁵ MSNBC legal correspondent Ari Melber wrote in January 2017 that the Federal Trade Commission, charged with protecting consumers, could use its authority to shut down or sanction sites that traffic in fake news.¹⁶ Elsewhere in the world, leaders have worried that the fake news epidemic would influence elections in their own countries, or they have used fake news as an excuse to restrict dissent online.¹⁷ Additional legislation is emerging.¹⁸

In light of recent attention paid to the fake news phenomenon¹⁹ and

12. See Callum Borchers, *Don’t Expect Facebook to Burst Your News Bubble*, WASH. POST (Mar. 24, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/03/24/dont-expect-facebook-to-burst-your-news-bubble/?utm_term=.e75bcc004feb; Nicholas Lemann, *Solving the Problem of Fake News*, NEW YORKER (Nov. 30, 2016), <http://www.newyorker.com/news/news-desk/solving-the-problem-of-fake-news>.

13. Honest Ads Act, S.1989, 115th Cong. (2017).

14. *Id.* sec. 3.

15. Noah Feldman, *Closing the Safe Harbor for Libelous Fake News*, Bloomberg (Dec. 16, 2016), <https://www.bloomberg.com/view/articles/2016-12-16/free-speech-libel-and-the-truth-after-pizzagate>.

16. Chaitin, *supra* note 1.

17. See Mirren Gidda, *As France and Germany Gear Up for Elections, The Fight Against Fake News Begins*, Newsweek (Mar. 31, 2017), <http://www.newsweek.com/fake-news-french-elections-german-elections-russia-vladimir-putin-577548>; Mike Masnick, *Bad Idea or the Worst Idea? Having the FTC Regulate ‘Fake News’*, TechDirt (Feb. 2, 2017), <https://www.techdirt.com/articles/20170201/23481336610/bad-idea-worst-idea-having-ftc-regulate-fake-news.shtml>.

18. Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz Entwurf eines Gesetzes zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz—NetzDG) [Draft Bill of the Federal Ministry of Justice and Consumer Protection (Network Enforcement Act—NetzDG)], (Mar. 14, 2017), https://netzpolitik.org/wp-upload/2017/03/1703014_NetzwerkDurchsetzungsG.pdf (draft law to improve enforcement in social networks); Strafgesetzbuch [StGB] [Penal Code] § 130, para. 3 (Ger.), http://www.gesetze-im-internet.de/stgb/___130.html (proposed legislation to regulate “fake news”).

19. See Adam J. Berinsky, *This is How You Stop Fake News*, WASH. POST (Mar. 28, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/28/this-is-how->

the renewed interest in regulating online speech,²⁰ it is critical to consider whether this is an area Congress could regulate. This article explores Congress's ability to enact legislation requiring social media platforms to remove fake news—and whether such legislation would be prudent. Part I defines fake news and examines the governmental interest in regulating it. Part II reviews the government's power generally to regulate the Internet, and Part III weighs the First Amendment implications of regulating online speech. Part IV reveals that the state action doctrine forecloses the First Amendment's application to privately owned Internet companies. And finally, we conclude by arguing that the government should not regulate in this area.

I. WHAT IS REALLY *FAKE*, AND WHY DOES THE GOVERNMENT CARE?

Since the election, the term fake news has been used frequently—and broadly.²¹ Margaret Sullivan, the media columnist for *The Washington Post* and the former *New York Times* public editor, highlighted the problem of trying to define fake news: “The term ‘fake news’ is fuzzy. It can refer to a multitude of problems, including disinformation, propaganda, [or] conspiracy-mongering”²² For the purposes of this article, we focus on a narrow category of speech that all would agree is fake: fabricated news stories published in the guise of a genuine news story.²³ Unlike satirical stories on sites like The Onion, the effect of fake news is not to amuse or criticize but to mislead.²⁴ This also differs from biased opinion pieces that selectively use accurate

you-stop-fake-news/?utm_term=.dbb1713330b8; Chaitin, *supra* note 1; Shane, *supra* note 4.

20. See Borchers, *supra* note 12; Lemann, *supra* note 12.

21. See Priscilla Alvarez, *CNN Takes on Donald Trump's 'Fake News' Label*, ATLANTIC (May 2, 2017), <https://www.theatlantic.com/politics/archive/2017/05/cnn-trump-feud/525096/>; Danielle Kurtzleben, *With 'Fake News,' Trump Moves from Alternative Facts to Alternative Language*, NAT'L PUB. RADIO (Feb. 17, 2017), <http://www.npr.org/2017/02/17/515630467/with-fake-news-trump-moves-from-alternative-facts-to-alternative-language>. Notably, President Trump and many other partisans have consistently used the term “fake news” to describe unfavorable news coverage. See, e.g., Alvarez, *supra*.

22. Margaret Sullivan, *Feds Should Stay Out of Fight Against Fake News*, WASH. POST (Dec. 16, 2016), <https://www.pressreader.com/usa/the-washington-post/20161216/282252370171265>.

23. See, e.g., Angie Drobnic Holan, *The Media's Definition of Fake News vs. Donald Trump's*, POLITIFACT (Oct. 18, 2017), <http://www.politifact.com/truth-o-meter/article/2017/oct/18/deciding-whats-fake-medias-definition-fake-news-vs/>.

24. See Kurtzleben, *supra* note 21 (describing the original meaning of fake news, that which the authors refer to throughout this article, as “lies posing as news”); Kaley Leetaru, *Fighting 'Fake News' Requires Fighting False Claims Not Banning News Outlets*, FORBES (Feb. 17, 2017), <https://www.forbes.com/sites/kalevleetaru/2017/02/17/fighting-fake-news-requires-fighting-false-claims-not-banning-news-outlets/#1d14992e6c03>.

information and quotes to present a slanted perspective of an issue.²⁵ Fake news is not based in fact—it is made up.²⁶ Though the publication of blatantly inaccurate and fabricated information is nothing new, social media has enhanced the ability quickly and effortlessly to spread misinformation.²⁷ A simple share, retweet, or repost amplifies the messages to a degree and at a speed not previously possible.²⁸ And as a result, social media has become an incubator for the proliferation of fake news—and the world is paying attention.²⁹

A. *The Fight Against Fake News Worldwide*

The reaction to fake news has been global, and in countries where citizens enjoy little to no freedom of speech, government regulation has been most severe.³⁰ In China, for example, the government controls online content with a management system it describes as the “Golden Shield[,]” a “mechanism of censorship and surveillance that blocks tens of thousands of websites deemed inimical to the Communist Party’s narrative and control, including Facebook, YouTube, Twitter and even Instagram.”³¹ Though China has claimed this system allows it to address the problem of fake news better than the West, it has not been immune to problems:

The fake news that spread on Facebook in the run-up to the [U.S.] election even spread to China. . . . Problems with fake news and fraudulent reporters have existed for over a decade in China, with people often presenting themselves as journalists and threatening companies with negative coverage in an attempt to extort money.³²

Despite this, “authorities have seized on the phenomenon as a justification to censor a wide-range of content.”³³ For example, the Cyberspace Administration of China, the central Internet censorship,

25. See Leetaru, *supra* note 24.

26. *Id.*

27. *Id.*

28. *Id.*; Benedict Carey, *How Fiction Becomes Fact on Social Media*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/health/social-media-fake-news.html>.

29. Carey, *supra* note 28.

30. See Simon Denyer, *China’s Scary Lesson to the World: Censoring the Internet Works*, WASH. POST (May 23, 2016), https://www.washingtonpost.com/world/asia_pacific/chinas-scary-lesson-to-the-world-censoring-the-internet-works/2016/05/23/413afe78-fff3-11e5-8bb1-f124a43f84dc_story.html?utm_term=.a4d74a39f0a2; Gidda, *supra* note 17.

