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Erwin Chemerinsky  
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## FALSE SPEECH AND THE FIRST AMENDMENT

ERWIN CHEMERINSKY\*

False speech—what today is called “fake news”—is nothing new. Throughout this country’s history, issues concerning false speech have arisen. Early in American history, Congress, with many of the Constitution’s drafters and ratifiers participating, adopted the Alien and Sedition Acts of 1798.<sup>1</sup> The law prohibited the publication of

false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame . . . or to bring them . . . into contempt or disrepute; or to excite against them . . . hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States.<sup>2</sup>

The law was all about dealing with what was regarded as false speech.

The Federalists under President John Adams aggressively used the law against their rivals, the Republicans.<sup>3</sup> The Alien and Sedition Acts were a major political issue in the election of 1800, and after he was elected President, Thomas Jefferson pardoned those who had been convicted under the law.<sup>4</sup> The Alien and Sedition Acts were repealed, and the Supreme

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\* Dean and Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley School of Law.

1. Ch. 74, 1 Stat. 596 (1798).

2. *Id.*

3. See Michael P. Downey, Note, *The Jeffersonian Myth in Supreme Court Sedition Jurisprudence*, 76 WASH. U. L.Q. 683, 692 (1998).

4. *Id.* at 694.

Court never ruled on their constitutionality.<sup>5</sup> In *New York Times Co. v. Sullivan*, however, the Court declared, “Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”<sup>6</sup>

Exactly a century later, the nation was focused on “yellow journalism.”<sup>7</sup> The term was used especially in the mid-1890s to characterize the sensational journalism that used some yellow ink in the circulation war between Joseph Pulitzer’s *New York World* and William Randolph Hearst’s *New York Journal*.<sup>8</sup> Yellow journalism was characterized by “prominent headlines that ‘screamed excitement,’ . . . ‘lavish use of pictures,’ . . . ‘frauds of various kinds,’ . . . Sunday supplement and color comics, . . . [and] ‘campaigns against abuses suffered by the common people.’”<sup>9</sup> One of the most famous law review articles in history—Warren and Brandeis on the right to privacy—was written in response to the journalistic practices of that time.<sup>10</sup> They decried the yellow journalists and gossip-mongers and criticized a sensational press that increasingly ignored the “obvious bounds of propriety and of decency.”<sup>11</sup>

Again now, early in the twenty-first century, there is a focus on false speech. The phrase “fake news” has become part of the vernacular. Is this just a continuation of an issue that has been part of American history since its earliest days, or is it somehow different? In this Essay I want to suggest that the internet has made the issue different from times past and will raise difficult issues of First Amendment law. Specifically, in this Essay I make three points. First, the internet has significantly changed the nature of free speech, including the problem of false speech. Second, there is no overall principle as to how false speech is treated under the First Amendment, and there never will be such a principle. And third, the problem of false speech from foreign governments and foreign actors that emerged as a result of the 2016 presidential election poses special difficulties under the First Amendment.

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5. *Id.*

6. 376 U.S. 254, 276 (1964).

7. Lawrence M. Friedman, *Name Robbers: Privacy, Blackmail, and Assorted Matters in Legal History*, 30 HOFSTRA L. REV. 1093, 1114–15 (2002) (discussing yellow journalism).

8. W. JOSEPH CAMPBELL, *YELLOW JOURNALISM: PUNCTURING THE MYTHS, DEFINING THE LEGACIES* 25 (2001) (describing nineteenth-century reporting practices).

9. *Id.* at 7.

10. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

11. *Id.* at 196.

My goal in this Essay is more to identify issues concerning false speech than to offer solutions. It is important to recognize both how the problems are different than those that have been confronted before and the challenges these new problems pose under the First Amendment.

*I. The Internet as a Unique Medium for Communication*

The internet is the most important medium for communication to be developed since the printing press. In *Packingham v. North Carolina*, decided in June 2017, the Supreme Court spoke forcefully about the importance of the internet and social media as a place for speech.<sup>12</sup> The Court declared unconstitutional a North Carolina law that prohibited registered sex offenders from using interactive social media where minors might be present.<sup>13</sup> The Court explained that cyberspace, and social media in particular, are vitally important places for speech.<sup>14</sup> 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.” . . .

. . . While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The

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12. 137 S. Ct. 1730 (2017).

13. *Id.* at 1733.

