

From Diet Pills to Truth Serum: How the FTC Could Be a Real Solution to Fake News

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I. INTRODUCTION

“Don’t believe everything you read on the internet.”-Abraham Lincoln¹

While the thought of President Lincoln espousing the dangers of believing unverified stories on the internet may seem comical, for people like James Alefantis, the owner of Comet Ping Pong, a pizza restaurant in Washington, D.C., blind reliance on Internet rumors can have horrifying results.² On December 4th, 2016, at around 3 p.m., a man arrived, walked into the restaurant armed with an AR-15 assault rifle, and fired several rounds.³ The shooter then proceeded to search the restaurant for underground vaults or hidden rooms, and finding none, surrendered to police after 45 minutes.⁴ It was later revealed that the shooter, Edgar Maddison Welch, had acted in reliance on a story that he had read online, which claimed the restaurant had concealed a pedophilia ring run by then-Democratic presidential candidate Hillary Clinton and her campaign manager, Jon Podesta.⁵ That story originated from a tweet alleging these rumors and rapidly spread across different social media platforms, with Infowars talk show host Alex Jones suggesting Clinton and Podesta’s involvement in a child sex ring.⁶ While these rumors had no factual basis, this incident, now known as “Pizzagate,”⁷ provides just one example of the effects of the unchecked spread of misinformation, or “fake news” on multi-service media platforms (hereinafter “platforms”) such as Facebook, Twitter, and Google. Despite the severity of the consequences of the rapid spread of patently false rumors, actually halting the dissemination of fake news has proven difficult for legislators and platforms alike, as the First Amendment fiercely protects free speech.⁸ To reduce the dissemination of fake news while balancing First Amendment concerns, the Federal Trade Commission (“FTC”) should regulate fake news by treating information shared by the media on platforms as “products.” This would allow the FTC to pursue unfair trade practice actions while removing the monetary incentive for the media and others to share these stories.

Part II of this Note begins by defining “fake news,” and then proceeds to identify the factors that make it so effective in reaching a large audience on

1. See *Abraham Lincoln Quotes*, MEME GENERATOR, <https://memegenerator.net/instance/67282698/abraham-lincoln-quotes-dont-believe-everything-you-read-on-the-internet-abe-lincoln> [<https://perma.cc/T8AS-G97H>] (last visited Nov. 9, 2017).

2. 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?utm_term=.1108ed20ba7b [<https://perma.cc/7V8H-RCHB>].

3. See *id.*

4. See *id.*

5. See *id.*

6. See *id.*

7. See *id.*

8. See generally U.S. CONST. amend. I. The First Amendment grants broad protection to speech, preventing Congress from creating laws that “abridge[e] the freedom of speech, or of the press.” *Id.*

social media platforms. Next, Part II examines the financial and political incentives that motivate posters of fake news. Lastly, Part II explores the dangers that fake news pose to our society. These risks include perpetuating a misinformed citizenry, destroying trust and confidence in the mainstream media, widening the partisan divide, and potentially interfering with democratic functions.

Part III examines the approaches taken by other countries in dealing with the spread of fake news on social media platforms. These approaches include a bill in Germany that would compel social media platforms to rapidly remove fake news or face massive fines, as well as the designation of special units in the Czech Republic tasked with debunking fake news stories. Part III then discusses the incompatibility of these approaches with the First Amendment protections on speech that are unique to the United States and the narrow exceptions to these protections that have been carved out by other laws.

Part IV explores several existing avenues that are available to combat fake news, as well as the pitfalls of these approaches. First, Part IV discusses the efficacy of libel laws and the jurisdictional and financial issues that make this method infeasible. Part IV also discusses methods of self-regulation, such as the steps taken by Facebook and Google to filter out fake news from their platforms, as well as calls for increased media literacy for the public.

Part V advocates for the oversight of fake news by the FTC. In doing so, this Note will discuss how the Second Circuit handled a case involving a fake news advertiser. Importantly, Part V will discuss the implication of the court's findings regarding the interaction of the Federal Trade Commission Act ("FTCA") with Section 230 of the Communications Decency Act ("CDA"), and how treating news as a product would provide a loophole in the rigorous First Amendment protections that would otherwise apply to publishers of fake news.

II. DEFINING FAKE NEWS AND IDENTIFYING ITS CONSEQUENCES

A. What is "Fake News"?

While misinformation has always been present in public discourse to some extent, the phenomenon of "fake news" has become especially prevalent in recent years. The lack of a precise definition of "fake news" adds to the difficulty of developing a solution.⁹ The President of the United States, Donald Trump, has frequently used the term to refer to news organizations and stories that reflect negatively on his administration and himself.¹⁰ However, as journalism Professor Larry Atkins has explained, the fact that a

⁹ See Claire Wardle, *Fake News: It's Complicated*, FIRST DRAFT (Feb. 16, 2017), <https://firstdraftnews.com/fake-news-complicated/> [<https://perma.cc/JYQ6-JZUA>].

¹⁰ See Donald J. Trump, TWITTER (Feb. 6, 2017), <https://twitter.com/realDonaldTrump/status/828574430800539648> [<https://perma.cc/4N9P-YJUR>] ("Any negative polls are fake news, just like the CNN, ABC, NBC polls in the election. Sorry, people want border security and extreme vetting."); see also Donald J. Trump, TWITTER (Feb. 15, 2017), <https://twitter.com/realdonaldtrump/status/831830548565852160> [<https://perma.cc/36JN-DY3J>] ("The fake news media is going crazy with their conspiracy theories and blind hatred. @MSNBC & @CNN are unwatchable. @foxandfriends is great!").

news article is critical or even biased does not necessarily make it fake if the article does not lie or misrepresent the facts.¹¹ Even inaccurate stories are not fake, another journalism professor Barbara Friedman has explained, where the mistakes are unintentional and the providers “strive for accuracy and work to correct their errors.”¹² For the purposes of this Note, fake news will be defined, borrowing from Tom Hagy’s definition in his article, *A Little Truth About Fake News—and the Law*, as an article that is intentionally and verifiably false and distributed via social media with the purpose of:

1. Swaying opinion, sparking emotion, or even causing outrage among individuals who — believing the information to be true — click, comment, and/or spread the information and/or take some form of action that supports a particular cause or point of view
2. Getting the reader to click through the content, driving “click revenue,” and view and even click on web ads, driving more revenue and, potentially, purchases¹³

As previously mentioned, misinformation and obviously false rumors are nothing new, which raises the question: Why is there currently so much concern about fake news? To answer this question, it is necessary to understand how fake news spreads and the incentives, both financial and political, that exist for creators of fake news. What makes today’s fake news troubling is in large part the relative ease with which these stories can be created and spread to thousands of readers as a result of reduced barriers to sharing content.¹⁴ With the resources available today, it is now easy to create websites and publish content, and with highly-populated userbases, online platforms such as Facebook and Twitter are prime markets for rapidly sharing sensational articles.¹⁵ Fake news sites may even use domain names and logos that are very similar to those of reputable news organizations and in doing so fool readers into believing that the information that they are reading is from a well-known and credible source.¹⁶

In addition to being easily circulated, fake news can be extremely lucrative. Fake news content may easily be monetized through advertising platforms.¹⁷ This format compensates publishers based on the number of

11. See Steven Seidenburg, *Lies and Libel: Fake news lacks a straightforward cure*, ABA J. (July 2017), http://www.abajournal.com/magazine/article/fake_news_libel_law [<https://perma.cc/M6SH-JT2V>] (“They are cherry-picking quotes or facts to back up their position but think they are telling the truth. MSNBC will show a positive slant on Obamacare. Fox News will have a negative slant. Neither is fake news because both networks are just cherry picking facts, not making stuff up.” (internal quotation marks omitted)).

12. *Id.* (internal quotation marks omitted).

13. Tom Hagy, *A Little Truth About Fake News—and the Law*, CORP. LAW ADVISORY, <https://www.lexisnexis.com/communities/corporatecounselnewsletter/b/newsletter/archive/2017/09/08/a-little-truth-about-fake-news-and-the-law.aspx> [<https://perma.cc/78KA-7MM7>].

14. See Hunt Alcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. OF ECON. PERSP. 211, 211–36, 214–15 (2017).

15. See *id.* at 215 (explaining “[i]n 2016, active Facebook users per month reached 1.8 billion and Twitter’s approached 400 million”).

16. See *id.* at 217.

17. See *id.* at 214.

clicks on a given article, which incentivizes individuals to churn out as much sensational content as possible in order to reach more viewers.¹⁸ For example, more than 100 sites posting right wing fake news articles were discovered to have been run by teenagers in a small town in Macedonia in order to earn tens of thousands of dollars in advertising revenues from the clicks on these fabricated stories.¹⁹

Some creators of fake news are motivated by ideology rather than financial gain. These posters post content designed to influence readers to either support or oppose candidates or causes consistent with the creator's own beliefs.²⁰ One right wing fake news provider stated that they actually identify as liberal and sought to use their article to embarrass conservatives who would share the content.²¹ Fake news posts, especially political posts, draw an especially large amount of views, with the top twenty fake news stories on Facebook generating more interaction than the top twenty news stories from mainstream media during the last three months of the 2016 presidential election.²² While fake news is disseminated by posters from all over the political spectrum, in the months leading up to the 2016 presidential election, nearly three times as many pro-Trump (or anti-Clinton) articles were shared on Facebook than pro-Clinton (or anti-Trump) articles, with totals of 30.3 million and 7.6 million shares, respectively.²³

B. *The Dangers of Fake News*

It may be tempting to dismiss the recent uptick in fake news posts on platforms as merely the most recent iteration of an age-old problem, but the same characteristics that incentivize the creation of fake news and make it so easy to spread also pose a serious threat to democratic institutions by eroding the public's trust in established sources of reliable information. A survey by Pew Research Center found that sixty-two percent of US adults get at least some of their news from multi-service media platforms.²⁴ Of this sixty-two percent, eighteen percent get their news from social media "often," twenty-six percent got their news from social media "sometimes," and eighteen percent get it "hardly ever."²⁵ While established news organizations have reputational concerns that discourage the reporting of false or unverified information, fake news publishers do not share these concerns,²⁶ and as previously noted, the top fake news stories are often much more widely shared

18. See Nabihya Syed, *Real Talk About Fake News: Towards a Better Theory for Platform Governance*, 127 YALE L.J. 337, 352 (2017); see also Alcott & Gentzkow, *supra* note 14, at 217; Seidenburg, *supra* note 11.

19. See Alcott & Gentzkow, *supra* note 14, at 217 (citation omitted); Syed, *supra* note 18, at 352–53 (citation omitted); Seidenburg, *Lies and Libel*, *supra* note 11.

20. See Alcott & Gentzkow, *supra* note 14, at 217.

21. See *id.*

22. Seidenburg, *supra* note 11 (citation omitted).

23. See Alcott & Gentzkow, *supra* note 14, at 223.

24. Jeffrey Gottfried & Elisa Shearer, *News 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> [https://perma.cc/F446-Z4FA].

25. *Id.*

26. See Alcott & Gentzkow, *supra* note 14, at 214.

than the top actual news stories on social media.²⁷ As a result of this inundation of misinformation, fake news has the effect of creating confusion and fooling people into believing false information.²⁸ This uncertainty can erode even the most basic foundations and assumptions, and a Pew Research Center associate found that an estimated eighty-four percent of people reported that a disagreement existed over the basic facts underlying public issues prior to the 2016 election.²⁹

In addition to flooding readers with false information, fake news also erodes trust in established sources of information. Trust in the mainstream media has dropped precipitously in recent years, with a Gallup poll reporting that just thirty-two percent of respondents claimed to have “a great deal” or “a fair amount” of trust for the established news outlets, the lowest reported level in Gallup polling history.³⁰ The evaporation of trust in the mainstream media has been more pronounced among Republicans than Democrats, dropping below twenty percent in 2016.³¹ This growing distrust is not limited to the media, with the credibility of intelligence agencies and scientists increasingly being called into question.³² This distrust creates a vicious cycle, as the uncertainty among Americans with regard to which sources they can trust creates a void that fake news is quick to fill.³³

Fake news also serves to inflame tensions and deepen partisan divisions, causing people to “double down on opinions they already have.”³⁴ In order to generate revenues from clicks, fake news articles tend to have sensationalist headlines that draw in viewers but can also create real animosity between sharers and commenters.³⁵ As Amanda Taub writes in her article, *The Real Story About Fake News Is Partisanship*, “[t]he very phrase [fake news] implies that the people who read and spread the kind of false political stories that swirled online during the election campaign must either be too dumb to realize they’re being duped or too dishonest to care that they’re

27. See generally Seidenberg, *supra* note 11.

28. See *id.* (quoting Alcott & Gentzkow, *supra* note 14) (“We estimated that half of the people who saw fake news stories believed they were true.”).