31. Denyer, *supra* note 30.

32. Kate Connolly et al., *Fake News: An Insidious Trend That’s Fast Becoming a Global Problem*, GUARDIAN (Dec. 2, 2016), <https://www.theguardian.com/media/2016/dec/02/fake-news-facebook-us-election-around-the-world>.

33. *Id.*

oversight, and control agency for the country, announced that “it would punish websites that publish ‘directly as news reports unverified content found on online platforms such as social media.’”³⁴ Justified as an effort to stop the spread of fake news, the examples of problematic stories offered by the Chinese government seem geared to suppress certain unfavorable information.³⁵

In South Africa, the minister of state security, David Mahlobo, announced that the government is considering regulating social media because of concerns about the spread of fake news.³⁶ Even in countries where citizens enjoy freedoms similar to (though less robust than) those under the First Amendment, governments are responding to the proliferation of fake news. Italy’s antitrust chief has called for government regulation to fight fake news,³⁷ while the most aggressive legislation abroad to address fake news was recently passed in Germany.³⁸ It requires social media companies to remove fake news content and slanderous or threatening posts within a short time frame or face fines of up to fifty million euros.³⁹ The platforms must “make it easy for users to report contentious material, and [must] respond to those requests promptly. [The legislation] calls for ‘obviously criminal content’ to be deleted or blocked within [twenty-four] hours, while companies would have seven days to remove posts that are less clear-cut.”⁴⁰

34. Edward Wong & Vanessa Piao, *China Cracks Down on News Reports Spread via Social Media*, N.Y. TIMES (July 5, 2016), https://www.nytimes.com/2016/07/06/world/asia/china-internet-social-media.html?_r=2.

35. *Id.* (utilizing the three examples cited by the Cyberspace Administration which were stories covering (1) the decay of moral standards in villages in northeastern China, (2) arson on a bus in Changsha, the capital of Hunan Province, and (3) a report about a girl from Shanghai who fled from a Lunar New Year dinner at her boyfriend’s family home in the south because of appalling living conditions).

36. Refilwe Pitjeng, *Should Social Media be Regulated?*, EYEWITNESS NEWS (Mar. 7, 2017), <http://ewn.co.za/2017/03/07/should-social-media-be-regulated>.

37. Flemming Rose and Jacob Mchangama, *History Proves how Dangerous it is to Have the Government Regulate Fake News*, WASHINGTON POST (Oct. 3, 2016), https://www.washingtonpost.com/news/theworldpost/wp/2017/10/03/history-proves-how-dangerous-it-is-to-have-the-government-regulate-fake-news/?utm_term=.09ca37c89516.

38. *See Bekämpfung von Hasskriminalität und strafbaren Falschnachrichten—Bessere Rechtsdurchsetzung in sozialen Netzwerken*, BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ (Mar. 14, 2017), http://www.bmjv.de/SharedDocs/Artikel/DE/2017/03142017_GE_Rechtsdurchsetzung_Soziale_Netzwerke.html [*Fighting Hate Criminality and Criminal False News—Better Legal Enforcement in Social Networks*, FED. MINISTRY JUST. & CONSUMER PROTECTION].

39. *Id.*

40. Melissa Eddy & Mark Scott, *Facebook and Twitter Could Face Fines in Germany Over Hate Speech Posts*, N.Y. TIMES (Mar. 14, 2017), <https://www.nytimes.com/2017/03/14/technology/germany-hate-speech-facebook-tech.html?smid=tw-share; 500,000 Euro Fines for Fake News on Facebook in Germany?>, DEUTSCHE WELLE (Dec. 16, 2016), <http://www>.

Justice Minister Heiko Maas, architect of the law, explained that it “sets out binding standards for the way operators of social networks deal with complaints and obliges them to delete criminal content.”⁴¹ Social media companies have challenged the law, arguing that it incentivizes companies to remove more lawful content than necessary in the face of the threat of disproportionate fines.⁴²

B. The Domestic Fight Against Fake News

Currently, there is little action the federal government can take regarding content posted on social media. It can (and does) flag content that it deems problematic and requests its removal from the social network. For example, the government frequently requests that Twitter remove content or delete user accounts.⁴³ But those are simply requests, and there is no requirement that Twitter oblige.⁴⁴

Social media companies that place a high value on freedom of speech—Twitter is a good example—generally ignore such requests.⁴⁵ Twitter has been outspoken that it chooses to be a leader in digital free speech rights, and it prioritizes its users’ ability to post freely and without intervention.⁴⁶ (Notably, this has gotten Twitter in trouble more than

dw.com/en/500000-euro-fines-for-fake-news-on-facebook-in-germany/a-36806244.

41. Eric Auchard & Hans-Edzard Busemann, *Germany Plans to Fine Social Media Sites over Hate Speech*, REUTERS (Mar. 14, 2017), <http://www.reuters.com/article/us-germany-fakenews-idUSKBN16L14G>; *Fighting Hate Criminality and Criminal False News*, *supra* note 38.

42. Miles Dilworth, *Facebook Claims Germany’s New Law to Tackle Fake News will Cause Tech Companies to Delete Legal Content*, INDEPENDENT (May 30, 2017), <http://www.independent.co.uk/news/business/news/facebook-germany-fake-news-law-tech-companies-delete-legal-content-social-media-hate-speech-fine-a7763081.html>; Melissa Eddy & Mark Scott, *Delete Hate Speech or Pay Up, Germany Tells Social Media Companies*, N.Y. TIMES (June 30, 2017), https://www.nytimes.com/2017/06/30/business/germany-facebook-google-twitter.html?_r=0.

43. *Transparency Report: United States of America*, TWITTER, <https://transparency.twitter.com/en/countries/us.html> (last visited Jan. 28, 2018) [hereinafter *Transparency Report*].

44. *See Transparency Report: Government TOS Reports*, TWITTER, <https://transparency.twitter.com/en/gov-tos-reports.html> (last visited Jan. 28, 2018).

45. *Id.*

46. *See, e.g.*, Michael Holmes, *ISIS Looking for Recruits Online*, WWLP-22 NEWS (June 20, 2014), <http://wwlp.com/2014/06/20/isis-looking-for-recruits-online/>; Somini Sengupta, *Twitter’s Free Speech Defender*, N.Y. TIMES (Sept. 2, 2012), <http://www.nytimes.com/2012/09/03/technology/twitter-chief-lawyer-alexander-macgillivray-defender-free-speech.html>. Twitter founder Biz Stone—who is no longer with the company—responded to media questions about ISIS’s use of Twitter to publicize its acts of terrorism by saying, “[i]f you want to create a platform that allows for the freedom of expression for hundreds of millions of people around the world, you really have to take the good with the bad.” Holmes, *supra*.

once.)⁴⁷ As such, Twitter routinely denies removal requests made by the United States government.⁴⁸

Social media's goal of promoting the speech of its users often conflicts with the government's interest in protecting its citizens against abuses. While this might seem like an academic exercise given that the Internet has received robust speech protections,⁴⁹ consider that in late 2016 President Obama signed into law the 2017 National Defense Authorization Act, allowing the Secretary of State to fight propaganda from foreign governments and to publicize the nature of ongoing foreign propaganda and disinformation operations against the United States and other countries.⁵⁰ This bipartisan bill was aimed at tracking *and* combating foreign propaganda amid growing concern that such efforts to spread fake news and disinformation threaten U.S. national security.⁵¹

In addition, for the sixth consecutive year, Freedom House, a group that ranks free speech around the globe, found that Internet freedoms are on the decline⁵²:

In 2013, it was a rise in surveillance. In 2014, governments shifted more from behind-the-scenes control to overt repression and arrests. In 2015,