14. *Id.* at 1735.

forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.<sup>15</sup>

Three characteristics of the internet are particularly important, especially for the problem of false 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 smart phone—or even just access to a library where there is a modem—can reach a huge audience instantaneously. There are great benefits to this, but also costs. No longer are people dependent on a relatively small number of sources for news.

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.<sup>16</sup> No longer is there such scarcity. The internet 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.<sup>17</sup> 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.<sup>18</sup> The internet and social media can be used to harass.<sup>19</sup> 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.”<sup>20</sup>

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. 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

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15. *Id.* at 1735–36 (citations omitted).

16. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969) (upholding the fairness doctrine based on broadcast spectrum scarcity).

17. See LORI ANDREWS, *I KNOW WHO YOU ARE AND I SAW WHAT YOU DID: SOCIAL NETWORKS AND THE DEATH OF PRIVACY* 121–35 (2011).

18. DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 53 (2014).

19. *Id.* at 35–55.

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

for it on microfilm or microfiche. Accessing the actual story would be very difficult.

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. 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 when I was in law school. We can visit the great museums of the world online. We have access to unlimited information from a myriad of sources. But it also means that false information can be easily accessed and remains available in a way that was impossible before the internet.

Finally, the internet does not respect national boundaries. Again, there are great benefits to this. Totalitarian governments cannot 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.<sup>21</sup> The Supreme Court has estimated that forty percent of pornography on the internet comes from foreign countries, making any attempt to control it within a country impossible.<sup>22</sup> Of course, as we saw in the 2016 presidential election and evidenced by Special Counsel Robert Mueller's indictments, this also allows foreign countries and foreign actors a vehicle for trying to influence the outcome of United States elections.<sup>23</sup>

This, of course, is just a brief sketch of how the internet has changed free speech. But my point, like the Court's in *Packingham*, is that the internet is different from other media that exist for speech. The benefits are great, but so too are the potential costs, especially when it comes to false speech. It is easier to disseminate, easier to retrieve, and easier for those in foreign countries to send it to be read by those in the United States.

## *II. The Lack of a Consistent First Amendment Approach to False Speech*

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. After reviewing some of

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21. *When Egypt Turned Off the Internet*, AL JAZEERA (Jan. 28, 2011), <https://www.aljazeera.com/news/middleeast/2011/01/2011128796164380.html>.

22. *Ashcroft v. ACLU*, 542 U.S. 656, 667 (2004).

23. *See infra* Part III.

these cases, I argue that this is 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*.<sup>24</sup> L.B. Sullivan, an elected commissioner of Montgomery, Alabama, sued the *New York Times* and four African-American clergymen for an advertisement that had been published in the newspaper on March 29, 1960.<sup>25</sup> The ad criticized the way in which police in Montgomery had mistreated civil rights demonstrators.<sup>26</sup> There is no dispute that the ad contained false statements: It said that the demonstrators sang “My Country ‘Tis of Thee,” but they actually sang the national anthem; it said that Dr. Martin Luther King, Jr., had been arrested seven times, but it really was only four; it said that nine students were expelled for the demonstration, but their suspension was for a different protest at lunch counters; and the ad mistakenly said that the dining hall had been padlocked.<sup>27</sup> Pursuant to a judge’s instructions that the statements were libelous per se and that general damages could be presumed, the jury awarded a \$500,000 verdict for Sullivan.<sup>28</sup>

The Supreme Court held that the tort liability violated the First Amendment.<sup>29</sup> Justice Brennan, writing for the Court, began by stating that the case was considered “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>30</sup> The Court explained that criticism of government and government officials was at the core of speech protected by the First Amendment.<sup>31</sup> Most importantly, especially for this discussion, the Court said that the fact that some of the statements were false was not sufficient to

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24. 376 U.S. 254 (1964).

25. *Id.* at 256.

26. *Id.* at 256–57.

27. *Id.* at 258–59.

28. *Id.* at 256, 262.

29. *Id.* at 283.

30. *Id.* at 270.

31. *Id.* at 273.

deny the speech First Amendment protection.<sup>32</sup> 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.’”<sup>33</sup>

Accordingly, the Court said that it was not enough that truth was a defense under Alabama’s libel law—requiring that defendants prove the truth of their statements will chill speech.<sup>34</sup> The Court thus concluded that the First Amendment prevents a “public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>35</sup>

*New York Times* is widely regarded as one of the most important First Amendment decisions in history because of its application of the Constitution as a limit on tort liability, because of its strong protection of political speech, and because of its protection of even false speech.<sup>36</sup>

More recently, in a very different context, in *United States v. Alvarez*, the Court again recognized the importance of judicial protection of false speech.<sup>37</sup> *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.<sup>38</sup> 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.”<sup>39</sup> 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.<sup>40</sup>

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32. *Id.* at 271.

