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The Golden Era of Free Speech

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It is not hyperbole to say that the internet and social media are the most important developments with regard to expression since the creation of the printing press. Throughout history a central problem with speech was scarcity of opportunities for expression. Even when newspapers were far more prevalent, there were a limited number, and a person had to be fairly rich to own one. When broadcasting developed, first radio and then television, there was the scarcity created by the limited number of frequencies on the spectrum. Indeed, in *Red Lion Broadcasting Co. v. Federal Communications Commission*, in 1969, the Supreme Court upheld the fairness doctrine for television and radio, including a right to reply law, based on the inherent scarcity of the broadcast spectrum.[1]

But with the internet and social media, no longer is scarcity an issue. Anyone can speak and potentially reach a mass audience instantly. Everyone has access to virtually unlimited information. A half-century ago, if free speech advocates had engaged in science fiction and tried to devise media to maximize expression, the Web and Twitter and Facebook and YouTube likely still would have been beyond their imaginations.

But every advance has costs as well as benefits. Many now point out that because it is easy to speak and reach a mass audience, there is more false speech and that it risks undermining democracy.[2] Also, there is no doubt that these developments have had a detrimental effect on traditional media, a tremendous loss of newspapers, and of the benefits they provide, such as investigative journalism.[3] The huge proliferation of sources of information means that it is easy for people to hear only what reinforces their beliefs. This contributes to the stark political polarization of American society.[4]

Ironically, while in *Red Lion* the justification for regulation was scarcity, now the call for regulation is based on there being too much speech. Although there are problems that require solutions, overall the internet and social media should

be heralded for their huge contributions to free speech, and great care should be taken to not enact regulations that could undermine what has been gained.

Simply put, the assumption of the First Amendment is that generally more speech is better. To be sure, that is not always so; if the speech is child pornography or false advertising, more is not better. But overall, the premise in analyzing speech should be to increase expression and in that way the internet and social media have brought us a golden age of free speech.

In the first section, we explain why the internet and social media should be heralded as radically changing free speech for the better. In the second section, we focus on Section 230 of the Communications Decency Act, which has become the focus of much of the debate over speech over the internet and social media. Although it has attracted significant criticisms from both the left and the right, we believe that Section 230 is desirable and only minor revisions would be desirable. Finally, in the third section we briefly identify some of the crucial problems with the internet and social media—false speech and foreign speech—and point out that there are no easy solutions under current First Amendment doctrine.

In Praise of the Internet and Social Media

A quarter of a century ago, Professor Eugene Volokh wrote a prescient article, *Cheap Speech and What It Will Do*, predicting how online communication would promote democracy by making publishing and receiving a vast amount and variety of information easily available to a wide range of individuals.[5] Professor Volokh wrote that before there was Facebook or Snapchat or Twitter. What he described has come to fruition in an exponential way.

In *Packingham v. North Carolina*, decided in June 2017, the Supreme Court spoke forcefully about the importance of the internet and social media as places for speech.[6] The Court declared unconstitutional a North Carolina law that prohibited registered sex offenders from using interactive social media where minors might be present.[7] The Court explained that cyberspace, and social media in particular, are vitally important places for speech.[8] Justice Kennedy, writing for the majority, explained:

> Seven in ten American adults use at least one Internet social networking service. . . . According to sources cited to the Court in this case, Facebook has 1.79 billion active users. This is about three times the population of North America.
>
> Social media offers "relatively unlimited, low-cost capacity for communication of all kinds." On Facebook, for example, users can debate

> religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship. And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics "as diverse as human thought."[9]

Three characteristics of the internet are particularly important for free speech. 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 to get a broadcast license. Now, though, anyone with a smartphone—or even just access to a library where there is a modem—can reach a huge audience instantaneously. No longer are people dependent on a relatively small number of sources for news.

It is difficult to overstate how much this changes the most fundamental nature of speech. As mentioned in the beginning of this essay, throughout world history, there always was a scarcity of most media for communication. Only so many books or newspapers or radio or television programs could exist. A half-century ago, the Court unanimously held that the federal government could regulate the broadcast media because of the inherent scarcity of spectrum space.[10] No longer is there such scarcity.

