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## Combatting Fake News: Alternatives to Limiting Social Media Misinformation and Rehabilitating Quality Journalism

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# Combating Fake News: Alternatives to Limiting Social Media Misinformation and Rehabilitating Quality Journalism

*Dallas Flick\**

## I. INTRODUCTION

The continued expansion and development of the Internet has generated a malicious side effect: social media intermediaries such as Facebook and Google permit the dispersion of third-party generated fake news and misinformation. While the term “fake news” tends to shift in definition, it most frequently denotes blatantly false information posted on the Internet intended to sway opinion.<sup>1</sup> The social and political implications for this trend have become radical, as shown by the shooting at the Comet Ping Pong restaurant in Washington D.C. in early December 2016.<sup>2</sup> Social media websites have been able to avert legal responsibility for this phenomenon—the First Amendment, along with the Communications Decency Act, create strong barriers to statutory or judicial regulation of this harmful journalistic trend.<sup>3</sup> Despite showing signs of concern for this issue, Facebook in particular continues to insist on their “technology company” label, even though the social media outlet remains a major source for news and media.<sup>4</sup>

This comment will discuss the decline in the primacy of traditional journalism and the countervailing rise in problematic fake news and misinformation disseminated through social media intermediaries. The comment will begin by exploring the development of the Fourth and Fifth Estates, traditional means of addressing harmful journalism, and the background of the Communications Decency Act. Next, this comment will discuss the current state of the law surrounding the Communications Decency Act as it applies

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1. See, e.g., Danielle Kurtzleben, *With ‘Fake News,’ Trump Moves from Alternative Facts to Alternative Language*, NPR (Feb. 17, 2017, 8:27 PM), <http://www.npr.org/2017/02/17/515630467/with-fake-news-trump-moves-from-alternative-facts-to-alternative-language>.
2. Kevin Bohn et al., *Gun-Brandishing Man Sought to Investigate Fake News Story Site, Policy Say*, CNN (Dec. 5, 2016, 2:48 PM), <http://www.cnn.com/2016/12/04/politics/gun-incident-fake-news/>.
3. See *infra* Part II.C.
4. Catherine Buni, *Facebook Won’t Call Itself a Media Company. Is it Time to Reimagine Journalism for the Digital Age?*, THE VERGE (Nov. 16, 2016, 4:25 PM), <http://www.theverge.com/2016/11/16/13655102/facebook-journalism-ethics-media-company-algorithm-tax>; see also Daisuke Wakabayashi & Mike Issac, *In Race Against Fake News, Google and Facebook Stroll to the Starting Line*, N.Y. TIMES (Jan. 25, 2007), <https://www.nytimes.com/2017/01/25/technology/google-facebook-fake-news.html>.

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to social media intermediaries. After looking to the social, legal, and economic considerations for each aspect of this issue, this comment will consider two alternative solutions for this issue: (1) a modification of the standard of scrutiny for statutes seeking to regulate fake news and misinformation; and (2) a nominal levy on large digital intermediaries to cross-subsidize quality journalism. As will be discussed below, policymakers and the judiciary should prioritize indirect or external solutions to reducing fake news and misinformation to restore the integrity of the Fourth and Fifth Estates, while at the same time ensuring the continued, healthy development of the Internet and social media intermediaries.

## II. LEGAL AND HISTORICAL DEVELOPMENT

### A. Development of the Fourth and Fifth Estates

The press, along with ancillary forms of journalism and media, has long embodied the “Fourth Estate,” an important element of developing and contemporary societies worldwide.<sup>5</sup> In the United States, the legislative, executive, and judicial branches of government embody the first three estates.<sup>6</sup> In theory, the Fourth Estate operates independently from the other three estates, as well as other significant business and industry institutions.<sup>7</sup> Independence ensures press integrity “to investigate, report on, and bring to public attention the activity of other institutions . . . .”<sup>8</sup> The press and mass media hold these institutions accountable by reporting on their activities, thereby becoming a political force for improved, pluralistic governance.<sup>9</sup>

Traditionally, the Fourth Estate comprises of print journalism<sup>10</sup> largely unencumbered by political party affiliation, thus cultivating less biased and more independent news reporting.<sup>11</sup> More recently, however, large media corporations maintaining a substantial portion of the global media market

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5. William H. Dutton, *The Fifth Estate Emerging Through the Network of Networks*, 27 PROMETHEUS 1, 1–2 (2009).

6. *Id.* at 2.

7. Nic Newman et al., *Social Media in the Changing Ecology of News: The Fourth and Fifth Estates in Britain*, 7 INT’L J. INT. SCI. 6, 6–7 (2012).

8. *Id.* at 7.

9. *See id.*

10. *Id.*

11. *See* Matthew Gentzkow et al., *The Rise of the Fourth Estate: How Newspapers Became Informative and Why It Mattered*, in CORRUPTION AND REFORM: LESSONS FROM AMERICA’S ECONOMIC HISTORY 187, 190, 195 (Edward L. Glaeser & Claudia Goldin eds., 2006) (measuring the post-Civil War decrease in newspaper partisan affiliation and the subsequent reduction in biased reporting and partisan content).

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share mutated the Fourth Estate.<sup>12</sup> These large corporations raise concerns regarding their ability to report the news free of bias or concern for personal profit.<sup>13</sup> The threat of excessive monopoly power creates a risk of decline in the creation and preservation of virtuous forms of journalism, as priorities shift from credibility of message to media branding and financial credibility.<sup>14</sup>

The Information Age established the “Fifth Estate,” which possesses similar characteristics to the Fourth Estate, but with more focus on the growing use of information communication technologies that manifest novel means of peer-to-peer connectivity.<sup>15</sup> This level of connectivity permits increased fluidity of information transfer, thus opening more ways to keep institutions of power accountable.<sup>16</sup> These new mediums include social media websites such as Facebook and Twitter, which offer mechanisms of directly expressing public opinion independent of any single institution.<sup>17</sup> Fourth Estate mass media may amplify Fifth Estate content (and vice versa), and in doing so, it can fulfill the same functions of holding government and business activities in a public light.<sup>18</sup> If, however, this content bypasses the Fourth Estate and lacks centralized accountability, the Fifth Estate could easily undermine Fourth Estate traditional journalism through the reinforcement of individual prejudices in “echo chambers” that manifest from selective exposure to unmediated and unsubstantiated news and information.<sup>19</sup>

## B. Traditional Defamation Law

Despite First Amendment protections for freedom of the press,<sup>20</sup> the tort of defamation remains preserved to protect the reputation and dignity of each individual American citizen.<sup>21</sup> Defamatory communication “tends . . . to harm the reputation of another as to lower him in the estimation of the com-

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12. Shaun Docherty, *Media Discourse During the Financial Crisis: An Inquiry into the Nature of the Contemporary “Fourth Estate”*, 6 INQUIRES J. (2015), <http://www.inquiriesjournal.com/articles/1051/media-discourse-during-the-financial-crisis-an-inquiry-into-the-nature-of-the-contemporary-fourth-estate>.

13. *Id.*

14. See Justin Schlosberg, *The Mission of Media in an Age of Monopoly*, REPUBLICA 1–2 (2016).

15. Dutton, *supra* note 5, at 2–3.

16. *Id.* at 17.

17. See *id.*; Newman et al., *supra* note 7, at 7.

18. Newman et al., *supra* note 7, at 7 (discussing the higher diversity in sources of information from local and global sources of journalism).

19. See *id.*

20. U.S. CONST. amend. I.

21. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)); Melissa A. Troiano,

munity or to deter third persons from associating or dealing with him.”<sup>22</sup> Liability for defamatory statements extends beyond publishers when an entity has a significant role in their publication or when the entity allows the continued publication in a medium under their control.<sup>23</sup> Defamation law distinguishes primary publishers from distributors and common carriers when determining liability for defamatory content found in print media and information technologies.<sup>24</sup> Primary publishers, such as authors or newspaper editors, are wholly liable for published defamatory statements because of their constructive editorial knowledge of the material in question.<sup>25</sup> Distributors, such as bookstores and newsstands, have less editorial control and only maintain liability for defamatory content they had reasonable knowledge of prior to publication.<sup>26</sup> Common carriers, such as telephone companies, facilitate the dissemination of defamatory statements, and thus have no editorial control to establish liability.<sup>27</sup> Defamation claims involving traditional media sources allow for a rigid categorization of liability between primary publishers and distributors, but lines blur when considering evolving Internet communication technologies and novel means of creating and disseminating potentially harmful content.<sup>28</sup>

### C. The Communications Decency Act

The advent and development of social media interactivity created a medium for information sharing much larger and more fluid than traditional forms of media and journalism.<sup>29</sup> This presented a litany of new legal issues concerning the obligations of website operators facilitating this information sharing, and the novel nature of this interconnectivity precluded a court con-

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*The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447, 1451 (2006).

22. RESTATEMENT (SECOND) OF TORTS: DEFAMATORY COMM. DEFINED § 559 (1977).
23. See RESTATEMENT (SECOND) OF TORTS: WHAT CONSTITUTES PUBLICATION § 577 (1977).
24. See Troiano, *supra* note 21, at 1453.
25. See *id.*; Stephanie Blumstein, *The New Immunity in Cyberspace: The Expanded Reach of the Communications Decency Act to the Libelous “Re-Poster”*, 9 B.U.J. SCI & TECH. L. 407, 409–10 (2003).
26. See Troiano, *supra* note 21, at 1453.
27. See *id.*
28. See Brian J. McBrearty, *Who’s Responsible? Website Immunity Under the Communications Decency Act and the Partial Creation or Development of Online Content*, 82 TEMP. L. REV. 827, 830 (2009).
29. See Michelle Jee, *New Technology Merits New Interpretation: An Analysis of the Breadth of CDA Section 230 Immunity*, 13 HOUS. BUS. & TAX L.J. 178, 183–84 (2003).