47. See Nathan Olivarez-Giles, *Why Twitter Can't Shake its Harassment Problem*, WALL STREET J. (Aug. 24, 2016), <https://www.wsj.com/articles/why-twitter-cant-shake-its-harassment-problem-1472045224>; Rob Price, *Twitter Admits—Again—That it Has Failed to Deal With its Abuse Problem*, BUS. INSIDER (July 27, 2016), <http://www.businessinsider.com/twitter-abuse-trolls-leslie-jones-q2-earnings-jack-dorsey-2016-7> (illustrating examples of Twitter's various issues with free speech online and harassment suffered by individuals); Anna Silman, *A Timeline of Leslie Jones's Horrific Online Abuse*, N.Y. MAG. (Aug. 24, 2016), <http://nymag.com/thecut/2016/08/a-timeline-of-leslie-jones-horrific-online-abuse.html>; Charlie Warzel, *The Twitter Paradox: How A Platform Designed For Free Speech Enables Internet Trolls*, NAT'L PUB. RADIO (Oct. 26, 2016), <http://www.npr.org/2016/10/26/499442453/the-twitter-paradox-how-a-platform-designed-for-free-speech-enables-internet-tro>.

48. See *Transparency Report*, *supra* note 43. This includes requests made by a government agency, police, and other authorized reporters. *Id.*

49. See Rob Frieden, *Invoking and Avoiding the First Amendment: How Internet Service Providers Leverage Their Status as Both Content Creators and Neutral Conduits*, 12 U. PA. J. CONST. L. 1279, 1290 (2010) (quoting *Reno v. ACLU*, 521 U.S. 844, 853, 874 (1997)) (“[T]he Internet qualifies for maximum protection from government intervention by promoting an open and robust marketplace of ideas.”).

50. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, sec. 1287, 130 Stat. 2000, 2546 (codified at 22 U.S.C. § 2656 notes).

51. Press Release, Senator Rob Portman, Senate Passes Major Portman-Murphy Counter-Propaganda Bill as Part of NDAA (Dec. 8, 2016), <https://www.portman.senate.gov/public/index.cfm/press-releases?MonthDisplay=12&YearDisplay=2016>.

52. FREEDOM HOUSE, FREEDOM ON THE NET 2016: UNITED STATES (2017), <https://freedomhouse.org/sites/default/files/FOTN%202016%20United%20States.pdf>; Alina Selyukh, *Internet Freedom Wanes as Governments Target Messaging, Social Apps*, NAT'L PUB. RADIO (Nov. 14, 2016), <http://www.npr.org/sections/alltechconsidered/2016/11/14/500214959/internet-freedom-wanes-as-governments-target-messaging-social-apps>.

it was more of the same, plus a push against encryption. Over the past year, the pressure fell increasingly on social media and messaging tools, often to quash protests or dissent.⁵³

And most importantly, the Trump administration has been exceptionally antagonistic toward the First Amendment.⁵⁴ The President has referred to the press as “the enemy of the American people,”⁵⁵ and during the 2016 campaign Trump repeatedly blasted news outlets with claims of dishonesty⁵⁶ and unfairness.⁵⁷ He hurled insults at reporters⁵⁸ and banned certain journalists from campaign events.⁵⁹ He threatened to “open up” libel laws⁶⁰ so he could successfully sue news organizations for publishing stories that he found objectionable.⁶¹ The relationship between the White House and the press has not improved since Trump took office.⁶²

Trump’s attitude and rhetoric seem to have emboldened lawmakers around the country to try to regulate speech in new ways. In the first few

53. Selyukh, *supra* note 52.

54. See, e.g., Bridgette Dunlap, *Trump’s Anti-Democratic War on Facts and Free Speech*, ROLLING STONE (Jan. 26, 2017), <http://www.rollingstone.com/politics/features/trumps-anti-democratic-war-on-facts-and-free-speech-w462960> (discussing Trump’s “war with the media”).

55. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 1:48 PM), <https://twitter.com/realdonaldtrump/status/832708293516632065?lang=en.html>; Tom Miles, *U.N. Experts See ‘Alarming’ U.S. Trend Against Free Speech, Protest*, REUTERS (Mar. 30, 2017), <http://www.reuters.com/article/us-usa-rights-un-idUSKBN1712SG>.

56. Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 14, 2016, 9:55 AM), <https://twitter.com/realdonaldtrump/status/764867963845484545> (“... I am fighting the dishonest and corrupt media . . .”); Brian Flood, *Donald Trump Goes on Twitter Rampage Against ‘Corrupt,’ ‘Dishonest’ Media*, WRAP (Aug. 15, 2016), <http://www.thewrap.com/donald-trump-hillary-clinton-dishonest-media-new-york-times-twitter-rampage/>.

57. Daniel Marans, *Donald Trump Accuses Lester Holt of Bias in First Debate*, HUFFINGTON POST (Sept. 27, 2016), http://www.huffingtonpost.com/entry/donald-trump-attacks-lester-holt_us_57ea5510e4b024a52d2a6852.

58. See Michael Finnegan, *Campaign 2016 Updates: Clinton and Trump Make Their Last Stands*, L.A. TIMES (Nov. 8, 2016), <http://www.latimes.com/nation/politics/trailguide/la-na-trailguide-updates-trump-crowd-shouts-down-media-at-1478570849-htmllstory.html>.

59. Tom Kludt & Brian Stelter, *‘The Blacklist’: Here Are the Media Outlets Banned by Donald Trump*, CNN (June 14, 2016), <http://money.cnn.com/2016/06/14/media/donald-trump-media-blacklist/>.

60. Jill Colvin, *Trump Revives Threat to Change Libel Laws*, AP NEWS (Mar. 30, 2017), <http://abcnews.go.com/Politics/wireStory/trump-revives-threat-change-libel-laws-46475043>; Hadas Gold, *Donald Trump: We’re Going to ‘Open Up’ Libel Laws*, POLITICO (Feb. 26, 2016), <http://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866>.

61. See *id.* (discussing Trump’s desire to open up libel laws to have easier access to lawsuits with media outlets).

62. See, e.g., Chris Cillizza, *The Trump White House Just Ramped Up its War with the Media*, CNN (June 28, 2017), www.cnn.com/2017/06/28/politics/donald-trump-sarah-huck-abee-sanders-media/index.html.

months following the election, nineteen U.S. states introduced legislation to “curb freedom of expression and the right to protest.”⁶³ New York introduced a “right to be forgotten” bill that would have required websites to remove inaccurate, irrelevant, inadequate, or excessive statements about others upon request, although the bill was subsequently withdrawn.⁶⁴

C. Fake News Legislation in the United States

In the wake of the 2016 election, cries have rung out to respond to the phenomenon of fake news.⁶⁵ No legal framework exists to regulate such speech, so many commentators have suggested that social media platforms bear an ethical responsibility for regulating fake news.⁶⁶ And even though some platforms, such as Facebook and Google, have announced plans to combat fake news,⁶⁷ their efforts have not yet sufficiently addressed the problem.⁶⁸

However, social media platforms and other Internet Services Providers (ISPs) are *quite good* at complying with at least one government regulation that requires prompt removal of content: the notice and takedown provisions of the Digital Millennium Copyright Act (DMCA).⁶⁹ The DMCA was passed in 1998 to limit the liability of ISPs for copyright infringement by its users.⁷⁰ It uses a “notice and takedown”

63. *Id.*

64. N.Y. Assembly Bill No. A05323, 240th Sess. (N.Y. 2017); Eugene Volokh, *N.Y. Bill Would Require People to Remove ‘Inaccurate,’ ‘Irrelevant,’ ‘Inadequate’ or ‘Excessive’ Statements About Others*, WASH. POST (Mar. 15, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/15/n-y-bill-would-require-people-to-remove-inaccurate-irrelevant-inadequate-or-excessive-statements-about-others/?utm_term=.0012ebc2972a.