To be sure, this also means that false information can be quickly spread by an almost infinite number of sources. True information that is private can be quickly disseminated.[11] There is even a name for it: "doxing," or publishing private information about a person on the internet, often with the malicious intent to harm the individual.[12] The internet and social media can be used to harass.[13] A study by the Pew Research Center "found 40 percent of adult Internet users have experienced harassment online, with young women enduring particularly severe forms of it."[14]

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. The internet has the benefit of providing us all great access to information. As lawyers and law students, we can access Westlaw and all of the cases and secondary sources that would have required a trip to the law library. We can visit the great museums of the world online. We have access to virtually unlimited information from a myriad of 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 his or her reputation. The falsity would

be known by readers of the paper and could be circulated by word of mouth. There could be great harm to the person's reputation. But the newspaper itself would largely disappear except to those wanting to search for it on microfilm or microfiche.

Now, though, the defamatory story can be quickly spread across the internet and likely will be there to be found 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. Totalitarian governments cannot easily cut off information to their citizens. When the revolution began in Egypt, the government tried to stop access to the internet, but people with satellite phones could maintain access and, consequently, disseminate what they learned.[15] 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.[16] Of course, as we saw in the 2016 presidential election and evidenced by Special Counsel Robert Mueller's report, this also allows foreign countries and foreign actors a vehicle for trying to influence the outcome of US elections.[17]

This, of course, is just a brief sketch of how the internet has changed free speech. But our point, like the Court's in *Packingham*, is that the internet is in-kind different from other media that exist for speech. The benefits are great, but so too are the potential costs.

Section 230

This golden age of free speech is possible thanks to the powerful shield against liability for online platforms created by Congress in 1996: 47 U.S.C. § 230. Under Section 230, "interactive computer services"—a capacious term that includes websites such as Facebook, Twitter, and TikTok—are immune from liability for most content posted by users. Platforms are permitted to solicit[18] and host user-generated content,[19] and to make editorial decisions regarding that content,[20] without fear of being sued. But Section 230 does not immunize platforms for content they have a hand in generating.

In the first major case analyzing Section 230, in 1997, the Fourth Circuit observed that

> [t]he purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive

> government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.[21]

Section 230 is essential to the functioning of the modern internet. It fosters the maximum amount of online speech by immunizing platforms for hosting content, and at the same time encourages a tolerable internet environment by permitting companies to freely edit or remove speech on their platforms. And it does it with remarkably low social costs because it protects online platforms from lawsuits they would almost always win anyway. Professor Jeff Kosseff has suggested that Section 230 contains "the twenty-six words that created the internet."[22]

In recent years, Section 230 has endured attack from both progressives and conservatives.[23] Progressives complain that online speech platforms create breeding grounds for bigotry and misinformation. Conservatives bemoan content moderation practices by tech giants such as Facebook and Twitter, which they claim favor left-leaning views at the expense of conservative speech.[24] Calls to amend Section 230 abound from both sides of the political aisle.[25] In December 2020, former president Donald Trump vetoed a major defense appropriation bill in protest of Congress's refusal to amend Section 230.[26] More than one hundred bills have been introduced in legislatures nationwide in the last several years in attempts to influence the content moderation decisions of social media platforms, either by encouraging more moderation or by requiring less moderation.[27] Although we are sympathetic to the criticisms of the current online speech environment—including online hate speech, violence, misinformation, revenge porn,[28] deepfakes,[29] and unequal access to critical informational technologies—we nevertheless believe that the issue here is not Section 230. Amending Section 230 significantly would be difficult to accomplish, likely unconstitutional, and more likely to cause harm than good. Indeed, we believe that Section 230 has been unfairly blamed for many of the problems that are inherent to the internet and social media.

Many proposals to modify Section 230's protection violate the First Amendment. In June 2021, a federal court preliminarily enjoined a Florida statute that "prohibits a social media platform from taking action to 'censor, deplatform, or shadow ban' a 'journalistic enterprise' based on the content of its publication or broadcast."[30] The court held that the statute was a content-based restriction of the speech of online platforms subject to strict scrutiny, and that the plaintiffs' First Amendment challenge was likely to prevail.[31] In a persuasive thirty-one-page opinion, the court identified the problem with most proposed Section 230 reforms: Online platforms have the right, protected by the First Amendment, to make editorial decisions regarding the content they host. Any

attempt to limit that right by restricting editorial power or mandating certain editorial decisions will be deemed a restriction or compulsion of speech that is subject to heightened scrutiny.