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sensus on how to address defamation claims against these new intermediaries.<sup>30</sup> In an attempt to regulate speech and other potentially harmful content on the Internet, in 1995, Senator James Exon of Nebraska introduced the Communications Decency Act of 1996 (CDA).<sup>31</sup> The intent of the CDA was to prevent minors from observing obscene or indecent content online,<sup>32</sup> and it sought to enhance government regulation over the Internet during its initial boon in the United States.<sup>33</sup>

Section 230 of the CDA (Section 230) was Congress's response to two conflicting decisions arising out of New York courts.<sup>34</sup> In *Cubby, Inc. v. CompuServe, Inc.*, CompuServe used third-party information to post a tabloid on one of its special interest forums, and the plaintiff sued CompuServe for libel for statements contained in the posting.<sup>35</sup> The court utilized traditional defamation doctrine to classify CompuServe as a distributor, thus shielding them from liability for the third-party posting.<sup>36</sup> If CompuServe neither knew, nor had reason to know, of the third-party defamatory statements, it could not be liable.<sup>37</sup> Determinative in this case was CompuServe's lack of editorial control, as the court compared the service to a library or newsstand, thus allowing a lower liability standard.<sup>38</sup> In contrast, the Supreme Court of New York in *Stratton Oakmont, Inc. v. Prodigy Services Co.* held the defendant Prodigy liable for defamation claims similar to those presented in *Cubby, Inc.*<sup>39</sup> In *Stratton*, because the website maintained sufficient editorial control of a bulletin board's contents, it was designated a publisher and maintained liability.<sup>40</sup> The court's conclusion shifted from the

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30. *See id.*

31. Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 52–53 (1996)

32. *CDA Legislative History*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/cda230/legislative-history> (last visited Feb. 1, 2018).

33. *See Cannon, supra* note 31, at 53.

34. *See CDA Legislative History, supra* note 32.

35. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 138 (S.D.N.Y. 1991); Jee, *supra* note 29, at 184.

36. *See Cubby, Inc.*, 776 F. Supp. at 139–40 (rejecting strict liability on distributors under the First and Fourteenth Amendment for the contents of the reading material they carry).

37. *Id.* at 141.

38. McBreaty, *supra* note 28, at 831.

39. *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710, at \*1 (N.Y. Sup. Ct. May 24, 1995); *see Cubby, Inc.*, 776 F. Supp. at 137–38.

40. *Stratton*, 1995 WL 323710, at \*5 (noting that Prodigy committed to controlling the content on their website and used screening software to enforce their content standards).

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traditional liability standard noted in *Cubby, Inc.* and instead used the level of editorial control as the metric for publisher liability.<sup>41</sup> According to this decision, a company with a website or any other source of information on the Internet would need to avoid all moderating of content to avoid liability.<sup>42</sup>

In response to the *Stratton* decision, Representatives Chris Cox and Ron Wyden introduced an amendment to the CDA, which would become Section 230.<sup>43</sup> Congress enacted the provision to avoid a chilling effect on Internet growth caused by disincentives to self-regulation spawned by the *Stratton* decision.<sup>44</sup> Congress enacted Section 230's immunity for interactive service providers to "remove disincentives for the development and utilization of blocking and filtering technologies that . . . restrict . . . access to objectionable or inappropriate online material."<sup>45</sup> It also sought to encourage the unfettered and unregulated development of Internet free speech and e-commerce.<sup>46</sup> Thus, Section 230 precludes the imposition of liability on an interactive computer service provider (ICSP) for its use of editorial and self-regulatory functions.<sup>47</sup>

Section 230(c) of the CDA states: "No 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."<sup>48</sup> This provision establishes federal immunity to any cause of action that would make interactive service providers liable for information originating from a third-party user.<sup>49</sup> Section 230 provides immunity contingent on the following conditions: (1) the party seeking immunity is a "provider or user of an interactive computer service"; (2) the claim treats the party seeking immunity "as the publisher or speaker" of the disputed content; and (3) the claim is based on content produced "by another information content provider."<sup>50</sup>

An interactive computer service is "[a]ny information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system

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41. *See id.*; *see also* McBrearty, *supra* note 28, at 831.

42. *CDA Legislative History*, *supra* note 32.

43. *Id.*

44. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

45. 47 U.S.C. § 230(b)(4) (1998); *see also CDA Legislative History*, *supra* note 32 (noting the demise of the anti-indecency sections of the CDA in 1997 and the survival of Section 230).

46. *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003).

47. *Zeran*, 129 F.3d at 331.

48. 47 U.S.C. § 230(c)(1) (1998).

49. *Id.*; *Zeran*, 129 F.3d at 330.

50. 47 U.S.C. § 230(c)(1) (1998).

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that provides access to the Internet . . . .”<sup>51</sup> Courts have broadly interpreted interactive computer services to include Internet providers and Internet-related services.<sup>52</sup> Section 230 provides immunity only where a plaintiff treats an ICSP as the publisher of the content at issue.<sup>53</sup> A claim under Section 230 must demonstrate that the allegedly problematic content originates from a third-party information content provider,<sup>54</sup> which the statute defines as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”<sup>55</sup> The reference in Section 230(c) to content produced by “another information content provider” demonstrates that providers cannot claim immunity when an action arises out of content the ICSP itself produced.<sup>56</sup> Section 230 also permits claims for joint liability for joint development of problematic content.<sup>57</sup>

Courts follow the plain language of Section 230 to establish broad boundaries for the immunity applied to ICSPs.<sup>58</sup> First, Section 230(c) immunizes an ICSP exercising a publisher’s traditional editorial functions, such as to publish, withdraw, postpone, or alter disputed content.<sup>59</sup> This broad provi-

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51. *Id.* § 230(f)(2).
52. *See* *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (including a listserv email newsletter sent by a website operator within the definition of interactive computer service); *Zeran*, 129 F.3d at 330 n.2 (concluding that America Online fell within the definition of interactive service provider); *Carafano v. Metrosplash.com, Inc.*, 207 F. Supp. 2d 1055, 1065–66 (C.D. Cal. 2002), *aff’d on other grounds*, 339 F.3d 1119 (9th Cir. 2003) (holding that a matchmaking and dating website is an interactive computer service); *see also* *McBrearty*, *supra* note 28, at 832.
53. *See* 47 U.S.C. § 230(c) (1998).
54. *Id.*
55. *Id.* § 230(f)(3).
56. *Id.* § 230(c); *McBrearty*, *supra* note 28, at 833; *see also* *Anthony v. Yahoo Inc.*, 421 F. Supp. 2d 1257, 1262–63 (N.D. Cal. 2006), *aff’d*, 376 Fed. Appx. 775 (9th Cir. 2010) (finding § 230(c) immunity inapplicable to Yahoo where it generated false profiles on its dating website and emailed profiles of expired members to current members).
57. *Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D.D.C. 1998).
58. Rachel Seaton, *All Crimes are Not Created Equal: Challenging the Breadth of Immunity Granted by the Communications Decency Act*, 6 SETON HALL CIRCUIT REV. 355, 362–63 (2010) (discussing the holding of *Zeran* and subsequent case law advancing a broad interpretation of immunity under 47 U.S.C. § 230(c)); *see* *McBrearty*, *supra* note 28, at 834.
59. *See* *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (“[T]he exclusion of ‘publisher’ liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message.”).



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sion of immunity garners support from Congress's stated goal of continued development of the Internet and other interactive media, while also minimizing government regulation over these new mediums of communication.<sup>60</sup> In furtherance of these policy goals, courts also extend Section 230(c) immunity to ICSPs that abstain from acting on their knowledge of offensive content on their websites.<sup>61</sup> This immunity also covers interactive computer services providing neutral tools to users to post potentially harmful content.<sup>62</sup> Courts split on whether an exception for immunity exists in instances where interactive computer services induce questionable—or illegal—content and information.<sup>63</sup> While some courts maintain the breadth of Section 230 immunity for ICSPs, others withhold immunity from services that materially contribute to the creation or dissemination of problematic content.<sup>64</sup> The Ninth Circuit in *Roommates.com* justified a broadened definition of contributory action by noting the Internet no longer operates as a fragile new means of communication, but rather is the dominant means in which communication occurs; thus, its under-regulation and provision of broad, uncompromising immunity may be outdated.<sup>65</sup>

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60. See 47 U.S.C. § 230(b)(1) (“It is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media.”); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997) (noting the intention of Congress in enacting 47 U.S.C. § 230(c) to reduce government regulation over the Internet); *Blumenthal*, 992 F. Supp. at 49 (noting the breadth of immunity to compensate for the higher speed and volume of informational exchange on the Internet and the difficulty of its regulation).
61. See *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007); *Zeran*, 129 F.3d at 332–33 (indicating that liability upon notice leads to service providers restricting speech and abstaining from self-regulation).
62. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 n.37 (9th Cir. 2008) (en banc) (“Providing neutral tools for navigating websites is fully protected by CDA immunity, absent substantial affirmative conduct on the part of the website creator promoting the use of such tools for unlawful purposes.”); see also *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124–25 (9th Cir. 2003) (permitting 47 U.S.C. § 230(c) immunity for a dating website that utilized a specialized questionnaire because the third party willingly provides the essential published content).
63. *McBrearty*, *supra* note 28, at 841–42.
64. *Compare Chi. Lawyers Comm. for Civil Rights under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 670 (7th Cir. 2008) (finding the exception for content inducement incompatible with the concept of 47 U.S.C. § 230(c) immunity), and *Lycos*, 478 F.3d at 420 (upholding 47 U.S.C. § 230(c) immunity for an interactive content service that made it marginally easier for third-party development and dissemination of misinformation), with *Roommates.com*, 521 F.3d at 1167–68 (holding that an interactive computer service’s publication of a defamatory statement “materially contributes” to its unlawfulness).
65. See *Roommates.com*, 521 F.3d at 1164 n.15.

