FAKE NEWS (& DEEP FAKES) AND DEMOCRATIC DISCOURSE

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INTRODUCTION

The U.S. Declaration of Independence was transformational because it declared the independence of the American colonies from England and incorporated democratic ideals. In 1776, most European countries were governed by monarchs, some of which had (at one point, at least) purported to rule by Divine Right. In the Declaration of Independence, the signers implicitly rejected the idea of Divine Right by flatly asserting their right to throw off a despotic monarch and declaring that the power to govern derives from the consent of the governed.[1] As the U.S. Supreme Court recognized in *New York Times Co. v. Sullivan*,[2] quoting James Madison, "the Constitution created a form of government under which 'The people, not the government, possess the absolute sovereignty,'" dispersing "power in reflection of the people's distrust of concentrated power, and of power itself at all levels," thus creating an entirely new form of government "from the British form, under which the Crown was sovereign and the people were subjects."

In the Constitution, freedom of speech was not initially regarded as an indispensable component. Indeed, the Framers of the U.S. Constitution believed that a bill of rights (which would have included specific protections for free speech) was not needed because they had created a government of limited and enumerated powers[3]—one whose power was sufficiently checked by the doctrine of separation of powers and other

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1. *See generally* The Declaration of Independence (U.S. 1776).
2. New York Times Co. v. Sullivan, 376 U.S. 254, 274 (1976).
3. *See* U.S. Const., Art. I, § 8.

limitations built into the new Constitution.[4] However, the people disagreed, and it rapidly became clear that the Constitution might not have enough support to gain ratification without the addition of a formal bill of rights.[5] In an effort to salvage the Constitution, proponents urged ratification of the document "as is," but promised that the first Congress would create what became the Bill of Rights.[6] Only then was ratification possible.[7] As a result, the Bill of Rights (and the right to freedom of expression) entered the Constitution as an amendment rather than in the body of the Constitution itself.[8]

Over time, it became apparent that freedom of expression and freedom of the press were indispensable components of the U.S. governmental system.[9] Indeed, the U.S. Supreme Court has declared that "Speech concerning public affairs is more than self-expression; it is the essence of self-government."[10] In a democratic system, change does not simply

4. *See* Ralph Ketcham, The Anti-Federalist Papers and the Constitutional Convention Debates: The Clashes and the Compromises That Gave Birth to Our Form of Government 6 (1986) ("Also, mindful of colonial experience and following the arguments of Montesquieu, the idea that the legislative, executive, and judicial powers had to be 'separated,' made to 'check and balance' each other in order to prevent tyranny, gained wide acceptance.").

5. *See* Wallace v. Jaffree, 472 U.S. 78, 92–93 (1985) (White, J., dissenting) ("During the debates in the Thirteen Colonies over ratification of the Constitution, one of the arguments frequently used by opponents of ratification was that without a Bill of Rights guaranteeing individual liberty the new general Government carried with it a potential for tyranny.").

6. *See* McDonald v. City of Chicago, 561 U.S. 742, 769 (2010) ("But those who were fearful that the new Federal Government would infringe traditional rights such as the right to keep and bear arms insisted on the adoption of the Bill of Rights as a condition for ratification of the Constitution.").

7. *See id.* at 769 ("But those who were fearful that the new Federal Government would infringe traditional rights such as the right to keep and bear arms insisted on the adoption of the Bill of Rights as a condition for ratification of the Constitution."); Marsh v. Chambers, 463 U.S. 783, 816 (1983) (Brennan, J., dissenting) ("The first 10 Amendments were not enacted because the members of the First Congress came up with a bright idea one morning; rather, their enactment was forced upon Congress by a number of the States as a condition for their ratification of the original Constitution.").

8. *McDonald*, 561 U.S. at 769.

9. *See generally* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964 (1978); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877 (1963); Alexander Meiklejohn, *The First Amendment as an Absolute*, 1961 Sup. Ct. Rev. 245; Russell L. Weaver & Catherine Hancock, The First Amendment: Cases, Materials and Problems (Carolina Academic Press, 6th ed., 2020).

10. Connick v. Myers, 461 U.S. 138, 145 (1983) (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Blackmun, J., concurring) ("core political speech occupies the highest, most protected position"); *see also* Roth v. United States, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.").

