

FAKE LEFT, FAKE RIGHT: PROMOTING AN INFORMED PUBLIC IN THE ERA OF ALTERNATIVE FACTS

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INTRODUCTION

Cable news hosts analyze it.¹ The President tweets about it.² Businesses fear it.³ It has damaged businesses and inspired acts of violence.⁴ Though it is by no means a new phenomenon, events surrounding the 2016 presidential election have brought *fake news* to the forefront of the national consciousness.⁵ The world seems so full of fake news and “alternative facts” that “post truth” was labeled the 2016 word of the year.⁶ Stories now appear regularly alleging that fake news was used to disrupt, destabilize, or promote a foreign interest.⁷

1. See, e.g., *Lemon Shuts Down Panelist's Fake News Argument*, CNN (May 31, 2017), <http://www.cnn.com/videos/politics/2017/05/31/spicer-trump-frustrated-kingston-lemon-ctn.cnn> (broadcasting a panel discussion where former Rep. Jack Kingston and Don Lemon discuss what constitutes fake news).

2. See, e.g., Donald Trump (@realDonaldTrump), TWITTER (Jan. 2, 2018, 5:05 PM), <https://twitter.com/realDonaldTrump/status/948359545767841792> (tweeting that he will announce awards in various categories for the “Fake News Media” next week).

3. See, e.g., Don Reisinger, *Fake News Sites Are Targeting More Small Businesses with Viral Stories*, FORTUNE (May 30, 2017), <http://fortune.com/2017/05/30/fake-news-sites-local-businesses> (describing how fake news stories have been circulated over social media to undermine restaurants and other small businesses).

4. See Marc Fisher et al., *Pizzagate: From Rumor, to Hashtag, to Gunfire in D.C.*, WASH. POST (Dec. 6, 2016), https://www.washingtonpost.com/local/pizzagate-from-rumor-to-hashtag-to-gunfire-in-dc/2016/12/06/4c7def50-bbd4-11e6-94ac-3d324840106c_story.html (describing an incident where Edgar Welch entered a pizza restaurant in Washington, D.C. with an assault rifle, fired it into the air, and searched the restaurant because a fake news story reported the pizza place was harboring child sex slaves as part of a child-abuse ring led by Hillary Clinton).

5. See Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 232 (2017) (finding that the average adult read and remembered at least one fake news story during the 2016 presidential election); Craig Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook*, BUZZFEED NEWS (Nov. 16, 2016, 4:15 PM), https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm_term=.uuaB0N6DY#.igNx7qaGA (announcing a study conducted by BuzzFeed News that showed twenty top-performing stories from false or hyper-partisan outlets generated more shares, likes, and comments than did the twenty top stories from the traditional media).

6. See, e.g., Sophie Jamieson, *'Fake News' Inquiry Launched By MPs*, TELEGRAPH (Jan. 30, 2017), <http://www.telegraph.co.uk/news/2017/01/30/fake-news-inquiry-launched-mps/> (reporting that the British parliament is investigating the fake news issue and ways to address the problem); *Word of the Year 2016 is . . .*, OXFORD LIVING DICTIONARY, <https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016> (last visited Feb. 4, 2017).

7. See Allcott & Gentzkow, *supra* note 5.

The rise (or resurgence) of fake news stems from the near omnipresence of social media, the public's growing distrust of traditional news outlets, the increasingly polarized electorate, and the unpredictable nature of the 2016 presidential race.⁸ Yet despite its prevalence, or perhaps because of it, there does not appear to be a consensus about how to classify news as "fake."⁹ Adding to the confusion, the term "fake news" is often employed simply to disparage and dismiss differing opinions.¹⁰ Others use "fake news" as a label for flawed journalism, though doing so effectively places inaccurate stories or those containing honest mistakes in the same category as conspiracy theories and intentional disinformation.¹¹ Whether willful or unintentional, using "fake" and "inaccurate" interchangeably only contributes to the difficulty of addressing disinformation in this social media era.

While it will be difficult, it is important for the U.S. government to address the problem of fake news because of the real harm it poses to the

8. 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> (concluding that then-candidate Trump's frequent social media use, sharing of conspiracy theories, and general unpredictability contributed to the public not knowing what to believe); Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP (Sept. 14, 2016), <http://www.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx> (showing only 32% of Americans have a "great deal" or "fair amount" of trust in the media).

9. Compare Elizabeth Casale, Note, *Online Breach, Offline Injury: Privacy Class Actions, and Business in the Internet Age*, 17 WAKE FOREST J. BUS. & INTELL. PROP. L. 226, 228 (2017) ("Fake news websites are websites that do not conform to typical standards of reporting"), and Steven Seidenberg, *Lies and Libel: Fake News Lacks Straightforward Cure*, A.B.A.J., July 2017, at 50 (quoting Professor Barbara Freidman) ("Fake news is 'deliberately and strategically constructed lies that are presented as news articles and are intended to mislead the public'"), with Cara Bayles, *Facebook Atty Says 'Fake News' Fight A Tough Balancing Act*, LAW360 (July 20, 2017, 10:52 PM), <https://www.law360.com/articles/946345/facebook-atty-says-fake-news-fight-a-tough-balancing-act> (arguing that fake news is "false news stories that sources posing as legitimate media outlets disseminate knowing they aren't true").

10. See Rebecca Savransky, *Trump Berates CNN Reporter: 'You Are Fake News'*, HILL (Jan. 11, 2017), <http://thehill.com/homenews/administration/313777-trump-berates-cnn-reporter-for-fake-news> (describing a press conference where President Donald Trump told a CNN reporter, "[Y]ou are fake news"); Donald Trump (@realDonaldTrump), TWITTER (Feb. 6, 2017, 7:01 AM), <https://twitter.com/realdonaldtrump/status/828574430800539648?lang=en> (tweeting "[a]ny negative polls are fake news").

11. See Kristine Phillips, *CNN's Russia Story Retraction and the Danger of Relying on One Anonymous Source*, WASH. POST, (June 27, 2017), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/06/27/the-cnn-retraction-and-the-danger-of-relying-on-one-anonymous-source> (describing CNN's retraction of a story that was based on one anonymous source and alleged collusion between the Trump campaign and a Russian investment fund).

country.¹² Anonymity on the Internet has long been used to damage businesses and cause volatility in the marketplace,¹³ but the current resurgence of “fake news” threatens the existence of a shared truth integral to the foundation of U.S. democratic society. Humans are biased information seekers who generally make decisions based on what their peers accept as truth.¹⁴ As such, a healthy democracy requires shared verifiable facts to form the basis for deliberation and debate.¹⁵ Absent a belief in some manner of shared facts, democracy loses its power and the loudest voices alone determine truth.¹⁶ Fake news creates a “crisis of credibility” by undermining the public’s confidence in information sources, thus threatening the very discourse the First Amendment seeks to protect.¹⁷

What, if anything, can be done about it? The growth of the Internet and social media has transformed the traditional U.S. media landscape and eliminated “spectrum scarcity”—where a few networks broadcast the news

12. Michela Del Vicario et al., *The Spreading of Misinformation Online*, 113 PROC. NAT’L ACAD. SCI. U.S. 554, 558 (2016) (“Digital misinformation has become so pervasive in online social media that it has been listed by the [World Economic Forum] as one of the main threats to human society.”); see also Seidenberg, *supra* note 9, at 50 (finding that fake news causes people to believe in falsehoods, creates a crisis of credibility in society, and widens the nation’s partisan divide).

