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Fitting a Square Peg into a Round Hole

Why Traditional Free Press Doctrines Fail in Dealing with Newer Media

Erwin Chemerinsky

The common law method is to try to apply existing precedents to new situations. It is therefore to be expected that lawyers and judges would apply well-established legal principles to the relatively new internet and social media. Although some basic principles apply to these media, as they do to all others, there are ways in which this approach fails because the internet and social media are different in kind from other methods of communication. Scholars and legal experts have given insufficient attention to the areas in which traditional First Amendment principles are inadequate for dealing with the internet and social media.

In this chapter, I begin by describing how the internet and social media are inherently different from other media. I then discuss traditional First Amendment doctrines that should apply to these newer media. With this as context, I then focus on three areas where current doctrine is inadequate for dealing with the internet and social media: These are false speech, how the internet and social media undermine the traditional press, and the issue of foreign influence in elections. My goal is not to offer solutions but to identify these areas where applying existing approaches is likely to fail because of the unique nature of the internet and social media as places for communication.

6.1 HOW THE INTERNET AND SOCIAL MEDIA ARE DIFFERENT FROM OTHER FORMS OF COMMUNICATION

How do the internet and social media differ from other forms of communication? First, the internet has democratized the ability to reach a mass audience. It used to be that to reach a large audience, a person had to be rich enough to own a newspaper or obtain a broadcast license. Now, though, anyone with a smartphone – or even just access to a library with a modem – can reach a huge audience instantaneously. No longer are people dependent on a relatively small number of news sources.

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Scarcity of media outlets was a core characteristic of media until now. There are only so many broadcast channels,[1] and there are only so many newspapers that the economy will support, with each having only so many physical pages. But the internet and social media provide the opportunity for infinite speech. Scarcity is no longer an issue.

Further, the internet and social media empower individuals who would otherwise be voiceless to express their opinions and provide them a place to do so.[2] The internet provides a platform for those who cannot physically gather and organize.[3] Previously silenced or marginalized individuals now have an accessible method for disseminating their political ideas.[4]

But these characteristics of the internet and social media also mean that false information can be quickly spread by an almost infinite number of sources. Information that is true but confidential can be quickly disseminated.[5] There is even a name for such action: "doxing," which refers to publishing private information about a person on the internet, often with the malicious intent to harm the individual.[6] The internet and social media can be used to harass.[7] A study by the Pew Research Center "found [that] 40 percent of adult Internet users have experienced harassment online, with young women enduring particularly severe forms of it."[8]

Traditionally, newspapers have acted as an important filter by excluding false and other types of harmful information. They have an editorial process and, if not journalistic ethics, at least a fear of liability. Certainly, at times, the filters have failed and newspapers have done harm. But at least there *are* filters, while none exist for the internet and social media. Anyone can post anything for the world to see.

Second, the internet has dramatically increased the dissemination and permanence of information, or to phrase this differently, it has enormously increased the ability to access information. Lawyers and law students can do all of their research online, reading statutes, cases, and treatises – previously, this would have required a trip to the law library. We can visit the great museums of the world online anywhere,

[1] *See* Red Lion Broadcasting v. F.C.C., 395 U.S. 367 (1969) (upholding the Fairness Doctrine on the grounds of the scarcity of the broadcast spectrum).

[2] David M. Howard, *Can Democracy Withstand the Cyber Age: 1984 in the Twenty-first Century*, 69 Hastings L.J. 1355, 1373 (2018).

[3] *Id*. at 1373; David M. Thompson, *Is the Internet a Viable Threat to Representative Democracy?*, 6 Duke L. & Tech. Rev. 1, 13 (2007–08).

[4] Howard, *supra* note 2, at 1373.

[5] *See* Lori Andrews, I Know Who You Are and I Saw What You Did: Social Networks and the Death of Privacy 121–35 (2011).

[6] Danielle Keats Citron, Hate Crimes in Cyberspace 53 (2014).