"happen," but is instead driven by the people, and the "constitutional safeguard [for free expression] 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people,'" so that "changes may be obtained by lawful means."[11] Indeed, free speech is so important to the U.S. governmental system that former U.S. Supreme Court nominee, Robert Bork argued that the "entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies."[12] Bork believed that protections for political speech are so essential to the democratic process that they "could and should be inferred even if there were no first amendment."[13] He defined political speech as "criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the conduct of any governmental unit in the country."[14]

"Fake news" creates problems for democratic systems because it has the potential to mislead the public, and undermine the quality of public debate through the use of false facts. Social media is a frequent source of fake news. For example, Twitter accounts have provided a major source of propaganda and misinformation.[15] During the 2016 election, the Twitter Data Science Team found some 50,000 Russia-linked accounts that were spreading disinformation, and it also found that disinformation was being spread by both Republican and Democratic partisans.[16]

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11. New York Times, Co. v. Sullivan, 376 U.S. 254, 269 (1964) (quoting Roth v. United States, 354 U.S. 476, 484 (1957) & Stromberg v. California, 283 U.S. 359, 369 (1931)); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339, 341 (2010) ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a pre-condition to enlightened self-government and a necessary means to protect it. The First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office.'" "It is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes."); *see also* Virginia v. Black, 538 U.S. 343, 365 (2003) ("[L]awful political speech [is] at the core of what the First Amendment is designed to protect.").

12. *See* Bork, *supra* note 9, at 23; *see also id*. at 20 ("Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic.").

13. *Id.* at 23.

14. *Id.* at 29.

15. Farhad Manjoo, *How Twitter is Being Gamed to Feed Misinformation*, N.Y. Times, June 1, 2017, at B-1, B-7 ("But the biggest problem with Twitter's place in the news is its role in the production and dissemination of propaganda and misinformation."). This article offers the example of a conspiracy theory suggesting that the murder of a staffer at the Democratic National Committee was linked to the leak of Clinton campaign emails. *Id.* at B-7.

16. Matthew Hindman & Vlad Barash, *Disinformation, 'Fake News' and Influence*

Facebook has nearly two billion users worldwide,[17] "reaches approximately 67% of U.S. adults," and 44% of U.S. adults state that they receive their news from Facebook.[18] As a result, "digging up large-scale misinformation on Facebook was as easy as finding baby photos or birthday greetings."[19] Included "were doctored photos . . . of Latin American migrants headed towards the United States border," as well as "easily disprovable lies about the women who accused Justice Brett M. Kavanaugh of sexual assault, cooked up by partisans with bad-faith agendas."[20] Indeed, "every time major political events dominated the news cycle, Facebook was overrun by hoaxers and conspiracy theorists, who used the platform to sow discord, spin falsehoods and stir up tribal anger."[21] For example, during the 2016 presidential campaign, conspiracy theorists circulated false internet rumors to the effect that then presidential candidate Hillary Clinton and her campaign manager were operating a child sex ring out of a restaurant.[22]

The situation is complicated further by two other phenomena: "bots" and "deep fakes." In recent years, "robotic speech bots" (bots) are increasingly able to disseminate speech on a mass scale.[23] Indeed, in some instances, bots can even create the content that is disseminated. "Deep fakes" involve video content that has been altered in some way.[24] For example, in 2019, someone altered a video of House Speaker Nancy Pelosi to make it appear that she was drunk and slurring her speech.[25] This false impression was possible because the pace of the video was slowed down and the pitch of her voice was raised as well.[26] In another

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Campaigns on Twitter, Knight Found., Oct. 2018, at 4, 33.

17. Dr. Joel Timmer, *Fighting Falsity: Fake News, Facebook and the First Amendment*, 35 Cardozo Arts & Ent. L.J. 669, 672 (2017).

18. *Id.* at 672–73.

19. Kevin Roose, *Facebook Thwarted Chaos on Election Day. It's Hardly Clear That Will Last.*, N.Y. Times: The Shift, Nov. 8, 2018, at B1.