13. See generally Bruce P. Smith, *Cybersmearing and the Problem of Anonymous Online Speech*, 18 COMM. LAW. 3, 3–4 (2000) (discussing how the Internet’s “veil of anonymity” can encourage cybersmearing of companies and their executives); Shaun Spencer, *Cyberslapp Suits and John Doe Subpoenas: Balancing Anonymity and Accountability in Cyberspace*, 19 J. MARSHALL. J. COMPUTER & INFO. L. 493 (2001) (explaining how an anonymous online posting can be used to commit securities fraud).

14. See generally Philip M. Fernbach et al., *Political Extremism is Supported by an Illusion of Understanding*, 24 PSYCHOL. SCI. 939, 939–46 (2013) (explaining that decisionmaking comes from group level narratives); Cass. R. Sunstein et al., *How People Update Beliefs about Climate Change: Good News and Bad News*, 102 CORNELL L. REV. 1431, 1433–34 (2017) (explaining that humans are biased information seekers who absorb information differently depending on how it relates to their previously held beliefs).

15. See Paul Chadwick, *Defining Fake News Will Help Us Expose It*, GUARDIAN (May 12, 2017), <https://www.theguardian.com/media/commentisfree/2017/may/12/defining-fake-news-will-help-us-expose-it> (arguing democracy relies on the existence of a “shared approximation of truth resting on verifiable facts and corrected or clarified incrementally”).

16. See *id.* (claiming that democratic governance is harder in the absence of a shared approximation of truth because power alone determines truth).

17. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail”); Seidenberg, *supra* note 9, at 51 (describing how the U.S. public has a historically low trust in the media, scientists, intelligence agencies, and other experts).

of the nation.¹⁸ The Internet's low barrier to entry creates a free market place of ideas, but that public forum is filled with so much noise that it can be harder to find verified truth.¹⁹ The near omnipresence of social media allows information to spread at dizzying speeds without a significant third-party filter, and to reach segments of the population who do not engage with traditional media sources.²⁰ While many believe that the very nature of fake news makes it impossible to regulate,²¹ others argue that it can be curbed indirectly by requiring social media platforms and content providers to remove suspected fake news articles, just as they might remove hate speech.²² However, any practical government action to control content shared over the Internet must also withstand rigorous First Amendment scrutiny.²³

This Comment will examine the current rise of fake news and consider ways that the federal government and private sector might curb its effects while complying with the letter and spirit of the First Amendment. Part I

18. Stanislav Getmanenko, *Freedom from the Press: Why the Federal Propaganda Prohibition Act of 2005 is a Good Idea*, 114 PENN ST. L. REV. 251, 272–73 (2010) (posturing that the Internet has eliminated the technological bottleneck of “spectrum scarcity”).

19. See Brandon Thornburg, *Editor's Note*, 21 LEWIS & CLARK L. REV. ix, x (2017) (asserting that people are presented with so much information and so many opinions that they choose to accept what they are presented with as truth rather than looking deeper for evidence that supports or contradicts that view).

20. See Allcott & Gentzkow, *supra* note 7, at 211 (finding that social media allows content to be shared among users instantly, with no filtering or editorial judgment); 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> (finding that 62% of U.S. adults get news on social media).

21. See Caroline O'Doherty, *Regulation 'Not Realistic for Fake News'*, IRISH EXAMINER (May 26, 2017), <http://www.irishexaminer.com/ireland/regulation-not-realistic-for-fake-news-450927.html> (quoting Ireland's Communication's Minister who believes attempts to regulate fake news would be too resource-intensive).

22. See Guy Chazen, *Germany Cracks Down on Social Media Over Fake News*, FIN. TIMES (Mar. 14, 2017), <https://www.ft.com/content/c10aa4f8-08a5-11e7-97d1-5e720a26771b?mhq5j=e6> (discussing a draft law presented by the German government that would impose fines on social networks that fail to delete hate speech or fake news). *But see* Sam Shead, *Facebook Said Germany's Plan to Tackle Fake News Would Make Social Media Companies Delete Legal Content*, BUS. INSIDER (May 30, 2017), <http://www.businessinsider.com/facebook-says-germany-fake-news-plans-comply-with-eu-law-2017-5> (reporting that the law may be invalid under the European Union and German constitutions and would lead to tech companies deleting legal content).

23. See generally *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (discussing the extent to which the First Amendment protects access, conduct, and speech in regard to the Internet).

will consider past iterations of fake news and establish a definition for fake news as it exists today. Part II will discuss the First Amendment's limits to any government actions that might regulate fake news. Part III will examine whether the Federal Communications Commission (FCC) may promulgate a new rule to create an online filter to help connect users with "trusted" news publishers. Finally, Part IV will propose possible private sector solutions that might also help tackle the current fake news crisis.

I. DEFINING FAKE NEWS

Prior to considering the ways in which governments or private entities may address the widespread issue of fake news, it is necessary to define the content contributing to the current problem. A definition for fake news should: consider past appearances of misinformation, disinformation, and propaganda; analyze their purposes; and examine their effects in order for the current incarnation to be addressed.

A. *The "History" of Fake News*

Fake news is not a recent phenomenon; it has appeared in various forms throughout history.²⁴ As developments in technology expanded the reach and speed with which information is conveyed, governments exploited mass communication and used propaganda to push an agenda.²⁵ During World War II, governments used radio and film broadcasts to keep patriotism high and convey strength to their enemies.²⁶ More recently, in 2004, the Bush Administration quietly produced "video news releases" to promote its policy agenda and fed them to national media outlets without disclosing their source.²⁷

24. Richard Darnton, *The True History of Fake News*, NYR DAILY (Feb. 13, 2017), <http://www.nybooks.com/daily/2017/02/13/the-true-history-of-fake-news> (citing sonnets written to try to manipulate the pontifical election of 1522, and the "canards" sold in the streets of Paris telling stories such as one of a winged monster being shipped from Chile to Spain).

25. See DONALD C. BLAISDELL, *AMERICAN DEMOCRACY UNDER PRESSURE* 193 (1957) (describing how governments have recognized the value of mass communication and use propaganda as a device to create public opinion); see also, e.g., Allcott & Gentzkow, *supra* note 7, at 211 (explaining how cheap newsprint and improved presses allowed newspapers to expand their reach).

26. James Spiller, *This is War! Network Radio and World War II Propaganda in America*, 11 J. RADIO STUD. 55, 55–56 (2004) (finding that more than 80% of American households had a radio, allowing the government to "immediately and intimately" relay information to boost the war effort).