65. See Berinsky, *supra* note 19; Borchers, *supra* note 12; Lemann, *supra* note 12.

66. Eric Johnson, *Platforms Must Take Responsibility for Fake News*, Tom Friedman Says, RECODE (Dec. 19, 2016), <https://www.recode.net/2016/12/19/14006278/tom-friedman-fake-news-facebook-google-recode-podcast>; Tamar Lisbona, *Do Social Media Companies Have a Legal Responsibility to Report or Censor Fake News?*, COLUM. BUS. L. REV. (Feb. 4, 2017), <https://cblr.columbia.edu/do-social-media-companies-have-a-legal-responsibility-to-report-or-censor-fake-news/>.

67. Nick Wingfield, Mike Isaac & Katie Benner, *Google and Facebook Take Aim at Fake News Sites*, N.Y. TIMES (Nov. 14, 2016), <https://www.nytimes.com/2016/11/15/technology/google-will-ban-websites-that-host-fake-news-from-using-its-ad-service.html>.

68. See Daisuke Wakabayashi & Mike Isaac, *In Race Against Fake News, Google and Facebook Stroll to the Starting Line*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/technology/google-facebook-fake-news.html>.

69. 17 U.S.C. § 512(g)(1)–(4) (2012); see Jonathan Hudis & Hillary J. Wucherer, *Social Media Infringement: How to Enforce Your Copyright and Trademark Rights*, INSIDE COUNS. (Mar. 15, 2016), <http://www.law.com/insidecounsel/2016/03/15/social-media-infringement-how-to-enforce-your-copy/?t=copyright-trademarks&slreturn=20171002145356>.

70. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998); Assaf Hamdani, *Who’s Liable for Cyberwrongs*, 87 CORNELL L. REV. 901, 950 (2002).

provision that requires a service provider to remove infringing material once the provider is on notice of its existence, “in order to obtain safe harbor from copyright infringement charges.”⁷¹

If there were any existing, workable model for Congress to use to regulate fake news on social media, this would be it.⁷² As seen in Germany, U.S. legislation could require social media to make it easy for users to report contentious material (provide notice), and to respond to those requests promptly (takedown).⁷³ It raises the question: How likely is it that the U.S. government could force social media’s hand, as is happening around the world, to remove fake news?

II. THE POWER TO REGULATE THE INTERNET

The first hurdle—whether Congress has the power to legislate in this area—is easily overcome. Congress has the power to regulate the Internet. The broad authority under the Commerce Clause gives Congress authority to regulate “channels of interstate commerce,” “instrumentalities of interstate commerce,” and “activities having a substantial relation to interstate commerce.”⁷⁴ If the regulated area falls into any of those categories, it is within Congress’s power to regulate.⁷⁵ Courts have consistently held that the Internet is a channel of interstate commerce.⁷⁶ Indeed, Congress has used this power to regulate various

71. 17 U.S.C. § 512; Ariel Ronneburger, *Sex, Privacy, and Webpages: Creating A Legal Remedy for Victims of Porn 2.0*, 21 SYRACUSE SCI. & TECH. L. REP. 1, 4 (2009).

72. It is not the first time that DCMA § 512 has been used as a suggested framework for legislation of ISPs. See Ronneburger, *supra* note 71, at 4 (revenge pornography); Olivera Medenica & Kaiser Wahab, *Does Liability Enhance Credibility?: Lessons from the DMCA Applied to Online Defamation*, 25 CARDOZO ARTS & ENT. L. J. 237, 263 (2007) (defamation).

73. Beiten Burkhardt, *German Government to Fight Online Hate Speech—Fines up to EUR 50 Million*, LEXOLOGY (Mar. 31, 2017), <https://www.lexology.com/library/detail.aspx?g=50fd1922-b285-4e27-b132-85892505417c>.

74. U.S. CONST. art. I, § 8, cl. 3; *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

75. *Lopez*, 514 U.S. at 558 (citing *Perez v. United States*, 402 U.S. 146, 150 (1971)).

76. Though the Supreme Court has not held as such, there is unanimous consent from courts of appeal and district courts that the Internet is a channel of interstate commerce. See *United States v. Kohn*, 634 F. App’x 818, 821 (2d Cir. 2015), *cert. denied*, 137 S. Ct. 149 (2016) (“[T]here can be no question that the Internet is a channel and instrumentality of interstate commerce.”); *United States v. Tello*, 600 F.3d 1161, 1165 (9th Cir. 2010); *Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*, 527 F.3d 1045, 1054 (10th Cir. 2008) (citing *United States v. Shaefer*, 501 F.3d 1197, 1201 n.8 (10th Cir. 2007)) (trademark); *United States v. MacEwan*, 445 F.3d 237, 245 (3d Cir. 2006) (“[T]he Internet is an instrumentality and channel of interstate commerce.”); *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004) (citing *United States v. Pipkins*, 378 F.3d 1281, 1295 (11th Cir. 2004)) (collecting cases); *SEC v. Straub*, 2016 U.S. Dist. LEXIS 136841 *1, *35 (S.D.N.Y. Sept. 30, 2016) (collecting cases).

online activities.⁷⁷

Because the Internet is a channel, Congress has the power to “prohibit its use for harmful or immoral purposes.”⁷⁸ Arguably, Congress would retain this power where online communications occur between individuals located in the same state as the social media company.⁷⁹ Even under the narrower reading of the Commerce Clause that the Supreme Court has used since *United States v. Morrison* and *United States v. Lopez*,⁸⁰ “Congress can reach such activity if doing so is necessary to effectuate a broader scheme that aims at commercial activity, and perhaps if it includes a jurisdictional hook ensuring a connection to interstate commerce in every case.”⁸¹ Here, Congress could achieve that hook by defining “social media companies” as Internet-based companies that engage in interstate commerce.⁸²

Regulating the removal of harmful content on social media platforms falls squarely within Congress’s power under the Commerce Clause.⁸³ However, the regulation would face significant First Amendment challenges.⁸⁴ We examine the rationale for the regulation and the anticipated challenges below.

III. THE FIRST AMENDMENT CONCERNS:

THE REMEDY FOR SPEECH THAT IS FALSE IS SPEECH THAT IS TRUE

In the marketplace of ideas, falsehoods are supposed to compete with truth until truth prevails.⁸⁵ The Internet is “the most participatory

77. See 15 U.S.C. § 6551 (2012) (internet safety of children); 15 U.S.C. § 8402 (2012) (prohibitions against certain unfair and deceptive Internet sales practices); 18 U.S.C. § 2252 (2012) (certain activities relating to material involving the sexual exploitation of minors).

78. *United States v. Schumaker*, 479 F. App’x 878, 885 (11th Cir. 2012) (citing *Hornaday*, 392 F.3d at 1311).

79. See *United States v. Darby*, 312 U.S. 100, 119 (1941) (citing *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)) (“The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce . . .”).

80. See 529 U.S. 598, 625–26 (2000) (citing *Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639 (1999)); 514 U.S. 549, 566 (1995).

81. Kermit Roosevelt III, *Bait and Switch: Why United States v. Morrison Is Wrong About Section 5*, 100 CORNELL L. REV. 603, 614 (2015).

82. See *Darby*, 312 U.S. at 117.

83. See *id.* at 118; Roosevelt III, *supra* note 81, at 614.

84. See, e.g., *Doe v. Kentucky ex rel. Tilley*, 2017 U.S. Dist. LEXIS 173750, at *16 (E.D. Ky. Oct. 20, 2017); Bruce Schreiner, *Judge Strikes Down Internet Restrictions for Sex Offenders*, U.S. NEWS (Oct. 20, 2017), <https://www.usnews.com/news/best-states/kentucky/articles/2017-10-20/judge-strikes-down-internet-restrictions-for-sex-offenders>.