20. *Id.*

21. *Id.*

22. *See* Jennifer Ludden, *Armed Man Threatens D.C. Pizzeria Targeted by Fake News Stories*, Nat'l Pub. Radio: All Things Considered (Dec. 5, 2016), https://www.npr.org/2016/12/05/504467162/armed-man-threatens-d-c-pizzeria-targeted-by-fake-news-stories.

23. *See* Manjoo, *supra* note 15, at B-7.

24. Grace Shao, *What 'Deepfakes' Are and How They May Be Dangerous*, CNBC (Oct. 13, 2019), https://www.cnbc.com/2019/10/14/what-isfdeepfake-and-how-it-might-be-dangerous.html.

25. Drew Harwell, *Faked Pelosi Videos, Slowed to Make Her Appear Drunk, Spread Across Social Media*, Wash. Post (May 24, 2019), https://www.washingtonpost.com/technology/2019/05/23/faked-pelosi-videos-slowed-make-her-appear-drunk-spread-across-social-media/.

26. *Id.*

instance, someone altered a video of former President Barrack Obama to make it appear that he was saying something that he did not say.[27]

This Article explores the problems related to fake news, bots and deep fakes. In addition to discussing the problems that they pose for public debate, it examines whether society has effective ways to deal with these problems.

I. FAKE NEWS

Fake news, or inaccurate and misleading information, is nothing new. Some individuals have always been willing to spread lies or inaccurate information about others.[28] However, with the development of the internet, the problem has become much worse.[29] For centuries, information passed between people by word of mouth or by handwritten methods, but generally information moved at the pace at which people could move.[30] Not until the fifteenth century, when Johannes Gutenberg invented the printing press,[31] did it become possible to easily create multiple copies of documents.[32] Although the printing press did not increase the speed at which information could disseminate, the ability to create multiple copies allowed information to spread more broadly. This led to a flowering of knowledge, information and ideas, which ultimately

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27. Hallie Jackson, *Fake Obama Warning about 'Deep Fakes' Goes Viral*, MSNBC (Apr. 19, 2018), https://www.msnbc.com/hallie-jackson/watch/fake-obama-warning-about-deep-fakes-goes -viral-1214598723984.

28. *See* Jacob Soll, *The Long and Brutal History of Fake News*, Politico (Dec. 18, 2016), https://www.politico.com/magazine/story/2016/12/fake-news-history-long-violent-214535. Political debate his involved not only outright lies, but also satire and ridicule. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54–55 (1988) ("Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. Nast's castigation of the Tweed Ring, Walt McDougall's characterization of Presidential candidate James G. Blaine's banquet with the millionaires at Delmonico's as 'The Royal Feast of Belshazzar,' and numerous other efforts have undoubtedly had an effect on the course and outcome of contemporaneous debate. Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder have been memorialized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist. From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.").

29. *See* Russell L. Weaver, From Gutenberg to the Internet: Free Speech, Advancing Technology, and the Implications for Democracy 139–58 (2nd ed. 2019).

30. *Id.* at 3. Of course, over the centuries, there were attempts to move information more quickly than people could move. *Id.* at 4. Information could move faster than people could move through the use of carrier pigeons. *Id.* at 4. However, although pigeons could discreetly communicate a particular piece of information relatively quickly, they were not suited to mass communication in the sense of the modern radio, television or internet. *Id.*

31. *Id.* at 9–11.

32. *Id.* at 10–11.

contributed to dramatic societal changes, including the scientific revolution, the demise of monarchy and the Protestant Reformation.[33]

Following Gutenberg's development of the printing press, communication technologies did not advance markedly until the nineteenth century.[34] At that point, the harnessing of electricity led to the development of a series of new electrically-based communication technologies, including the telegraph, radio, television, and eventually satellite and cable technologies.[35] These new technologies allowed information to move much more quickly than the speed at which people could move.[36] The telegraph reduced the time required to send a message across the United States from a matter of weeks to a few seconds.[37] Radio made it possible for President Franklin Delano Roosevelt to transmit his fireside chats to every house in the U.S. almost simultaneously.[38] Television made it possible to communicate through both audio and video content in real time.[39]