Several proposals put forward in Congress recently, such as the Protecting Constitutional Rights from Online Censorship Act, which would make it unlawful for internet platforms to restrict access to content, would similarly be unconstitutional on First Amendment grounds.[32] They would require online platforms to host messages the platforms would prefer to remove and would thus trigger strict scrutiny under the Supreme Court's compelled speech jurisprudence.

Proposals that would *require* platforms to moderate content also have serious constitutional problems. The government cannot directly require platforms to moderate objectionable speech if that speech is protected by the First Amendment. This means that Congress cannot directly impose requirements that platforms prohibit hate speech or misinformation, both of which are at least sometimes protected speech.[33] Any statutory attempt to restrict hate speech online, even if desirable, would need to meet strict scrutiny under the Supreme Court's rules for judicial analysis of content-based restrictions on speech.

But any reasonable observer can agree that some content moderation is required for the internet to be a tolerable place. If platforms could not remove First Amendment–protected terrorism accounts, or misinformation, or harassment, or posts espousing bigotry, the internet would be unusable. Section 230 gets around the basic First Amendment problem in content moderation by taking the government out of the equation and leaving editorial decisions up to the platforms and their users. It also is predicated on the very basic notion in the American free speech tradition that, if a person doesn't like someone's speech, he or she can just ignore it or respond with more speech. Section 230 encourages private companies to do what the government cannot do itself—moderate "cheap speech" that is harmful—while leaving open a channel for online speech available to everyone. In doing so, it permits a balance between free speech and decent speech that would be impossible to achieve through state action.[34]

Even where proposals to increase moderation do not pose constitutional difficulties, they are frequently undesirable as a matter of policy because they would significantly reduce liberty of speech online. One proposal, the PACT Act, co-sponsored by Sen. Brian Schatz (D-HI) and Sen. John Thune (R-SD), would make Section 230 immunity contingent on online platforms' complying with elaborate notice-and-takedown procedures for illegal or policy-violating content, publishing quarterly transparency reports, and even setting up toll-free call centers.[35] The point of the PACT Act is to ensure that companies rapidly respond to complaints of illegal content, and to encourage them to enforce their own acceptable use policies. The PACT Act cleverly attempts to quell lawful

but awful online speech by exhorting platforms to promulgate acceptable use policies and to enforce them. All platforms, including ones that exist for the express purpose of offering a safe haven from censorship, prohibit uses that would be constitutionally protected if restricted by the government.[36] The PACT Act encourages moderation of that speech, without directly requiring it, to restrict speech without running into a looming state action problem. But it may lead to a decrease in freedom of speech, as platforms would overregulate to avoid the risk of tort or criminal liability.[37]

There is considerable evidence in the context of the Digital Millennium Copyright Act (DMCA)[38] (which uses a notice-and-takedown system) that notice-and-takedown procedures can chill online speech by giving anyone a way to veto speech they do not like. In a persuasive article, Professor Wendy Seltzer explains that the DMCA serves as a "prior restraint by proxy," encouraging platforms to overmoderate online speech without the presence of state action, by requiring them to set up private adjudication schemes for online speech that may constitute copyright infringement.[39]

The PACT Act would surely compound the potential free speech problems caused by the DMCA. Not only would it impose a similar notice-and-takedown requirement, but it would do it in a context in which adjudication is much more complicated. It is much easier for a platform to look at two photos, or listen to musical compositions, and then make a quick determination as to whether one infringes the copyright of the other, than it would be in the context of speech torts. For example, if a platform receives a notice that a post is defamatory, it would be required to rapidly determine whether the post is true. That would require significant fact-finding resources that platforms are not prepared to expend. Rather than investigating the truthfulness of every claim of defamation on the internet (of which there would be many), platforms would lean toward the side of overmoderation.