27. Janel Alania, *The "News" From the Feed Looks Like News Indeed: On Video News Releases*,

Of course, governments have not held a monopoly on misleading the public to serve their own purposes. The private industry has a long history of misleading customers through false advertising, exaggerated claims, and erroneous labels.²⁸ Yellow journalism in the late seventeenth century used fake interviews and stories to manipulate public opinion and push the United States into war.²⁹ Though fake news has appeared in various forms throughout history, its reach has been limited by the then-existing methods of communication.

B. *The Role of Social Media*

Just as the introduction of the radio and cable television gave rise to “traditional” government propaganda, today’s fake news would not be possible without the Internet as a tool for mass communication. Social media outlets have created a perfect environment for the spread of false or misleading information over the Internet.³⁰ Networks like Facebook, Twitter, and Instagram allow anyone to instantly share content from one website to another.³¹ Celebrities are able to immediately share stories to millions of followers,³² and bots³³ can artificially promote an article and send it viral in

the FCC, and the Shortage of Truth in the Truth in Broadcasting Act of 2005, 24 CARDOZO ARTS & ENT. L.J. 229, 229–30 (2006) (examining the Bush Administration’s use of video news releases produced by the Department of Health and Human services, as well as other agencies, and illegally distributing them for broadcast without disclosing their origins).

28. See, e.g., *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 390 (1965) (holding that Colgate’s undisclosed use of Plexiglas with sand applied in a television commercial to demonstrate that its shaving cream could allow a razor to shave the sand clean was a materially deceptive practice).

29. See Jacob Soll, *The Long and Brutal History of Fake News*, POLITICO (Dec. 18, 2016), <https://www.politico.com/magazine/story/2016/12/fake-news-history-long-violent-214535>.

30. David Lazer et al., Executive Summary, *Combating Fake News: An Agenda for Research and Action*, HARV. KENNEDY SCH. (May 2, 2017, 11:45 AM), <https://shorensteincenter.org/combating-fake-news-agenda-for-research> (discussing the vulnerabilities of democratic societies to fake news in the age of social media).

31. See, e.g., *How to Post & Share*, FACEBOOK, <https://www.facebook.com/help/333140160100643> (last visited Feb. 4, 2018).

32. See Madeline Berg, *The Social 100: Twitter’s Most Followed Celebrities*, FORBES (June 29, 2015), <https://www.forbes.com/sites/maddieberg/2015/06/29/twitters-most-followed-celebrities-retweets-dont-always-mean-dollars> (estimating 65 million people read Justin Bieber’s tweets).

33. See Rob Dubbin, *The Rise of Twitter Bots*, NEW YORKER (Nov. 14, 2013), <http://www.newyorker.com/tech/elements/the-rise-of-twitter-bots> (describing twitter bots as “computer programs that tweet of their own accord”); Kurt Wagner, *Bots, Explained:*

a matter of hours.³⁴ Even the format by which people consume social media content contributes to the dissemination of false information.³⁵

The creation of social media “echo chambers” further exacerbates the problem.³⁶ Social networks offer users increasing control over the content they see while using the service.³⁷ Users continually adjust and customize their network, adding people and outlets with whom they agree while deleting or blocking those they do not.³⁸ The result is that users have a profile or feed that is cluttered with similar information and devoid of countering viewpoints.³⁹ Homogenous news feeds create “echo chambers,” which make it more difficult for users to recognize dubious content, thus helping to perpetuate fake news stories.⁴⁰

What's the Point? Or the Business Model?, RECODE (Apr. 11, 2016), <https://www.recode.net/2016/4/11/11586022/what-are-bots> (explaining a ‘bot’ as a software designed to automate a task users would normally do on their own).

34. See Joon Ian Wong, *Trumphbots are Drowning Out Other Voices in a Torrent of Tweets*, QUARTZ (Oct. 18, 2016), <https://qz.com/812487/twitter-twtr-trumphbots-are-drowning-out-other-voices-in-a-torrent-of-tweets> (analyzing tweets around the first presidential debate in the 2016 election and finding that 20% of all tweets are sent by bots). *But see* Jen Weedon et al., *Information Operations and Facebook*, FACEBOOK (Apr. 27, 2017), <https://fbnewsroomus.files.wordpress.com/2017/04/facebook-and-information-operations-v1.pdf> (finding that fake news on Facebook is primarily spread by human users and not bots).

35. Allcott & Gentzkow, *supra* note 7, at 221 (explaining that people generally access social media networks on mobile devices, which makes it harder to evaluate the veracity of content).

36. See *id.* (finding that people on social media are more likely to read and share news articles that are aligned with their ideological positions); Walter Quattrociocchi et al., *Echo Chambers on Facebook* 12–13 (Harv. L. Sch., Working Paper, 2016), <https://ssrn.com/abstract=2795110> (explaining that echo chambers are created from peoples’ confirmation bias and result in a group that will accept and share intentionally false claims that support their pre-existing beliefs, while ignoring debunking information).

37. *E.g.*, *Controlling What You See in News Feed*, FACEBOOK, <https://www.facebook.com/help/335291769884272> (last visited Feb. 4, 2018) (explaining to users how they can personalize what they see on their Facebook news feed).

38. See S.I. Strong, *Alternative Facts and the Post-Truth Society: Meeting the Challenge*, 165 U. PA. L. REV. ONLINE 137, 140 (2017), <http://www.penlawreview.com/online/165-U-Pa-L-Rev-Online-137.pdf> (defining confirmation bias as the “unconscious but pervasive human propensity to filter out information that contradicts an existing belief”).

39. See Quattrociocchi et al., *supra* note 36 (concluding users’ confirmation bias influences what content they share, leading to the creation of echo chambers).

40. *Id.*

C. Who Creates Fake News

Fake news is created by individuals, governments, and politically motivated groups for ideological and economic purposes.⁴¹ Foreign governments may target other countries by spreading disinformation to sow discord or achieve some other political goal.⁴² Similarly, individuals or partisan groups may create fake news stories in an attempt to support or oppose specific political candidates or parties.⁴³

Fake news is also created for economic gain. Social media allows content to be created and disseminated quickly and cheaply.⁴⁴ With the commoditization of new content, there is an incentive for people to create fake stories with headlines designed to draw eyes and tempt people to click on the associated link.⁴⁵ Google and other search engine companies in turn generate advertising dollars for the website owner.⁴⁶ These types of fake

41. Seidenberg, *supra* note 9, at 51 (discussing who creates fake news stories and websites).

42. See, e.g., Philip Bump, *Here's the Public Evidence that Supports the Idea that Russia Interfered in the 2016 Election*, WASH. POST (July 6, 2017), https://www.washingtonpost.com/news/politics/wp/2017/07/06/heres-the-public-evidence-that-supports-the-idea-that-russia-interfered-in-the-2016-election/?utm_term=.6bdb5b74d7e1 (summarizing the suspected attempts of Russia to influence the United States 2016 presidential election); Evan Perez & Simon Prokupez, *CNN Exclusive: US Suspects Russian Hackers Planted Fake News Behind Qatar Crisis*, CNN (June 7, 2017, 7:34 AM), <http://www.cnn.com/2017/06/06/politics/russian-hackers-planted-fake-news-qatar-crisis/index.html> (reporting that U.S. investigators believe Russian hackers planted a fake news report in the Qatar state-run news agency to create a rift between the country and its Gulf allies).

