

Separating Fact From Fiction: The First Amendment Case for Addressing “Fake News” on Social Media

by MICHAEL K. PARK*

Introduction

On February 14, 2018, 19-year-old Nikolas Cruz, armed with an AR-15 semi-automatic rifle, entered a Parkland Florida high school and unleashed a torrent of bullets, killing seventeen people and injuring many others.¹ Several days after the shooting, the top trending video on YouTube featured David Hogg, one of the school shooting survivors and an outspoken critic of current gun control laws, with a caption that falsely read that Hogg was not a student, but a “crisis actor.”² The video had amassed over 200,000 views before YouTube removed it.³ On Facebook, over 111,000 users had shared a since-deleted post falsely claiming that the surviving students were performers exploiting this tragedy.⁴ Unfortunately, these posts were not isolated acts of garnering misinformation following the school shooting; they underscored that a deluge of false information and “fake news” had spread across social networks, including conspiracy theories advancing the idea that students like Hogg were promoting the agenda of “left-wing activists.”⁵

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1. Oliver Laughland, et al., *Florida School Shooting: At Least 17 People Dead on ‘Horrific, Horrific Day,’* THE GUARDIAN (Feb. 15, 2018, 3:53 AM), <https://www.theguardian.com/us-news/2018/feb/14/florida-shooting-school-latest-news-stoneman-douglas>.

2. John Herrman, *The Making of a No. 1 YouTube Conspiracy Video After the Parkland Tragedy*, N.Y. TIMES (Feb. 21, 2018), <https://www.nytimes.com/2018/02/21/businessmedia/youtube-conspiracy-video-parkland.html>.

3. *Id.*

4. Daniel Arkin & Ben Popkin, *How the Internet’s Conspiracy Theorists Turned Parkland Students into ‘Crisis Actors,’* NBC NEWS (Feb. 21, 2018, 7:08 PM), <https://www.nbcnews.com/news/us-news/how-internet-s-conspiracy-theorists-turned-parkland-students-crisis-actors-n849921>.

5. Mike Murphy, *Conspiracy Theory Video About Florida Shooting Survivor Rose to No. 1 on YouTube Trending*, MARKETWATCH (Feb. 21, 2018, 1:27 PM), <https://www.marketwatch.com/story/fake-news-strikes-again-this-time-targeting-florida-school-shooting-survivors-2018->

In today's digital landscape, "fake news" can go viral within minutes. Anyone with an Internet connection can record or livestream events in real-time or post "news" that has the look and feel of actual news—such as those featuring Hogg as a "crisis actor"—except that it isn't actual news: it's fake. The decline in barriers to widespread publication has fostered an environment where speech can be easily harnessed as a weaponized tool to suppress substantive dialogue, and sow civil discord. After revelations that Russian operatives used influential media websites like Facebook, Twitter, and Google to spread "fake news" during the 2016 United States presidential election, these Internet giants vowed to take steps to suppress disinformation and limit automated or "bot" activity from adversely affecting our democratic process.⁶ These technology companies have been criticized for not doing enough to stem misleading and blatantly false information. And while they recently vowed to implement safeguards, the continued flood of "fake news" raises the specter that the steps implemented thus far—whether changes to the algorithms or other safeguards designed to address "fake news"—have not adequately addressed this online scourge.

Pursuant to First Amendment principles, the federal government must address "fake news" in order to protect our self-governing democracy. While the Free Speech Clause of the First Amendment is commonly understood as an individual's right against government interference with private speech, limitations on government abridgment is not the sole purpose of the Free Speech Clause. A key principle of the First Amendment is to seek and maintain a system of free expression in order to fulfill the constitutional purpose of creating and sustaining a self-governing republic. Thus, the government has a duty to maintain our democratic form of government when private interests threaten the citizenry's ability to be well-informed and to make informed decisions. The focus here is on the government's power to limit false or "fake news," and this article makes the case that social media companies like Facebook cannot be relied upon to limit or prevent disinformation on their own accord; rather, this article makes the First Amendment case to address "fake news" through sound policies that survive legal scrutiny.

02-20; see also Erin Griffith, *Pro-Gun Russian Bots Flood Twitter After Parkland Shooting*, WIRED (Feb. 15, 2018, 2:00 PM), <https://www.wired.com/story/pro-gun-russian-bots-flood-twitter-after-parkland-shooting/>; see also Arkin & Popkin, *supra* note 4.