85. Christopher T. Wonnell, *Truth and the Marketplace of Ideas*, 19 U.C. DAVIS L. REV. 669, 670 (1986) (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–80 (1964)).

marketplace of mass speech that this country—and indeed the world—has yet seen.”⁸⁶ Thus, it is no surprise that the majority of regulations aimed at restricting online content, even those aimed at protecting minors, have been struck down by the U.S. Supreme Court under the First Amendment.⁸⁷

As previously noted, social media companies, as private entities, are free to censor the speech of their users.⁸⁸ And they do—via community standards and terms of service.⁸⁹ That freedom to censor dissolves, however, when it is done at the government’s behest.⁹⁰ Any new attempt at government regulation of online speech will almost certainly face First Amendment problems.⁹¹

A. Fake News Regulations Could Not Survive Strict Scrutiny

“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”⁹² Thus, if a regulation draws a distinction between acceptable and unacceptable speech based on the speaker’s message, it is content-based.⁹³ Any regulation of speech on the basis of its falsity (such as a fabricated news story) would be content-based.⁹⁴

86. *ACLU v. Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1996), *aff’d in part*, 521 U.S. 844 (1997).

87. Nicholas P. Dickerson, Comment, *What Makes the Internet so Special? And Why, Where, How, and By Whom Should its Content Be Regulated?* 46 *HOUS. L. REV.* 61, 78 (2009) (citing *Ashcroft v. ACLU*, 542 U.S. 656, 673 (2004)).

88. See Marjorie Heins, *The Brave New World of Social Media Censorship*, 127 *HARV. L. REV.* 325, 325 (2014).

89. See *Community Standards*, FACEBOOK, <https://www.facebook.com/communitystandards#hate-speech> (last visited Jan. 28, 2018) (“Facebook removes hate speech . . .”); *Twitter Terms of Service*, TWITTER (Sept. 30, 2016), <https://twitter.com/tos?lang=en>; *Ad Policy: Hateful Content*, TWITTER, <https://business.twitter.com/en/help/ads-policies/prohibited-content-policies/hate-content.html> (last visited Jan. 28, 2018) (“Twitter prohibits the promotion of hate speech globally.”); *Terms of Service*, YOUTUBE (June 9, 2010), <https://www.youtube.com/static?template=terms;HateSpeech>, YOUTUBE, <https://support.google.com/youtube/answer/2801939?hl=en> (last visited Jan 28, 2018) (“[W]e don’t permit hate speech.”).

90. Susan Klein & Crystal Flinn, *Social Media Compliance Programs and the War Against Terrorism*, 8 *HARV. NAT’L SEC. J.* 53, 97 (2017).

91. See, e.g., Dickerson, *supra* note 87, at 78.

92. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992)).

93. *Id.* at 2227.

94. See *id.* The Court has made clear that even more subtle regulations that attempt to regulate speech by its function or purpose are drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny. See *id.*; *United States v. Alvarez*, 567 U.S. 709,

Content-based laws are constitutional only when they meet the highest level of judicial review: strict scrutiny.⁹⁵ In addition, the Court has repeatedly made clear that this includes content-based regulations of online speech.⁹⁶ So why does this matter? Because strict scrutiny “requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”⁹⁷

1. *Compelling Government Interest*

Such interests are “of the highest order”⁹⁸ and “extraordinarily limited,”⁹⁹ but they have been found in speech regulations: to prevent speech promoting drug use,¹⁰⁰ to preserve the integrity of the election process,¹⁰¹ to protect children from exposure to indecent speech over broadcast airwaves,¹⁰² to ensure national security,¹⁰³ and possibly to restrict fraudulent claims about having been awarded a military medal of honor.¹⁰⁴

There is perhaps an argument to be made that the government has a compelling interest in prohibiting false information disguised as news. The Court has recognized a compelling interest in maintaining the stability of its election process,¹⁰⁵ and false information spread during and related to political campaigns could threaten this interest. But absent reliable data proving that false speech has *significantly* undermined the election process and/or outcome, it seems a stretch that a court would find this prong met.

725–26 (2012) (applying strict scrutiny to a restriction of false speech).

95. *Reed*, 135 S. Ct. at 2228 (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

96. *See* *Ashcroft v. ACLU*, 542 U.S. 656, 673 (2004) (striking down the Child Online Protection Act (COPA)); *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (striking down a portion of the Communications Decency Act (CDA)).

97. *Reed*, 135 S. Ct. at 2231 (quoting *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)).

98. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

99. *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1189 (D. Colo. 2010) (quoting *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“[T]here is a compelling interest in protecting the physical and psychological well-being of minors.”)).

100. *Mood for a Day, Inc. v. Salt Lake Cty.*, 953 F. Supp. 1252, 1262 (D. Utah 1995).

101. *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 228 (1989) (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 221–22 (1986)).

102. *Action for Children’s Television v. FCC (ACT III)*, 58 F.3d 654, 661 (D.C. Cir. 1995).

103. *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citing *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964)) (“[N]o governmental interest is more compelling than the security of the Nation.”).

104. *Cf. United States v. Alvarez*, 567 U.S. 709, 725–26 (2012) (suggesting that state interest may be sufficient to prevent fraudulent claims regarding military medals).

105. *Eu*, 489 U.S. at 231.

Fake news also might meet the legal definition of fraud.¹⁰⁶ Under *Alvarez*, there is an argument that it could be regulated on that basis.¹⁰⁷ In other words, if fake news constitutes an intentional misrepresentation of material fact, and is made with knowledge of its falsity, for the purpose of inducing the reader to act (to vote in a particular way, for example), and the reader does act in that way and is damaged by it—that would constitute fraud.¹⁰⁸ Proving the fraud, particularly the causation and damage, would likely be difficult.

And even assuming that a court did find a compelling interest in preventing the spread of fake news, it is doubtful the government could show that forcing social media companies to limit the speech available on their platforms is the least restrictive means of achieving that interest.

2. Narrowly Tailored

“Most cases striking down speech restrictions . . . rely primarily on the narrow tailoring prong[,] . . .”¹⁰⁹ To satisfy it, the government must adequately explain how the regulation advances the interest.¹¹⁰

Surely, it is not hard to see a direct causal link between the restriction imposed and the injury to be prevented. However, the link is not enough. A law is not narrowly tailored when less speech-restrictive means exist to achieve the interest.¹¹¹ In addition, the restriction cannot be vague, overinclusive, or underinclusive.¹¹²

When it comes to fake news, there is a better way to deal with the problem—one the Supreme Court has time and again expressed a preference for—counter speech.¹¹³ “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

106. *Compare Fraud*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“[K]nowing misrepresentation or concealment of a material fact made to induce another to act to his or her detriment.”), with Hunt Allcot & Matthew Gentzkow, *Social Media and Fake News in 2016 Election*, 31 J. ECON. PERSPS. 211, 213 (2017) (“[A]rticles that are intentionally and verifiably false, and could mislead readers.”).

107. *See Alvarez*, 567 U.S. at 720.

108. *See id.*

109. Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2421 (1996) [hereinafter Volokh, *Freedom of Speech*].

110. *See, e.g.*, *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217, 222 (1986)).

111. *See Reno v. ACLU*, 521 U.S. 844, 874–79 (1997).

112. *See Volokh, Freedom of Speech, supra* note 109, at 2422–23.