33. *Id.* at 271–72.

34. *Id.* at 278–79.

35. *Id.* at 279–80.

36. See, e.g., Harry Kalven Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 221 n.125 (describing *New York Times v. Sullivan* as the occasion for “dancing in the streets”).

37. 567 U.S. 709 (2012).

38. *Id.* at 715–16.

39. *Id.* at 715.

40. *Id.* at 725–26.



Most importantly, Justice Kennedy expressly rejected the government's argument that false speech is inherently outside the scope of the First Amendment.<sup>41</sup> 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.<sup>42</sup>

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."<sup>43</sup>

Most recently, in *Susan B. Anthony List v. Driehaus*, the Court considered a challenge to an Ohio law that criminalized making false statements about candidates during political campaigns.<sup>44</sup> The Susan B. Anthony List, a political group that previously had been threatened with prosecution under the law, brought a suit for a declaratory judgment to have the law declared unconstitutional.<sup>45</sup> Although the Court did not reach the merits as to whether Ohio's law violated the First Amendment,<sup>46</sup> the Court recognized the harms of such a prohibition of speech and noted "[t]he burdens that Commission proceedings can impose on electoral speech are of particular concern here."<sup>47</sup> It is hard to imagine the Supreme Court upholding a state law like Ohio's that prohibits false statements in election campaigns.<sup>48</sup>

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41. Justice Breyer concurred in the judgment, joined by Justice Kagan. He said that he would use intermediate rather than strict scrutiny and that the law failed this test because it was not narrowly tailored. *Id.* at 731 (Breyer, J., concurring).

42. *Id.* at 718.

43. *Id.* at 719.

44. 134 S. Ct. 2334, 2338 (2014).

45. *Id.* at 2339.

46. The Court found that the plaintiffs met the standing requirements of Article III because they alleged a credible threat of enforcement and remanded the case on those grounds. *Id.* at 2343, 2347.

47. *Id.* at 2346.

48. On remand, the United States District Court for the Southern District of Ohio found the law to be an unconstitutional restriction of protected speech; the decision was then affirmed by the Sixth Circuit. *Susan B. Anthony List v. Ohio Elections Comm'n*, 45 F.

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.<sup>49</sup> The Court frequently has declared that only truthful commercial speech is constitutionally protected.<sup>50</sup> Of course, the law is clear that the government can constitutionally prohibit making false statements under oath (perjury) or to law enforcement officials.<sup>51</sup> The First Amendment is no defense to such charges. 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,”<sup>52</sup> and that false statements “are not protected by the First Amendment in the same manner as truthful statements.”<sup>53</sup> 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.”<sup>54</sup>

The Court’s seemingly 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 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.’”<sup>55</sup>

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Supp. 3d 765, 775–79 (S.D. Ohio 2014), *aff’d sub nom.*, *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 476 (6th Cir. 2016).

49. *See, e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980).

50. *Id.* at 566.

51. *United States v. Alvarez*, 567 U.S. 709, 720 (2012).

52. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988).

53. *Brown v. Hartlage*, 456 U.S. 45, 60–61 (1982).

54. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

55. 376 U.S. 254, 271–72 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

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.<sup>56</sup>

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.

### *III. 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.<sup>57</sup> American intelligence agencies recognized this soon after the election.<sup>58</sup> 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.<sup>59</sup> 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

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56. 567 U.S. at 723.

57. See, e.g., Office of the Dir. of Nat'l Intelligence, *Assessing Russian Activities and Intentions in Recent US Elections*, DIR. OF NAT'L INTELLIGENCE (Jan. 6, 2017), [https://www.dni.gov/files/documents/ICA\\_2017\\_01.pdf](https://www.dni.gov/files/documents/ICA_2017_01.pdf).