43. See Allcott & Gentzkow, *supra* note 7, at 217 (describing a Romanian man who ran a website called Endingthefed.com, a website responsible for four of the ten most popular fake news stories on Facebook, which he started mainly to help Donald Trump's campaign); Seidenberg, *supra* note 9, at 51 (discussing the different motivations for create fake news stories).

44. Seidenberg, *supra* note 9, at 51 (emphasizing Stanford University Professor Gentzkow's claim "[s]ocial media . . . makes fake news financially profitable.").

45. See Allcott & Gentzkow, *supra* note 7, at 217 (describing a company called Disinfo-media that owns many fake news sites and employs writers to create content solely to generate advertising dollars); Seidenberg, *supra* note 9, at 51 (describing a group of teenagers in Macedonia that created thousands of right-wing fake news articles, many of which went viral); Casale, *supra* note 9, at 228 (finding that fake news stories are sometimes created simply to get people to click on them); Eric Kroh, *News Cos. Want Antitrust Pass To Confront Google, Facebook*, LAW360 (July 10, 2017), <https://www.law360.com/articles/942635/news-cos-want-antitrust-pass-to-confront-google-facebook> (discussing how traditional news companies blame Facebook and Google for making news content a commodity, establishing a market for fake news websites).

46. See Abby Ohlheiser, *This is How Facebook's Fake-News Writers Make Money*, WASH.

news websites tend to be short lived, often disappearing once the content is spread and people begin to recognize it as phony.⁴⁷

D. Finding a Working Definition of “Fake News”

Whether created by an individual, a group or government, or for financial or political purposes, fake news generally falls into one of several categories: intentionally deceptive information; large-scale hoaxes; jokes taken at face-value; slanted reporting of real facts; and stories where the truth is contentious.⁴⁸ Intentionally deceptive news includes fraudulent reporting and tabloids like the *World Weekly News*, while jokes refer to satirical content and parodies like those published by outlets such as *The Onion*.⁴⁹ Though both the *World Weekly News* and *The Onion* produce fake “news,” this analysis focuses on content created to purposefully deceive others by exploiting social media networks. To address the current problem of fake news, the definition needs to be broad enough to encompass the different sources of false or deceptive content but narrow enough that it does not sweep up clearly whimsical jokes that present little harm to public discourse. With that in mind, this Comment defines fake news as “fictions deliberately fabricated and presented as non-fiction with the intent to mislead recipients into treating fiction as fact or into doubting verifiable fact.”⁵⁰

Narrowing the scope of today’s fake news problem to content that is purposefully created to mislead others offers a specific target for government actions. Before considering government solutions, it is important to understand the limits on a government actor’s authority to address fake news.

POST (Nov. 18, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/11/18/this-is-how-the-internets-fake-news-writers-make-money/?utm_term=.3bb35dba019f (explaining how one fake news website owner makes money via Google and Facebooks’ self-service ad technology); *Discover How Easy it is to Use AdSense*, GOOGLE ADSENSE, <https://www.google.com/adsense/start/how-it-works> (last visited Feb. 4, 2018) (describing how independent website owners can use Google AdSense to generate revenue from their websites).

47. See Allcott & Gentzkow, *supra* note 7, at 217 (noting that many of the fake news websites created during the 2016 election no longer exist).

48. See Victoria L. Rubin et al., *Deception Detection for News: Three Types of Fakes*, ASS’N. FOR INFO. SCI. & TECH. (Nov. 6, 2015), <https://www.asist.org/files/meetings/am15/proceedings/submissions/posters/194poster.pdf> (describing the categories of fake news).

49. *Id.*

50. Chadwick, *supra* note 15.

II. FIRST AMENDMENT LIMITATIONS TO GOVERNMENT REGULATION OF FAKE NEWS

The First Amendment protects the public from government actions that restrict or impede a person or entity's right to free speech.⁵¹ Because fake news is simply the expression of an idea, any rule, law, or regulation aimed at curbing the fake news problem must withstand judicial scrutiny under the First Amendment.⁵²

A. Direct Government Regulation of Speech

A law, regulation, or rule that directly restricts the creation or spread of fake news would face nearly insurmountable First Amendment challenges. The government cannot prevent the expression of an idea simply because society does not agree or finds it distasteful, even if that language is intended to offend another person or group of people.⁵³ Government actions that limit speech based on its content are subject to strict scrutiny and presumed to be unconstitutional.⁵⁴ Strict scrutiny requires the government to justify its regulation by demonstrating: a compelling government interest, the regulation is narrowly tailored to achieve that interest, and the regulation is the least restrictive means for achieving that interest.⁵⁵ Under strict scrutiny, courts will only allow content-based restrictions when: (1) the speech creates a clear and present danger of lawless action; (2) the speech constitutes defamation; or (3) the government can demonstrate a compelling interest for limiting that speech or activity.⁵⁶ Further, any content-based burden to

51. U.S. CONST. amend. I.

52. See Noah Feldman, *Fake News May Not Be Protected Speech*, BLOOMBERG (Nov. 23, 2016), <https://www.bloomberg.com/view/articles/2016-11-23/fake-news-may-not-be-protected-speech> (concluding that knowingly presenting false information is protected under the First Amendment).

53. See *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (holding that giving offense is a viewpoint, and the government is prohibited from viewpoint discrimination); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (holding that the government cannot punish a person for burning the national flag because it cannot prohibit the expression of an idea society finds offensive).

54. See *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) (holding that the Constitution demands content-based restrictions on speech be presumed invalid).

55. See *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987) (holding that the State must show that a content-based law concerning the taxation of magazines serves a compelling state interest and is narrowly tailored to achieve that end).

56. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that the constitutional guarantee of free speech does not allow a state to forbid someone from advocating the use of force unless that advocacy is "directed to inciting or producing imminent lawless action and

speech must be narrowly tailored to achieve the government's purpose.⁵⁷

The first requirement under strict scrutiny means that the government cannot proscribe speech unless it is "directed to inciting or producing immediate lawless action" that is likely to occur.⁵⁸ Advocating for violence generally is merely an expression of one's beliefs and is protected from government regulation.⁵⁹ Fake news, as considered in this analysis, is more an expression of the author's belief than a direct call to violence. The fake stories about a child sex-slave ring at Comet Pizza in Washington, D.C. did not orchestrate Edgar Welch's trip from North Carolina or direct him to fire his AR-15 rifle in the middle of a busy restaurant.⁶⁰ As the Court distinguishes the discussion of lawless action generally from purposefully inciting that lawless action, it would seem unlikely that the government will be able to show that fake or misleading content shared indiscriminately over the Internet meets the standard of strict scrutiny.⁶¹

Even if the government could justify content-based legislation on fake news, the law must also utilize the least restrictive means for achieving its goal.⁶² Fake news is commonly disassociated from its creator,⁶³ because fake news is frequently spread over social media, a content-based law will sweep up an increasing number of users who were only incidental to the

is likely to incite or produce such action"); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that public figures must prove that the publisher of the defaming statement knew that the statement was false or acted in reckless disregard for the truth).