[7] *Id*. at 35–55.

[8] Marlisse Silver Sweeney, *What the Law Can (and Can't) Do About Online Harassment*, Atlantic (Nov. 12, 2014), https://www.theatlantic.com/technology/archive/2014/11/what-the-law-can-and-cant-do-about-online-harassment/382638/.

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anytime. We have access to virtually unlimited information from nearly infinite sources.

But there is a downside to this easy access and permanence. Take defamation as an example. Imagine, before the internet, that a local newspaper published false information about a person that harmed their reputation. The falsity would be known by readers of the paper and could be circulated by other media and by word of mouth. Eventually, however, the impact of the defamatory article would fade, and the false information would live on only in remote places like a library's microfiche archives. Now, though, the defamatory story can be quickly spread across the internet, accessed from anywhere, and is likely to remain there forever. It is enormously difficult, if not impossible, to erase something from the internet.

Finally, the internet does not respect national boundaries. Again, there are great benefits to this – for instance, totalitarian governments cannot easily cut off information to their citizens. When the revolution began in Egypt, the government tried to halt internet access, but people with satellite phones maintained access and disseminated what they learned.[9] Yet, there are also drawbacks. The Supreme Court has estimated that 40 percent of pornography on the internet comes from foreign countries, making any attempt to control it within a country impossible.[10] As occurred in the 2016 presidential election and evidenced by Special Counsel Robert Mueller's report, the lack of borders on the internet also gives foreign countries and foreign actors a vehicle for trying to influence the outcome of United States elections.[11]

6.2 BASIC FIRST AMENDMENT PRINCIPLES SHOULD APPLY TO THESE MEDIA

I do not want to overstate the First Amendment problems in dealing with newer media. The same basic First Amendment principles should apply to these media as to all other aspects of the press. Central to free speech analysis is whether a government regulation is content-based or content-neutral, with content-based regulations having to meet strict scrutiny and content-neutral laws needing to satisfy intermediate scrutiny. As the Court observed in *Police Department of Chicago v. Mosley*, "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content."[12] Hence, the Court endorsed a two-tier system of review. The Court

[9] *When Egypt Turned Off the Internet*, Al Jazeera (Jan. 28, 2011), https://www.aljazeera.com/news/middleeast/2011/01/201112879616438o.html.

[10] Ashcroft v. ACLU, 542 U.S. 656, 667 (2004).

[11] Robert S. Mueller, III, *Report on the Investigation Into Russian Interference in the 2016 Presidential Election*, U.S. Department of Justice (March 2019), https://www.justice.gov/d9/report.pdf.

[12] 408 U.S. 92, 95–96 (1972).

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applies "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."[13] But, "[i]n contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny."[14]

This should apply to government regulation of the internet and social media as it does to all other government regulation of speech. Likewise, the same categories of unprotected speech – incitement, true threats, defamation, false and deceptive advertisements – are applicable to expression made over the internet and social media.

A core aspect of freedom of the press is that the government cannot control the content of what is published. This should apply with equal force to the internet and social media. In *Miami Herald v. Tornillo*, the Court unanimously declared a right-of-reply law unconstitutional as applied to newspapers.[15] A Florida law required that a newspaper print a reply from any candidate for office whose character or official record had been attacked in its pages. The newspaper had to print the reply free of charge and in as conspicuous a place as the initial story was presented. The Court, in an opinion by Chief Justice Burger, stated the following:

> [T]he Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty . . . is exacted in terms of the cost in printing and . . . in taking up space that could be devoted to other material the newspaper may have preferred to print . . . Faced with [such a penalty], editors might well conclude that the safe course is to avoid controversy.[16]

The Court stressed that forcing newspapers to publish a reply intrudes on editorial discretion that is protected by the First Amendment. Likewise, regulating what social media companies do or don't "publish" should be deemed to violate the First Amendment.[17]