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Several policy considerations underpin the continued deployment of immunity under Section 230 of the CDA.<sup>66</sup> As previously discussed, the legislative intent buttressing the provision of immunity is the continued development of the Internet as a means of peer-to-peer connectivity without the burdens of government regulation.<sup>67</sup> Tangential to this development is the promotion of the Internet free market, which includes competition for news and information sharing.<sup>68</sup> This advancement improves the development and dissemination of news and information, as well as the means of control over what information individuals receive.<sup>69</sup> Courts recognized the possibilities for the Internet's advancement and thus sought to remove the disincentives for the continued development of interactive computer services.<sup>70</sup> The historical development of the CDA establishes the norm of protecting ICSPs, and the justification for this protection remains with the proliferation of contemporary websites and other sources of news and information.<sup>71</sup>

### III. CURRENT STATE OF THE LAW

#### A. CDA Applicability to Social Media Intermediaries

Contemporary growth of the Internet and interactive computer services results in the reapplication of Section 230 of the CDA to a wide variety of new communication applications.<sup>72</sup> To retain the same protections given to content at the outset of the Internet's development, courts broadly construe Section 230 protections to include social media websites and other digital intermediaries, thus granting immunity to their permissive stance toward po-

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66. See 47 U.S.C. § 230(b) (1998).

67. See *supra* note 60 and accompanying text.

68. See 47 U.S.C. § 230(a)(1) ("The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens."); *id.* § 230(b)(2) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation . . .").

69. *Id.* § 230(b)(3) ("[T]o encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services[.]").

70. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (discussing the necessity of immunity for ICSPs to stymie the intrusive threat of tort-based lawsuits on freedom of speech in the new Internet marketplace); Jee, *supra* note 29, at 185–86.

71. See Jee, *supra* note 29, at 195–96.

72. See Alfred C. Weaver & Benjamin B. Morrison, *Social Networking*, 41 COMPUTER 97, 97 (2008).

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tentially harmful fake news and misinformation.<sup>73</sup> Social media platforms typically qualify as interactive computer services because they “provide[ ] information to ‘multiple users’ by giving them ‘computer access . . . to a computer server’ . . . namely the servers that host [their] social networking website[s].”<sup>74</sup> These platforms provide applications that permit users to create and develop their own content, rather than solely access the content developed by websites alone.<sup>75</sup> The service’s capability to control or remove content posted on their social media website does not void its immunity.<sup>76</sup> As with earlier rulings on the applicability of Section 230, establishing liability for the self-policing of content creates a chilling effect on ICSPs’ willingness to regulate and improve their content.<sup>77</sup> Thus, even though Facebook, Twitter, and other social media intermediaries have the ability to remove harmful content on their websites from public consumption, their protection under the CDA remains intact.<sup>78</sup>

Plaintiffs bringing claims against social media websites such as Facebook rarely successfully contest the status of interactive computer service as defined by the CDA.<sup>79</sup> Instead, plaintiffs may attempt to challenge the immunity provision by arguing that the social media websites operate as both interactive computer services *and* information content providers.<sup>80</sup> Establishing liability requires proof that the social media website had full or partial responsibility for the creation or development of the harmful content in question.<sup>81</sup> For instance, the court in *Perkins v. LinkedIn Corp.* found that a professional networking service’s excessive sending of networking invitation emails went beyond that of the traditional editorial functions typically pro-

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73. See *Doe v. MySpace, Inc. (MySpace, Inc. II)*, 528 F.3d 413, 418 (5th Cir. 2008); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003).

74. *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (quoting 47 U.S.C. § 230(f)(2) (2012)).

75. *Jee*, *supra* note 29, at 196.

76. *Klayman*, 753 F.3d at 1358.

77. *Id.*; see *Jee*, *supra* note 29, at 184–85; see also *supra* note 61 and accompanying text.

78. See *Klayman*, 753 F.3d at 1357–58.

79. See, e.g., *id.* at 1358 (“[Plaintiff] does not seriously dispute that Facebook meets the statutory definition of an interactive computer service . . . .”); *MySpace, Inc. II*, 528 F.3d 413, 419 (5th Cir. 2008) (“The [plaintiffs] appear to agree with the consensus among courts regarding the liability provisions in § 230(c)(1).”).

80. See *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc) (“A website operator can be both a service provider and a content provider . . . .”).

81. *Id.*

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tected by Section 230 of the CDA.<sup>82</sup> The plaintiffs did not dispute the “interactive computer service” denotation, but successfully argued that the nature of its emails and content dissemination also establishes it as an information content provider, thus precluding immunity under Section 230 of the CDA.<sup>83</sup> The court, agreeing with the plaintiffs, noted the excessive use of emails with the names and likenesses of the plaintiffs as personalized endorsement of its interactive computer service went beyond that of passive publication, and therefore concluded that the true authorship and publication of the information lay with LinkedIn.<sup>84</sup>

Decisions regarding the applicability of Section 230 to social media intermediaries reflect a limited withholding of immunity claims of harmful third-party content; they use original interpretations of the CDA to give broad immunity to new varieties of ICSPs. For instance, the court in *Anthony v. Yahoo! Inc.* withheld immunity from Yahoo! when the website would generate false dating profiles to send to users to increase confidence in its online dating services.<sup>85</sup> The court held that the CDA does not preclude misrepresentation and fraud claims against ICSPs that *knowingly* generate and maintain harmful content on their websites.<sup>86</sup> Similarly, in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, the Ninth Circuit precluded immunity for a roommate connectivity website designed to force users to provide personal characteristics and discriminatory preferences in a questionnaire in order to find a preferable roommate.<sup>87</sup> In both cases, the courts lacked novel interpretations of Section 230 to apply to new social media websites, as compared to other forms of interactive computer services. Rather than provide a helpful reinterpretation for a new line of services, the courts retrofitted the original provision to their rulings, thus keeping static the broad applicability of ICSP immunity.

The urge to uphold the original policy justifications of Section 230 remains unchanged despite the stark rise in the dissemination of harmful content through social media intermediaries.<sup>88</sup> Technological modernity makes broad applicability of Section 230 immunity under the CDA less imperative

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82. See *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1247–48 (N.D. Cal. 2014).

83. See *id.* (citing *Roommates.com*, 521 F.3d at 1165).

84. *Id.*

85. *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1259–60, 1262 (N.D. Cal. 2006), *aff'd*, 376 Fed. Appx. 775 (9th Cir. 2010).

86. *Id.* at 1262–63 (citing *Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D.D.C. 1998)).

87. See *Roommates.com*, 521 F.3d at 1164, 1169–70.

88. See *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997).

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as during the early development of the Internet.<sup>89</sup> Despite the lack of immediate necessity for this focus, courts remain afflicted by policy-based tunnel vision when considering the application of CDA immunity to a website. For example, the court in *Dart v. Craigslist, Inc.* held that Craigslist was entitled to immunity regardless of the plaintiff's complaint that the website makes solicitation and prostitution permissible on their classified advertisement pages.<sup>90</sup> The court rejected the plaintiff's arguments purporting Craigslist's knowledge of their website's available prostitution<sup>91</sup> and non-neutral tools that connected users to prostitutes and brothels.<sup>92</sup> In another instance, the Northern District Court of Ohio in *Doe v. SexSearch* granted immunity to the provider of an adult dating online service, thus rejecting plaintiff's arguments that SexSearch was an information content provider that altered and deleted profiles noncompliant with the website's guidelines.<sup>93</sup> The complaint indicated that the website facilitated a matchup between two individuals, one who misrepresented her age to be eighteen when in actuality she was fourteen.<sup>94</sup> The court extended the reasoning from *Carafano v. Metrosplash.com*<sup>95</sup> and *Doe v. MySpace*<sup>96</sup> to assign immunity under Section 230 of the CDA.

In both *Dart* and *SexSearch*, the courts utilized an overly broad interpretation of immunity for interactive computer services without giving significant credence to the nature of the websites in question and their eliciting of dangerous and potentially illegal information and services.<sup>97</sup> This tunnel vision begs consideration for change of either Section 230's provision of immunity, or its subsequent interpretation by the courts. But, any direct change would be piecemeal at best and would likely not address the broader issues ICSPs face with fake news and misinformation, especially what does not reach a criminal level. While Section 230 does address the necessity for curb-

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89. Seaton, *supra* note 58, at 356–57.

90. See *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967–69 (N.D. Ill. 2009).

91. See *id.* at 967.

92. See *id.* at 969 (distinguishing from the search function criticized in *Roommates.com* which achieved illegal ends for its users).

93. See *Doe v. SexSearch*, 502 F. Supp. 2d 719, 725–26 (N.D. Ohio 2007), *aff'd on other grounds*, 551 F.3d 412 (6th Cir. 2008).

94. *Id.* at 722.