6. Tom McCarthy, *Facebook, Google and Twitter Grilled by Congress over Russian Meddling – As It Happened*, THE GUARDIAN (Oct. 31, 2017, 5:40 PM), <https://www.theguardian.com/technology/live/2017/oct/31/facebook-google-twitter-congress-russian-election-meddling-live>; see also *Facing Tougher Questions on Russian Interference, Social Media Giants Vow to Do Better*, PBS NEWS HOUR (Nov. 1, 2017, 6:40 PM), <https://www.pbs.org/newshour/show/facing-tougher-questions-on-russian-interference-social-media-giants-vow-to-do-better>.

I. “Fake News”: A Primer

The Collins English Dictionary named “Fake News” the “Word of the Year for 2017” due to the 365 percent increase in use of the term from the previous year.⁷ The term has recently become fixed in the media and political lexicon in large part due to then-GOP presidential candidate Donald Trump’s use of the term to disparage national media outlets during his 2016 U.S. presidential campaign. While President Trump and his political supporters continue to use the term to denigrate media outlets, false or “fake news” has a long history in the United States. In 1782, Founding Father Benjamin Franklin concocted an entirely false news story to encourage Revolutionary support for allegations that Indians, at the behest of the British, had murdered and scalped the heads of men, women and children—the scalps from children were said to be “ripped out of their mothers’ bellies.”⁸ A few days after the American battleship U.S.S. Maine exploded and sank off a Cuban harbor in 1898, William Randolph Hearst’s *New York Journal* deemed the cause (which is still debated today) of the sinking to be a Spanish mine.⁹ Hearst had long supported the invasion of the Spanish-occupied island, and to stoke up American support for an invasion, included a headline and excerpt on the front page of the February 17, 1898 issue that left little doubt as to who was responsible.¹⁰ Two months later, the U.S. declared war against Spain.

While “fake news” is not a new phenomenon, the purveyors of such news today are no longer nationally established news outlets or coercive government figures. Unlike the days when Edward R. Murrow or Walter Cronkite delivered the news through one of a few broadcast channels, in the Digital Age, there are no longer centralized or concentrated media distribution centers à la twentieth-century broadcasting networks. Today, anyone with Internet access can create and disseminate disinformation. The manufacturing of “fake news” stems from both a financial and ideological motivation. As one journalism study points out, outrageous and fake stories go viral—“precisely because they are outrageous”—which provides content

7. Summer Meza, ‘Fake News’ Named Word of the Year, NEWSWEEK (Nov. 2, 2017, 12:33 PM), <http://www.newsweek.com/fake-news-word-year-collins-dictionary-699740>. Collins Dictionary cited the company’s own “monitoring [of] word output across all forms of media.”

8. GREGORY E. DOWD, GROUNDLESS: RUMORS, LEGENDS, AND HOAXES ON THE EARLY AMERICAN FRONTIER 9 (2015) (Franklin concocted a fake issue of *The Independent Chronicle*, a Bostonian newspaper, and fabricated a story about the New York frontier).

9. Richard Todd, *America’s Original Fake News*, HUFFINGTON POST (May 1, 2017, 9:28 AM), https://www.huffingtonpost.com/entry/americas-original-fake-news_us_590734ffe4b084f59b49fae6.

10. *Id.*

producers with “clicks” that are converted to advertising revenue.¹¹ During the 2016 U.S. presidential race, financially-motivated and tech-savvy residents of the Macedonian town of Veles launched at least 140 U.S. political websites with American-sounding domain names aimed at Pro-Trump supporters; the largest of these sites enjoyed hundreds of thousands of followers.¹² The most successful posts were false news stories that were shared thousands of times on Facebook, including fake stories that claimed Pope Francis endorsed Donald Trump and that Mike Pence said First Lady Michelle Obama is the “most vulgar first lady we’ve ever had.”¹³ The four most successful false news posts generated more than one million “shares,” “reactions,” and comments on Facebook.¹⁴ Moreover, “fake news” has been produced to promote particular ideas or political figures that producers favor.¹⁵ For instance, Russian agents employed sophisticated online tactics on social media, often posing as Americans, during the 2016 U.S. presidential campaign to alter voter behavior and seed political and social discord.¹⁶

Although anyone with an Internet connection can produce false stories, as Zeynep Tufekci points out, the capacity to spread ideas and reach an audience today is limited primarily “by one’s ability to garner and distribute attention.”¹⁷ The most effective platforms to attract and sustain attention are found in today’s digital public sphere: social media. According to the Pew Research Center, seven out of ten Americans use social media to connect with one another. Facebook—with 68 percent of U.S. adults using the platform—is by far the most widely used social media platform.¹⁸ It is no coincidence that a site such as Facebook has become a breeding ground for the spread of “fake news”: close to one-half (45 percent) of U.S. adults resort