6.3 THE INTERNET AND SOCIAL MEDIA RAISE UNIQUE ISSUES

Although the fundamental principles of the First Amendment apply to the internet and social media, it cannot be ignored that these newer media pose unique issues for which existing doctrine does not provide an adequate answer. First, there is the problem of false speech. False information can cause great harm, and social media facilitates the rapid dissemination of such information.[18] The unprecedented speed

[13] Turner Broadcasting v. FCC, 512 U.S. 622, 641 (1994).
[14] *Id.*
[15] 418 U.S. 241 (1974).
[16] *Id.* at 257.
[17] Alex Chemerinsky & Erwin Chemerinsky, *Misguided Federalism: State Regulation of the Internet and Social Media*, 102 N.C. L. Rev. 1 (2023).
[18] *See generally* American Psychological Association, *Misinformation and Disinformation*, https://www.apa.org/topics/journalism-facts/misinformation-disinformation (misinformation is "false

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and scale of digital communication have simplified the dissemination of false information like never before, frequently outpacing efforts to debunk it.[19] Social media algorithms can prioritize content more likely to generate user engagement regardless of its veracity.[20] Facebook and other social media are sending their users specific content based on the platform's assessment of their interests but with little regard to whether the information is true. In the political realm, this can change the outcome of elections, especially if the falsehoods are spread soon before election day when there is little time to refute them. The spread of disinformation and misinformation can prevent voters from accessing essential information required to make well-informed decisions regarding candidates for office and laws.[21] False accusations can be quickly and widely circulated, making all the difference between who wins and who loses. False speech has enormous implications for politics, public health, elections, and other domains where the availability of accurate information is vital. Additionally, and quite importantly, false information can undermine trust in reliable sources and credible news.[22]

Researchers at the Massachusetts Institute of Technology "found that false news spreads faster and to more people than true stories, reaching more people than any other type of information."[23] The First Amendment is predicated on the romantic notion – articulated by John Stuart Mill and Oliver Wendell Holmes – that there is a marketplace of ideas and that allowing all speech will lead to truth triumphing over falsehoods. But many studies have demonstrated that people are unlikely to change false beliefs when confronted with true information.[24] False information has a permanent effect. When 70 percent of Republican voters believe that Trump was cheated out of the presidency in 2020, how can there be faith in the notion that truth will triumph over falsity in the world of the internet and social media?

This problem will grow as technology becomes more sophisticated. It is all too easy to imagine how, in the days before an election, unscrupulous actors could circulate a deepfake of an opposing candidate saying something repulsive. What we see and hear for ourselves seems true, even if it is created by bots or artificial

or inaccurate information – getting the facts wrong," whereas disinformation is "false information which is deliberately intended to mislead – intentionally misstating the facts") (last visited June 27, 2024); *see* Bharat Dhiman, *Key Issues and New Challenges in New Media Technology in 2023: A Critical Review*, 5 J. OF MEDIA & MGMT. 1, 3 (2023).

[19] Dhiman, *supra* note 18, at 3; Andrea Butler, *Protecting the Democratic Role of the Press: A Legal Solution to Fake News*, 96 WASH. U. L. REV. 419 (2018).

[20] Dhiman, *supra* note 18, at 2.

[21] *Id.*

[22] *Id.*

[23] William M. Brooks, *Democracy on the Edge: Use the First Amendment to Stop False Speech by Government Officials*, 53 MEMPHIS L. REV. 255, 270 (2023), citing Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCIENCE 1146–51 (Mar. 2018), https://science.sciencemag.org/content/.359/6380/1146.

[24] Brooks, *supra* note 23.

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intelligence. A deepfake depicting a politician taking a bribe would create lingering doubts for many, and be believed by some, even after it is revealed to be fictitious.