95. See *id.* at 725–26 (citing *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123–25 (9th Cir. 2003)) (ruling that questionnaires provided to website users are not enough to create the developer distinction for SexSearch).

96. See *id.* at 727–28 (citing *Doe v. MySpace, Inc. (MySpace Inc. I)*, 474 F. Supp. 2d 843, 849–50 (W.D. Tex. 2007)) (holding that the allegation that SexSearch is liable as a publisher due to its not monitoring the victim's activity on the website fails to defeat the claim of immunity under the CDA).

97. Seaton, *supra* note 58, at 369.

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ing criminal activity on the Internet,<sup>98</sup> misinformation and subsequent defamation claims lack a criminal nature, and thus do not create the same impetus for change as the issues presented in *Dart* and *SexSearch*. The contemporary policy focus of the CDA does not seek to remedy issues of fake news and misinformation disseminated by social media intermediaries—alternative policy considerations must occur to raise the importance of this inquiry.

### **B. Potential for Statutory Change**

Statutory change for the CDA is unlikely without a major change in Section 230's judicial interpretation and applicability to ICSPs. Similar to the genesis of the Internet, the continued development of ICSPs could present novel legal issues for the courts to evaluate.<sup>99</sup> If other courts adopt the broadened definition of "content contributor" from *Roommates.com* and apply it to social media ICSPs,<sup>100</sup> a statutory response could occur similar to that following the *Stratton* case.<sup>101</sup> But, contemporary technological advancement does not necessitate an Internet free of tort liability—the threat of a chilling on ICSP innovation carries less merit than at the time of the CDA's passing.<sup>102</sup> Courts could consider the current necessities of public policy, determine that expansive Section 230 immunity is no longer valid, and create more accountability for the harmful content that circulates on various social media websites. Policymakers would thus make a determination as to how they will treat modern ICSPs—either with the same level of protection to ensure self-regulation and a lack of government intrusion, or with more scrutiny toward the harmful content created and disseminated on their platforms.<sup>103</sup> Based on current social media trends, a new policy debate regarding the validity and applicability of Section 230 immunity would surely include a discussion regarding liability for fake news, misinformation, and other forms of malicious social media content not currently punishable.

### **C. Legal Protections for Fake News and Misinformation**

The First Amendment provides strong (but not absolute) protection for the freedom of expression, as well as underpinning viewpoints, subject matter, and content of said expression.<sup>104</sup> This constitutional safeguard precludes

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98. See 47 U.S.C. § 230(b)(5) ("It is the policy of the United States . . . to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.").

99. See *supra* text accompanying notes 29–33.

100. See *supra* text accompanying note 65.

101. See *supra* text accompanying notes 43–46.

102. See *supra* text accompanying note 65; see *infra* Part IV.B.

103. See *supra* notes 66–70 and accompanying text.

104. *United States v. Alvarez*, 132 S. Ct. 2537, 2543–44 (2012) (quoting *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002)).

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any deterrent or chilling effect on the free interchange of ideas within the political and social realms, including what makes up the Fourth and Fifth Estates.<sup>105</sup> The importance of this protection currently demands the presumption of invalidity for content-based restrictions, and the burden is on the government to prove their constitutionality.<sup>106</sup>

The Supreme Court of the United States has long rejected any form of ad hoc social balancing test to measure the strength of a particular aspect of First Amendment coverage.<sup>107</sup> Content-based restrictions on speech and publications become permissible when confined to categories long considered valid by the Court and found in the historical foundation of the free speech tradition.<sup>108</sup> Advocacy intended to defame or disparage operates in this list of exceptions, but absent is a general exception for knowingly false statements.<sup>109</sup> In a litany of cases, the Court expressed disdain for false statements and their attempt to be included under the umbrella of First Amendment protection.<sup>110</sup> For instance, the Court stated, “[f]alse statements . . . are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas . . . ,”<sup>111</sup> and that they are not protected by the First Amendment in the same caliber as truthful statements.<sup>112</sup> As they appear in discussions on First Amendment protections, the Court repeatedly discounted the value of fake speech and expressions.<sup>113</sup> But, the Court in *United States v. Alvarez* refused to contextualize these former statements as a categorical removal, or even dilution, of constitutional protection for false statements or

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105. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)); see *supra* Part II.A.

106. See *Alvarez*, 132 S. Ct. at 2543–44 (quoting *Ashcroft*, 542 U.S. 656, 660).

107. *Id.* at 2544 (quoting *United States v. Stevens*, 559 U.S. 460, 470 (2010)); see *Sullivan*, 376 U.S. at 271 (rejecting as a First Amendment exception any test of truth to be administered by a court or jury, especially one that places the burden of proof on the speaker).

108. *Alvarez*, 132 S. Ct. at 2544 (quoting *Stevens*, 559 U.S. at 470).

109. *Id.*

110. *Id.* at 2544–45.

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

112. *Brown v. Hartlage*, 456 U.S. 45, 60–61 (1982); see *Alvarez*, 132 S. Ct. at 2545.

113. See, e.g., *Herbert v. Lando*, 441 U.S. 153, 171 (1979) (“Spreading false information in and of itself carries no First Amendment credentials.”); *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (“Untruthful speech, commercial or otherwise, has never been protected for its own sake.”); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“[T]here is no constitutional value in false statements of fact.”); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (“[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.”).

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misinformation.<sup>114</sup> It narrowed the reduction or removal of First Amendment protections for false speech and misinformation to instances involving defamation, fraud, or some other legally cognizable harm associated with a false statement.<sup>115</sup> Further, even in those instances, falsity is not wholly determinative in removing the speech from First Amendment protections; the speech must be a knowing or reckless falsehood to be actionable.<sup>116</sup> Limiting this exception avoids a chilling effect on speech by encouraging uncertain speakers or authors to make true—or ostensibly true—statements with a lower risk of persecution.<sup>117</sup>

Government attempts at content-based regulation of speech, commercial or otherwise, receive judicial review under a strict scrutiny standard.<sup>118</sup> Under this standard, courts must consider content-based restrictions invalid, and the government bears the burden of showing their constitutionality by establishing a compelling government interest that outweighs the protected individual interest.<sup>119</sup> The Court in *Alvarez* applied this standard to determining if the Stolen Valor Act, a law proscribing false claims of receipt of military decorations or medals, was unconstitutional.<sup>120</sup> It held the act unconstitutional under the First Amendment, because the government cannot proscribe false statements solely because they are false.<sup>121</sup> This particular falsity did not fall within a predetermined category unprotected by the First Amendment, nor was the Court presented with persuasive evidence that the novel restriction on content was part of a long and recognized tradition of proscription.<sup>122</sup> This decision shows that even the worst forms of expressed falsity will fall under the strict scrutiny standard for judicial review, thus making direct statutory solutions extremely difficult.

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114. *See Alvarez*, 132 S. Ct. at 2544–45.

115. *Id.* at 2545.

116. *Id.*; *see New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964) (barring recovery for a defamation claim against a public official unless the statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not.”).

117. *See Alvarez*, 132 S. Ct. at 2545; Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1637 (2013).

118. *Alvarez*, 132 S. Ct. at 2543; *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994) (“Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”).

119. *See Alvarez*, 132 S. Ct. at 2543–44.

120. *Id.* at 2539.

121. *Id.* at 2551 (“The Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace.”).

122. *Id.* at 2547 (quoting *Brown v. Entm’t Merch. Assn.*, 564 U.S. 786, 792 (2011)).



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In his concurring opinion in *Alvarez*, Justice Breyer advocated for a flexible intermediate scrutiny standard for regulations of false speech.<sup>123</sup> This standard would permit the regulation of published false information that creates direct and indirect harm while avoiding the rigors of the strict scrutiny standard typically deployed for content-based regulations.<sup>124</sup> This approach creates breathing room for the policy justifications of regulations on fake news or misinformation, while at the same time protecting the values embodied in the First Amendment protection of free expression.<sup>125</sup> It could guide lawmakers in creating legislation proscribing harmful false speech,<sup>126</sup> provided the statutory remedy does not create a “disproportionate constitutional harm.”<sup>127</sup>

The Court in *Alvarez* identified certain legal options to address claims against false speech, including defamation, fraud, and criminal charges.<sup>128</sup> The CDA also provides external remedies for problematic content on the Internet not within the scope of Section 230 immunity.<sup>129</sup> The nature of fake news and misinformation circulated on the Internet, however, prevents a holistic and direct remedy—even the most potent solution for news that seeks to defame has limited recourse.<sup>130</sup> The Court typically seeks to limit the applicability of laws that require an understanding of speaker intent, primarily to avoid the chilling of speech from uncertain speakers who do not intend to create a falsity or misinform.<sup>131</sup> Because news and information on the Internet carry the same First Amendment protections as that found in traditional print media, the current statutory and legal understanding of the First Amendment and false information apply.<sup>132</sup>

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123. *Id.* at 2551–52 (Breyer, J., concurring).

124. *See id.*

125. *See Alvarez*, 132 S. Ct. at 2556 (Breyer, J., concurring).

126. *See infra* Part V.A.

127. *See Alvarez*, 132 S. Ct. at 2556 (Breyer, J. concurring).

128. *See supra* text accompanying note 115.

129. *See supra* note 98 and accompanying text.

130. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (prohibiting a public official from recovering damages for defamation unless proof is presented that the defaming statement was made with knowledge or reckless disregard of its falsity).

131. *See Kendrick, supra* note 117, at 1648–49.

132. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997).