11. Edson C. Tandoc, Jr., et al., *Defining “Fake News,”* 6.2 DIGITAL JOURNALISM 137, 138 (2017).

12. Craig Silverman & Lawrence Alexander, *How Teens in the Balkans are Duping Trump Supporters with Fake News*, BUZZFEED NEWS (Nov. 3, 2016, 7:02 PM), https://www.buzzfeed.com/craigsilverman/how-macedonia-became-a-global-hub-for-pro-trump-misinfo?utm_term=.qx4kKmBggW#.quJ6xelzzE.

13. *Id.*

14. *Id.*

15. Tandoc, Jr., *supra* note 11, at 138.

16. See Molly McKew, *Did Russia Affect the 2016 Election? It’s Now Undeniable*, WIRED (Feb. 16, 2018, 10:25 PM), <https://www.wired.com/story/did-russia-affect-the-2016-election-its-now-undeniable/> (based on the 37-page indictment issued by the U.S. Department of Justice against Russia’s Internet Research Agency on February 16, 2018).

17. Zeynep Tufekci, *It’s the (Democracy-Poisoning) Golden Age of Free Speech*, WIRED (Jan. 16, 2018, 6:00AM), <https://www.wired.com/story/free-speech-issue-tech-turmoil-new-censorship/>.

18. *Social Media Fact Sheet*, PEW RESEARCH CENTER (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/social-media/>.

to Facebook to read the news.¹⁹ Furthermore, posts on social media can turn into news items, depending on who is posting. Even tweets are considered “news” or newsworthy facts that deserve media attention. A recent study on the typology of “fake news” identified six ways that previous studies have operationalized “fake news,” including: satire, parody, fabrication, manipulation, propaganda, and advertising.²⁰ However, what is consistent across these definitions is how “fake news” appropriates the look and feel of traditional news websites.²¹ The authors of the study note that “fake news” “hides under a veneer of legitimacy as it takes on some form of credibility by trying to appear like real news.”²² While this article focuses on the application of First Amendment Doctrine to “fake news” on social media, this article devotes particular attention to Facebook (and to a lesser extent, Twitter) due to its dominant position (i.e. popularity) in social media and its omnipresence in our personal digital sphere.

II. Self-Regulating Social Media: Reliably Unreliable

As the U.S. Supreme Court recently noted, social media is one of the most important places to exchange views, where users “engage in a wide array of protected First Amendment activity on topics as ‘diverse as human thought.’”²³ Social media is one of the principal sources to get information about current events, to speak and listen in the modern public square, and otherwise explore “the vast realms of human thought and knowledge.”²⁴ Yet the ease with which “fake news” can spread rapidly on social media continues to wreak havoc on civil discourse and undermine the proper functioning of our democratic institutions, in large part due to social media’s ubiquity in our daily lives. Through mathematical formulas and data retrieved from social media use, modern algorithms can segment large populations into subgroups with defining characteristics such as political beliefs, music taste, or religious affiliation. Propagandists—whether from Moscow or Madison—can manually craft fake posts, messages, and videos to influence the public through social media platforms. When numerous “likes,” “shares,” or comments accompany such false posts, the posts are

19. Elisa Shearer & Jeffrey Gottfried, *News Use Across Social Media Platforms 2017*, PEW RESEARCH CENTER (Sept. 7, 2017), <http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/>.

20. See Tandoc, Jr., *supra* note 11.

21. *Id.* at 147.

22. *Id.*

23. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735–36 (2017) (citing *Reno v. ACLU*, 521 U.S. 844, 870 (1997)).

24. *Id.* at 1737.

more likely to receive attention from others and be further shared.²⁵ Thus, engineering “fake news” that targets important domestic and foreign issues reflects the pernicious weaponization of speech—the use of speech to subvert, and confuse the decision-makers of our Republic: the American electorate. Furthermore, human interactivity is no longer required to generate and disseminate “fake news”; automated computer programs that impersonate humans called “bots” often promote many of these fake stories or accounts. Computer scientists Emilio Ferrara and Alessandro Bessi examined twenty million election-related tweets posted from September 16, 2016 to October 21, 2016, and found that almost twenty percent of the tweets were generated by bots.²⁶

Disinformation poses a danger to democracy because people act and vote on information that they perceive as real and trusted. While the extent to which “fake news” stories adversely affected the 2016 U.S. presidential election results remains unknown, recent communication research reveals that persons with greater political-partisan identity (e.g., Republicans versus Democrats) believe that members of the opposing political party are more vulnerable to the effects of “fake news.”²⁷ As communication scholars Jang and Kim point out, this finding leads to concerns of false consensus among partisans: as partisan political members do not believe they are influenced by “fake news” stories, they may develop the false impression that information shared amongst them, regardless of their validity, is true.²⁸ Moreover, the flood of “fake news” also results in grave danger because people begin to question what truth is: truth becomes a casualty when credible news sources are questioned, criticized, and dismissed.