In fact, one place where the law has changed is in the area of injunctions in defamation cases. Traditionally, the only remedy in defamation cases was money damages, in accord with the maxim that equity would not enjoin defamation.[25] But because of the internet and social media, the law in this area has changed, and injunctions in defamation cases have now become commonplace.[26]

A solution to false speech over the internet and social media is likely elusive under existing First Amendment doctrine. The Supreme Court has rightly and emphatically declared the importance of protecting false speech. The most important case in this regard – and one of the most important free speech decisions of all time – is *New York Times Co. v. Sullivan*.[27] The Court reversed a defamation judgment against the newspaper and stated that the fact that some of the statements were false was not sufficient to deny the speech First Amendment protection.[28] The Court explained that a false "statement is inevitable in free debate and [it] must be protected if the freedoms of expression are to have the 'breathing space' that they 'need … to survive.'"[29] This surely is correct. If any false statement about a government official, no matter how minor, would be a basis for liability, speech about our government would be chilled and lost.

Subsequently, in a very different context, the Court again recognized the importance of judicial protection of false speech in *United States v. Alvarez*.[30] A federal law made it a crime for a person to falsely claim to have received military honors or decorations.[31] Writing for a plurality of the Court, Justice Kennedy expressly rejected the government's argument that false speech is inherently outside the scope of the First Amendment.[32] He declared that there is not "any general exception to the First Amendment for false statements" and stressed that "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee."[33] Justice Kennedy further explained that "the Court has been careful to instruct that falsity alone may not suffice to bring … speech outside the First Amendment."[34]

[25] David Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 Wm. & Mary L. Rev. 1, 4 (2013) ("It has long been a fixture of Anglo-American law that libel plaintiffs are not entitled to injunctive relief; their remedies are solely monetary. Indeed, it has been repeated as a truism: 'equity will not enjoin a libel.'")

[26] Jim Stewart & Len Niehoff, *Zombies Among Us: Injunctions in Defamation Cases Come Back from the Dead*, 30 Fall Comm. Law 28 (2014).

[27] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[28] *Id.* at 271.

[29] *Id.* at 271–72.

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

[31] *Id.* at 715–16.

[32] *Id.* at 725–26.

[33] *Id.* at 718.

[34] *Id.* at 719.

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Given its harms, why is there First Amendment protection for false speech? In large part, it is because of the danger of giving anyone, including (or maybe especially) the government, the power to decide what is true and what is false. Allowing the government to prohibit false speech grants it the role of arbiter of truth. As Justice Kennedy explained: "Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth."[35] Would Democrats want the Trump administration, or would Republicans want the Biden administration, to have the power to create an agency that could scour the internet and social media and remove what it deems false? It is so much easier to put faith in the marketplace of ideas to refute falsehoods, even when we know that it is likely to fail in many instances.

But it is wrong to think that the First Amendment never allows restrictions of false speech. There are contexts in which the Supreme Court has refused to protect false speech and has allowed it to be prohibited and punished. For example, it is clearly established that the First Amendment does not protect false and deceptive advertisements.[36] The government, of course, can constitutionally prohibit making false statements under oath (perjury) or to law enforcement officials. But these are limited areas where false speech can be punished. The Court generally has treated commercial speech as being of lower value than political speech, which may make it easier to say that false advertising is entitled to no constitutional protection. As for perjury, there must be proof of a knowing and intentional falsehood.

The Court's inconsistent statements about false speech can be understood as reflecting the competing interests inherent in First Amendment analysis. On the one hand, false speech can create harm, great harm even. Speech is protected particularly because of its importance for the democratic process, but false speech can distort that process. Speech is safeguarded, too, because of the belief that the marketplace of ideas is the best way for truth to emerge. But false speech can infect that marketplace, and there is no reason to believe that truth will triumph. The Supreme Court has recognized this and declared that "[f]alse statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas."[37]

A great deal of the problem is simply the amount of speech transmitted over social media and how difficult that makes content moderation. The quantity of information posted daily is staggering, and social media companies already conduct an enormous amount of content moderation. For example, Facebook reported that between October and December 2021, it took action against terrorism content 7.7 million times, bullying and harassment 8.2 million times, and child sexual

[35] Alvarez, 567 U.S. at 723.