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#### IV. COMPETING SOCIAL, LEGAL, AND ECONOMIC CONSIDERATIONS

##### A. Social Media Intermediaries and Journalism

The stability of the Fourth and Fifth Estates relies on the quality of news and information obtainable on the Internet.<sup>133</sup> The legitimacy and quality of information found in new technological mediums remains fundamental to keeping society informed, as well as to maintaining the accountability of social, government, business, and industry forces.<sup>134</sup> Contemporary news and information still circulates through traditional forms of media, such as newspapers and television media, but it also maintains its fluidity through Internet-based outlets, with a large focus on social media websites.<sup>135</sup> While a symbiotic relationship often exists between entities of the Fourth and Fifth Estates,<sup>136</sup> a lack of growth and legitimacy in traditional Fourth Estate media may create a shift, in both investment and overall attention, away from these news sources.<sup>137</sup>

Social media intermediaries and third-party journalists are forever married, and thus, the decline of one would invariably implicate the other. While users and providers of valid information in the Fifth Estate operate independently of any single institution, they typically originate from the Fourth Estate.<sup>138</sup> A solution to the issue of fake news and misinformation would have to ensure the survival of both forces; it must foster beneficial forms of journalism and improve the intermediaries that invest in the spreading of said journalism.<sup>139</sup>

Ideally, accountability for the spread of fake news and misinformation could lie directly with the ICSPs that facilitate content dissemination. But, social media intermediaries refuse this accountability and avoid the title of “media company” or “news provider.”<sup>140</sup> By doing so, they receive benefits of media membership while also maintaining immunity as ICSPs under Sec-

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133. See Newman et al., *supra* note 7, at 7.

134. See *id.*

135. See *id.*

136. See *id.* (discussing the ability for Fifth Estate networking to fill in the informational gaps left by traditional Fourth Estate media, thus allowing for both forces to be bolstered).

137. See Schlosberg, *supra* note 14, at 8 (noting the trend of investment moving from former news investigators to social media intermediaries).

138. See Newman et al., *supra* note 7, at 7.

139. See Schlosberg, *supra* note 14, at 6 (discussing the cross-subsidy of professional news through promoting public interest journalism and having the modern technological vehicles of delivery bid for investment).

140. See Buni, *supra* note 4 (discussing Facebook and Google’s avoidance of the “media company” label).

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tion 230 of the CDA.<sup>141</sup> Larger social media intermediaries have taken marginal steps to address these issues without fully committing to the solution. For instance, Google announced the permanent ban of 200 advertisers—out of nearly two million—from its AdSense advertising network due to deceiving users with their online ad services.<sup>142</sup> In November, Facebook updated its policy language, which already stated it would not display ads from websites showing misleading content, to include fake news websites.<sup>143</sup> Both companies announced in early 2017 a push for the use of fact-checking tools in Germany and France to root out fake news stories ahead of the elections in each country.<sup>144</sup> For instance, if a user reports a story as false or misinforming, a third party, independent fact-checking organization based in Berlin will examine it and determine its reliability.<sup>145</sup> Users may still share stories flagged as “disputed,” but with a warning disputing the validity of the story.<sup>146</sup> More recently, Facebook announced its decision to hand over to Congress 3,000 Russia-linked ads used on the social media site during the 2016 presidential campaign,<sup>147</sup> reflecting a continued acknowledgment of its relation to the false news phenomenon.<sup>148</sup> While these actions ostensibly seem like a substantial improvement, the companies will likely refrain from limiting or removing content on their own, or else risk losing their neutrality.<sup>149</sup> The social media intermediaries must confront the moral obligations packaged with their massive global influence, while also avoiding claims of censorship to maintain their neutrality and immunity.<sup>150</sup> While these steps may approach a solution, the hesitance to make full strides remains clear;

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141. *See id.*

142. Wakabayashi & Issac, *supra* note 4.

143. *Id.*

144. Federico Guerrini, *Facebook Will Flag and Filter Fake News in Germany*, FORBES (Jan. 16, 2017, 5:33 AM), <http://www.forbes.com/sites/federicoguerrini/2017/01/16/facebook-will-flag-and-filter-fake-news-in-germany/#60ea991060e3>; Gwenaelle Barzic & Sudip Kar-Gupta, *Facebook, Google Join Drive Against Fake News in France*, REUTERS (Feb. 6, 2017, 2:40 AM), <http://www.reuters.com/article/us-france-election-facebook-idUSKBN15L0QU>.

145. Guerrini, *supra* note 144.

146. *Id.*

147. Mike Isaac & Scott Shane, *Facebook to Deliver 3,000 Russia-Linked Ads to Congress on Monday*, N.Y. TIMES (Oct. 1, 2017), <https://www.nytimes.com/2017/10/01/technology/facebook-russia-ads.html>.

148. *See* Andre Spicer, *Why Facebook’s About-Face on Russia Ads?*, CNN (Sept. 22, 2017, 6:18 PM), <http://www.cnn.com/2017/09/22/opinions/facebook-advertisements-russia-spicer-opinion/index.html>.

149. *See supra* notes 60–62 and accompanying text.

150. Mike Isaac, *Facebook Mounts Effort to Limit Tide of Fake News*, N.Y. TIMES (Dec. 15, 2016), <https://www.nytimes.com/2016/12/15/technology/facebook-fake-news.html>.

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thus, judicial solutions, as well as indirect policy solutions, require consideration.

## B. Tort Liability for Interactive Service Providers

The “specter of tort liability” remains the largest perceived threat by ICSPs of any new reshaping or reduction of Section 230 immunity by the CDA.<sup>151</sup> Congress considered the imposition of tort liability on digital or social media intermediaries based on the communications of third parties to be an intrusive government regulation of speech.<sup>152</sup> Further, Congress assumed the worst from a potential response from ICSPs to a potential hike in regulation; particularly, they worried providers would severely limit or restrict the quality and quantity of communications circulated on their websites, thereby quashing true diversity of social and political discourse.<sup>153</sup> But, as the Ninth Circuit in *Roommates.com* stresses, “The Internet is no longer a fragile new means of communication that can be easily smothered . . . by overzealous . . . laws and regulations.”<sup>154</sup> Social media intermediaries and other ICSPs remain a dominant force, socially and economically, in markets for communications and commerce.<sup>155</sup> To use legislative intent from the advent of Section 230 of the CDA to justify the lack of advancement in regulating online fake news and misinformation is to ignore the ever-rising juggernaut of social media intermediaries and their political, cultural, and social influence.

Assuming *arguendo* that the specter of immense tort liability remains over ICSPs without Section 230 immunity, alternative judicial and policy solutions exist to stymie this concern and still work toward an improved Internet marketplace of ideas. First, a judicial reimagining of reviewing statutes targeting false speech may permit new legislation that strikes a careful balance between limiting blatant fake news and misinformation and promoting self-regulation of social media intermediaries without a heightened risk of liability.<sup>156</sup> Second, a cross-subsidization of effective, nonpartisan journalism avoids intersecting with the qualifications of Section 230 immunity.<sup>157</sup> This policy proposal addresses the concerns facing journalistic integrity within the Fourth and Fifth Estates without seeking a reduction in liability protection for interactive service providers.<sup>158</sup> These alternatives establish stronger answers

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151. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997).

152. See *id.*

153. See *id.* at 330–331.

154. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 n.15 (9th Cir. 2008) (en banc).

155. See *id.*; see *infra* Part V.B.

156. See *Zeran*, 129 F.3d 327 at 330; *infra* text accompanying notes 193–96.

157. See *infra* text accompanying notes 234–38.

158. See *infra* text accompanying notes 236–38.

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to the issue of fake news and misinformation through indirect means—the judicial solution creates a new framework for a statutory response, and the policy solution externally funds new media to counteract harmful media. Thus, the consequence of excessive tort liability on social media intermediaries, regardless of validity, remains in consideration when addressing possible solutions to fake news and misinformation.

## V. ALTERNATIVES

### A. Judicial Application of an Intermediate Scrutiny Standard

Justice Breyer's concurring opinion in *United States v. Alvarez* provides a guiding light to legislators seeking to stymie the Internet dissemination of harmful fake news and misinformation.<sup>159</sup> The concurring opinion advocates for an intermediate scrutiny approach to evaluating statutes that seek to curb unambiguous falsehoods in public circulation.<sup>160</sup> More generally, this standard applies in instances where an author blatantly falsifies public speech, or when false speech runs contrary to easily verifiable information.<sup>161</sup> Rather than meet the exacting strict scrutiny required of most free speech regulations,<sup>162</sup> the intermediate scrutiny approach provides more flexibility in constructing statutes that target unambiguously false Internet speech, while also preserving speech valued by First Amendment jurisprudence.<sup>163</sup> While inevitably there are instances where the First Amendment need protect false speech,<sup>164</sup> situations where the harm of false speech substantially outweighs its benefit to the marketplace of ideas permits a more generous approach.<sup>165</sup>

Justice Breyer's intermediate scrutiny approach employs a balancing test consisting of three factors: (1) harmfulness of targeted speech; (2) the potential constitutional harm in the regulation of the targeted speech; and (3) the mitigating effects of counterspeech.<sup>166</sup> While individual judges may weigh these factors differently against each other, this approach identifies the

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159. *United States v. Alvarez*, 132 S. Ct. 2537, 2551–56 (2012) (Breyer, J., concurring); Jeffrey C. Barnum, *Encouraging Congress to Encourage Speech: Reflections on United States v. Alvarez*, 76 ALB. L. REV. 527, 535 (2013).