After the 2016 U.S. presidential election, technology companies like Facebook and Twitter were criticized for not doing enough to divert misleading and blatantly false information, and as such, they vowed to implement safeguards. In early 2018, Facebook Chief Executive Officer Mark Zuckerberg announced that the company would revamp its flagship News Feed feature by modifying its algorithms to prioritize content shared by a user’s friends and family over viral videos and news stories.²⁹ Facebook

25. See Emily Thorson, *Changing Patterns of News Consumption and Participation*, 11.4 INFORMATION, COMMUNICATION AND SOCIETY, 473 (2008).

26. Emilio Ferrara & Alessandro Bessi, *Social Bots Distort the 2016 U.S. Presidential Election Online Discussion*, 21 FIRST MONDAY 11 (Nov. 7, 2016), <http://firstmonday.org/article/view/7090/5653>.

27. S. Mo Jang & Joon K. Kim, *Third Person Effects of Fake News: Fake News Regulation and Media Literacy Interventions*, 80 COMPUTERS IN HUMAN BEHAVIOR 295–302 (2018).

28. *Id.* at 299.

29. Eli Meixler, *Facebook is Revamping its News Feed to Show You More From Friends and Family and Less From Brands*, TIME (Jan. 12, 2018), <http://time.com/5100245/facebook-newsfeed-update-posts-friends-family/>.

also adopted new measures to verify identities of the purchasers of political advertisements.³⁰ However, during California's 2018 primary elections, Facebook's new transparency measures failed to flag and label many targeted political ads, leaving voters with no information as to who paid for the political ads.³¹ While leading social media sites have made attempts to mitigate disinformation, the unfortunate reality is that they have not adequately addressed the online spread of disinformation through "fake news."

But this should come as no surprise: technology companies like Facebook are financially incentivized to promote and enable social engagement. Facebook alone has a meaningful relationship with over two *billion* people around the world. The business models for these platforms, at their core, are driven by social engagement, and advertising dollars fueled by viral content. More users, more posts, and more "likes," enable the "network effect"—one of the key drivers to social media's revenue model and expansive influence: the more users "like" a post, the further it goes. These platforms often promote social engagement, even with content from dubious sources because success is measured in "clicks," "likes," and "retweets." Thus, the reliance on a limited application of algorithms pursuant to self-regulation alone is not sufficient to address the continued flood of "fake news."

III. The First Amendment Case for Addressing 'Fake News'

A. Limiting Private Interests to Promote Democratic Deliberation

The Free Speech Clause of the First Amendment is most often perceived as a limitation on government coercion, protecting the rights of a speaker when the State attempts to silence the speaker because of the speech's content. Pursuant to this concept, the classic "marketplace of ideas" model argues that truth can be discovered through robust, uninhibited debate.³² As C. Edwin Baker noted, the value of free speech under this model is derived from unimpeded discussion, where "any loss from allowing speech is so small, that society should tolerate no restraint on the verbal

30. Jack Nicas, *Facebook to Require Verified Identities for Future Political Ads*, N.Y. TIMES (Apr. 6, 2018), <https://www.nytimes.com/2018/04/06/business/facebook-verification-ads.html>.

31. Sheera Frankel, *Facebook Tried to Rein In Fake Ads. It Fell Short in a California Race*, N.Y. TIMES (June 3, 2018), <https://www.nytimes.com/2018/06/03/technology/california-congressional-race-facebook-election-interference.html>.