[36] *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

[37] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988).

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exploitation material 19.8 million times.[38] In the last quarter of 2020, Facebook took action on over 1.1 million pieces of content *per day*.[39] Designing a system to exclude false speech – even if it could be decided what is false and even if mandating this would not violate the First Amendment – seems an insurmountable task.

But one should have no illusions. There will be elections decided because of false speech circulated over social media, especially in the days before voting. The threat to democracy is real and will grow. We need new First Amendment doctrines to deal with false speech over the internet and social media.

In addition, we must acknowledge how the internet and social media endanger traditional media and thus undermine the crucial newsgathering functions of the press. Much of the country is now facing a crisis of news deserts, which refers to places where local newspapers no longer exist.[40]

A recent study by the Medill School of Journalism found that since 2005, the country has lost more than one-fourth of its newspapers and is on track to lose one-third by 2025. Between late 2019 and May 2022, more than 360 newspapers closed. The report concluded:

> [M]ost of the communities that have lost newspapers do not get a print or digital replacement, leaving 70 million residents – or a fifth of the country's population – either living in an area with no local news organizations, or one at risk, with only one local news outlet and very limited access to critical news and information that can inform their everyday decisions and sustain grassroots democracy.[41]

Most newspapers that have survived have had to cut their staffs. From 2008 to 2017, total newspaper newsroom staffing almost halved, dropping from 71,000 employees to 39,000.[42]

[38] Guy Rosen, *Community Standards Enforcement Report Q4 2021*, META (Mar. 1, 2022), https://about.fb.com/news/2022/03/community-standards-enforcement-report-q4–2021/. Much of this moderation is either performed by algorithms or aided by algorithms. In the second and third quarters of 2022, alone, Facebook acted against 24.1 million posts containing hate speech: Guy Rosen, *Integrity and Transparency Reports, Third Quarter 2022*, META (Nov. 22, 2022), https://about.fb.com/news/2022/11/integrity-and-transparency-reports-q3–2022/ (It attributed its moderation actions in part to improved "proactive detection technology."). For discussion of algorithmic moderation, *see, e.g.*, Hannah Bloch-Wehba, *Automation in Moderation*, 53 CORNELL INT'L L. J. 41 (2020); Evelyn Douek, *Governing Online Speech: From "Posts-as-Trumps" to Proportionality and Probability*, 121 COLUM. L. REV. 759, 791 (2021); Tim Wu, *Will Artificial Intelligence Eat the Law? The Rise of Hybrid Social-Ordering Systems*, 119 COLUM. L. REV. 2001 (2019); Aziz Z. Huq, *A Right to a Human Decision*, 106 VA. L. REV. 611 (2020).

[39] Douek, *supra* note 38, at 791.

[40] *See* MARTHA MINOW, SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH (2021).

[41] *More Than Half of U.S. Counties Have No Access or Very Limited Access to Local News*, NORTHWESTERN UNIVERSITY, MEDILL SCHOOL OF JOURNALISM (Nov. 16, 2023), https://www.medill.northwestern.edu/news/2023/more-than-half-of-us-counties-have-no-access-or-very-limited-access-to-local-news.html

[42] *Id.*

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Many studies have shown that when a community does not have a strong print or digital news organization, corruption increases and voter participation decreases. One study of eleven California cities found that when there are fewer reporters covering an area, fewer people run for mayor and fewer people vote.[43]

The internet and social media have contributed to this because they allow people to get their news for free, and thus, they do not need to purchase newspapers. Few newspapers have successfully found a way to monetize their online presence. Google, Facebook, Instagram, and others link to news stories and reap the advertising revenue, with none of the money going to the news organizations that did the actual reporting. The tech platforms are swallowing the profits that otherwise would go to the newspapers that are covering events, conducting investigations, and writing stories.

When news organizations vanish, there is no one to go to the city council meetings or do the investigative reporting to uncover corruption or report on local elections. Google and Facebook and Instagram do not have newsrooms to do this work, and they are not going to create them.