29. See *id.*

30. Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP NEWS (Sept. 14, 2016), <http://news.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx> [<https://perma.cc/YDU2-XRHZ>].

31. See Alcott & Gentzkow, *supra* note 14, at 215-16.

32. See Philip Rotner, *Trump Trashes Free Press and U.S. Intelligence In Poland*, HUFFINGTON POST (July 6, 2017), https://www.huffingtonpost.com/entry/trump-trashes-free-press-and-us-intelligence-in-poland_us_595ea645e4b08f5c97d0683f [<https://perma.cc/D5YC-82L5>]; Brian Kennedy & Cary Funk, *Many Americans are skeptical about scientific research on climate and GM foods*, PEW RES. CTR. (Dec. 5, 2016), <http://www.pewresearch.org/fact-tank/2016/12/05/many-americans-are-skeptical-about-scientific-research-on-climate-and-gm-foods/> [<https://perma.cc/MR9Z-B5BF>].

33. See generally Alcott & Gentzkow, *supra* note 14, at 215.

34. See Seidenberg, *supra* note 11 (quoting Rachel Davis Mersey, an associate professor of journalism at Northwestern University’s Medill school).

35. See generally Craig Silverman, *This Is How Your Hyperpartisan Political News Gets Made*, BUZZFEED NEWS (Feb. 27, 2017), https://www.buzzfeed.com/craigsilverman/how-the-hyperpartisan-sausage-is-made?utm_term=.hrWnJY8k3#.jsDdLbDjZ [<https://perma.cc/9VFZ-4M9H>]; Amanda Taub, *The Real Story About Fake News Is Partisanship*, N.Y. TIMES (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/upshot/the-real-story-about-fake-news-is-partisanship.html> [<https://perma.cc/74YY-T56P>].

spreading lies.”³⁶ The contentiousness of these articles may result in individuals unfollowing or blocking other users, even friends or family, whose ideological views do not match up with their own.³⁷ As a result, many users end up in an insular echo chamber, with similarly-minded friends posting content that aligns with their own closely held beliefs, reaffirming what they were already disposed to believe, regardless of whether or not the content is reliable and accurate information.³⁸ These echo chambers are so pronounced that researchers can tell with high accuracy whether social media users skew liberal or conservative just by looking at their friends.³⁹ While it might be tempting to believe that this insularity will facilitate greater engagement with politics, without exposure to opposing viewpoints, the value of this discourse is significantly lessened.⁴⁰

The above listed effects of fake news are not independent of one another, and their interaction can be readily seen, particularly regarding discussions of the Russian interference in the 2016 presidential election. In the aftermath of the election, Facebook and Twitter discovered that Russian entities had purchased significant amounts of advertising pushing divisive issues in the months leading up to the election.⁴¹ Additionally, the platforms uncovered thousands of fake bot accounts traced to Russian users that pushed anti-Clinton comments in these online spaces.⁴² The United States is not the only country that has experienced a plague of fake news as a means of targeted election interference. According to the recent “Freedom of the Net” report, at least 16 countries experienced attacks that were similar to the meddling efforts that took place during 2016 presidential election.⁴³

Fake news, while not completely new, has a reach and influence unlike other iterations of miscommunication. Understanding the motives behind fake news and the effects it can have is crucial to developing an effective solution to combat the issue of rapidly spreading misinformation without unduly treading on rights of free expression.

III. A COMPARATIVE VIEW OF REGULATING FAKE NEWS

A. Actions Taken by Other Countries

As mentioned above, fake news is a global problem, with ramifications that extend well beyond the United States. The threat posed by fake news has

^{36.} Taub, *supra* note 35.

^{37.} See Fillipo Menczer, *Fake Online News Spreads Through Social Echo Chambers*, SCI. AM. (Nov. 28, 2016), <https://www.scientificamerican.com/article/fake-online-news-spreads-through-social-echo-chambers/> [<https://perma.cc/W7V5-DDDK>].

^{38.} *See id.*

^{39.} *See id.*

^{40.} *See id.*

^{41.} See Scott Shane, *The Fake Americans Russia Created to Influence the Election*, N.Y. TIMES (Sept. 7, 2017), <https://www.nytimes.com/2017/09/07/us/politics/russia-facebook-twitter-election.html> [<https://perma.cc/M24Q-7T89>].

^{42.} *Id.*

^{43.} Megan Trimble, *Fake News Found in 16 Countries' Elections*, U.S. NEWS (Nov. 14, 2017), <https://www.usnews.com/news/best-countries/articles/2017-11-14/report-russia-like-election-meddling-discovered-in-16-countries> [<https://perma.cc/TA7W-R7LU>].

prompted some countries to take aggressive action to counter and prevent the spread of deliberate misinformation. In Germany, for example, a fake news article falsely claimed that asylum seekers raped a German girl of Russian descent, a falsehood that was repeated by even high-ranking members of the Russian government, presumably to attack Chancellor Angela Merkel's open-door policy for refugees.⁴⁴ In response to such incidents, as well as the reports of the impact of fake news in the 2016 United States presidential election, Merkel's cabinet drafted a bill that would impose hefty fines on social media outlets that fail to remove blatantly false news articles that incite hate within twenty-four hours.⁴⁵ The law, called "Netzwerkdurchsetzungsgesetz" or "NetzDG," came into effect in October 2017 and would fine social media platforms as much as fifty million euros for failing to adequately police the content shared on their sites.⁴⁶ Networks would have up to a week to remove other content that is less blatantly in violation of the law.⁴⁷