32. See JOHN STUART MILL, *ON LIBERTY* (1956); see also ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* (1964); see also ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* (1965).

search for truth.”³³ While several free speech scholars like Baker defer to this model and system of free expression, the objectives of the Constitution require more than a limited application of the clause than just a prohibition on government interference. The objectives of the Constitution are tied to the creation of a republic, where citizens share sovereign authority and participate in the creation of public policy. “We the people” cemented the directive that Americans shall be self-governed; sovereignty was what the founding generation called liberty. The initial conception of liberty in constitutional thought was not narrowly focused on the negative freedom from government interference; liberty also had a positive dimension—the freedom to participate and the protection of individual rights under law.³⁴ U.S. Supreme Court Justice Stephen Breyer reminds us that “liberty” stands not only for freedom from government coercion or despotic government, but also participation in collective power and the sharing of sovereign authority among the nation’s people.³⁵

However, liberty is at risk when private interests restrict or “bottleneck” democratic deliberation. Liberty hinges on the public’s ability to receive information about public affairs so citizens can make informed decisions about important issues of the day. Thus, liberty is in danger when laws restrict speech directly related to the shaping of public opinion. But what if much of the speech shaping public opinion is false, deceptive, presents itself as “news,” and attracts a great amount of attention? And what if most of the mis- and dis-information is circulated in a dominant, if not indispensable, forum for communication? According to Melville Nimmer, “the enlightenment function,” which constitutes the foundation of the Free Speech Clause, is central to the theory of the First Amendment.³⁶ If power rests in the hands of the people, *accurate* information about public issues, proposed policies, and newsworthy information by, for, and about citizens,

33. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 965 (1978).

34. See Steven J. Heyman, *The First Duty of Government: Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991); see generally JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM (1990); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 5 (2005); see also 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 125–26 (St. George Tucker ed., 1803 & photo. reprint 1969) (Blackstone argues: “[T]he law, which restrains a man from doing mischief to his fellow-citizens, through it diminishes the natural, increases the civil liberty of mankind.”).

35. BREYER, *supra* note 34, at 5 (Justice Breyer contends that courts should take greater account of the Constitution’s democratic nature (participatory self-government and democratic deliberation) when interpreting and applying the Constitution.); see also Baker, *supra* note 33, at 992 (The author asserts that the fundamental purposes of the First Amendment center on “individual self-fulfillment and participation in change.”).

36. MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT (1984).

is therefore critical to a self-governing republic. It follows that “fake news” inhibits “enlightenment” of the citizenry, and undermines our self-governing democracy. If the Constitution’s general democratic objective goes beyond just protecting the individual from government coercion, and enables greater public participation and collective decision-making,³⁷ then the First Amendment should not be read in isolation. Instead, it should be a vehicle “seeking to maintain a system of free expression designed to further a basic constitutional purpose: creating and maintaining democratic decision-making institutions.”³⁸

Yet the threat to liberty is not only borne of acts by the government, but also by foreign and domestic threats, and the threat to liberty sometimes means overriding private interests.³⁹ History shows that the government has committed affirmative (and sometimes unpopular) acts that superseded private interests in order to preserve democratic deliberation and our self-governing republic. Founding Father James Madison believed it was imperative for the Republic to facilitate both democratic deliberation and to protect the public not just against the government, but protect the public against its fellow citizens.⁴⁰ In the *Federalist Papers*, Madison wrote that the “protection” of the “faculties of men,” and of “rights of property” to which these faculties give rise, “is the first object of government.”⁴¹ As Lloyd and Park note, the establishment of the Postal Service and Postal Act of 1792 was “a clear realization” of the “duty to inform and protect liberty.”⁴² The Act provided substantial subsidies for the dissemination of newspapers, and Congress imposed higher postal rates for business and personal use to help subsidize lower rates for newspapers—all for the sake of ensuring that the Republic would be informed about important public issues.⁴³ In *Associated Press v. United States*, the U.S. Supreme Court reaffirmed this foundational

37. BREYER, *supra* note 34, at 39.

38. *Id.* at 47.

39. See Mark Lloyd & Michael K. Park, *The Constitutional Case for Addressing Critical Information Needs*, in *THE COMMUNICATION CRISIS IN AMERICA, AND HOW TO FIX IT* 235–47 (M. Lloyd & L.A. Friedland eds., 2016) (the authors note that the government has a duty to maintain a democratic form of government, and a duty to establish policy to protect the critical information needs of the public. Citing the Postal Service Act of 1792, and *Associated Press v. United States*, 326 U.S. 1 (1945), the authors reiterate how the core values of the First Amendment provided the government with the means to regulate private interests when those interests infringed on core First Amendment principles).

40. See Heyman, *supra* note 34.

41. *Id.* at 524.