There is a bill pending in the California legislature – the California Journalism Preservation Act – that would help solve this problem. Assembly Bill 886 would require platforms to pay a fee for the news on their platforms, which would allow journalism providers to recoup their fair share of revenue for the news stories they produce. The law would require that these internet and social media platforms pay a "journalism usage fee" to news outlets for news content appearing on their sites. The law would create an arbitration process with newsrooms and establish a fee that the companies would pay to carry news articles.

The experience of other countries suggests that this type of legislation works. In 2021, Australia passed a law requiring social media companies to share a portion of the profits they make from news content with news companies. The law generated almost $150 million in revenue in its first year.[44] Canada adopted a similar law last year.

Yet, it is unclear whether such targeted financial assessments would survive First Amendment scrutiny. In *Arkansas Writers' Project, Inc. v. Ragland*, the Court ruled that the government cannot discriminate among types of publications.[45] A state exempted from its sales tax special interest publications, such as religious, professional, trade, and sports journals, but did not exempt general interest magazines. The Court emphasized that any differential taxation of the press – either of the press

[43] Michael Hiltzik, *How the Decline of Local News Exposes the Public to Lies and Corruption*, L.A. Times (August 29, 2022), https://www.latimes.com/business/story/2022-08-29/decline-of-local-news.

[44] Bill Grueskin, *Australia Pressured Google and Facebook to Pay for Journalism. Is America Next?*, Colum. Journalism Rev. (Mar. 9, 2022), https://www.cjr.org/business_of_news/australia-pressured-google-and-facebook-to-pay-for-journalism-is-america-next.php.

[45] 481 U.S. 221 (1987).

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as opposed to others in society or of particular parts of the press – risked chilling reporting. Yet there is a key distinction: The current proposal would not impose a tax on social media but would rather require that they pay for what they use.

The point is that the internet and social media endanger the press, and protecting freedom of the press requires deliberate action. First Amendment doctrines will need to be adapted to accomplish this.

Finally, another way the internet and social media threaten democracy is when foreign nations and foreign entities use them to influence the outcome of elections. As mentioned earlier, there is now incontrovertible evidence that Russia engaged in a concerted effort to use speech, including false speech, to influence the outcome of the 2016 presidential election.[46] This was suspected during the campaign, and American intelligence agencies confirmed it soon after the election.[47] In February 2018, Special Counsel Robert Mueller issued a 37-page indictment charging thirteen Russians and three companies with executing a scheme to subvert the 2016 election and help to elect Donald Trump as president.[48] Mueller's indictment details "how the Russians repeatedly turned to Facebook and Instagram, often using stolen identities to pose as Americans, to sow discord among the electorate by creating Facebook groups, distributing divisive ads and posting inflammatory images."[49]

Although condemning Russia's meddling in the American election is easy, solving the underlying First Amendment issue is difficult. Certainly, illegal conduct, such as hacking into the Democratic National Committee headquarters and subsequently disseminating unlawfully gained information,[50] is not constitutionally protected. But what about foreign speech that is legal and that expresses an opinion – or even false speech?

The Supreme Court has repeatedly stated that the source of information does not matter for First Amendment purposes. In *First National Bank of Boston v. Bellotti*, in 1978, the Supreme Court declared unconstitutional a Massachusetts law that prohibited banks or businesses from making contributions or expenditures in connection with ballot initiatives and referenda.[51] Justice Powell, writing for the Court, concluded that the value of speech is in informing the audience. Any restriction on speech, regardless of its source, therefore undermines the First Amendment. Justice Powell explained: "The inherent worth of the speech in terms of its capacity for

[46] *See, e.g.*, Mueller, *supra* note 11.

[47] *Id.*

[48] Indictment, United States v. Internet Research Agency, LLC, No. 1:18-cr-00032-DLC (D.D.C. Feb. 16, 2018), 2018 WL 914777.