This approach to regulating truthfulness has been visible in the context of the COVID-19 pandemic. Facebook has struggled mightily to reduce antivaccine misinformation on its platform. Although Facebook bans antivaccine advertisements,[40] it admits that the most popular Facebook post from January to March 2021 was one that promoted antivaccine doubts.[41] This occurred even though its algorithm frequently moderates posts that are well meaning. For example, the *Washington Post* reported that although Facebook has put its algorithms and fifteen thousand human moderators to the task of detecting vaccine misinformation—it has taken down more than twenty million posts since the start of the pandemic—"it routinely misses new memes and conspiracy theories, while at times scrubbing legitimate information."[42] If it is too difficult for Facebook to moderate the truthfulness of posts about commonly accepted scientific information, we shudder to think how it might respond to

private claims of defamation, or how it might respond when pressed with factual understandings that shift over time.

Content moderation occurs at too massive a scale for companies to risk liability for each item of user-generated content they host. In a white paper published in 2013, Facebook revealed that at that time—and the number is likely much larger now—more than 350 million photos were uploaded to the platform (not inclusive of Instagram) *per day*.[43] According to the paper, 4.75 billion items are shared on Facebook every day.[44] In the first quarter of 2021, Facebook took action against five million pieces of content that violated its child nudity and sexual exploitation policies alone.[45] From 2015 to 2018, Twitter removed more than 1.2 million Twitter accounts promoting terrorism.[46] At this scale, content moderation acts on a system of probability and proportionality, not individual fairness.[47] If companies face increased risk, they will only respond by hedging their bets and deleting lawful user speech to avoid expensive lawsuits, even if they would win those suits easily on First Amendment grounds.

The overmoderation problem was visible following the only major amendment that there has been to Section 230. In 2018, Congress enacted the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA), which creates exceptions to Section 230 for claims under sex-trafficking laws.[48] Shortly after the passage of FOSTA, Craigslist removed its entire personal ads section.[49] It explained that it could not continue hosting users' personal advertisements "without jeopardizing all our other services," because it would face potential civil and criminal liability if it hosted content that violated certain sex-trafficking laws.[50] Any future attempts to add carveouts to Section 230 should contend with the fact that restriction of illegal or objectionable speech online, even if constitutional, will inevitably lead to restriction of desirable speech as well. Given the presumption that more speech is better underlying the American First Amendment tradition, we argue that such carveouts should be made sparingly and narrowly.

Moreover, carving categories of illegal speech out of Section 230's protection will not resolve many of the problems on the internet. Hate speech and bigotry will still thrive because it is not illegal to be a bigot. Misinformation will still be present because of the enormous challenge of sorting fact from fiction,[51] and because much false speech is protected by the First Amendment.[52] Users will still be able to discuss and organize violent activity without rising to the level of incitement. Despite inevitable overregulation, illegal and objectionable speech will still survive simply because content moderation at scale is impossible to perform.

Pressed with the practical and constitutional limitations of statutorily required content moderation, we think that the best way to approach online

speech is to trust in the First Amendment rights of private entities. Section 230 is an elegant and simple method of attaining a balance between free speech and online decency. It encourages online platforms to permit their users to speak freely, to comment on each other's posts and on articles, and to upload anything they like, and empowers those platforms to moderate that speech in a way that the government cannot. We recognize that a great deal of online speech is abhorrent, and that content moderation is not always perfect or fair, but we ultimately conclude that the current regime is the best possible way to ensure the endurance of the golden age of speech.

This does not mean, however, that online speech regulation should stop only at an immunity. Social pressures motivated by thorough reporting and terrific scholarship are already causing platforms to begin improving moderation practices. Those efforts can and should be improved by efforts to improve the transparency of content moderation, perhaps through the establishment of a commission or through transparency reports, such as those that would be required by the PACT Act. It will be easier for everyone to have a conversation about online speech if we have a better sense of the facts. And we can have that conversation without further carving away at Section 230's core protection.

The Problems of the Internet

Although we believe that the internet and social media have created a golden age of speech, we do not deny that the ease of speech that reaches a mass audience creates serious problems. Some already have drawn legislative fixes. California, for example, has adopted laws to address revenge porn (posting sexually explicit photos of a person without consent). We believe that such regulations are constitutional. As for revenge porn, the most basic notions of privacy support preventing sexually explicit photos of a person being publicly disseminated without his or her consent.