Critics of this law highlight the threat it poses to expressive speech. These critics raise concerns that in the government's effort to eradicate fake news articles, other permissible forms of expression will inevitably be limited by the law.⁴⁸ By enacting such harsh penalties, the government runs the risk of imposing burdensome restrictions on citizens who might unknowingly violate the law by merely sharing their opinions.⁴⁹

France has also taken steps to introduce a law to prohibit fake news. The law proposed by President of France Emmanuel Macron and passed by the French parliament in June 2018 draws some of its inspiration from Germany's law addressing fake news.⁵⁰ The law will impose tougher rules on social media regarding sources of news content and would give judges emergency powers to remove or block content determined to be fake during election periods.⁵¹

The Czech Republic has taken a very different approach to addressing fake news, declining to adopt a law. Instead, the government created a task

44. See Anthony Faiola & Stephanie Kirchner, *How do you stop fake news? In Germany, With a Law*, WASH. POST (Apr. 5, 2017), https://www.washingtonpost.com/world/europe/how-do-you-stop-fake-news-in-germany-with-a-law/2017/04/05/e6834ad6-1a08-11e7-bcc2-7d1a0973e7b2_story.html?utm_term=.1967bf0ed6b1 [<https://perma.cc/S9HB-XVDS>].

45. See *id.*

46. See Patrick Evans, *Will Germany's new law kill free speech online?*, BBC NEWS (Sept. 18, 2017), <http://www.bbc.com/news/blogs-trending-41042266> [<https://perma.cc/Y6JX-AN87>]. The law does not substantively change what is considered illegal hate speech, but instead cites categories from the German Criminal Code.

47. *Id.*

48. See generally *id.*

49. *Id.*

50. James McAuley, *France weighs a law to rein in 'fake news,' raising fears for freedom of speech*, WASH. POST (Jan. 10, 2017), https://www.washingtonpost.com/world/europe/france-weighs-a-law-to-rein-in-fake-news-raising-fears-for-freedom-of-speech/2018/01/10/78256962-f558-11e7-9af7-a50bc3300042_story.html?utm_term=.2fd3157331a8 [<https://perma.cc/93RB-Q24F>]; Zachary Young, *French Parliament passes law against 'fake news'*, POLITICO (July 4, 2018), <https://www.politico.eu/article/french-parliament-passes-law-against-fake-news/> [<https://perma.cc/UC26-YAB7>].

51. Emmanuel Macron: *French president announces 'fake news' law*, BBC NEWS (Jan. 2, 2018), <http://www.bbc.com/news/world-europe-42560688> [<https://perma.cc/L26G-UGL4>]; McAuley, *supra* note 50.

force to seek out and identify publishers of misinformation on social media and to alert the public to the falsity of fake news articles.⁵² The agency does not engage in overt censorship of content, and instead merely flags posts as untrue.⁵³ While this method somewhat alleviates concerns over restraints on free speech, the task force has experienced only limited success since its inception.⁵⁴ The center's Twitter account, which it uses to notify the public of fake news stories, has fewer than 7,000 followers, and to date has only flagged a handful of news stories as fake news.⁵⁵

B. First Amendment Limitations on Comparative Approaches

1. The First Amendment

While other countries have taken aggressive steps to halt the spread of fake news, the United States has been slower to adopt proactive regulatory measures to address the issue. In addition to public criticism of limitations on self-expression, lawmakers in the United States face a significant hurdle that is largely absent in the countries that have been able to pass aggressive laws or regulation: The First Amendment to the United States Constitution. The plain language of the First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press,” effectively curtailing the government’s power to constrain the speech of its citizens.⁵⁶ While there are limits as to what constitutes protected speech, restrictions on speech that are based on the content are subject to strict scrutiny by courts.⁵⁷ Content-based laws are defined as “those that target speech based on its communicative content” or “appl[y] to particular speech because of the topic discussed or message expressed.”⁵⁸ In order to survive strict scrutiny, the government must demonstrate that a content-based law “is necessary to serve

52. See Faiola & Kirchner, *supra* note 44; Rick Noack, *Czech elections show how difficult it is to fix the fake news problem*, WASH. POST (Oct. 20, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/10/20/czech-elections-show-how-difficult-it-is-to-fix-the-fake-news-problem/?utm_term=.86b39744faaf [<https://perma.cc/MHB3-WWCY>].

53. Noack, *supra* note 52.

54. Michael Colborne, *The Brief Life, and Looming Death, of Europe’s ‘SWAT Team for Truth’*, FOREIGN POL’Y (Sept. 20, 2017), <http://foreignpolicy.com/2017/09/20/the-brief-life-and-looming-death-of-europes-swat-team-for-truth-fake-news/> [<https://perma.cc/6GDC-9YPH>].

55. See *id.*; Noack, *supra* note 52.

56. U.S. CONST. amend. I.

57. See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (explaining “[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed and [s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.”) (internal citations omitted).