Even though these new communication technologies revolutionized communication in important aspects, this technology came with one major drawback: they were almost invariably owned and controlled by relatively rich individuals or corporations who became the "gatekeepers" of those technologies.[40] Even the printing press, which was relatively cheap in comparison to other modern communication technologies (*e.g.*, satellites), could be relatively expensive and difficult to obtain.[41] Benjamin Franklin, who was known as a printer (among many other things), came from a family of limited means and struggled for many years to acquire the funds needed to buy a printing press.[42] He ultimately obtained one only with the help of a partner, and due to the demise of a former employer's printing business that resulted in a fire sale price for a printing press.[43]

Those who controlled communication technologies had the power to decide who could use those technologies, as well as the messages that could be communicated over them.[44] Predictably, the owners of communication platforms would only allow the dissemination of

33. *Id.* at 13–14.
34. *Id.* at 39–46.
35. *Id.*
36. *Id.*
37. *Id.* at 39–40.
38. *Id.* at 47–60.
39. *Id.* at 44–45.
40. *Id.* at 47–60.
41. *Id.* at 33–34.
42. *Id.*
43. *Id.* at 34.
44. *Id.* at 34–38.

information that favored their views and positions.[45] As a result, although there were dramatic advances in communication technologies over the centuries, these new technologies were not readily accessible by ordinary individuals.[46] Ideas and political arguments might or might not be communicated, depending on the whims of those who owned the communication technologies.[47]

The internet was transformative because it was the first technology that allowed ordinary individuals to communicate on a mass scale,[48] and generally allowed them to do so free of the censorship of the traditional gatekeepers and filters on communication.[49] This broadening of communicative capacity had a profound impact on modern societies, enabling mass communication on a scale never seen before, and resulting in significant societal changes.[50] The impact of the internet has been seen in contexts ranging from President Barrack Obama's 2008 presidential campaign, which used the internet very effectively to organize and recruit supporters, and raise money,[51] to the Arab Spring uprisings in the Middle East.[52] The impact has also been seen in a multitude of other contexts.[53]

The greatest strength of the internet—the enabling of mass communication by ordinary individuals—has also proved to be its greatest weakness.[54] By enabling ordinary people to engage in mass communication, the internet has created the potential for mischief. Some have used the internet to perpetrate fraud (haven't we all received emails from Africa soliciting help in moving money out of Africa for a handsome fee?) and has also enabled those who wish to propagate fake news. Using platforms such as Twitter and Facebook, individuals can easily distribute "facts," both real and fake. Moreover, because the internet is global in nature, individuals have the ability to distribute information across international borders. As a result, during the 2016 presidential election, some believed that Russian operatives attempted to influence the outcome of the election in favor of Donald Trump.[55]

The impact of internet speech is amplified by bots and deep fakes. Bots enable individuals to distribute their ideas broadly, and even give

45. *Id.* at 36.
46. *Id.* at 35–38.
47. *Id.* at 36–37.
48. *Id.* at 67–70.
49. *Id.*
50. *Id.* at 67–114.
51. *Id.* at 102–104.
52. *Id.* at 73–82.
53. *Id.* at 67–114.
54. *Id.* at 139–170.
55. *See* Stephen Budiansky, *The Coming War for Cyberspace*, Wall St. J., July 15–16, 2017, at C5 ("An army of Russia-based human and automated attackers ("robo-trolls") deluged the United States with pro-Trump disinformation . . .").

them the possibility of using bots to create new and additional speech on their behalf. Deep fakes allow individuals to use new technologies to created distorted views showing things that never actually happened.

A. *Possible Responses to Fake News, Bots, and Deep Fakes*

Fake news and deep fakes are inconsistent with the notion of informed self-government because they have the potential to mislead the voting public. At its worst, "fake news" can distort the public debate with ideas or facts that are made up and simply untrue.

Of course, the usual remedy for offensive or false speech is counter speech that attempts to set the record straight and helps inform the public of the truth. Whether this remedy is effective with fake news is unclear. After President Obama was elected President of the United States, there were those who questioned whether he was born in the United States, and thus whether he was eligible to serve as President.[56] While there was plenty of counter-speech, including President Obama's production of a copy of his birth certificate, rumors regarding President Obama's birth status continued to circulate.[57] Accordingly, it is not clear that responsive speech will always set the record straight, nor that the public will accept the truth even if it is made available.