42. Lloyd & Park, *supra* note 39, at 238.

43. *Id.*; see also Richard R. John, *From Franklin to Facebook: The Civic Mandate for Communications*, in *TO PROMOTE THE GENERAL WELFARE: THE CASE FOR BIG GOVERNMENT* 156, 156–72 (Steven Conn ed., 2012).

approach to free speech.⁴⁴ Justice Hugo Black, writing for the Majority, asserted that the same core values of the First Amendment, which limited government interference with the dissemination of information, also provided the government with the means to regulate private interests when those interests interfered with “the widest possible dissemination of information from diverse and antagonistic sources.”⁴⁵ Justice Black’s opinion affirmed that the government has a duty to limit a private corporation’s speech activity if such activity interferes with the public’s right to access a broad array of information that is critical to a democracy built on self-governance.

Moreover, pursuant to the civic mandate to inform the citizenry on public affairs, the Federal Communications Commission (“F.C.C.”) shaped broadcast content throughout the twentieth century to ensure citizens’ access to diverse content to enable them to make informed decisions regarding public affairs. For instance, the F.C.C. enforced the “Fairness Doctrine” for several decades, which required radio and television stations to broadcast opposing views on controversial issues.⁴⁶ Although abolished in 1987, the doctrine was inspired by the Founders’ presumption that the Federal government had a duty to provide the public with access to information on public affairs.⁴⁷ These efforts reflect a history of government action pursuant to this civic mandate to maintain a self-governing democracy, which put the public’s interest ahead of private interests. Furthermore, courts and Congress have recognized that just as false or deceptive advertising can be prohibited, restraints on trade or conglomeration is sometimes lawful, because it promotes, rather restricts, competition. Likewise, reasonable restrictions on speech will sometimes prove sensible and constitutional to promote and improve democratic deliberation.

B. Addressing ‘Fake News’ Beyond Self-Regulation: A Few Prospects

While social media companies like Facebook and Twitter dominate the public discourse, they are generally immune from being held accountable for the content they propagate. With the ongoing circulation of mis- and dis-information diffused through social media sites, we have reached a social-networked inflection point, and it is crucial for our democracy to maintain

44. *Associated Press*, 326 U.S. 1 (1945).

45. *Id.* at 20 (the Supreme Court denied the Associated Press, a private corporation, to use its monopoly to restrict access to information or to create barriers of entry for other news organizations. The Court held that the Associated Press was using its monopoly power to inhibit competition in the gathering and reporting of news).

46. *See* John, *supra* note 43.

47. *Id.* at 171.

open discussion on public affairs—based on accurate information—which the First Amendment seeks to sustain, both as an end and as a means to achieve a self-governing republic. One way to address the “fake news” epidemic requires a judicial reexamination of section 230 of the Communications Decency Act of 1996 (“CDA § 230”), which shelters Internet intermediaries like Facebook, from liability for the content that their users post.⁴⁸ While the U.S. Supreme Court has refused to address the scope of CDA § 230, lower courts have interpreted its immunity provision broadly: “There has been near-universal agreement that section 230 should not be construed grudgingly.”⁴⁹ Instead, courts should limit the broad construction of “service provider” immunity when sites no longer behave as passive, neutral conduits, but instead operate like traditional media companies.

Social media sites such as Facebook and Twitter would undoubtedly claim that CDA § 230 and the First Amendment shield them from any attempts to regulate content; they will likely defer to the classic “marketplace of ideas” model, where the dogma of “the more information in the marketplace, the better” governs the system of free expression. However, it is difficult to reconcile how today’s social media sites do not operate like information content providers, and therefore should be treated as such under the law. Even Facebook’s Mark Zuckerberg has publicly stated that Facebook is not just an online platform but is a “media company.”⁵⁰ And like many media companies, Facebook and Twitter have expanded their footprint by creating original video content and even the streaming of sports games on their sites. In March 2018, Twitter signed a three-year deal with Major League Soccer to livestream games on Twitter.⁵¹ Around the same time, Facebook reached a \$30-35 million dollar deal with Major League Baseball for exclusive rights to stream twenty-five games in 2018, marking the first time a major U.S. sports league has agreed to exclusively stream games on Facebook.⁵² Furthermore, Facebook has publicly announced plans to spend up to one billion dollars through 2018 to generate original

48. 47 U.S.C. § 230(c) (1996).

49. *Jane Doe No.1 v. Backpage.com*, 817 F.3d 12, 18 (1st Cir. 2016) (citing cases from the First, Fifth, Ninth, and Eleventh Circuits), *cert. denied*.

50. Mathew Ingram, *Mark Zuckerberg Finally Admits Facebook is a Media Company*, FORTUNE (Dec. 23, 2016), <http://fortune.com/2016/12/23/zuckerberg-media-company/>.