160. For a summary of this decision, see *supra* Part III.C.

161. See *Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring).

162. See *id.*; Barnum, *supra* note 159, at 535.

163. See Barnum, *supra* note 159, at 543, 546–47.

164. See *Alvarez*, 132 S. Ct. at 2564 (Alito, J., dissenting) (discussing instances where purportedly false speech may benefit public debate and how its wholesale proscription could lead to an abuse of government power).

165. *Id.* at 2552 (Breyer, J., concurring).

166. See *id.* at 2553–56 (Breyer, J., concurring) (identifying justifications for regulating certain strains of speech, but cautioning against causing constitutional harm); Barnum, *supra* note 159, at 535–36 (crystallizing the main aspects of Justice Breyer's intermediate scrutiny balancing test).

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core balancing variables necessary to establish a judicial decision.<sup>167</sup> This approach permits a proper response to statutes that adversely affect constitutionally protected interests, but do not trigger near-immediate rejection nor near-automatic approval (or, stated differently, neither strict scrutiny nor rational basis review, respectively).<sup>168</sup>

Statutes constricting free speech require a limiting principle to prevent an overreach of government power and the discouraging of valuable discourse.<sup>169</sup> The Court in *Alvarez* sought to contextualize false speech by its cognizable harm, rather than its potential benefit, to determine the necessity of its potential regulation.<sup>170</sup> This intermediate scrutiny approach measures the harmfulness of speech and the probability of its occurrence in contextually specific instances to determine how it balances against the risk of constitutional harm.<sup>171</sup> Potential harm from false speech occurs in one of two ways: (1) direct harm, where a speaker of false speech directly targets a victim or damaged party; or (2) indirect harm, where the speaker does not directly target the victim, but nonetheless causes the victim harm.<sup>172</sup> Establishing the direct harm from fake news would likely prove difficult on a broad scale, given the fluctuating nature of purportedly fraudulent content and its dissemination throughout various social media intermediaries. As a result, any statute seeking to proscribe the source of the purported harm would likely fail to survive under the intermediate scrutiny standard.<sup>173</sup>

Fake news and misinformation may indirectly harm a party, even if said harm is incidental.<sup>174</sup> Justice Breyer draws an analogy to statutes prohibiting trademark infringement that require a showing of actual confusion, which assures the high likeliness that a harm will occur.<sup>175</sup> Similarly, a statute regulating knowingly fake news or misinformation may identify physical harm, emotional distress, or a comparable harm as what fake news could create.

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167. Barnum, *supra* note 159, at 535–36.

168. *Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring).

169. *See id.* at 2555.

170. *See id.* at 2547 (plurality opinion); *see id.* at 2555 (Breyer, J., concurring) (“[L]imitations of context, requirements of proof, and the like, narrow the statute to a subset of lies where specific harm is more likely to occur.”).

171. *See id.* at 2555; Barnum, *supra* note 159, at 535.

172. Barnum, *supra* note 159, at 537; *see Alvarez*, 132 S. Ct. at 2553–54 (Breyer, J., concurring).

173. *See Alvarez*, 132 S. Ct. at 2555 (Breyer, J., concurring) (noting the requirement of a statutory regulation on speech to establish its narrowed scope through clearly defined proof of context and injury).

174. Barnum, *supra* note 159, at 540; *see Alvarez*, 132 S. Ct. at 2549 (plurality opinion) (noting the indirect harms of falsely claiming possession of military awards).

175. *Alvarez*, 132 S. Ct. at 2554 (Breyer, J., concurring).

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The challenge for creating this statute would be the specific identification of a harm that falls outside what is already actionable, such as defamation. Without this particular limiting principle, the potential for constitutional harm from a regulation of free speech would substantially outweigh the limited harm deterred by the statute.<sup>176</sup>

In order to pass muster under Justice Breyer's intermediate scrutiny standard, statutes seeking to regulate fake news and misinformation must not create "disproportionate constitutional harm."<sup>177</sup> Statutes create significant First Amendment tumult when their regulation of free speech and press experience overbreadth, vagueness, selective enforcement, or engage in viewpoint-discrimination.<sup>178</sup> A well-tailored regulatory statute targeting false speech establishes constitutional muster under this approach when it identifies material, specific harm in narrowly construed contexts, and when it requires specific knowledge of falsity by the author or publisher to be actionable.<sup>179</sup> To avoid a degradation of the First Amendment's legitimacy, the constitutional harm element carries significant weight when the speech in question falls into contexts that usually call for strict scrutiny protection, such as religion, history, and the social sciences.<sup>180</sup> In contrast, these concerns carry less weight when statutory regulations maintain "slight social value" and do not maintain high priority of First Amendment values.<sup>181</sup> A statute that highlights the lesser constitutional value of fake news and misinformation, while also narrowly construing permissible regulation of said speech, holds the strongest chance of overcoming disproportionate constitutional harm.<sup>182</sup>

The First Amendment requires a statutory restriction on speech at issue be "actually necessary" to achieve its interest.<sup>183</sup> This necessity requirement includes a showing that counterspeech, a natural or artificial means of refuting harmful speech, would not suffice to achieve the government interest.<sup>184</sup> The government maintains the responsibility to either create their own

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176. *See id.* at 2555.

177. *Id.* at 2556.

178. *See id.* at 2551–56 (discussing First Amendment risks prevalent in statutes aiming to prohibit false factual statements).

179. *See id.* at 2555–56.

180. *Id.* at 2552.

181. *See Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring); Barnum, *supra* note 159, at 542 (first citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); then citing *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011)).

182. *See Alvarez*, 132 S. Ct. at 2555–56 (Breyer, J., concurring).

183. *Id.* at 2549 (plurality opinion) (citing *Brown v. Entm't Merch. Assn.*, 564 U.S. 786, 798 (2011)).

184. *See id.* at 2550 (requiring a showing that the dynamics of free speech and refutation through counter speech cannot overcome false speech).

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counterspeech measures, or identify the natural means of counterspeech arising in a particular context, and show why they unsuccessfully or insufficiently deal with the problematic false speech.<sup>185</sup> Under Justice Breyer's intermediate scrutiny approach, a showing of effective counterspeech dilutes the harmfulness of the targeted speech, so proving the inadequacy of counterspeech against specific harmful speech legitimizes the constitutionality of a responsive statute.<sup>186</sup> Further, this approach measures the mitigating effect of counterspeech by the subject matter being regulated—fake news and misinformation—and the harm targeted by the statute—here, the quality and reputation of the marketplace of ideas.<sup>187</sup>

Tedious attempts to respond to the breadth of fake news on the Internet prevents a government-created means of counterspeech from adequately overcoming the targeted harmfulness. The impossibility of a general, but effective, remedy to fake news shifts the responsibility of an effective response onto natural counterspeech.<sup>188</sup> But, the public lacks the ability to completely identify fake news and eradicate it from the marketplace of ideas. Methods of fact checking from sources of traditional media and third party, independent verification fall short of distinguishing real news from fake news.<sup>189</sup> Further, roadblocks (some self-imposed) impede social media intermediaries from curbing the dissemination of fake news on the Internet.<sup>190</sup> Social media intermediaries lack the willpower to eradicate fake news and misinformation on their websites primarily to maintain immunity under the CDA<sup>191</sup> and to maintain the “technology company” label.<sup>192</sup> Legislators creating a statute must stress the public's inability to curb fake news on their own accord to show how statutes must mitigate fake news's harmfulness.

If the Supreme Court were to adopt this intermediate scrutiny standard, any statute seeking to regulate fake news and misinformation on the Internet must comport with the above described factors. Additionally, a constitution-

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185. *See id.*; Barnum, *supra* note 159, at 544.

186. *See Alvarez*, 132 S. Ct. at 2555–56 (Breyer, J., concurring); Barnum, *supra* note 159, at 535, 544–45. *But see Alvarez*, 132 S. Ct. at 2551–52 (plurality opinion).

187. *See* Barnum, *supra* note 159, at 544.

188. *See Alvarez*, 132 S. Ct. at 2550 (plurality opinion) (discussing the variety of possible responses to public false claims of military honors, such as through press coverage and social media responsiveness).

189. *See, e.g.*, Brooke Borel, *Fact-Checking Won't Save Us from Fake News*, FIVETHIRTYEIGHT (Jan. 4, 2017), <https://fivethirtyeight.com/features/fact-checking-wont-save-us-from-fake-news> (noting the increasing difficulty for traditional media outlets and other sources of information to debunk fake news stories, especially within more partisan topics).

190. *See id.*

191. *See generally supra* Part II.C.

192. *See supra* text accompanying notes 140–41.



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ally compliant statute should coincide with the goals of the CDA to promote self-regulation and effective provision of services from ICSPs.<sup>193</sup> An amendment to the CDA—or an entirely new piece of legislation—must work with ICSPs to establish new standards for content permissible on social media websites. This process cannot deter valuable speech lacking the same character of harm narrowly construed by the intermediate scrutiny standard.<sup>194</sup> Further, the overall goal of this type of statute should not be the complete override of social media intermediaries; rather, creating a more compelling incentive for ICSPs to better self-regulate harmful content without risking the loss of Section 230 immunity, and to avoid immediate government intervention into harmful speech.<sup>195</sup> This alternative promotes a healthier marketplace of ideas without mandating that Facebook, Google, and other social media intermediaries completely redesign their operability.<sup>196</sup>

The adoption of an intermediate scrutiny standard for review of statutes regulating fake news and misinformation reimagines the constitutional view on free speech and the marketplace of ideas. This standard sustains the First Amendment's promotion of free speech and reduces the potency of a deterrent on activity within the marketplace of ideas through its requirements for a narrowly tailored harm from particular speech, and a showing of the insufficiency of counterspeech to resolve the particularized harm.<sup>197</sup> Extensive policy consideration needs to go into a potential response to the Internet fake news epidemic, as it must balance the public's need for a healthy marketplace of ideas with social media intermediaries' necessity for immunity to ensure technological growth, while also meeting the demands of this potential new First Amendment standard.