B. *Governmental Regulation of Fake News?*

Should there be more stringent remedies against fake news? For example, should government be entitled to declare that "fake news," being false, is not entitled to constitutional protection? In other words, can it treat fake news like fighting words,[58] child pornography,[59] or obscenity,[60] and thus impose criminal sanctions on those who propagate it? Should government also have the power to impose civil or criminal sanctions on those who circulate fake news, or may it impose licensing restrictions or seek injunctive relief against fake news?

Any attempt to regulate fake news might lead to a number of thorny questions regarding the proper role of government in our constitutional system. Let us begin by assuming that Congress decides to create a new federal agency to regulate fake news, the Federal Truth Commission (Truth Commission). Would we, as a society, feel comfortable giving the Truth Commission the power to determine which ideas and facts are

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56. *See* Ashley Parker & Steve Eder, *How Trump's 'Birther' Claims Helped to Stir Presidential Bid*, N.Y. Times, July 3, 2016, at A1.

57. *See* Sophie Tatum & Jim Acosta, *Report: Trump Continues to Question Obama's Birth Certificate*, CNN (Nov. 29, 2017), http://www.cnn.com/2017/11/28/politics/donald-trump-barack-obama-birth-certificate-nyt/index.html.

58. *See generally* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

59. *See generally* Ferber v. New York, 458 U.S. 747 (1982).

60. *See generally* Miller v. California, 413 U.S. 15 (1973).

"true," and which are "false," and to prosecute those who espouse ideas and facts that the commission regards as completely false? Would we feel comfortable giving the Truth Commission the power to license news, based on its truth or falsity, and the power to seek injunctive relief against false facts and ideas?

If the Truth Commission were given such authority, how would it go about determining what qualifies as "fake news?" In order to qualify as false, must something be "completely false," or could something be regarded as "fake news" simply because it is biased or slanted in favor of one side of a debate? For example, during the Obama Administration, suppose that the Truth Commission had existed, and decided that climate change was a "fact" and that climate change denial was fake news. Could the Truth Commission have criminally prosecuted those who argued that climate change was a hoax? Would the Truth Commission have been free to redefine the truth regarding climate change when Donald Trump came to power? In other words, could the Truth Commission have changed its definition of "truth," dismissed all charges against climate change deniers, and criminally prosecuted those who were arguing that climate change is a real phenomenon? Would we, as a society, feel comfortable giving the government the power to declare that facts like these are undeniably true, and that anyone who dissents can be subject to criminal sanctions?

Of course, the Truth Commission might be given the power to prohibit not only "completely false" ideas or facts, but also to prohibit biased or partially false statements. In other words, the Truth Commission might be given the power to impose the equivalent of the Federal Communication Commission's "fairness doctrine,"[61] but instead extend that doctrine beyond broadcasting to all communications disseminated by newspapers, cable television, the internet and satellite.

If the Truth Commission were given the power to prosecute for bias or lack of "fairness," it could have many players on either side of the political spectrum to prosecute. Those on the left might argue that Fox News and other right-wing commentators should be criminally prosecuted for their allegedly biased views and statements. At the same time, those on the right, who believe that the media has a left-wing bias, might argue for the prosecution of a wide swath of left-wing journalists. Although I would personally find it offensive to prosecute anyone for simply expressing their ideas, no matter how biased or slanted, if I were forced (at gun point on threat of death) to name a news personality who exhibits extreme bias and lack of objectivity, I would name a particular National Public Radio program host whose work I often find is

61. *See* Red Lion Broad. Co. v. Fed. Commc'ns Comm'n, 395 U.S. 367, 369 (1969) (holding that the "Fairness Doctrine" required that broadcasters' discussion of public issues give fair coverage to both sides of those issues).

unreasonably partisan. Would the Federal Truth Commission be free to criminally prosecute the NPR host for biased news coverage? Would the host have a defense if there is *some truth* to his statements of fact and articulated ideas? In other words, could he only be convicted if his allegations and reporting are totally false?