113. *See, e.g.*, *United States v. Alvarez*, 567 U.S. 709, 727 (2012) (citing *Whitney v. California*, 274 U.S. 357, 377 (1927)).

enlightened; to the straight-out lie, the simple truth.”¹¹⁴ Here, counter speech would suffice to achieve the government’s interest in promoting the truth and reducing the negative impact of fake news.¹¹⁵

All of which is to say, an attempt to regulate fake news will fail the strict-scrutiny analysis.¹¹⁶

B. Is Fake News Subject to Less First Amendment Protection Because it is False?

The First Amendment does not regard all speech as equal—restrictions on certain categories of speech have long been permitted.¹¹⁷ For example, the Court has held that obscenity, defamation, fraud, incitement, and speech integral to criminal conduct are outside the First Amendment’s protections.¹¹⁸ But these content-based restrictions allowed by the Court are “confined to the few historic and traditional categories of expression long familiar to the bar.”¹¹⁹ Notably, there has been no historical exception for false statements of fact.¹²⁰ “[N]ew categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated.”¹²¹

The Court directly confronted this question in *United States v. Alvarez*, when it struck down a federal law that made it a crime for a person to represent falsely that he or she received a military decoration or medal.¹²² The plurality opinion written by Justice Kennedy recognized that language in other cases—mostly dealing with defamation and fraud—did support government regulation of false factual statements when they cause, or are likely to cause, cognizable harm to other persons.¹²³ But the Court cautioned that despite this line of precedent, there exists no categorical rule that false statements receive no First Amendment protection.¹²⁴ The Court noted that if the Stolen Valor Act

114. *Id.*

115. Ankhi Das, *Best Antidote to Fake News and Hate Speech is More Speech*, INDIANEXPRESS.COM (Dec. 31, 2016), <http://indianexpress.com/article/opinion/columns/best-antidote-to-fake-news-and-hate-speech-is-more-speech-4452346/>.

116. *See, e.g.*, *Brown v. Entm’t Merch. Ass’n*, 564 U.S. 786, 799 (2011) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992)).

117. *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *R.A.V.*, 505 U.S. at 382).

118. *Id.* at 468–69 (citing *Roth v. United States*, 354 U.S. 476, 483 (1957)).

119. *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (internal quotation marks omitted) (quoting *Stevens*, 559 U.S. at 468).

120. *Id.* at 718.

121. *Brown*, 564 U.S. at 786 (citing *Stevens*, 559 U.S. at 469–72).

122. *Alvarez*, 567 U.S. at 714–15, 729–30.

123. *Id.* at 718–19 (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988)).

124. *Id.* at 719.

were allowed to stand, it would mean the government could regulate false statements on the basis of their falsity—and nothing more:

Permitting the government to decree [false] 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. Were this law to be sustained, there could be an endless list of subjects the National Government or the States could single out.¹²⁵

Those words, although strongly cautionary, do not mean that false statements of fact *cannot* be regulated.¹²⁶ Such statements are not themselves an unprotected category of speech, but government regulation may be appropriate when those statements are made to cause harm, such as effecting fraud.¹²⁷ And indeed, this is the very justification that explains the regulation of certain fraudulent speech on the basis of its falsity.¹²⁸

At bottom, false speech may still have value, particularly as it helps contribute to the search for truth.¹²⁹ Though the Court has opined that “there is no constitutional value in false statements of fact,”¹³⁰ it has also recognized that “[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’”¹³¹ Even within some of the defined categories undeserving of First Amendment protection, the Court has found value in protecting false statements of fact when to do otherwise would have a chilling effect.¹³² Defamation serves as an appropriate example. Where the speech at issue is about a public official or figure, the speaker must know the information

125. *Id.* at 723 (citing GEORGE ORWELL, NINETEEN EIGHTY-FOUR (Centennial ed. 2003)).

126. *See id.* (citing *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 (1976)).

127. *See Alvarez*, 567 U.S. at 723 (citing *Va. Bd. of Pharmacy*, 425 U.S. at 771).

128. *See* 18 U.S.C. § 1001(a) (2012) (prohibiting fraudulent statements to the government); *Illinois v. Telemarketing Assocs.*, 538 U.S. 600, 620 (2003) (citing *In re Witt*, 583 N.E.2d 526, 531 (Ill. 1991)) (prohibiting fraud); *United States v. Tomsha-Miguel*, 766 F.3d 1041, 1048 (9th Cir. 2014) (citing *Alvarez*, 567 U.S. at 721) (“[P]rohibit[ing] the impersonation of federal officials and employees.”).

129. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964).

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

131. *N.Y. Times Co.*, 376 U.S. at 279 n.19 (quoting JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 21 (World's Classics ed. 1991)).

132. *See id.* at 299–301.

is false or have reckless disregard for the truth.¹³³ The mere fact that speech is false is not enough to impose liability.¹³⁴

Ultimately, as would be the case here, “the government . . . cannot suppress statements of fact simply because they are demonstrably untrue and may lead astray those who hear the statements and are too lazy or dim-witted to sort out truth from falsehood.”¹³⁵

C. Getting Around the First Amendment Hurdle: The Carrot and Stick of Section 230

Despite the broad First Amendment protections for online speech, Congress has a relatively simple way to force social media companies to follow content-based restrictions. Social media benefits from a statute that grants broad immunity for user-generated content posted on its platforms.¹³⁶ Section 230 of the Communications Decency Act provides that interactive computer services, defined to include social media, cannot be treated as publishers or speakers of third-party content.¹³⁷ It does not matter if the social media company is aware of inappropriate content.¹³⁸ It does not matter if it elects to moderate site content.¹³⁹ If the content is generated by users, the social media company is generally immune from liability related to that content.¹⁴⁰ This immunity has been applied to claims for defamation, negligence, intentional infliction of emotional distress, privacy, and more.¹⁴¹

Section 230 has evolved into what many commentators consider

133. *Id.* at 279–80.

134. *See id.*

135. Steven G. Gey, *Papers from the First Amendment Discussion Group: The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 21 (2008).

136. 47 U.S.C. § 230 (2012).

137. *Id.*

138. This is not without limits; section 230 expressly carves out immunity from federal criminal law, intellectual property law, and communications privacy law. *See* 47 U.S.C. § 230(c)(1), (d), (e)(1)–(2), (4).

139. *See id.* § 230(c)(2).

140. *See id.* § 230(c)(1).

141. *See* *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003) (defamation); *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 983 (10th Cir. 2000) (defamation & negligence claims); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330, 332 (4th Cir. 1997) (negligence claims); *Beyond Sys. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 525 (D. Md. 2006) (claim under Maryland Commercial Electronic Mail Act); *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 U.S. Dist. LEXIS 93348, at *2–*3 (E.D. Tex. Dec. 27, 2006) (involving claims of negligence, negligence per se, intentional infliction of emotional distress, invasion of privacy, civil conspiracy and distribution of child pornography); *Barnes v. Yahoo!, Inc.*, No. 05-296-AA, 2005 U.S. Dist. LEXIS 28061, at *1 (D. Or. Nov. 8, 2005) (negligence claim resulting in personal injury).

“one of the most valuable tools for protecting freedom of expression and innovation on the Internet.”¹⁴² This immunity is not a constitutional grant.¹⁴³ It comes from Congress, and Congress can take it away.¹⁴⁴ While that is unlikely—§ 230 has received tremendous support for over twenty years and has a strong tech lobby supporting it¹⁴⁵—it remains possible that Congress could condition § 230’s application on compliance with another regulatory scheme.¹⁴⁶ In other words, Congress could regulate fake news on social media by conditioning § 230 immunity on a social media company’s compliance with a process of investigating and removing content flagged as fake news.