58. See Annie C. Hundley, *Fake News and the First Amendment: How False Political Speech Kills the Marketplace of Ideas*, 92 TUL. L. REV. 497, 504 (2017) (citing *Reed*, 135 S. Ct. at 2226–27) (internal quotation marks omitted).

a compelling state interest and is narrowly drawn to achieve that end.”⁵⁹ Even where the government makes a compelling argument for the necessity of a content-based law, such cases rarely survive strict scrutiny.⁶⁰

Commercial speech receives a lesser degree of protection under the First Amendment than other forms of speech.⁶¹ Commercial speech is “speech that *proposes* a commercial transaction,” such as an advertisement.⁶² However, speech does not necessarily become commercial due to the fact that it is marketed, and in cases where the government seeks to impose a restriction on commercial speech, it must first demonstrate that the speech in question is commercial within the parameters set by the constitution.⁶³ Even where content is deemed to be commercial speech, it still retains the protections of the First Amendment where the speech is related to lawful activities.⁶⁴ However, the government may impose restrictions on commercial speech “when the particular content or method of advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse.”⁶⁵ Advertising that is false or misleading receives no First Amendment protections whatsoever and “may be prohibited entirely.”⁶⁶

In determining whether a regulation of commercial speech is constitutional, the Supreme Court prescribed a four-prong test in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.⁶⁷ Under the first prong, courts examine whether the commercial speech at question concerns lawful activity, the extent to which it is accurate and not misleading, and depending on these factors, whether it is protected by the First Amendment.⁶⁸ The second prong asks “whether the asserted governmental issue is substantial.”⁶⁹ Where the answers to the first two prongs are affirmative, the inquiry shifts to the third and fourth prongs, which examine, respectively, “whether the regulation directly advances the government interests asserted” and “whether it is not more extensive than is necessary to serve that interest.”⁷⁰ Even where there exists a compelling government interest that is served by a restriction on commercial speech, the restriction

^{59.} See, e.g., *Reed*, 135 S. Ct. at 2236 (citing *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987) (internal quotation marks omitted)).

^{60.} See *Hundley*, *supra* note 58, at 504 (citing *Reed*, 135 S. Ct. at 2226-27).

^{61.} *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993).

^{62.} KATHLEEN ANN RUANE, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT, CONG. RES. SERV. No. 95-815, at 14 (2014) (citing *Bd. of Trs. of the State University of New York v. Fox*, 492 U.S. 469, 482 (1989)) (internal quotation marks omitted) (emphasis in original).

^{63.} *Id.*

^{64.} *In re R. M. J.*, 455 U.S. 191, 203 (1982).

^{65.} *Id.*

^{66.} *Id.*

^{67.} *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of New York*, 447 U.S. 557, 566 (1980); see RUANE, *supra* note 62, at 15.

^{68.} *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566. In *Central Hudson*, the Supreme Court rejected the New York Public Service Commission's argument that Central Hudson's possession of monopoly power meant that the Commission's order prohibiting promotional advertising did not constitute a meaningful restriction of commercial speech.

^{69.} *Id.*

^{70.} *Id.*

will be found unconstitutional where it is overly broad.⁷¹ However, the fourth prong does not require that the state use the “least restrictive means” to advance the asserted governmental interest, but the fourth prong may be satisfied where there is “a reasonable ‘fit’ between the legislature’s ends and the means chosen to accomplish these ends.”⁷²

2. Section 230 of the Communications Decency Act

Beyond the protections afforded to speech by the First Amendment, legislatures face another obstacle to implementing a solution to fake news, Section 230 of the Communications Decency Act (“CDA”). The CDA, which was passed as part of the Telecommunications Act of 1996, “subject to a few exceptions . . . forbids the imposition of damages or injunctions against search engines, social networks, online marketplaces, web-based sharing services and consumer review sites.”⁷³ Section 230(c)(1) states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁷⁴ Section 230(c)(2) states,

“No provider or user of an interactive computer service shall be held liable on account of-

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).”⁷⁵

These provisions provide a high degree of protection to social media platforms and publishers of fake news alike.⁷⁶

Recent developments suggest that the protections of Section 230 may not be as ironclad as they may seem. On March 21, 2018, the United States Senate passed the Stop Enabling Sex Traffickers Act (“SESTA”) with the

71. *See id.* at 570 (finding that the New York Public Service Commission’s order prohibiting electric utilities from promoting the use of electricity was overly broad).

72. RUANE, *supra* note 62, at 15 (citing Bd. of Trs. of the State University of New York v. Fox, 492 U.S. 469, 482 (1989)).

73. Timothy Alger, *The Communications Decency Act: Making Sense of the Federal Immunity for Online Services*, ORANGE COUNTY LAW. (Jan. 2017), http://www.virtualonlineeditions.com/article/The_Communications_Decency_Act%3A_Making_Sense_Of_The_Federal_Immunity_For_Online_Services/2674709/371959/article.html [<https://perma.cc/57NE-UUL2>]; *see generally* 47 U.S.C.A. § 230 (2018).

74. 47 U.S.C.A. § 230(c)(1).

75. *Id.* at § 230(c)(2).

76. *See generally* Alger, *supra* note 73; *Id.* at § 230.

Allow States and Victims to Fight Online Sex Trafficking Act (“FOSTA”).⁷⁷ Under the acts, websites will be stripped of CDA Section 230 protections and will be liable for hosting content that “promote[s] and facilitate[s]” prostitution and sex trafficking.⁷⁸ While this development has limited applications that do not directly affect fake news, it reflects the willingness of Congress to place at least some restrictions on the scope of CDA Section 230.⁷⁹

While FOSTA-SESTA seriously erodes the protections of CDA Section 230 with regard to sex trafficking, the statute’s protections in most other areas remain a significant hurdle for those who might seek to target websites for content shared by third parties, such as fake news articles. With full CDA Section 230 protections in place, it would be impossible for Congress to adopt a law similar to those proposed in France and Germany, where the state places liability on platforms to police the content shared on their sites.⁸⁰

IV. EXISTING REMEDIES

A. *Libel Suits*

Proponents of free speech may argue that no further action should be taken to stop fake news from spreading if the solutions would place further restraints on First Amendment protections, pointing instead to existing remedies as the preferred solution. Libel suits allow plaintiffs to sue defendants for defamation and have the potential for huge rewards, which might be enough to bankrupt some publishers of fake news while deterring creators from posting new fake news content.⁸¹ However, identifying a defendant to sue for defamation can be difficult, as possibilities include the creator of the content as well as anyone who shares the content.⁸² This uncertainty of who to sue can be especially problematic in cases where the publishers are outside the United States, as in the previously mentioned cases of the Macedonian teenagers who made thousands of dollars sharing fake news stories.⁸³ In such cases it may be difficult for courts to gain jurisdiction over defendants.⁸⁴ Additionally, litigation is slow and may cost more than can be recovered from a defendant, making it unappealing to pursue such claims

^{77.} See Violet Blue, *Congress just legalized sex censorship: What to know*, ENGADGET (Mar. 30, 2018), <https://www.engadget.com/2018/03/30/congress-just-legalized-sex-censorship-what-to-know/> [<https://perma.cc/P6U6-WAM5>]; Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat 1253 (Apr. 11, 2018).