A more difficult question arises if government is given the power to prosecute ideas which have elements of truth: but which can be regarded as biased or slanted? Vested with that kind of authority, I'm sure that the Trump Administration would be able to find several biased journalists to prosecute. Would we feel comfortable giving Trump that authority?

Of course, some nations have already attempted to declare truth and criminally prosecute those who transgress their versions of truth. For example, France currently makes it a crime to deny that the Holocaust occurred.[62] However, it is not clear that such crimes provide effective deterrents. There is no evidence that France's ban on Holocaust denial has eliminated Holocaust deniers from France.[63] On the contrary, France is still home to Holocaust deniers.[64] Moreover, despite the U.S.'s failure to prohibit Holocaust denial, there is no evidence that Holocaust deniers have won the day in the United States.

Any attempt to establish a Truth Commission and to allow prosecution of political and news commentators for false statements would run directly counter to the nation's free speech traditions. In *United States v. Alvarez*,[65] the Court struck down portions of the Stolen Valor Act and concluded that Congress could not impose criminal sanctions on those who falsely claim to have won the Congressional Medal of Honor. In *Alvarez*, the Court flatly rejected the proposition that false speech has no value, and therefore should be denied constitutional protection.[66] In doing so, the Court expressed concern that the government might try to create something like the Truth Commission (referencing George Orwell's Oceania Ministry of Truth), and empower it with the authority to "compile a list of subjects about which false statements are punishable."[67] The Court referred to this type of power as being a "broad censorial power," which the Court viewed as "unprecedented in this Court's cases or in our constitutional tradition," and one which involves "a chill the

62. *See* Russell L. Weaver, N. Delpierre & L. Boissier, *Holocause Denial and Governmentally Declared "Truth": French and American Perspectives*, 41 TEX. TECH. L. REV. 495, 497 (2009).

63. *Id.* at 498.

64. *Id.*

65. *See generally* United States v. Alvarez, 567 U.S. 709 (2012).

66. *Id.* at 718–19. The Court did note that certain types of false speech could be criminally prosecuted such as perjury or filing a false claim with the U.S. government. *See id.* at 734.

67. *Id.* at 723.

First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom."[68]

Alvarez is consistent with the Court's general free speech jurisprudence. If the legitimacy of our governmental system depends on the consent of the governed, it is inappropriate to give government the power to control, limit and suppress the range of ideas that the people can hear or consider. In *Ashcroft v. American Civil Liberties Union*,[69] the Court declared that as "a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[70] Likewise, in *Cohen v. California*, the Court flatly recognized that the "constitutional right of free expression is powerful medicine in a society as diverse and populous as ours," and concluded that it "is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[71] *Cohen* went on to state that it would not "indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able . . . to discern little social benefit that might result from running the risk of opening the door to such grave results."[72]

Limitations on government's ability to control or censor speech are grounded in history and in our constitutional tradition. After Johannes Gutenberg invented the printing press in the fifteenth century, many countries feared that widespread use of the press might undermine their power, and therefore they sought to control and limit its use.[73] The English government used the decision in *de Libellis Famosis*,[74] to criminally prosecute those who criticized the Crown or certain religious officials of high station, and it did so in an effort to prosecute, intimidate

68. *Id.*

69. Ashcroft v. ACLU, 535 U.S. 564, 573 (2002).

70. *See Alvarez*, 567 U.S. at 717 (citing *Ashcroft*, 535 U.S. at 573); *see also* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790–91 (2011).

71. Cohen v. California, 403 U.S. 15, 24 (1971).

72. *Id.* at 26.

73. *See* Weaver & Hancock, *supra* note 9, at 5.

74. *See generally* De Libellis Famosis Case, 77 Eng. Rep. 250 (Star Chamber 1606).

and silence governmental critics.[75] Moreover, under English law, a defendant could not rely on the defense of truth; indeed, truth was treated as an aggravating factor. "Since maintaining a proper regard for government was the goal of this new offense, it followed that truth was just as reprehensible as falsehood and was eliminated as a defense."[76]