This would be a mistake. Congressional policy has long been that the Internet should be left unregulated.¹⁴⁷ In enacting § 230,

Congress reasoned that any liability would threaten development of the online industry as a medium for new forms of mass communication and simultaneously create disincentives to self-regulate such content by service providers. Congress therefore determined that liability should rest with the actual wrongdoers—the originators of the illegal and harmful content—and not intermediary servers whose systems are

142. *Section 230 of the Communications Decency Act*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/cda230> (last visited Jan. 28, 2018).

143. *See* 47 U.S.C. § 230 (2012).

144. *Id.* § 230(a).

145. Christopher Zara, *The Most Important Law in Tech Has a Problem*, WIRED (Jan. 3, 2017), <https://www.wired.com/2017/01/the-most-important-law-in-tech-has-a-problem/>. It should be noted that commentators regularly call for restrictions, limitations, or the end of § 230 immunity. Alexis Kramer, *Portman, McCaskill Urge Changes to Online Liability Law*, BUREAU NAT’L AFFS. (Jan. 18, 2017), <https://www.bna.com/portman-mccaskill-urge-n73014449976/>.

146. Considering the government’s response to the release of confidential diplomatic cables to WikiLeaks, such a possibility does not seem remote. *See* Julie Adler, *The Public’s Burden in a Digital Age: Pressures on Intermediaries and the Privatization of Internet Censorship*, 20 J. L. & POL’Y 231, 239–40 (2011).

Upon learning that WikiLeaks’ website was hosted on Amazon’s cloud servers, Senator Joseph Lieberman had his staffers call Amazon to inquire; shortly after, Amazon reported back that it was no longer hosting WikiLeaks. Lieberman also released a statement ‘calling on any other company or organization that was hosting WikiLeaks to immediately terminate its relationship with them.’ Soon after, EveryDNS, the American company that provided WikiLeaks’ domain name, also terminated its services to WikiLeaks, forcing it to move its domain name registration to Switzerland. The iPhone also pulled its WikiLeaks app, and various payment processors cut WikiLeaks off.

Id.

147. *See* 47 U.S.C. § 230(b)(2) (“It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet . . . , unfettered by Federal or State regulation.”).

sometimes abused by wrongdoers.¹⁴⁸

In furtherance of that goal, § 230 was enacted to encourage websites and users to self-police.¹⁴⁹ It undermines that legislative intent to condition immunity on engaging in the very conduct Congress sought to encourage but did not require.¹⁵⁰

IV. DOING AN END RUN AROUND THE STATE ACTION DOCTRINE

Social media companies may devise their content rules as they please, unconstrained by constitutional limits.¹⁵¹ They are nongovernmental entities, and per the state action doctrine, they are beyond the government's regulatory powers under the Fourteenth Amendment.¹⁵² Indeed, courts so far have held that private online service providers are not state actors for First Amendment purposes.¹⁵³ That means the First Amendment has no *direct* role to play in regulating the content policies and practices of social media companies.

But what about an indirect role? What if Congress passed legislation, in an end run around the state action doctrine, requiring Internet platforms to comply with First Amendment doctrines articulated by the Supreme Court? The source of Congress's power would be the Commerce Clause.¹⁵⁴ But that power, again, is limited by the Bill of Rights. Indeed, the First Amendment itself would provide a basis to strike down the legislation. By subjecting the companies' content policies and practices to First Amendment scrutiny, the legislation would require the companies to speak by hosting content they did not want to host.¹⁵⁵ That

148. *Barnes v. Yahoo!, Inc.*, No. 05-296-AA, 2005 U.S. Dist. LEXIS 28061, at *5 (D. Or. Nov. 8, 2005).

149. *See* 47 U.S.C. § 230(b); *Batzel v. Smith*, 333 F.3d 1018, 1028 (9th Cir. 2003).

150. *See* § 230(b)(4); Adler, *supra* note 146, at 244; Zara, *supra* note 145.

151. *See* Somini Sengupta, *On Web, a Fine Line on Free Speech Across the Globe*, N.Y. TIMES (Sept. 16, 2012), <http://www.nytimes.com/2012/09/17/technology/on-the-web-a-fine-line-on-free-speech-across-globe.html>.

152. *Developments in the Law: State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1250 (2010).

153. *See, e.g.*, *Name.Space, Inc. v. Network Sols., Inc.*, 202 F.3d 573, 581 (2d Cir. 2000); *Island Online, Inc. v. Network Sols., Inc.*, 119 F. Supp. 2d 289, 307 (E.D.N.Y. 2000); *Nat'l A-I Adver. v. Network Sols., Inc.*, 121 F. Supp. 2d 156, 178 (D. N.H. 2000); *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1026, 1028 (S.D. Ohio 1997); *Cyber Promotions Inc., v. Am. Online Inc.*, 948 F. Supp. 436, 445 (E.D. Pa. 1996).

154. U.S. CONST. art. I, § 8, cl. 3; *see* Marvin Ammori, *First Amendment Architecture*, 2012 WIS. L. REV. 1, 58 (2012).

155. In addition, it would conflict with Congress's traditional perception of private censorship on the Web. *See, e.g.*, 47 U.S.C. § 230(b). Consider the Communications Decency Act of 1996, whose Section 230 allows private actors to make their own content decisions—a regime that has been judicially recognized many times. *See, e.g.*, *Communications Decency*

is significant because the First Amendment protects not only the right to speak, but also the right to refrain from speaking.¹⁵⁶

Moreover, the Due Process Clauses of the Fifth and Fourteenth Amendments would provide a basis to strike down the legislation.¹⁵⁷ They offer two types of protection: substantive and procedural.¹⁵⁸ The clauses guarantee procedurally that liberty and property interests may not be impaired without notice and a fair hearing, and they guarantee that substantively courts must protect fundamental rights from government interference.¹⁵⁹ With that in mind, legislation requiring Internet platforms to comply with First Amendment principles would be problematic because, as noted, it would interfere with the platforms' fundamental rights to speak and refrain from speaking.¹⁶⁰

In addition, the Takings Clause might be triggered.¹⁶¹ Found in the Fifth Amendment, it provides in pertinent part: “[N]or shall private property be taken for public use without just compensation.”¹⁶² Government policies that significantly restrict the use of private property may constitute a taking. It is not inconceivable, then, that the platforms would argue that by requiring them to comply with the First Amendment, the legislation interferes materially with their property interests, backed by law, to such a degree that it would qualify as a taking. That is possible because the Supreme Court has made clear that the Takings Clause applies to interests in physical and intellectual property.¹⁶³

Supporters of such legislation would likely defend it by arguing that its requirements are rationally related to a public purpose—a basis for the government to take or otherwise coopt private property (perhaps on the theory that the requirements further social, economic, and political ends by using the First Amendment to protect the public discourse on those

Act of 1996, Pub. L. No. 104-104, sec. 230, 110 Stat. 56, 138; *Klayman v. Zuckerberg*, 753 F.3d 1354, 1355 (D.C. Cir. 2014) (Facebook protected for delay in removing material).

156. *Pac. Gas & Elec. Co. v. Pub. Utils. Com.*, 475 U.S. 1, 11 (1986) (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985)).

157. David M. Rabban, *The Emergency of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1207, 1345 (1983).

158. Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L. J. 101, 103 (1995).

159. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (citing *Louisville & Nashville R.R. Co. v. Schmidt*, 177 U.S. 230, 236 (1900)).

160. *Pac. Gas & Elec. Co.*, 475 U.S. at 11; RABBAN *supra* note 157, at 1343, 1345.

161. *See, e.g., Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978) (first citing *Goldblatt v. Hempstead*, 369 U.S. 590, 593 (1962); and then citing *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928)).