^{78.} See *id.* FOSTA-SESTA has drawn much criticism for its loose definition of sex trafficking, which critics say conflates sex trafficking with sex work. The immediate effect of the Act so far has been the elimination of online spaces for sex workers. The loss of these spaces means the loss of income for thousands of individuals employed in sex work.

^{79.} See *id.*

^{80.} See generally Alger, *supra* note 73; Faiola & Kirchner, *supra* note 44; McAuley, *supra* note 50.

^{81.} See Seidenberg, *supra* note 11.

^{82.} See *id.*

^{83.} See *id.*; Alcott & Gentzkow, *supra* note 14, at 217.

^{84.} See Seidenberg, *supra* note 11.

unless the defendant has substantial means.⁸⁵ The cost of litigation also has the effect of limiting who is able to bring these claims in the first place, and parties with insufficient resources to bear the cost of litigation are often left without recourse.⁸⁶ Additionally, as previously mentioned, Section 230 of the Communications Decency Act protects speech on the Internet, limiting the ability of harmed parties to hold social media platforms liable for information posted and spread on their sites by third parties.⁸⁷

B. Self-Monitoring

Free speech proponents concerned with the prospect of government oversight of fake news have suggested that platforms should monitor themselves. Amidst reports of the pervasiveness of fake news on the Internet during the 2016 presidential election cycle, Facebook, Google, and Twitter have faced enormous pressure to recognize the role their platforms played in the spread of false and misleading articles and to take action to address the issue.⁸⁸ While reluctant to take responsibility for the prevalence of fake news and Russian “trolls,” the platforms have taken some steps to address the rampant spread of fake news on their sites.⁸⁹ Facebook has partnered with multiple fact-checking agencies to vet articles and is implementing a feature that would notify users if the veracity of an article is in question, and then suggest other, more trustworthy sources.⁹⁰ While this is an encouraging step towards more responsible platform governance, this solution is problematic because it does not ultimately address the incentives that drive the spread of fake news.⁹¹ Even while under scrutiny at two U.S. Congressional hearings, Facebook CEO Mark Zuckerberg declined to make any further promises about supporting legislation to regulate the platform or for Facebook to implement regulations itself.⁹² Furthermore, by actively suggesting other alternatives to users, the platform could be subject to bias and influence the perceptions of viewers.⁹³

Google has undergone efforts to change its algorithms to ensure that the search results that appear first tend to be verifiable and reliable sources of

85. *See id.*

86. *See id.*

87. 47 U.S.C.A. § 230; Alger, *supra* note 73.

88. *See* Issie Lapwsky, *Eight Revealing Moments From The Second Day Of Russia Hearings*, WIRED MAG. (Nov. 1, 2017), <https://www.wired.com/story/six-revealing-moments-from-the-second-day-of-russia-hearings/> [<https://perma.cc/8CEP-K597>].

89. *See* Lewis Long, *Fighting fake news: how Google, Facebook, and others are trying to stop it*, TECHRADAR (May 25, 2017), <http://www.techradar.com/news/fighting-fake-news-how-google-facebook-and-more-are-working-to-stop-it> [<https://perma.cc/H4V6-QR8Y>].

90. *Id.*

91. *Id.*

92. *See* Dustin Volz & David Ingram, *Zuckerberg resists effort by senators to commit him to regulation*, REUTERS (Apr. 10, 2018), <https://www.reuters.com/article/us-facebook-privacy-zuckerberg/zuckerberg-resists-effort-by-senators-to-commit-him-to-regulation-idUSKBN1HH1CU> [<https://perma.cc/38R3-DA2V>].

93. *Id.*; David Lumb, *Facebook and Twitter met with GOP leaders over tech's liberal bias*, ENGADGET (June 27, 2018), <https://www.engadget.com/2018/06/27/facebook-twitter-meet-gop-leaders-tech-liberal-bias-censorship/> [<https://perma.cc/FP5S-7VD6>].

information, rather than results that are popular or trending.⁹⁴ This step will likely help those who seek to learn more about a news story to gain access to better information, but because many Americans get their news from other social media platforms, this safeguard would only be effective if, after seeing a story on a platform, people turned to Google to verify the information.⁹⁵

C. Media Literacy

A third alternative method of addressing fake news is a push for increased media literacy. Media literacy is “the ability to identify different types of media and understand the messages they’re sending.”⁹⁶ Some communications experts have pointed to the lack of media literacy programs in high school curriculums as a major reason for the pervasiveness and effectiveness of fake news in the United States.⁹⁷ Whereas other proposed solutions place the burden on the government or private actors to make determinations for others as to what sources of information are credible, this approach would place the burden on citizens to make these decisions.⁹⁸ This approach has the obvious advantage avoiding First Amendment concerns, as it does not involve government action.⁹⁹

Additionally, a recent study from the University of California, Riverside and Santa Clara University suggests that media literacy training improves judgements about accuracy, even more than having higher than average political knowledge.¹⁰⁰ However, this solution requires a high degree of civic engagement, which could be problematic, as there would be no guarantee that students would internalize the concepts from these programs once they enter the real world.¹⁰¹ Additionally, and more problematically, people do not only share fake news as a result of an inability to critically analyze information, as people may choose to share stories they know are fake “to show what groups and ideas they agree with, to feel part of a movement, even for entertainment.”¹⁰² Lastly, the benefits of this approach could not be realized until it has been in place for some time and, standing alone, it would be unlikely to effectively address the issue of the extreme pace and volume of fake news.¹⁰³

^{94.} See Long, *supra* note 89.

^{95.} See generally *id.*

^{96.} *What is media literacy, and why is it important?*, COMMON SENSE MEDIA, <https://www.common sense media.org/news-and-media-literacy/what-is-media-literacy-and-why-is-it-important> [<https://perma.cc/B2VD-2UJM>].