[49] Sheera Frenkel & Katie Benner, *To Stir Discord in 2016, Russians Turned Most Often to Facebook*, N.Y. Times (Feb. 17, 2018), http://www.nytimes.com/2018/02/17/technology/indictment-russians-tech-facebook.html.

[50] Raphael Satter, *Inside Story: How Russians Hacked the Democrats' Emails*, AP (Nov. 4, 2017), https://www.apnews.com/dea73efc01594839957c3c9a6c962b8a.

[51] First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765, 767–68 (1978).

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informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."[52]

The Court relied heavily on this in *Citizens United v. Federal Election Commission* to hold that corporations have the constitutional right to spend unlimited amounts of money directly from their treasuries to elect or defeat candidates for political office.[53] The Court stressed that the value of the speech does not depend on the speaker's identity and held that corporate speech is protected not because of the inherent rights of corporations but because all expression contributes to the marketplace of ideas. The Court wrote that "the First Amendment bars regulatory distinctions based on a speaker's identity."[54] On other occasions, too, the Court has declared that "[t]he identity of the speaker is not decisive in determining whether speech is protected."[55]

But if this is so, why should it matter that a speaker is a foreign government or a foreign individual? Federal law prohibits foreign governments, individuals, and corporations from contributing money to candidates for federal office.[56] A federal court upheld this restriction on foreign speech, declaring, "It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government." As a result, it asserted that "the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the US political process."[57] But can this be reconciled with the Supreme Court's declaration that the speaker's identity should not matter in First Amendment analysis? Although it is not a comfortable answer, I do not see a way to exclude foreign speakers that would be consistent with the Court's premise that the speaker's identity cannot be the basis for regulation. The First Amendment assumes that more speech is better, whether the speaker is foreign or domestic.

At the very least, however, it would be desirable to disclose speakers' identities so that people can know when speech is coming from a foreign government or other foreign source. But this, too, raises First Amendment issues, as the Supreme Court has held that there is a First Amendment right to speak anonymously. In *McIntyre v. Ohio Elections Commission*, the Court declared unconstitutional a law prohibiting the distribution of anonymous campaign literature.[58] Justice Stevens, writing for the Court, stated that "an author's decision to remain anonymous, like other

[52] *Id.* at 776–77 (emphasis added).
[53] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 319 (2010).
[54] *Id.* at 350, 394.
[55] Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 8 (1986) (plurality opinion).
[56] Blauman v. FCC, 800 F. Supp. 2d 281, 284 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).
[57] *Id.* at 288.
[58] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

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decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."[59] Further, Justice Stevens contended that anonymity also provides a way for a speaker "who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent."[60]

All that said, there is a compelling interest in stopping speakers from masking their identity and deceiving voters. It is one thing to speak anonymously but another to falsely present oneself, especially to deceive and manipulate voters. Whether the speaker is domestic or foreign, that should be regarded as a form of fraud that is unprotected by the First Amendment. At the very least, we should implement laws that prohibit this, along with stronger disclosure laws, especially for foreign speakers. The Supreme Court has consistently upheld the constitutionality of laws that require disclosure of the identity of those spending money in election campaigns. These requirements must be significantly strengthened.

The transnational nature of the internet makes exercising control over speech elusive, even if it were to be constitutional. As the 2016 presidential election demonstrated, foreign governments can use the internet and social media to influence elections without their officials and agents ever physically entering the United States. It is unclear how American law could be successfully applied to them. The internet thus enables them to engage in false speech (and all other kinds of expression) with relatively little fear of legal sanctions, and whether there could be meaningful international sanctions is uncertain at best.

6.4 CONCLUSION

It is crucial to recognize that the internet and social media are different from the modes of communication that preceded them and that they will require new doctrines for First Amendment analysis because of the inadequacy of the doctrines applied to traditional media. The internet and social media provide great benefits in terms of speech, but they also pose unprecedented harms as well.

[59] *Id.* at 341–42.
[60] *Id.* at 342.

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