## B. Creation of a Journalism Cross-Subsidy

The difficulty in establishing direct liability for the dissemination of fake news and misinformation justifies examining alternative means of restoring the Fourth and Fifth Estates. The Centre for Media Transparency, partnered with The ResPublica Trust, an independent non-partisan think tank, proposes a nominal levy on the revenues of Internet news intermediaries that possess significant monopoly market power in online search and social networking markets.<sup>198</sup> While the proposal does not identify a specific taxable percentage, it does discuss the potential outcomes from a one percent tax,

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193. See *supra* text accompanying notes 44–47.

194. See *supra* note 105 and accompanying text.

195. See *supra* text accompanying notes 47–50.

196. See Buni, *supra* note 4 (discussing social media intermediaries' lack of willingness to take full responsibility for the harmful content shared on their respective websites).

197. See *supra* note 166 and accompanying text.

198. Schlosberg, *supra* note 14, at 3.

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giving some context to its understanding of “nominal.”<sup>199</sup> The proposal advocates for the tax proceeds to fund particular forms of local and long-form public interest journalism valuable to, and endangered in, the media ecosystem.<sup>200</sup> This functionally operates as a cross-subsidy to assist in counteracting the harmful impact of fake news and misinformation on the Internet, and to place accountability on the intermediaries that disseminate said harmful content.<sup>201</sup>

The original context and justification for this levy was to promote journalistic plurality at the local level, and to work against the stagnation of public interest journalism caused by mass media concentration.<sup>202</sup> There is a public interest in sustaining local and long-form journalism, and the levy proposal effectively supports these news sources via the cross-subsidized resources of large-scale Internet intermediaries, such as Google and Facebook.<sup>203</sup> The revenues reallocated by this proposal stem from advertisers that once supported publishers of valuable long-form public interest journalism, so the proposal would not operate as a radical shift in media market resources.<sup>204</sup> While the original proposal from the Centre for Media Transparency primarily focuses on permitting new entrants into the media market and diluting the monopoly power held by large-scale Internet intermediaries,<sup>205</sup> an ancillary goal of the proposal is an efficient reallocation of resources necessary to counteract detrimental journalism and preserve the Fourth and Fifth Estate.

Despite the conception of ostensible journalistic independence in the United States created by the First Amendment and permissible dissent from government narratives, historically, a mixed system of private enterprise and public support forms the foundation of American journalism.<sup>206</sup> While advertising makes up the broad majority of revenues for modern news media, the government heavily subsidized the news market through the early 20th century through such means as printing and postal subsidies.<sup>207</sup> Publicly funded

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199. *See id.* at 8.

200. *Id.* at 6.

201. *See id.*

202. *See id.* at 4–6.

203. *See id.*

204. *See* Schlosberg, *supra* note 14, at 7–8.

205. *See id.* at 4–6.

206. Lee C. Bollinger, *Journalism Needs Government Help*, WALL ST. J. (July 14, 2010, 12:01 AM), <https://www.wsj.com/articles/SB10001424052748704629804575324782605510168>.

207. Robert McChesney, *Rejuvenating American Journalism: Some Tentative Policy Proposals Workshop Presentation on Journalism*, Federal Trade Commission Washington, D.C., March 10, 2010, 10 PERSPECTIVES ON GLOB. DEV. & TECH. 224, 226–27 (2010).

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journalism contributes to this mixed system, as seen with non-profit journalism from the Public Broadcasting Service (PBS) and National Public Radio (NPR).<sup>208</sup> State support does not *per se* lead to impermissible control—systems of peer review for grant making, along with independence instilled by the First Amendment, wards off the most problematic concerns of government censorship or regulation of information.<sup>209</sup> International publicly funded journalism, such as the BBC and BBC World Services, shows high levels of success while maintaining their global presence courtesy of British citizens who pay into a public funding structure and operating under a set of professional norms that protect their editorial freedom.<sup>210</sup> In the United States, concerns for the First Amendment requires a public funding structure to invigorate beneficial public journalism without excessive control over the subsequently generated news and media.<sup>211</sup> Successful and enlightened policymaking must not sacrifice the autonomy of the Fourth and Fifth Estates; thus, a policy of reorienting resources to invigorate the marketplace of ideas must occur within a mixed and balanced system.<sup>212</sup>

A cross-subsidy benefitting public interest journalism responds directly to an ongoing crisis within the Fourth Estate. Journalism facilitated by newspapers and local media sources are weakening while partisan broadcast and Internet media outlets continue to gain traction and profitability through disseminating distorted and misleading information.<sup>213</sup> Local and long-form public interest journalism face the largest risk of dying out with the continued digital transition of newspapers, and the subsequent shift in their cost base and prioritization of content.<sup>214</sup> The shift in investor confidence in traditional news media contributes to this decline—the decreasing market value of local newspaper companies forces investors to look to large-scale Internet intermediaries for better profitability.<sup>215</sup> Within the realm of digital media,

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208. See Christopher Hooton, *Donald Trump Set to 'Eliminate Arts Funding Programs'*, INDEPENDENT (Jan. 20, 2017), <http://www.independent.co.uk/arts-entertainment/donald-trump-budget-cuts-arts-humanities-nea-neh-npr-cbs-president-a7536741.html>. These programs are currently at risk of losing approximately \$445.5 million a year from the government with the Trump Administration's proposal to privatize the Corporation for Public Broadcasting. *Id.*

209. See Bollinger, *supra* note 206.

210. *Id.*

211. See McChesney, *supra* note 207, at 228–29.

212. See *id.*

213. Bill Kling, *Government Should Help the Media*, WALL ST. J. (July 20, 2010, 12:01 A.M.), <https://www.wsj.com/articles/SB10001424052748704913304575371391095137302>.

214. See *id.*; Schlosberg, *supra* note 14, at 4–5.

215. See Rasmus Kleis Nielsen, *Introduction*, in LOCAL JOURNALISM: THE DECLINE OF NEWSPAPERS AND THE RISE OF DIGITAL MEDIA 1, 3 (Rasmus Kleis Nielsen ed., 2015); Schlosberg, *supra* note 14, at 4–5.

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new websites such as BuzzFeed and the Huffington Post attempt meaningful contributions to long-form journalism, but their entry lacks the traction necessary to make a significant impact.<sup>216</sup> In addition, sources of news receiving public funding, such as PBS and NPR, are currently at risk of elimination, furthering the concern for a lack of variety of quality national journalism.<sup>217</sup> Local news in the United States receives focus in the local television industry, but these news sources often lack coverage meaningful to the Fourth Estate; instead, their coverage is often “inadequate, episodic, and superficial – and rarely genuinely local.”<sup>218</sup> This remains particularly troubling given that over half of the country primarily relies on local media for news and information about the government, elections, and other relevant matters in current events.<sup>219</sup> The risk to particular forms of beneficial journalism, both at the local and national levels, worsens exponentially when resources flow to Internet intermediaries that promulgate information counterproductive to the growth of the Fourth and Fifth Estates.<sup>220</sup> A new policy of cross-subsidized public interest journalism may help to re-establish the legitimacy of the Estates and rejuvenate the marketplace of ideas.

As stated above, the cross-subsidy proposal requires a balance of promoting effective, public interest journalism without the consequences of government control. The goal of this proposal is the creation of stronger accountability from large-scale Internet intermediaries permitting the spread of fake news and misinformation. Because these intermediaries reject the news media company label, a new policy must indirectly ascertain responsibility.<sup>221</sup> This process of cross-subsidizing public interest journalism would have minimal impact on the viability of companies such as Facebook and Google.<sup>222</sup> The reallocated resources originally applied to these targeted media markets, and the intermediaries’ overall bottom line would remain unscathed compared to the large upswing garnered by the beneficiary of the proposal.<sup>223</sup> Accountability from large-scale search engines and social networking websites matters because of the websites’ function as technology intermediaries operating as platforms in two-sided markets.<sup>224</sup> An intermedi-

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216. Schlosberg, *supra* note 14, at 5.

217. *See supra* note 208 and accompanying text.

218. Nielsen, *supra* note 215, at 3.

219. Erika Franklin Folwer et al., *Does Local News Measure Up?*, 18 STAN. L. & POL’Y REV. 410, 410–11 (2007).

220. *See* Schlosberg, *supra* note 14, at 4–6.

221. *See* Buni, *supra* note 4.

222. *See* Schlosberg, *supra* note 14, at 8.

223. *See id.*

224. Florence Thépot, *Market Power in Online Search and Social-Networking: A Matter of Two-Sided Markets*, 36 WORLD COMPETITION L. & ECON. REV. 195, 196–97 (2013).

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ary platform creates a website or service available to public users, which make up the audience for advertisers, which provides revenue to the intermediary.<sup>225</sup> Google operates as a search engine platform for its users to find information disseminated by various advertisers, and Facebook provides a platform for social exchange that exposes users to tailored advertisements.<sup>226</sup> Google and Facebook disseminate web-based media in a mutually beneficial way: the higher user bases for their platforms directly implicate the popularity of a particular strain of media or advertisements, and in return, the platforms obtain revenue from these sources necessary to operate effectively.<sup>227</sup> In a similar fashion, these intermediaries connect users with providers of news and information, thereby establishing a foundational element of the Fifth Estate.<sup>228</sup> This function justifies the cross-subsidy focus on search engine and social media platforms; it can be both a cause of and remedy for the issues presented by fake news and misinformation disseminated on the Internet.