51. Sarah Perez, *Twitter Snags the Major League Soccer Live Streaming Deal From Facebook*, TECHCRUNCH (Mar. 12, 2018), <https://techcrunch.com/2018/03/12/twitter-snags-the-major-league-soccer-live-streaming-deal-from-facebook/>.

52. Scott Soshnick, *Facebook Signs Exclusive Deal to Stream 25 MLB Games*, BLOOMBERG (Mar. 9, 2018, 8:22 AM), <https://www.bloomberg.com/news/articles/2018-03-09/facebook-says-play-ball-in-exclusive-deal-to-stream-25-mlb-games>.

television-like content on its platform called Facebook Watch.⁵³ To maximize user engagement and sharing, sites like Facebook and Twitter actively manage, shape, and disseminate content in several ways, including live-streaming (and soon-to-be, at least for Facebook, scripted television-like) content and employing algorithms and human curators to organize the content users see.

For instance, Facebook managed news content through its “Trending” section whereby Facebook actively prioritized certain “news” content to its users. One report revealed that Facebook “news curators” were also instructed to inject certain stories into the trending module, even if such stories warranted very little attention.⁵⁴ Other times, Facebook workers deliberately suppressed politically conservative stories from the trending news section.⁵⁵ These actions point to a deliberate effort to manipulate the type of news content and viewpoints that users receive and share. Furthermore, it arguably goes beyond the purview of a neutral news conduit, and “a publisher’s traditional editorial functions,”⁵⁶ including whether to publish, withdraw, postpone or make minor alterations to user content. If more courts would limit Section 230’s broad construction and construe their actions in alignment with an information content provider, then social media platforms like Facebook would no longer be immune from legal liability under CDA § 230 and would be subject to the same common law principles as are traditional media companies.

Although digital governance is not bound by practices abroad, it bears mentioning that many European Union member states already treat social media sites like traditional media companies and hold them to the same high standards. When given appropriate notice, companies like Facebook are required to correct false information. Germany, for example, requires social media sites to correct false information and to remove illegal content or face hefty fines (i.e., €50 million).⁵⁷ The French press outlet Le Monde requires online plug-ins to their sites to provide “pop-up” warnings when users view dubious stories. By categorizing social media sites as media companies, governments can hold sites like Facebook accountable for the false information that their algorithms or human curators promote to the public.

53. KC Ifeanyi, *Will Facebook Watch Be Must-See TV in 2018?*, FAST COMPANY (Jan. 3, 2018), <https://www.fastcompany.com/40510962/will-facebook-watch-be-must-see-tv-in-2018>.

54. Michael Nunez, *Former Facebook Workers: We Routinely Suppressed Conservative Views*, GIZMODO (May 9, 2016, 9:10 AM), <https://gizmodo.com/former-facebook-workers-we-routinely-suppressed-conser-1775461006>.

55. *Id.*

56. *Zeran v. Am. Online*, 129 F.3d 327, 330 (4th Cir. 1997).

57. Sam Shead, *Germany Has Approved €50 Million Fake News Fines That Could Target Facebook and Google*, BUSINESS INSIDER UK (June 30, 2017 5:21 AM), <http://uk.businessinsider.com/germany-has-approved-50-million-fake-news-fines-for-facebook-and-google-2017-6>.

However, sites like Facebook may still claim First Amendment protection, even if their active shaping of content is no longer deserving of Section 230 protection. But as this article puts forth, public interests pursuant to the principles of liberty and the First Amendment should outweigh the private interests in “free speech” when sites like Facebook rely on First Amendment protection.

Another potential remedy to address “fake news” includes a statutory measure that strikes a reasonable balance between speech restricting and speech-enhancing benefits within a narrowly-applied political context. As outlined above, this new law could be supported by the strong government interest, bulwarked by the First Amendment, in preserving the integrity of public discourse and informed and collective decision-making vital to self-governance. Congress should consider a new law or an amendment to CDA § 230 focused on fake political news content in the form of a “takedown notification” or “labeling notification” procedure akin to the “safe harbors” found in the Digital Millennium Copyright Act (DMCA).⁵⁸ In order to maintain immunity for third-party content, the law would require social media companies to take corrective action when notified by users (e.g., political candidates or members of a political organization) adversely affected by a false news story.⁵⁹ The notification would require the identification of the alleged false facts (as opposed to political opinion), and a stipulation by the affected user that the notification is being made in good faith, subject to penalties by the social media site. After the social media site receives the requisite notification, the site could either remove the news story until the factual content can be verified or, alternatively, “flag” the story with a disclaimer that the news content is “under review” or that the “factual content has not been verified.” The site would then be required to authenticate the factual content of the news story, which could be accomplished by utilizing a combination of designated “fact checkers,” with the assistance of independent news organizations, algorithms, and artificial intelligence (AI).