^{97.} See Seidenberg, *supra* note 11.

^{98.} See *id.*

^{99.} See *id.*

^{100.} See Michael Rosenwald, *Making media literacy great again*, COLUM. JOURNALISM REV. (2017), https://www.cjr.org/special_report/media-literacy-trump-fake-news.php [<https://perma.cc/GCK9-SMTQ>].

^{101.} See *id.*

^{102.} *Id.*

^{103.} Seidenberg, *supra* note 11.

D. Federal Trade Commission Enforcement

Regulation by the Federal Trade Commission (“FTC”) provides an attractive alternative to previously mentioned solutions to limit the spread of fake news. The FTC, through Section 5 of the Federal Trade Commission Act (“FTCA”), is “empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”¹⁰⁴ To prove a deceptive act or unfair trade practice, the FTC must establish three elements: “[1] a representation, omission, or practice, that [2] is likely to mislead consumers acting reasonably under the circumstances, and [3], the representation, omission, or practice is material.”¹⁰⁵ It is not required that the representation was made with the intent to deceive where the deception or practice was likely to mislead consumers acting reasonably.¹⁰⁶ The FTC defines “unfair” practices as those that “cause[] or [are] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”¹⁰⁷ Deceptive practice suits have included suits against companies that publish fake scientific studies that support the efficacy of products such as fat loss pills.¹⁰⁸ These “studies” are designed to make consumers believe that the product being discussed is legitimate in order to induce a purchase.¹⁰⁹ Applied to fake news, the deception would be the marketing of fake news as legitimate information, targeting consumers for click revenue, and relying on consumers’ false belief that the sites contain accurate information to attract web traffic.

V. THE FTC AS A REGULATOR OF FAKE NEWS

A. Analogizing Fake News to an Unfair Trade Practice

While the intricacies of the First Amendment make it unlikely that a blanket remedy to fake news will emerge, this inherent complexity does not mean that there are no mechanisms in place to serve as a bulwark against threats to democratic institutions. Rather than attempt to create a new law that would have to navigate the challenges of First Amendment protections and the insulation of Section 230 of the CDA, fake news should be policed

^{104.} 15 U.S.C.A. § 45 (2006).

^{105.} *FTC v. Verity Int’l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006) (quoting *Cliffdale Assocs., Inc.*, 103 FTC 110, 165 (1984)).

^{106.} *See* *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 168 (2d Cir. 2016) (citing *Verity Int’l, Ltd.*, 443 F. 3d at 63).

^{107.} *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, FCC, <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [<https://perma.cc/L23N-CAAS>] (citing 5 U.S.C. § 45(n) (2006) (internal quotation marks omitted)).

^{108.} *See* Callum Borchers, *How the Federal Trade Commission could (maybe) crack down on fake news*, WASH. POST (Jan. 30, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/30/how-the-federal-trade-commission-could-maybe-crack-down-on-fake-news/?utm_term=.6c0864b5bb37 [<https://perma.cc/YN7D-Y2Q7>].

^{109.} *Id.*

through an existing agency that already possesses the resources and mechanisms to address the issue. Because the FTC is empowered to pursue claims for deceptive practices, the agency would be a suitable candidate to target financially-motivated fake news.

By extending its regulatory framework to fake news sites, the FTC could treat these sites as deceptive advertising inducing consumers to visit sites that “sell” fake news as a product.¹¹⁰ By treating fake news sites that present blatantly false news stories similarly to websites that present fabricated articles purporting the efficacy of a product such as a fat loss pill, the FTC could bring this type of fake news under the umbrella of commercial speech and remove it from broad First Amendment protections.¹¹¹ In 2013, the FTC reached settlements in ten cases against online marketers who used fake news sites to market weight loss products.¹¹² In these cases, the marketers designed their websites to appear as if they were part of legitimate news organizations, with titles such as “News 6 News Alerts,” “Health News Health Alerts,” or “Health 5 Beat Health News.”¹¹³ These sites also falsely claimed that their reports had been carried on major networks, including ABC, Fox News, CBS, CNN, USA Today, and Consumer Reports.¹¹⁴ These sites bear striking similarities to other, more recent fake news sites which, as previously discussed, also present themselves as legitimate sites, often borrowing logos or closely imitating the names of reputable networks.¹¹⁵ With these similarities, the FTC could pursue unfair trade practice claims against fake news sites by viewing news as the product, although this approach would be limited to publishers of fake news who use the news to sell products or to generate click revenue.¹¹⁶

The FTC could apply its unfair trade practice criteria to fake news, which would limit liability for fake news to misleading representations made to the consumers, and within these cases, only when the deception or omission is material.¹¹⁷ Because fake news is designed to look like real news, it is likely to mislead consumers and therefore could alleviate any need to demonstrate intent to deceive.¹¹⁸ While not a perfect analogy, the FTC’s treatment of fake websites created to promote the efficacy of weight loss products provides a clear example of how the FTC could engage in oversight of fake news.

110. *See id.*

111. *See id.*

112. *See FTC Permanently Stops Fake News Website Operator that Allegedly Deceived Consumers about Acai Berry Weight-Loss Products*, FTC (Feb. 7, 2013), <https://www.ftc.gov/news-events/press-releases/2013/02/ftc-permanently-stops-fake-news-website-operator-allegedly> [<https://perma.cc/DVD6-4S2E>].

113. *See id.*

114. *See id.*

115. *See Alcott & Gentzkow, supra note 14, at 217.*

116. *See Borchers, supra note 108.*

117. *See FTC v. Verity Int’l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006) (quoting *In re Cliffdale Assocs., Inc.*, 103 FTC 110, 165 (1984)).