57. See *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 826–27 (2000) (finding that shielding children from sexual images was a compelling government interest but the regulation was unconstitutional because it was not the least restrictive means for achieving that end).

58. See *Brandenburg*, 395 U.S. at 447.

59. See *id.* at 456 (Douglas, J., concurring) (asserting that all matters of belief are beyond the reach of subpoenas and government investigations).

60. Faiz Siddiqui & Susan Svrluga, *N.C. Man Told Police He Went to D.C. Pizzeria with Gun to Investigate Conspiracy Theory*, WASH. POST (Dec. 5, 2016), https://www.washingtonpost.com/news/local/wp/2016/12/04/d-c-police-respond-to-report-of-a-man-with-a-gun-at-comet-ping-pong-restaurant/?utm_term=.6fa541ea8e8e (describing the "Pizzagate" incident).

61. See *Brandenburg*, 395 U.S. at 447–48 (holding that teaching about a moral necessity for violence to armed Ku Klux Klan members is not the same as preparing and steeling that group to violent action).

62. See *Reno v. ACLU*, 521 U.S. 844, 874 (1996) (holding that the Communication Decency Act's Internet indecency provisions' burden on speech is unacceptable "if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was to serve").

63. See Rubin et al., *supra* note 48.

spread of the harmful conduct. Even once a malicious actor is identified, the Internet's low barrier to entry could allow the target of the law to vanish, only to reappear under another alias. The difficulty in crafting a content-based law that is both enforceable and capable of withstanding strict scrutiny strongly suggests that direct regulation is not the appropriate means for addressing the problem of fake news.

B. Regulations Restricting Access to Social Media Networks

If the government cannot address the harmful effect of fake news directly, another approach might be to restrict the access of known disseminators of disinformation to social media generally. The Internet and social media are now classified as modern democratic forums, akin to public spaces where people exchange, debate, and protest viewpoints.⁶⁴ In *Packingham v. North Carolina*,⁶⁵ the Supreme Court considered a law that completely prohibited registered sexual offenders from accessing any social media website.⁶⁶ While the Court found that the government may be permitted to restrict specific conduct on the Internet, it held that completely banning a person from accessing any “websites integral to the fabric of our modern society and culture” violates his First Amendment rights.⁶⁷ The Court's decision in *Packingham* means that even if the government identifies an individual responsible for spreading harmful fake news, it will not be able to protect the public by banning his or her access to social media.⁶⁸

Further, it will be harder for the government to regulate fake news now that the Court has found social media to be a public forum.⁶⁹ Government regulation of speech in a public forum is only valid if it is content neutral, narrowly tailored, and leaves open alternative channels of communication.⁷⁰ Because fake news is often spread via social media, the government

64. See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735, 1738 (2017) (holding that the Internet is now a vast democratic forum and social media websites are integral to the fabric of our modern society and culture).

65. *Id.*

66. See *id.* at 1738–39 (holding North Carolina's law prohibiting sex offenders from accessing social media violated their First Amendment right to free speech).

67. *Id.* at 1737–38.

68. *Id.*

69. Compare *Packingham*, 137 S. Ct. at 1735 (finding social media to be a vast democratic forum), with *Ward v. Rock Against Racism*, 491 U.S. 781, 796–97 (1989) (holding that a street or park is a quintessential forum for the exercise of First Amendment rights).

70. See *Frisby v. Schultz*, 487 U.S. 474, 482 (1988) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)) (holding that a law must be narrowly tailored to serve a significant government interest and “leave open ample alternative channels

will be hard pressed to create a rule or regulation that effectively addresses the problem without targeting any particular viewpoint and leaving open reasonable alternative channels of communication.

III. THE FCC AND CONTROLLING FAKE NEWS

Since mass media communications came into existence, people have searched for new, effective ways to combat deceptive or fictitious stories.⁷¹ Correcting information is much more difficult now that the Internet has created a platform for ordinary individuals to share their thoughts and opinions with a global audience.⁷² The incredible pace at which content is created and consumed on social media means that false stories can rarely be contained reactively once they have spread.⁷³ Social media and other Internet companies motivated by their own economic interests have already taken some measures to curb the spread of fake news over their networks.⁷⁴ However, relying on private companies to develop proprietary solutions will only create a patchwork of protections that vary in strength and effectiveness. Instead, a centralized, flexible yet enforceable policy to direct a concerted effort against fake news is required.

The federal government's regulatory powers afford it the unique opportunity to develop a uniform approach to the problem of fake news. Though

of communication" to pass First Amendment scrutiny).

71. SIDNEY L. GULICK, *THE FIGHT FOR PEACE: AN AGGRESSIVE CAMPAIGN FOR AMERICAN CHURCHES* 152 (1915) (suggesting methods for Christians and the Church to combat yellow journalism).

72. See *Packingham*, 137 S. Ct. at 1737 (finding that social media websites are a powerful mechanism for private citizens to make their voices heard); Dawn C. Nunziato, *First Amendment Values for the Internet*, 13 *FIRST AMEND. L. REV.* 282, 282 (2014) (citing *ACLU v. Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1996)) (claiming the Internet to be a "vast public forum for expression" and "marketplace of mass speech").

73. See Robert Allen, *What Happens Online in 60 Seconds*, SMART INSIGHTS: ACTIONABLE MKTG. ADVICE (Feb. 6, 2017), <http://www.smartinsights.com/internet-marketing-statistics/happens-online-60-seconds/attachment/what-happens-online-in-60-seconds/> (showing via an infographic that there were over three million posts on Facebook, 448,800 tweets via Twitter, and 149,513 e-mails via several services, each minute during 2016).

74. See, e.g., Kerry Flynn, *Twitter Reportedly Explores the Idea of a Fake News Button*, MASHABLE (June 29, 2017), <http://mashable.com/2017/06/29/twitter-fake-news-button/#ifzEEsun3OqT> (reporting that Twitter is exploring adding a feature to allow users to flag tweets containing "misleading, false, or harmful information"); Mike Snider, *Facebook Aims to Filter More Fake News from News Feeds*, USA TODAY (June 30, 2017), <https://www.usatoday.com/story/tech/news/2017/06/30/facebook-aims-filter-more-fake-news-news-feeds/440621001/> (describing steps Facebook is taking to reduce the spread of fake news on its service).

legislation is an effective way to establish comprehensive reform, the current partisan gridlock and strong lobbying presence of large technology companies is likely to prevent passage of an effective, timely law.⁷⁵

Congress created the Federal Trade Commission (FTC) in 1914 and empowered it to protect consumers and hold corporations accountable for false claims.⁷⁶ The FTC combats false and deceptive advertising through law enforcement actions, court actions, and educating consumers and businesses through reports and policy guidelines.⁷⁷ At first glance, the FTC and its prosecutorial-like powers appear well-suited for tackling fake news at its source. However, the type of fake news at issue in this analysis does not mislead people about a product or service.⁷⁸ Because the damaging content can rarely be classified as commercial speech, it is largely beyond the scope of the FTC.⁷⁹ Fortunately, the FCC is already positioned to address the current fake news crisis.