The authentication process should also include verification of the poster’s identity and news agency before a determination can be made as to whether the challenged content should be corrected, removed or flagged as “unverified.” Rather than have the alleged “fake news” content deleted, labeling the content with a warning and notice that the facts and author’s

58. 17 U.S.C. § 512 (1998). The DMCA “safe harbor” provisions protect Internet service providers (“ISPs”) from legal liability based on the alleged copyright infringing activities of third parties—granted the ISPs comply with the section’s requirements.

59. The taxonomy of “news” is beyond the scholarly inquiry here, but a modest proposal to define or categorize “news story” subject to the proposed new law could be limited to “reports of recent events” or posts presented (or resembling) as such by a news organization or an individual employed by a news agency dedicated to informing the public.

identity are “unverified” is more likely to be considered a constitutionally viable measure. History shows that courts have been more receptive to “less restrictive” alternatives than direct content regulation. For instance, in *Ashcroft v. American Civil Liberties Union*, the Supreme Court held that Internet filtering software installed by users was less restrictive to content regulation than provisions in the Child Online Protection Act, which criminalized speech on the Internet.⁶⁰ Informed by the F.C.C.’s political broadcasting rules regarding the “lowest unit charge,”⁶¹ and to further narrow the law’s application, this new law should only apply within forty-five days of a primary, general, or special election.

Pursuant to the principles of liberty and the First Amendment, there is a compelling need for such a statutory remedy, especially when private social media companies have become today’s dominant focal point for public discourse. If dis- and mis-information via online “fake news” has hijacked democratic deliberation, then the core values of the First Amendment provide the government with the means to regulate media platforms and companies that interfere with the public’s ability to be adequately informed—an indispensable prerequisite to a self-governing republic.⁶² In *Red Lion Broadcasting Co. v. Federal Communications Commission*, the Supreme Court affirmed the proposition that the First Amendment’s purpose is to preserve a political forum in which “truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.”⁶³ While the Supreme Court in *Red Lion* specifically addressed the scarcity of the broadcast spectrum rationale in upholding the Fairness Doctrine, in today’s digital world, the scarcity is with user attention. Thus, the digital dynamics outlined here present a compelling justification to regulate “fake news”—information that provides little to no valuable contribution to public discourse—and concern content that can be easily verifiable.

Conclusion

Supreme Court Justice Louis Brandeis famously advised that to avert the evil of falsehoods and fallacies, “the remedy to be applied is more speech, not enforced silence.”⁶⁴ But when the modern public sphere is filled with false information posing as news, the distinction between falsehood and truth becomes muddled. Mass misinformation leads to the insecurity of

60. See *Ashcroft v. Am. Civ. Liberties Union*, 535 U.S. 564 (2002).

61. See 47 C.F.R. § 73.1942 (1992).

62. See *Associated Press v. United States*, 326 U.S. 1 (1945); *Red Lion Broad. v. FCC*, 395 U.S. 367 (1969).

63. *Red Lion*, 395 U.S. at 390.

64. *Whitney v. Cal.*, 274 U.S. 357, 377 (1927).

information. We must acknowledge, once again, that the First Amendment seeks to protect more than an individual's freedom of expression; it also seeks to encourage the exchange of factually accurate information to inform citizens and enable them to participate in the democratic process. The Supreme Court has recognized that speech concerning public affairs "is more than self-expression; it is the essence of self-government."⁶⁵ Without accurate and reliable information, the electorate of a sovereign nation is unable to make well-informed decisions about which policies to support, and for which representatives they should vote. The protection of democratic deliberation by preventing or limiting the widespread dissemination of misinformation undoubtedly merits considerable government scrutiny and remedial action. Pursuant to the core principles of the First Amendment, the government has a duty to restrain false or "fake news" to promote constructive public discourse and the enlightenment of the citizenry. Democratic self-governance collapses when the citizenry is unable to discern who or what to believe, leaving them less likely to understand the consequences of their actions. As Cass Sunstein reminds us, if people are unaware of the consequences of their choices, "they are, to that extent, less free."⁶⁶

65. *Garrison v. La.*, 379 U.S. 64, 75-75 (1964).

66. Cass R. Sunstein, *Informing America: Risk Disclosure, and the First Amendment*, 20 FLA. ST. U. L. REV. 653, 655 (1993).