118. *See generally id.*

B. Constitutional Hurdles

While it may be more difficult to demonstrate that fake news is likely to “cause substantial injury to consumers which is not reasonably avoidable by consumers themselves,”¹¹⁹ in *FTC v. LeadClick Media, LLC*, the Court held online marketing company LeadClick liable for its participation in directing affiliates to create false news sites that misrepresented the effectiveness of weight loss products sold by its client and were made to appear as scientific studies.¹²⁰ Similarly, when fake news publishers market falsehoods as legitimate information by adopting logos and web layouts designed to deceive consumers as to the veracity of the content they are reading, the content should be treated as no longer expressive, but instead commercial and designed to sell a belief or generate click revenue. Additionally, the FTCA allows for the consideration of public policies alongside other evidence.¹²¹ The similarities between political fake news and deceptive trade practices that rely on fake news reports about products, coupled with the compelling public policy concern of preventing the deliberate spread of misinformation that harms democratic institutions, makes a compelling case for FTC regulation for this category of fake news content.

By pursuing this method of regulating fake news, the FTC could avoid constitutional hurdles that other remedies would be unable to avoid. If challenged, the FTC’s regulation of fake news sites, limited to those who use the news to market products or generate click revenue, would be akin to product regulation and would therefore place restrictions on commercial speech, which is subject to a lesser degree of protection under the First Amendment, especially where advertising is false or misleading.¹²² While false commercial speech is generally not protected by the First Amendment, even if the courts found fake news to have some protections, the FTC would only need to satisfy the intermediate scrutiny standard as opposed to strict scrutiny for content-based speech.¹²³ Fake news, as defined by this Note, is arguably not lawful activity, due the fraud inherent in its creation.¹²⁴ Even if courts were to adopt the view that fake news constitutes lawful activity, it is still inaccurate and misleading, which would cause it to fail to satisfy the first prong of the *Central Hudson* intermediate scrutiny test, eliminating any First Amendment Protections.¹²⁵

Furthermore, even if the government were to find that fake news constitutes protected speech, the FTC could satisfy the second prong of the analysis, as preventing the spread of misinformation is a substantial governmental interest.¹²⁶ From here, the inquiry would shift to the third and

^{119.} 15 U.S.C.A. § 45(n).

^{120.} See generally, *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 158 (2d Cir. 2016).

^{121.} See 15 U.S.C.A. § 45(n). In order to declare a practice unlawful as an unfair trade practice, the FTC must show that the practice is likely to cause injury to consumers that is not reasonably avoidable, relying on public policy and other evidence. *Id.*

^{122.} See *R. M. J.*, 455 U.S. 191, 203 (1982).

^{123.} See *id.*

^{124.} See generally Seidenberg, *supra* note 11.

^{125.} See Ruane, *supra* note 62, at 15; see generally *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980).

^{126.} See *Cent. Hudson*, 447 U.S. at 566.

fourth prongs, in which the FTC would be required to demonstrate that the regulation “directly advances the government interests asserted” and “is not more extensive than is necessary to serve that interest.”¹²⁷ As previously stated, the fourth prong does not require that the FTC use the least restrictive means, as long as there is a “reasonable fit” between the legislature’s goals and the mechanism used to achieve it.¹²⁸ Here, the regulation of sites deriving revenue from marketing false information would directly advance the government interest in halting the spread of fake news. Because this standard applies only to publishers who monetize their fake news content and whose content meets the criteria for an unfair trade practice, this regulatory scheme is tailored narrowly enough that it should survive a challenge under intermediate scrutiny.¹²⁹

In addition to surviving constitutional challenges, the FTC regulation of fake news would also bypass the issues of immunity under Section 230 of the CDA.¹³⁰ In the recent action brought by the FTC against LeadClick Media, LLC, a manager of networks of online advertisers using fake news to sell products, the Court of Appeals for the Second Circuit found that LeadClick was not entitled to Section 230 immunity.¹³¹ Even though LeadClick claimed to be an interactive computer service provider, the court found that it was an information content provider with respect to its deceptive and unfair trade practices.¹³² Because the publishers of fake news that would be targeted by this solution actively market their sites and products with fake news, they would be found to be information content providers and would therefore receive no constitutional protections.¹³³

C. Limits of FTC Oversight

The tradeoff for the permissibility of this method is its limited applicability. While this method works to remove the financial incentives to publish fake news content, it does not address the publishing of fake news that is purely designed to create confusion.¹³⁴

However, eliminating profit incentives and empowering the FTC to pursue actions against creators of fake news, would reduce the overall level of fake news created. Individuals who churn out vast quantities of fake news to profit from click revenue would be less likely to produce content if they knew that they would be liable for sharing fake news. While this solution does not apply to other forms of fake news, such as articles meant to cause confusion and spread misinformation, the alternative non-regulatory methods discussed earlier in this Note could prove to be effective tools when paired with this regulatory mechanism.¹³⁵ FTC enforcement would provide

127. *Id.*

128. See RUANE, *supra* note 62, at 15 (citing Bd. of Trs. of the State Univ. of New York v. Fox, 492 U.S. 469, 492 (1989)).

129. See generally *Cent. Hudson*, 447 U.S. at 566.

130. See 47 U.S.C.A. § 230.

131. *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 172 (2d Cir. 2016).

132. See *id.* at 175.

133. See generally Alger, *supra* note 73.

134. See generally Seidenberg, *supra* note 11.

135. See generally Long, *supra* note 89; discussion *supra* Part IV: Sections A-C.

objective criteria to target the financial incentives behind fake news, while self-policing by platforms and increased emphasis on media literacy by citizens could prove to be an effective remedy for fake news in areas that are less suitable for government regulation.

VI. CONCLUSION

In our daily lives, we are constantly bombarded with information that shapes the way we view issues and make decisions. Crucial to this process is an implicit reliance on the truthfulness of the information on which we base our decisions. With the emergence and increased prevalence of fake news, it is essential that our society develop mechanisms to better discern facts from misinformation and protect the institutions that form the basis for our democracy. Because fake news as we now know it is new and not totally understood, it is important to acknowledge the shortcomings of existing methods of regulating fake news and why a failure to effectively do so is a threat. In developing a solution to defend against attempts to weaken our democratic systems, it is important that the solutions we pursue do not inflict even greater harm to our personal liberties. By reading the Federal Trade Commission Act to encompass the regulation of fake news publishers, the Federal Trade Commission would be able to target and deter disseminators of blatantly false information while respecting First Amendment rights to free speech.