Similar restrictions were imposed in the American colonies where the British prosecuted "criticism directed against the government or public officials" because it was considered to be "a threat against public order and a criminal offense," and again truth was not a defense.[77] For example, British colonial officials prosecuted John Peter Zenger, a New York publisher, for seditious libel for publishing stories mocking the royal Governor and his administration.[78] Among other things, Zenger published "anti-British song-sheets and mock advertisements describing an associate of the royal governor as 'a large Spaniel, of about 5 feet 5 inches high . . . lately strayed from his kennel with his mouth full of fulsome panegyricks,' and a 'monkey . . . lately broke from his chain and run into the country.'"[79] The Royal Governor eventually managed to indict Zenger for seditious libel.[80] When the case was finally tried, Zenger's lawyer admitted that Zenger had published the allegedly libelous statements, and offered to concede the libel if the prosecution could prove that the allegations were false. When the prosecution declined, Zenger's attorney offered to prove that the statements were true. Although the court disallowed the evidence, on the valid legal basis that truth was immaterial, the jury chose to acquit Zenger in a decision that history has portrayed as an early example of jury nullification.[81]

Based on this history of speech repression, some commentators have argued that the First Amendment was designed to eliminate seditious libel, and to provide broad protections for freedom of expression. For example, Zechariah Chafee argued that the Framers of the First Amendment intended to "wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible."[82] Although Leonard W. Levy disputed the idea that the First Amendment was intended "to

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75. *Id. See also* William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 Colum. L. Rev. 91, 103 (1984).

76. *Id.*

77. Lawrence W. Crispo, Jill M. Slansky & Geanene M. Yriarte, *Jury Nullification: Law Versus Anarchy*, 31 Loy. L.A. L. Rev. 1, 7 (1997).

78. *Id.*

79. Elizabeth I. Haynes, *United States v. Thomas: Pulling the Jury Apart*, 30 CONN. L. REV. 731, 744–45 (1998).

80. *See* Cohen v. Hurley, 366 U.S. 117, 140 (1961) (Black, J., dissenting).

81. *See* Haynes, *supra* note 79, at 7–8.

82. Zechariah Chafee Jr., Free Speech In The United States 21 (Harvard Univ. Press 1941).

eliminate the law of seditious libel,"[83] he agreed that the "American people of 1787 understood . . . that they were entitled to an explicit reservation of their rights against government, that a bill of rights is a bill of restraints upon government, and that people may be free only if the government is not."[84]

Early experiences under the U.S. Constitution were not necessarily consistent with this anti-repression principle. Less than a decade after the First Amendment was framed and ratified, Congress enacted the Alien and Sedition Act of 1798, which made it illegal to publish "false, scandalous, and malicious writing against the Government of the United States with intent to defame, or to bring them into contempt or disrepute, or to excite against them hatred of the good people of the United States, or to stir up sedition within the United States."[85]

In its more modern decisions, the Court has been sensitive to the history of speech repression in both the U.S. and Europe, and quite protective when the government seeks to repress core political speech. In general, the Court's decisions have suggested that the government should not be allowed to control either thought or speech. As the Court stated in *Ashcroft v. Free Speech Coalition*, "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end.[86] The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." Likewise, in *Virginia v. Black*, the Court stated that the "hallmark of the protection of free speech is to allow free trade in ideas—even ideas that the overwhelming majority of people might find distasteful or discomforting."[87] This point has been made in many different ways. For example, Professor Emerson argued that the "only justification for suppressing an opinion is that those who seek to suppress it are infallible in their judgment of the truth. But no individual or group can be infallible, particularly in a constantly changing world."[88] As a result, "through the acquisition of new knowledge, the toleration of new ideas, the testing of opinion in open competition, the discipline of rethinking its assumptions, a society will be better able to reach common decisions that will meet the needs and aspirations of its members."[89]

However, there is one situation in which fake news can be prohibited, as well as bots and deep fakes: when the speech comes from outside the

83. Leonard W. Levy, *The Legacy Reexamined*, 37 Stan. L. Rev. 767, 767 (1985).
84. *Id.* at 773.
85. 1 Stat. 596 (1798). *See also* 1 Stat. 570, 577 (1798).
86. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253 (2002).
87. Virginia v. Black, 538 U.S. 343, 358 (2003).
88. Emerson, *supra* note 9, at 882.
89. *Id.*

U.S. and is designed to interfere in U.S. elections. Federal law prohibits such interference.