But the internet and social media also expose some serious issues where there are not easy answers and current First Amendment jurisprudence makes solutions difficult. We identify two: false speech and foreign speech.

False Speech

False information can cause great harms. In the political realm, it can change the outcome of elections. We have seen, in the area of public health, that it can exacerbate the spread of a communicable disease and undermine efforts to control it through masks and vaccinations.

There is no consistent answer as to whether false speech is protected by the First Amendment. In some areas, the Court has found constitutional protection for false expression, but in other instances it has upheld the ability of the government to punish false speech. This seems inevitable because analysis must be contextual and must be the result of balancing of competing interests, which will prevent a consistent approach to false speech. That is, the Court never will be able to say that all false speech is outside of First Amendment protection or that all false speech is constitutionally safeguarded.

In some instances, the Court has 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*.[53] One L. B. Sullivan, an elected commissioner of Montgomery, Alabama, successfully sued the *New York Times* and four African American clergymen for defamation for an advertisement that had been published in the newspaper on March 29, 1960. The ad criticized the way in which police in Montgomery had mistreated civil rights demonstrators. There is no dispute that the ad contained minor false statements.

The Supreme Court held that the tort liability violated the First Amendment. Justice Brennan, writing for the Court, explained that criticism of government and government officials was at the core of speech protected by the First Amendment.[54] The Court said that the fact that some of the statements were false was not sufficient to deny the speech First Amendment protection.[55] The Court explained that 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.' "[56]

Subsequently, in a very different context, in *United States v. Alvarez*, the Court again recognized the importance of judicial protection of false speech.[57] *Alvarez* involved the constitutionality of a federal law that made it a crime for a person to falsely claim to have received military honors or decorations.[58] Justice Kennedy wrote for a plurality of four and concluded that the law imposed a content-based restriction on speech and thus had to meet the most "exacting scrutiny."[59] He explained that the government failed this test because it did not prove any harm from false claims of military honors and because the government could achieve its goals through less restrictive alternatives.[60]

Most importantly, Justice Kennedy expressly rejected the government's argument that false speech is inherently outside the scope of the First Amendment. Justice Kennedy declared:

> Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements. This comports with the common understanding

> 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.[61]

Justice Kennedy further explained: "Even when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment."[62]

Yet there are other contexts in which the Supreme Court has refused to provide protection for false speech. For example, it is clearly established that false and deceptive advertisements are unprotected by the First Amendment.[63] The government, of course, can constitutionally prohibit making false statements under oath (perjury) or to law enforcement officials.[64] As for the former, the Court generally has treated commercial speech as being of lower value than political speech and that may make it easier to say that false advertising is entitled to no constitutional protection at all. As for perjury, there is a requirement for proof of a knowing and intentional falsehood.

More generally, the Court has declared that "[f]alse statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas,"[65] and that false statements "are not protected by the First Amendment in the same manner as truthful statements."[66] Indeed, the Court has declared that "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."[67] Whether these statements remain good law after *Alvarez* is an open question, but whether *Alvarez* would come out the same way today is also uncertain. It was a 6–3 decision with Justices Kennedy and Ginsburg in the majority, and Justices Scalia, Thomas, and Alito dissenting. It is not clear how the three newest Justices—Gorsuch, Kavanaugh, and Barrett—would have voted in the case. But ideologically they are much more like the dissenters in *Alvarez* than those in the majority.

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 harms, even great harms. Speech is protected especially 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. False speech can hurt reputation, and it is fanciful to think that more speech necessarily can undo the harms.

But at the same time, there is great concern about allowing the government to prohibit and punish false speech. *New York Times Co. v. Sullivan* was unquestionably correct when it said that 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.' "[68] Also, allowing the government to prohibit false speech places it in the role of being the arbiter of truth. Justice Kennedy captured the dangers of this in *Alvarez*:

> Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth.[69]

The result is that it always will be impossible to say either that false speech is always protected by the First Amendment or that it never is protected by the First Amendment. Inescapably, the Court will need to balance the benefits of protecting the false speech against the costs of doing so. Such balancing is inherently contextual and will yield no general answer as to the Constitution's protection of false speech. This, then, creates an enormous challenge for dealing with false speech over the internet and social media. Without a doubt, the internet and social media make the problem of false speech much greater: False speech is easier to disseminate to a large audience and has much greater permanent availability. But we do not think that there can be a general rule about how to treat false speech over these media without either doing great harm to free speech or providing protection in instances where restrictions should be constitutional.