A. The Telecommunications Act of 1996 and the V-Chip

The FCC holds broad authority to regulate forms of communication within the United States.⁸⁰ Originally charged with licensing and controlling public airwaves in a manner responsive to the “public convenience, interest, or necessity,” the FCC’s reach has expanded to encompass the In-

75. See Sarah Binder, *Polarized We Govern?*, BROOKINGS CTR. FOR EFFECTIVE PUB. MGMT. 8, 10 (May 2014) (illustrating with a line graph how the frequency of legislative gridlock in Congress has increased since 1947).

76. See generally 15 U.S.C. § 45 (2012) (establishing the Federal Trade Commission (FTC) and granting it power to regulate unfair or deceptive trade practices); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1964) (affirming the FTC’s ability to regulate misleading advertising).

77. See 15 U.S.C. § 53 (allowing the FTC to file for injunctions and restraining orders against entities engaged or believed to be engaged in false advertising practices); *Truth in Advertising: Protecting Consumers*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/media-resources/truth-advertising/protecting-consumers> (last visited Feb. 4, 2018) (describing the ways the FTC seeks to protect consumers from fraud and deception).

78. See *supra* Part I.D.

79. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n.*, 447 U.S. 557, 563 (1980) (holding that the government can limit or prohibit types of commercial speech that mislead the public); see also 15 U.S.C. § 45 (establishing the FTC as an agency to protect consumers against unfair business practices).

80. See 47 U.S.C. § 151 (2012) (creating the Federal Communications Commission (FCC) “for the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . rapid, efficient, Nation-wide, and world-wide wire and radio communication service”).

ternet.⁸¹ As the gatekeeper to the country's principal means of mass communication, the FCC plays an important role in preserving an "uninhibited marketplace of ideas in which the truth will ultimately prevail."⁸²

Preserving an open marketplace of ideas does not, however, preclude the FCC from taking measures to protect people from certain content. In the mid-1990s, Americans grew increasingly concerned about violence and sexually explicit material on television and its effect on children.⁸³ In response, Congress required that all television models built after January 1, 2000, include a filtering tool called the "V-Chip."⁸⁴

Section 551 of the Telecommunications Act of 1996 seeks to provide parents with greater control over the content their children are exposed to on television.⁸⁵ Though the V-Chip is required in every television, the hardware was useless without a ratings system by which it could filter content.⁸⁶ As no such system existed in 1996, Congress called for an advisory committee that would help establish a television rating code.⁸⁷ To avoid further government regulation, the television and film industries instead agreed to develop their own voluntary ratings system.⁸⁸ While the advisory

81. *Id.* § 303; *see id.* § 201 (empowering the FCC to prescribe rules and regulations "in the public interest"); *Verizon v. FCC*, 740 F.3d 623, 629 (D.C. Cir. 2014) (holding that FCC's authority to regulate the Internet is based in the agency's jurisdiction over "all interstate and foreign communications by wire or radio" as granted in 47 U.S.C. § 152(a)).

82. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969); *see Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 669 (1994) (Stevens, J., concurring) (confirming the majority's opinion that the government has a strong interest in assuring public access to "a multiplicity of information sources").

83. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 140 (1996) (codified as amended at 47 U.S.C. § 303) (noting studies that suggest children exposed to violence on television have a higher tendency to exhibit aggressive and violent behavior later in life, and that casual treatment of sexual material on television undermines parents' ability to instill responsible attitudes in their children); Don Oldenburg, *TV Violence Isn't Child's Play*, L.A. TIMES (May 3, 1992), http://articles.latimes.com/1992-05-03/news/tv-1608_1_tv-violence (discussing the effect of TV violence on children).

84. *See* 47 U.S.C. § 303(x) (requiring all televisions with screens thirteen inches or greater in size to be equipped with a filtering device that will allow viewers to block programs of a certain rating (called a V-Chip)).

85. Remarks Following a Meeting with Entertainment and Media Executives, 1 PUB. PAPERS 344 (Feb. 29, 1996) ("We're handing the TV remote control back to America's parents so that they can pass on their values and protect their children.").

86. *See* David V. Scott, *The V-Chip Debate: Blocking Television Sex, Violence, and the First Amendment*, 16 LOY. L.A. ENT. L.J. 741, 744-45 (1996) (discussing the technology behind the V-Chip).

87. *See id.* at 746.

88. *See* Lisa D. Cornacchia, *The V-Chip: A Little Thing but a Big Deal*, 25 SETON HALL

committee was never established, § 551 effectively grants the FCC express authority to rate television programming based on its sexual, violent, or other indecent content.⁸⁹

B. A “V-Filter” for the Internet

Where the FCC is willing to regulate content disseminated to the public over radio and television channels, it has taken an anti-interventionist position with respect to the Internet.⁹⁰ Rather than be proactive, the FCC has preserved a free market of ideas over the Internet by keeping it unfettered from state and federal regulations.⁹¹ However, the federal government’s non-regulatory policy does not entirely prevent the FCC from enacting rules and regulations to protect the public from harmful online content.⁹² Given the deleterious effects that fake news has on the national marketplace of ideas, the FCC should promulgate a rule establishing a filtering tool to give the people more control over the content they receive on the Internet.

The FCC could create a filtering tool software, or “V-Filter,” that enables users to choose what type of news content they encounter while browsing websites and using social media. Adopting the V-Chip’s two-part concept, the V-Filter would be an opt-in tool that blocks or flags content based upon an objective ratings system. The development of the rating system could be proposed either by an advisory committee of Internet, media, and social networking companies, or voluntarily by the industry itself. Under the V-Filter rule, social media networks and search engines would not be required to use a rating system; however, should a company decide to offer its users a tool or label that assesses the credibility of a publisher, the com-

LEGIS. L.J. 385, 394 (2001) (noting that political pressure forced the industry to agree to voluntary ratings for television programs).

89. *Id.* at 398.

90. See Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 ADMIN. L. REV. 1, 7 (2009) (comparing the FCC’s proactive approach in “cultivating a democracy-enriching free marketplace of ideas” in the pre-Internet era to the current autonomy-based vision of the First Amendment that describes the FCC’s position toward Internet regulation).

91. *Id.*

92. See 47 U.S.C. § 230(b)(2) (2012) (stating that it is the policy of the United States to preserve the Internet’s free marketplace of ideas as it presently exists “unfettered by Federal or State regulation”). *But see, e.g.*, Child Online Privacy Act (COPA), 47 U.S.C. § 231(a)(1) (restricting minors’ access to harmful material on the Internet), *invalidated by* *Ashcroft v. ACLU*, 542 U.S. 656, 671–72 (2004) (holding that COPA violated the First Amendment by burdening adult access to protected speech but noting that Congress is not incapable of enacting regulations designed to prevent minors from accessing harmful content on the Internet).

pany would be required to comply with the V-Filter ratings system.

The V-Filter's purpose would be to offer Internet users the choice to only receive content from certain "trusted" news sources. There is little doubt that the rating system's method for determining a "trusted" news source will be a matter of significant debate. However, so long as the criteria are reasonable, a V-Filter will combat the problem of fake news by offering users a transparent, consistent tool that better informs them about the content they consume online.