The cross-subsidy proposal from the Centre for Media Transparency discusses a tax on online search and social media intermediaries that maintain at least a 25% market share of their respective markets.<sup>229</sup> Limited participants with high individual market shares make up the bulk of these markets.<sup>230</sup> In particular, Google maintains over an 80% market share for the online search engine market, and it has kept this level consistent since 2008.<sup>231</sup> Since 2010, Facebook has maintained above 40% market share in the Internet social media market, thus consistently outpacing other intermediaries such as YouTube, Twitter, and Reddit.<sup>232</sup> Thus, based on market share reports from 2016, adopting the Centre for Media Transparency proposal of a nominal tax on intermediaries with a 25% monopoly market share would only affect Google and Facebook.<sup>233</sup> Intermediaries' market strength limits the negative consequences of the cross-subsidy, as the taxed amount would be nominal compared to the intermediaries' overall yearly revenue.<sup>234</sup> Based on estimated reported annual revenues for Google and Facebook in

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225. *Id.*

226. *See id.*

227. *See id.* at 197.

228. *See supra* Part II.A.

229. *See* Schlosberg, *supra* note 14, at 8.

230. Thépot, *supra* note 224, at 195.

231. *Id.*

232. Priit Kallas, *Top 10 Social Networking Sites by Market Share of Visits*, DREAMGROW (Jan. 21, 2017), <https://www.dreamgrow.com/top-10-social-networking-sites-market-share-of-visits/>.

233. *Id.*; *see* Schlosberg, *supra* note 14, at 8; Thépot, *supra* note 224, at 195.

234. *See* Schlosberg, *supra* note 14, at 8.

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2016, a one percent tax would generate approximately \$1.17 billion.<sup>235</sup> This taxable percentage can change based on the needs of the programs receiving funds from the cross-subsidy, as well as the health of the targeted intermediary markets. Financially the cross-subsidy would not be a significant burden on these companies, as they continue to demonstrate their capacity to avoid full corporate taxation by redirecting profits to other jurisdictions away from their point of generation.<sup>236</sup>

This cross-subsidy would ensure that these corporations make a meaningful contribution to the public through stimulating beneficial journalism and the Fourth Estate as a whole. The cross-subsidy is a less invasive means of working toward improving Internet-based journalism. Rather than imposing a direct regulation or set of proscriptions on technological intermediaries, the cross-subsidy would operate externally to keep these companies incentivized to self-regulate their own content and maintain Section 230 immunity offered by the CDA.<sup>237</sup> Further, it would avoid the need for major policy or judicial overhauls required by a direct solution to fake news and misinformation.<sup>238</sup> An indirect solution prevents the need for reimagining statutory or judicial approaches to speech and content regulation, while simultaneously maintaining the structural integrity of technological intermediaries.

While public subsidies for journalism are structurally important for its continued societal benefits, the primary concern remains the First Amendment obligation to preserve an independent free press.<sup>239</sup> The direct provision of resources needed to populate beneficial journalism inevitably leads to the

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235. Reinhardt Krause, *Google Plays Catch-Up in the Cloud with Amazon and Microsoft*, INVESTOR'S BUS. DAILY (Feb. 24, 2017), <http://www.investors.com/news/technology/google-cloud-takes-on-amazon-and-microsoft/> (reporting Google's 2016 annual revenue at approximately \$90 billion); Josh Constine, *Facebook Beats in Q4 with \$8.81B Revenue, Slower Growth to 1.8B Users*, TECHCRUNCH (Feb. 1, 2017), <https://techcrunch.com/2017/02/01/facebook-q4-2016-earnings/> (reporting Facebook's 2016 annual revenue at approximately \$27.6 billion).

236. Schlosberg, *supra* note 14, at 8 (noting that intermediaries avoid corporate taxes through the use of tax havens and other means of avoiding tax liability); see Eugene Kim, *Tech Giants are Paying a Lot Less Tax than Some of the Biggest Companies in the US*, BUS. INSIDER (Dec. 21, 2015, 2:51 PM), <http://www.businessinsider.com/tech-companies-have-lower-effective-tax-rates-than-others-2015-12> (noting the low corporate tax rate paid by Google at 19.3%); Renee Merle, *One of Facebook's Biggest Accomplishments This Year Has Nothing to Do with Likes and Shares*, WASH. POST (July 14, 2016), [https://www.washingtonpost.com/news/business/wp/2016/07/14/one-of-facebooks-biggest-accomplishments-this-year-has-nothing-to-do-with-likes-and-shares/?utm\\_term=.3a71ec8eeb29](https://www.washingtonpost.com/news/business/wp/2016/07/14/one-of-facebooks-biggest-accomplishments-this-year-has-nothing-to-do-with-likes-and-shares/?utm_term=.3a71ec8eeb29) (noting Facebook's corporate tax rate of 27%).

237. See *supra* text accompanying notes 76–78.

238. See *supra* Part III.C.

239. McChesney, *supra* note 207, at 228.

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government evaluating journalism content qualitatively, which may result in authoritarian or totalitarian outcomes.<sup>240</sup> But, other nations consistently outspend the United States in public journalism subsidies without seeing severe consequences for their rates of freedom and democracy.<sup>241</sup> Ostensibly, it is possible to maintain a free and independent press while also publicly funding its continued operation, but concerns still arise as to the determination of how to disperse the funds generated from the proposed cross-subsidy. As previously stated, the goal of the proposal must be the improvement of public journalism without the specter of government control of content.<sup>242</sup> The Centre for Media Transparency suggests the use of an independent media board to determine how to redirect funds to different forms of journalism and various media outlets.<sup>243</sup> An independent board can operate with the principle of arms-length funding to avoid government interference with what forms of news writing or media outlets obtain funding.<sup>244</sup> This would also ensure that all forms of journalism, and the respective social platforms reflected in their content, obtain representation by this proposal.<sup>245</sup> In prioritizing particular forms of journalism to receive funds, rather than specific platforms or messages, the cross-subsidy's availability opens up to a diverse set of outlets and styles for journalism, such as public interest, long-form, or investigative.<sup>246</sup> This diversity ensures a lack of favoritism for the new government subsidy, thus maintaining the integrity of the free press protected by the First Amendment.

## VI. CONCLUSION

The advent of the Internet and subsequent protections for interactive service providers sought to cultivate a new means of global communication and commerce without intrusive government regulation.<sup>247</sup> The unfettered and unregulated development of Internet free speech and e-commerce desired by the Communications Decency Act likely did not predict the harmful spread of fake news and misinformation through popular social media intermediaries.<sup>248</sup> With this contemporary trend, new judicial and policy solu-

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240. *See id.*

241. *See id.* at 228–29.

242. *See supra* text accompanying notes 207–212.

243. Schlosberg, *supra* note 14, at 8 (noting how the appointments system of such a board can operate similarly to that of the Press Recognition Panel, which maintains independence under the Independent Press Standards Organization in the United Kingdom).

244. *See id.*

245. *See id.*

246. *See id.* at 6.

247. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

248. *See id.*

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tions require consideration to maintain journalistic integrity within the Fourth and Fifth Estates. A reimagining of the standard of review used to evaluate statutes regulating Internet can establish a framework for new legislation that can regulate fake news and misinformation on social media intermediaries without risking the loss of their Section 230 immunity provided by the CDA. Alternatively, a cross-subsidy funding public, non-partisan journalism by large digital intermediary resources is an external solution to ensure continued quality journalism while also keeping accountability for large social media intermediaries that disseminate fake news and misinformation.

In the short-term, these alternatives could play an essential role in scaling back a trend of fake news on websites such as Facebook and Twitter. This harmful misinformation plays a role in shaping social and political events globally; thus, its impact deserves prioritization and focus from industry and government leadership.<sup>249</sup> The long-term implications broaden to the overall future of journalism. The future of the Fourth Estate relies heavily on the public's confidence in the news, so the risk of the line blurring between fake and legitimate information threatens the stability of traditional journalism. Cross-subsidizing public, non-partisan journalism is a step in the right direction, as it creates a new source of valuable, independent journalism while maintaining the involvement and accountability of social media intermediaries.<sup>250</sup> This external policy solution benefits the Fourth Estate by reinvigorating traditional journalism through public interest stories not influenced by partisan or industry interests, and the Fifth Estate benefits by circulating beneficial news and information influenced by the reinvigorated Fourth Estate journalism.<sup>251</sup> The long-term health of traditional journalism, along with its tangential influences on Fifth Estate Internet communications, depends on a solution that values quality news and information and the advancement of digital intermediaries that disseminate the information.

As of late, the understanding of the term "fake news" shifts colloquially on a rapid basis. Most recently, the public occasionally perceives the term to identify information that dissents from subjective truth, rather than what is recklessly or knowingly false.<sup>252</sup> Despite this fluidity in understanding, the stymying of fake news and misinformation disseminated through social media intermediaries remains critically important, or we risk a long-term decline in the quality of the marketplace of ideas. Critical dissent and agonistic pluralism carry upmost value in social and political discourse; blatant falsehoods merely denigrate the value of that discourse.

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249. *See supra* Part IV.A.

250. *See supra* Part V.B.

251. *See supra* Part II.A.

252. *See Kurtzleben, supra* note 1.