Foreign Speech

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.[70] American intelligence agencies recognized this soon after the election.[71] In February 2018, Special Counsel Robert Mueller issued a thirty-seven 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.[72] 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."[73] Russia's efforts to influence the election primarily were through the internet and social media.

There is understandable widespread outrage at the idea of Russia's engaging in a concerted effort to influence the outcome of the 2016 presidential election. Yet, it must be remembered that the United States long has been doing exactly

this, using speech—including false speech—to try to influence the outcome of elections in foreign countries. Dov Levin, a professor at Carnegie Mellon University, identified eighty-one instances between 1946 and 2000 in which the United States did this.[74] As one report explained,

> Bags of cash delivered to a Rome hotel for favored Italian candidates. Scandalous stories leaked to foreign newspapers to swing an election in Nicaragua. Millions of pamphlets, posters and stickers printed to defeat an incumbent in Serbia. The long arm of Vladimir Putin? No, just a small sample of the United States' history of intervention in foreign elections.[75]

Although condemnation of Russian meddling in the American election is easy, the underlying First Amendment issue is difficult. Obviously illegal conduct, such as hacking into the Democratic National Committee headquarters and the subsequent dissemination by the hackers of unlawfully gained information,[76] is not constitutionally protected. But what about foreign speech that is legal and that expresses an opinion—even false speech?

The Supreme Court repeatedly has said that the source of information does not matter for First Amendment purposes. In *First National Bank of Boston v. Bellotti*, 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.[77] 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 informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."[78]

The Court relied 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.[79] The Court stressed that the value of the speech does not depend on the identity of the speaker 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: "The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its 'identity' as a corporation."[80] On other occasions, too, the Court has declared that "[t]he identity of the speaker is not decisive in determining whether speech is protected."[81]

But if this is so, why should it matter whether the speaker is a foreign government or foreign individual? Federal law prohibits foreign governments, individuals, and corporations from contributing money to candidates for federal office.[82] 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. It follows, therefore, 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."[83] But can this be reconciled with the Supreme Court's declaration that the identity of the speaker should not matter in First Amendment analysis? Although it is not a comfortable answer, we do not see a way to exclude foreign speakers consistent with the Court's premise that the identity of speaker cannot be the basis for regulation. The assumption of the First Amendment is that more speech is better and that is true whether the speaker is foreign or domestic.

At the very least, it would be desirable to have disclosure of the identity of speakers so that people can know when the 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 *Mclntyre v. Ohio Elections Commission*, the Court declared unconstitutional a law that prohibited the distribution of anonymous campaign literature.[84] Justice Stevens, writing for the Court, stated: "An author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."[85] Moreover, Justice Stevens said 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."[86] Wouldn't that be especially true of a foreign government or foreign individuals who were trying to influence an American election?

We would draw a distinction between a right to speak anonymously and a right for a speaker to mask its identity in order 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.

The transnational nature of the internet makes controls elusive even if they are constitutional. As the 2016 presidential election shows, foreign governments can use the internet and social media to influence elections without their officials' and agents' ever entering the United States. It is unclear how the law can be applied to them. The internet gives them the ability to engage in false speech (and all other kinds of expression) with relatively little fear of legal sanctions. The United

States could attempt to impose international sanctions on nations that interfere with our elections. Under the Court's recent decision in *Agency for International Development v. Alliance for Open Society International,* the First Amendment does not apply to the government's extraterritorial actions.[87] The United States' imposing sanctions on foreign entities that engage in such behavior is the appropriate response, not the government amending Section 230 to require online platforms to engage in moderation of foreign speakers. But whether such international sanctions would make any difference is at best uncertain.

Conclusions

Our basic point is that the internet and social media provide enormous benefits in terms of speech and also unique challenges. Great care should be taken to make sure that any regulation actually solves the problems without sacrificing the great gains in expression from these relatively new media.