C. *The FCC's Authority for a V-Filter*

The FCC can create the V-Filter and encourage the accompanying ratings system of news sources under its normal notice-and-comment rulemaking procedures. Lacking express statutory authorization from Congress, the FCC can create V-Filter regulations pursuant to its ancillary jurisdiction under Title I of the Communications Act of 1934 (Title I).⁹³

The FCC's ancillary jurisdiction is constrained in scope.⁹⁴ In *American Library Ass'n v. FCC*,⁹⁵ the U.S. Court of Appeals for the D.C. Circuit considered whether the FCC's ancillary jurisdiction provided sufficient authority for "Broadcast Flag" regulations, which would have required receivers of digital television broadcasts to have equipment capable of preventing the unauthorized redistribution of digital content.⁹⁶ The D.C. Circuit found that the FCC could regulate pursuant to ancillary jurisdiction if the subject of the regulation was included in the agency's general jurisdiction under Title I, and if the regulation's subject was "reasonably ancillary to the effective performance of the [FCC]'s various responsibilities."⁹⁷ Though Title I grants the FCC jurisdiction over "all interstate and foreign communication by wire or radio," the court held that such authority did not extend to components that affected a broadcast after transmission was complete.⁹⁸

Conversely, a V-Filter rule remains within the scope of the FCC's ancillary jurisdiction under Title I. Unlike the failed Broadcast Flag rule, a V-Filter and its accompanying rating system affect content *during* transmis-

93. See 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.").

94. *Am. Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005).

95. *Id.*

96. *Id.* at 691.

97. *Id.* at 692–93.

98. *Id.* at 692, 703 (holding that the Broadcast Flag rule does not regulate the communications themselves because it imposes regulations on a device that operates after the communications have occurred).

sion.⁹⁹ In addition, the V-Filter rule's ratings of Internet news sources, like other disclosure requirements, are in the public interest because they help to build an informed public dialogue.¹⁰⁰ As the FCC is charged with managing interstate communications in a manner responsive to the public interest,¹⁰¹ the V-Filter rule appears to satisfy both prongs of the ancillary jurisdiction test.

D. The V-Filter is a Time, Place, or Manner Restriction to Internet Speech

Having established the FCC's authority to promulgate a V-Filter rule, the next challenge is whether the filtering tool and ratings system are permissible under the First Amendment. As previously discussed, parts of the Internet and social media networks are becoming increasingly viewed as public forums.¹⁰² While speech in public forums is generally protected by the First Amendment, the government is permitted to impose reasonable restrictions on the time, place, or manner of that speech, provided those restrictions are content neutral, narrowly tailored to serve a valid government interest, and leave open ample alternative channels.¹⁰³

The V-Filter rule will be content neutral because neither the filtering tool nor the ratings system depends on the actual content being flagged or blocked. The government's purpose is an important consideration in determining whether a regulation is content neutral.¹⁰⁴ The V-Filter will block or flag content based on a ratings system designed to measure the trustworthiness of an information source. The ratings system will not be based on the specific story flagged but rather the publisher's reputation as determined by certain objective criteria. Because the viewpoint an article

99. See *supra* Part III.B (proposing an Internet filter that blocks or flags Internet content based on pre-determined criteria before it is received by the user).

100. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (holding that "people will perceive their best interests if only they are well enough informed"); see also Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 87 (2006) (examining the harms posed by stealth marketing and why disclosure is in the public interest).

101. See 47 U.S.C. § 201 (2012) (charging the FCC with the responsibility to control communication channels in manner responsive to the public interest).

102. See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (finding social media to be a vast democratic forum); see also Ethan Bordman, *Defamation and the Internet*, 87 N.Y. ST. B. ASS'N J. 35, 38 (2015) (explaining that "a public forum is that which the government opens for public expression").

103. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

104. See *id.* (holding that the regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech").

expresses has no direct effect on whether it is caught by the V-Filter, the regulation will be inherently content neutral.

The V-Filter will serve a valid government interest because the FCC has a duty to protect the public from the harmful effects of fake news. There are now regular accounts of fake news causing direct or indirect danger and injury to public figures, private businesses, and average citizens.¹⁰⁵ Further, fake news may inflict lasting harm to democratic institutions if it continues unchecked.¹⁰⁶ The V-Filter rule seeks to safeguard the public by remedying the fake news problem, albeit incrementally.

Finally, the V-Filter is narrowly tailored to address online content from questionable publishers. A court will determine that a regulation is narrowly tailored by considering the alternative ways the FCC may regulate the speech at issue.¹⁰⁷ The V-Filter tool requires a user to opt-in and voluntarily limit his or her own Internet experience. In addition, the regulation creates an optional rating system. Though social media networks and other Internet companies may face market and political pressure to adopt the model rating system to help combat the spread of fake news on their services, they will retain the option to forgo participation.

Finally, the V-Filter also leaves open alternative means for affected online publishers to reach the same audience. A regulation leaves an adequate alternative channel when there is another means for the speaker to reasonably convey that message to the targeted audience.¹⁰⁸ The V-Filter does not prevent publishers from maintaining a website and posting their content online. A website or post that fails the objective criteria may only be blocked from appearing in searches or social media feeds by the V-Filter; the content is not removed from the Internet.

A V-Filter or similar regulation takes a step to address the ongoing fake news problem, while remaining inside the fairly limited scope of the FCC's ancillary jurisdiction over Internet communication. While modest in their

105. See, e.g., Allcott & Gentzkow, *supra* note 7; Fisher et al., *supra* note 4.

106. See Jason Schwartz, *Trump's 'Fake News' Mantra a Hit With Despots*, POLITICO (Dec. 8, 2017), <https://www.politico.com/story/2017/12/08/trump-fake-news-despots-287129> (discussing how government leaders around the world are using the term “fake news” to discredit and undermine journalism).

107. See Clay Calvert & Minch Minchin, *Can the Undue-Burden Standard Add Clarity and Rigor to Intermediate Scrutiny in First Amendment Jurisprudence? A Proposal Cutting Across Constitutional Domains for Time, Place & Manner Regulations*, 69 OKLA. L. REV. 623, 630–31 (2017) (explaining that narrow tailoring compels a consideration of the other ways to regulate the speech at issue).

108. See *id.* at 631 (explaining that an adequate alternative channel is determined by its cost, convenience, and “effectiveness in conveying a message to speaker’s targeted or desired audience”).

direct effect, the filtering tool and model ratings system signal the government interest in developing more comprehensive, uniform solutions to better protect the public from false and misleading information online.