162. U.S. CONST. amend. V.

163. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2431 (2015).

subjects, on the platforms where such discourse occurs today).¹⁶⁴ However, if legislation decreases the economic value of a party's property based on the owner's "investment-backed expectations," then that constitutes a taking that generally necessitates compensation by the government.¹⁶⁵ That means the government would have to pay for the property's "fair market value."¹⁶⁶

Here, the Internet companies would have a strong argument that by requiring them to comply with the First Amendment, the legislation is fundamentally changing their property and decreasing its economic value. In other words, the companies have made content-related decisions to shape the communities that they host,¹⁶⁷ and the legislation would upend those decisions and ultimately the essence of the communities. In light of the First Amendment's protection for hate speech and the reality that a large number of American adults and children favor restrictions on hate speech,¹⁶⁸ it is not hard to imagine users would leave the platforms if they were forced to host hate speech, reducing the platforms revenue.

For these reasons, it would be difficult, if not impossible, for Congress to pass a law requiring Internet platforms to comply with First Amendment principles. The law could be invalidated under the First or Fifth Amendments, and under the Takings Clause it could place on the government the burden of paying the companies so much in just compensation that the economics alone would render the legislation practicably un-passable.

CONCLUSION:

REGULATING FAKE NEWS IS NOT JUST UNDESIRABLE, IT IS BAD POLICY

Fake news may present a danger to our democracy, but its regulation poses a greater danger. Neither the federal government—its legislators, courts, or judges—nor the social media companies who would bear the burden of identifying fake news are in a good position to determine what constitutes the same.

164. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984); *Berman v. Parker*, 348 U.S. 26, 35–36 (1954) ("Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.").

165. *Penn Cent. Transp. Co.*, 438 U.S. at 127 (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

166. *United States v. Reynolds*, 397 U.S. 14, 16 (1970).

167. See, e.g., *Community Standards*, *supra* note 89.

168. See Jacob Poushter, *40% of Millennials OK with limiting speech offensive to minorities*, PEW RES. CTR., (Nov. 20, 2015), <http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/>.

Allowing the government to determine what is real and what is fake, even with a seemingly clear definition,¹⁶⁹ is problematic: “[It puts] the question of what constitutes real news and what constitutes fake news in the hands of those who may be most affected by it.”¹⁷⁰ As noted by David Kaye, the U.N. special investigator on freedom of expression, “fake news has emerged as a global topic of concern,” but “there is a risk that efforts to counter it could lead to censorship, the suppression of critical thinking and other approaches contrary to human rights law.”¹⁷¹ A regulatory prohibition on fake news would have a chilling effect on not only journalists, but also anyone interested in participating in a public debate on social media. The difference between a fact and a falsity is not always straightforward, and there is a risk that even true statements on controversial topics could be punishable.

In brief, while fake news possesses no political or social value, allowing the government in the realm of politics—the realm in which today’s concerns about fake news fester and flourish—to define what is true and false improperly vests temporary political majorities with authority that contradicts democratic self-governance.¹⁷²

Even worse, such regulation would shift the burden of making a legal determination about the status of speech from government to the social media platform. At risk of facing liability exposure, social media platforms would likely err on the side of caution and remove more content than necessary—and by extension remove protected and potentially valuable speech from the marketplace.

It is a worthwhile effort for social media companies, as part of their corporate social responsibility, to make efforts to ensure that their platforms are not incubators for false and misleading information. This would be in service to their users, “most of whom would presumably

169. See Jeremy W. Peters, *Wielding Claims of ‘Fake News,’ Conservatives Take Aim at Mainstream Media*, N.Y. TIMES (Dec. 25, 2016), <https://www.nytimes.com/2016/12/25/us/politics/fake-news-claims-conservatives-mainstream-media-.html> (“[Fake news] had been widely understood to refer to fabricated news accounts that are meant to spread virally online.”).

170. Sullivan, *supra* note 22.

171. *UN Experts Express Concern About Growth of ‘Fake News,’* AP (Mar. 3, 2017), <http://bigstory.ap.org/article/b7feb827ff3f407ead51586b58049fcf/un-experts-express-concern-about-growth-fake-news>; *Freedom of Expression Monitors Issue Joint Declaration on ‘Fake News,’ Disinformation, and Propaganda*, OFF. HIGH COMMISSIONER (Mar. 3, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21287&LangID=E>.

172. Clay Calvert, *Comments Off on Fake News, Free Speech, & the Third-Person Effect: I’m No Fool, But Others Are*, 7 WAKE FOREST L. REV. ONLINE 1, 12 (2017), <http://wakeforestlawreview.com/2017/02/fake-news-free-speech-the-third-person-effect-im-no-fool-but-others-are/>.

prefer seeing true stories instead of false stories; indeed, the job of various news services is to do precisely this.”¹⁷³

Many companies are doing so.¹⁷⁴ Facebook has integrated fact checking into its publication process, and now allows users to report fake news as a reason for requesting that content be removed or blocked.¹⁷⁵ As *The Guardian* reported recently,

If a story is deemed to fail the fact check, it will be publicly flagged as “disputed by 3rd party fact-checkers” whenever it appears on the social network. Users will be able to click on a link to understand why it’s disputed. If a Facebook user then still want [sic] to share the story, they’ll get another warning about its reliability.¹⁷⁶

Margaret Sullivan reported that Eli Pariser, founder of Upworthy, has created an online portal for possible solutions.¹⁷⁷ One of them is verified press pages. A news organization would have to apply to be verified as a credible news source, after which its stories would be published with a ‘verified’ mark, similar to Twitter’s check mark.¹⁷⁸ Several news outlets are establishing dedicated fact-checking teams to debunk false and misleading stories.¹⁷⁹

Ultimately, this is the desired outcome—innovations in the private sector to respond to consumer demand for accurate, reliable information. Government regulation, however well-intentioned, would produce negative consequences that far outweigh the benefits. Indeed,

[w]hen Government seeks to use its full power . . . to command where a person may get his or her information or what distrusted source he or

173. Eugene Volokh, *Fake News and the Law, From 1798 to Now*, WASH. POST (Dec. 9, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/09/fake-news-and-the-law-from-1798-to-now/?utm_term=.150dc5190de0.

174. See, e.g., Terry Collins, *Steve Ballmer Says Social Platforms Can’t Stop Fake News*, CBS NEWS (Oct. 10, 2017), <https://www.cbsnews.com/news/steve-ballmer-says-social-platforms-cant-curb-fake-news/>.

175. Peter Kafka, *Facebook Has Started to Flag Fake News Stories*, RECODE (Mar. 4, 2017), <https://www.recode.net/2017/3/4/14816254/facebook-fake-news-disputed-trump-sno-pes-politifact-seattle-tribune>; Casey Newton, *Facebook is Patenting a Tool That Could Help Automate Removal of Fake News*, VERGE (Dec. 7, 2016), <https://www.theverge.com/2016/12/7/13868650/facebook-fake-news-patent-tool-machine-learning-content>.

176. Amber Jamieson & Olivia Solon, *Facebook to Begin Flagging Fake News in Response to Mounting Criticism*, GUARDIAN (Dec. 15, 2016), <https://www.theguardian.com/technology/2016/dec/15/facebook-flag-fake-news-fact-check>.

177. Sullivan, *supra* note 22.

178. *Id.*

179. See LUCAS GRAVES & FEDERICA CHERUBINI, *THE RISE OF FACT-CHECKING SITES IN EUROPE 8* (Digital News Project 2016); Jasper Jackson, *BBC Sets up Team to Debunk Fake News*, GUARDIAN (Jan. 12, 2017), <https://www.theguardian.com/media/2017/jan/12/bbc-sets-up-team-to-debunk-fake-news>.

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she may not hear, it uses censorship to control thought. This is unlawful. The *First Amendment* confirms the freedom to think for ourselves.¹⁸⁰

180. *Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 356 (2010).