58. *Id.*

59. Indictment, *United States v. Internet Research Agency LLC*, No. 1:18-cr-00032-DLF (D.D.C. Feb. 16, 2018), 2018 WL 914777; Kara Scannell et al., *Mueller Indicts 13 Russian Nationals over 2016 Election Interference*, CNN (Feb. 17, 2018), <https://www.cnn.com/2018/02/16/politics/mueller-russia-indictments-election-interference/index.html>.

divisive ads and posting inflammatory images.”<sup>60</sup> 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 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 and 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.<sup>61</sup> 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.<sup>62</sup>

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 subsequently disseminating the unlawfully gained information,<sup>63</sup> 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.<sup>64</sup> Justice Powell, writing for the Court, concluded that the value of speech is in informing the audience. Any restriction on speech,

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

61. Scott Shane, *Russia Isn’t the Only One Meddling in Elections. We Do It Too*, N.Y. TIMES (Feb. 17, 2018), <http://www.nytimes.com/2018/02/17/sunday-review/russia-isnt-the-only-one-meddling-in-elections-we-do-it-too.html>.

62. *Id.*

63. Raphael Satter, *Inside Story: How Russians Hacked the Democrats’ Emails*, AP (Nov. 4, 2017), <https://www.apnews.com/dea73efc01594839957c3c9a6c962b8a>.

64. 435 U.S. 765, 767–68 (1978).

regardless of its source, therefore undermines the First Amendment. Justice Powell explained:

The speech proposed by appellants is at the heart of the First Amendment's protection. . . . If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. *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.*<sup>65</sup>

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.<sup>66</sup> 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 rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity. . . . 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.<sup>67</sup>

On other occasions, too, the Court has declared that "[t]he identity of the speaker is not decisive in determining whether speech is protected."<sup>68</sup>

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

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65. *Id.* at 776–77 (emphasis added).

66. 558 U.S. 310, 319 (2010).

67. *Id.* at 350, 394.

68. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion).

candidates for federal office.<sup>69</sup> 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 U.S. political process.<sup>70</sup>

But can this be reconciled with the Supreme Court's declaration that the identity of the speaker should not matter in First Amendment analysis? It is notable that the Court in *Bluman* focused just on campaign contributions and expenditures, declining to decide "whether Congress could prohibit foreign nationals from engaging in speech other than contributions to candidates and parties, express-advocacy expenditures, and donations to outside groups to be used for contributions to candidates and parties and express-advocacy expenditures."<sup>71</sup>

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 *McIntyre v. Ohio Elections Commission*, the Court declared unconstitutional a law that prohibited the distribution of anonymous campaign literature.<sup>72</sup> Justice Stevens, writing for the Court, stated:

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69. Federal law

bar[s] foreign nationals—that is, all foreign citizens except those who have been admitted as lawful permanent residents of the United States—from contributing to candidates or political parties; from making expenditures to expressly advocate the election or defeat of a political candidate; and from making donations to outside groups when those donations in turn would be used to make contributions to candidates or parties or to finance express-advocacy expenditures.

*Bluman v. FCC*, 800 F. Supp. 2d 281, 284 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).

70. *Id.* at 288.

71. *Id.* at 292.

72. 514 U.S. 334, 357 (1995).

The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. . . . Accordingly, 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.<sup>73</sup>

Moreover, Justice Stevens said that anonymity also provides a way for a speaker "who may be personally unpopular to ensure that readers will not prejudice her message simply because they do not like its proponent."<sup>74</sup> Wouldn't that be especially true of a foreign government or foreign individuals who were trying to influence an American election?

I also worry that the internet may make all of this First Amendment and legal analysis irrelevant. As the 2016 presidential election shows, foreign governments can use the internet and social media to influence elections. They can do so 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.

### *Conclusion*

Ultimately the question underlying this symposium is the question of whether there can be too much speech. The premise of the First Amendment, and especially court decisions interpreting it, is that more speech is inherently better. But if it is false speech, that assumption seems dubious. Speech is protected as a fundamental right because it has effects. But how should we think about it when the impact is harmful, such as with false speech?

I also worry at how the internet and the ease with which it allows speech may be increasing the polarization within the United States. I believe that such polarization is the greatest threat to American democracy. In the twentieth century, the media played an enormous unifying function. People across the country watched the same movies, listened to the same radio programs, and saw the same television programs. Everywhere in the United States people got their news from Walter Cronkite or Huntley and Brinkley. This helped bring together a nation with enormous regional differences. But

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73. *Id.* at 341–42.

74. *Id.* at 342.

now, because of the internet, people see news that not only reinforces their beliefs but also—pointedly and purposefully—emphasizes our differences. The media is dividing, not unifying us as a nation.

Like so much in this Essay, I do not have a solution. I still believe in the premise of the First Amendment—that more speech is better. But ever more, I realize that it is a matter of faith, and the internet may challenge that faith for all of us.