IV. PRIVATE SECTOR ACTIONS TO COMBAT FAKE NEWS

The nature of fake news and the protections of the First Amendment make it difficult to effectively address the fake news problem with a broad government policy.¹⁰⁹ The Internet and social media networks allow fake news content to be issued from new websites and profiles with ease.¹¹⁰ However, companies like Facebook and Twitter are wary of taking steps that might restrict speech, as their businesses depend on public discourse and interaction between their members.¹¹¹

In the face of mounting pressure from the public and from Congress following the 2016 U.S. Presidential election, Facebook, Google, and Twitter each took steps to curb the spread of misinformation on their services.¹¹² Facebook and Twitter have updated their algorithms to preemptively identify fake news stories and prevent bots from promoting content on their networks.¹¹³ Similarly, Google has also adjusted its news rankings to prioritize established sites and considered features to allow users to flag potentially false content for independent review.¹¹⁴ However, individual companies can do more to stem the spread of false and deceptive information on their services.

109. See *supra* Part III.

110. See Allcott & Gentzkow, *supra* note 7, at 214; Seidenberg, *supra* note 9, at 55 (noting that fake news is a moving target where by the time one article is removed another pops up).

111. See Ali Breland, *Social Media Fights Back Against Fake News*, HILL (May 27, 2017, 11:52 AM), <http://thehill.com/policy/technology/335370-social-media-platforms-take-steps-to-protect-users-from-fake-news>.

112. See Elizabeth Dwoskin, *Twitter is Looking for Ways to Let Users Flag Fake News, Offensive Content*, WASH. POST (June 29, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/06/29/twitter-is-looking-for-ways-to-let-users-flag-fake-news/?utm_term=.596c1ca69f4a; Mark Zuckerberg, FACEBOOK (Nov. 19, 2016), <https://www.facebook.com/zuck/posts/10103269806149061> (posting about Facebook's plans to address misinformation shared on its service); see Dylan Byers & Seth Fiegerman, *Facebook, Twitter, Google Face Aggressive Questioning at Senate Hearing*, CNN (Nov. 1, 2017, 4:14 PM), <http://money.cnn.com/2017/11/01/media/facebook-twitter-google-russia-senate-house-intelligence-committees/index.html?iid=EL> (describing a Senate hearing where lawyers for three major Internet companies were questioned about their companies' efforts to address foreign meddling in U.S. politics via their platforms).

113. See Breland, *supra* note 111 (describing the steps that major social networks are taking to prevent the spread of fake news on their services).

114. See Seidenberg, *supra* note 9, at 55.

A. Leveraging Social Media Networks' Terms of Service Agreements

Just like other private businesses, social media companies maintain control over their networks by enforcing their User Agreements containing the terms of service.¹¹⁵ These contractual agreements between the social network and its users allow the company to determine exactly what activities and content can be shared on its platform without being subject to the same First Amendment restrictions as the government.¹¹⁶ If social networks update their terms of service to prohibit fake news, it could enable its users to flag such content for review, after which the network could remove the material just as it would hate speech or other inappropriate content.¹¹⁷ Flagging content is unlikely to conflict with the protections guaranteed by the First Amendment because it is analogous to requiring disclosure, which encourages informed public discourse.¹¹⁸

Unfortunately, enabling users to flag content has not shown much initial success.¹¹⁹ On Facebook, the flagging feature may have even exacerbated the fake news issue and reinforced peoples' preconceived bias toward the information.¹²⁰ Further, if a social network or Google flags a website or removes a profile for containing fake news, the Internet's low barrier to entry make it easy for that publisher to post the same or similar content on a new profile or website.¹²¹ Instead of flagging, some social media companies

115. *E.g.*, *Terms of Service*, TWITTER, <https://twitter.com/en/tos> (last visited Feb. 5, 2018).

116. David Berreby, *Click to Agree With What? No One Reads Terms of Service, Studies Confirm*, GUARDIAN (Mar. 3, 2017), <https://www.theguardian.com/technology/2017/mar/03/terms-of-service-online-contracts-fine-print> (discussing what terms of service for social media actually allow).

117. *See YouTube Help: Flag Inappropriate Content*, YOUTUBE, <https://support.google.com/youtube/answer/2802027?hl=en> (last visited Feb. 5, 2018) (providing users with a tool to flag content they find inappropriate for review, which will then be removed if it is found to violate the website's Community Guidelines).

118. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

119. *See* Tessa Lyons, *News Feed FYI: Replacing Disputed Flags with Related Articles*, FACEBOOK NEWSROOM (Dec. 20, 2017), <https://newsroom.fb.com/news/2017/12/news-feed-fyi-updates-in-our-fight-against-misinformation> (announcing the discontinuation of Facebook's disputed flag feature because academic studies suggest that flagging articles may actually reinforce a person's bias).

120. *See* Jeff Smith & Grace Jackson, *Designing Against Misinformation*, MEDIUM (Dec. 6, 2017), <https://medium.com/facebook-design/designing-against-misinformation-e5846b3aa1e2> (discussing what Facebook learned from its initial changes to protect against the spread of misinformation over its network).

121. *See* Allcott & Gentzkow, *supra* note 7, at 217 (finding that websites supplying fake

are now experimenting with showing a list of related articles next to false stories to provide readers with context.¹²²

B. Creating a Trade Association for Social Networks and Online Media Outlets

Social and traditional media outlets can also look to other industries for guidance. Established in 1922, the Motion Picture Association of America (MPAA) is a private organization that was created to prevent government interference in filmmaking.¹²³ Rather than submit to government regulation of offensive content, MPAA has created a voluntary rating system for films.¹²⁴ Creating a similar trade association for the Internet would establish a private entity capable of flagging misinformation, promoting verified content, and holding traditional and new media outlets accountable for the information they share with the public. A central association could also offer fact-checking tools or create a registry of fake news websites to alert advertisers and stem the revenue supporting the promulgation of dangerous content.¹²⁵

CONCLUSION

The Internet has grown into an important marketplace of ideas and vast public forum for mass speech.¹²⁶ The government has a strong public interest to address the problem of fake news now and should do so by creating a V-Filter rule for the Internet. However, the Internet's low barrier to entry, in conjunction with the strong protections afforded to Internet speech by the First Amendment, make it nearly impossible for the government to solve the problem posed by fake news on its own. As such, Internet companies should continue to work to develop tools to prevent the spread of disinformation over their services. While each network or service is unique, Internet companies should create an industry-wide association to

news tend to be short lived).

122. See Lyons, *supra* note 119.

123. *History of the MPAA*, MOTION PICTURE ASS'N AM., <https://www.mpa.org/our-story> (last visited Feb. 5, 2018).

124. *Preserving Free Speech*, MOTION PICTURE ASS'N AM., <http://www.mpa.org/preserving-free-speech/> (last visited Feb. 5, 2018) (describing the Motion Picture Association of America and how its voluntary movie rating system helps protect the film industry from government censorship).

125. See Allcott & Gentzkow, *supra* note 7, at 217 (discussing how fake news can be a revenue generator via advertisements due to viewers and click rate).

126. See Nunziato, *supra* note 72, at 282 (citing *ACLU v. Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1996)).

facilitate a collaborative effort against fake news.

History has shown that as people grow accustomed to forms of mass communication, they are better equipped to identify fake news.¹²⁷ However, the current crisis is such that both the government and industry must take immediate action to protect the public and its democratic institutions.

127. See Carson, *supra* note 8 (discussing twentieth century propaganda and how its effectiveness decreased as the public grew accustomed to mass media and was better able to identify biased information).