C. *Injunctions and Licensing as Possible Remedies?*

An alternate (or, perhaps, supplementary) approach is to give the Truth Commission two other powers: (1) to review and license new stories before they are published, and (2) to seek injunctive relief against fake, biased or slanted news. Under such an arrangement, the Truth Commission could require that all facts and all new stories be submitted to it prior to publication, and the law could further provide that nobody could publish anything without the explicit authority of the Truth Commission. The Truth Commission would then have the power to refuse to license any story that it regards as false. Alternatively, if someone published facts or stories without gaining the Truth Commission's approval, it could be given the authority to seek injunctive relief against the publication of such stories. They could also seek injunctive relief against biased or "unfair" news or ideas.

Of course, both a licensing power and an injunctive power would run directly counter to the long-established prohibition against prior restraints.[90] In the Court's landmark decision in *Near v. Minnesota*, the Court emphasized that the constitutional protection for liberty of the press was designed to prohibit "previous restraints upon publication."[91] Likewise, in *Patterson v. Colorado*, the Court declared that the "main purpose" of the First Amendment's provisions is "to prevent all such previous restraints upon publications as had been practiced by other governments."[92]

The prohibition against prior restraints is also rooted in history. After Johannes Gutenberg invented the printing press, many countries sought to control and limit its use.[93] In addition to restricting the number of printing presses that could exist, England imposed content licensing restrictions.[94] In other words, before an individual could publish a book or document, the government required the individual to submit the content of the book to governmental censors, who could veto the publication or require modifications to the content (usually modifications designed to mute or eliminate criticism of the King or the clergy).[95] In

90. *See generally* New York Times Co. v. United States, 403 U.S. 713 (1971); Lovell v. City of Griffin, 303 U.S. 444 (1938); Near v. Minnesota, 283 U.S. 697 (1931).

91. *Near*, 283 U.S. at 713.

92. Patterson v. Colorado, 205 U.S. 454, 462 (1907).

93. *See* Weaver & Hancock, *supra* note 9, at 5–6.

94. *Id.* at 5–6.

95. *Id.* at 6; *see also* Times Film Corp. v. City of Chicago, 365 U.S. 43, 55–56 (1961) (Warren, C.J., dissenting).

general, in the U.S., such speech licensing schemes are prohibited. In *Lovell v. City of Griffin*,[96] the Court struck down an ordinance which required that the written permission of the city manager must be obtained before anyone could distribute circulars, advertising, or literature of any kind in the City of Griffin. In doing so, the Court emphasized that the law stuck "at the very foundation of the freedom of press by subjecting it to license and censorship."[97] Noting that the "struggle for the freedom of the press was primarily directed against the power of the licensor," the Court held the ordinance was invalid because it "would restore the system of license and censorship in its baldest form."[98]

The Court has also denied injunctions against speech.[99] In *Near v. Minnesota*, the Court struck down a Minnesota law which authorized the abatement of any "malicious, scandalous and defamatory newspaper, magazine or other periodical."[100] The case involved an attempt to enjoin publication of *The Saturday Post* because it was "largely devoted to malicious, scandalous and defamatory articles."[101] Reaffirming the prohibition against prior restraints, the Court held that the Minnesota law imposed "an unconstitutional restraint upon publication."[102]

Thus, it is extremely unlikely that the Truth Commission could impose a licensing scheme, requiring that publishers obtain its permission before publishing information, or that it could use injunctions to prohibit the publication of "fake news."

D. *Other Potential Remedies?*

If Congress cannot vest the Truth Commission with the power to criminally prosecute or enjoin the publication of fake news, then are there other potential remedies for fake news or against the perpetrators of such news?

In appropriate cases, one potential remedy is to bring a defamation suit against someone who propagates fake news that injures another's reputation. As discussed previously, if the plaintiff is a public official or a public figure, it is extremely difficult to prevail in defamation litigation. However, if an allegation really does involve "fake news," in the sense that the defendant is "making it up," it should be possible for even a public official or a public figure to satisfy the more stringent actual malice

96. Lovell v. City of Griffin, 303 U.S. 444, 451 (1938).

97. *Id.*

98. *Id.* at 451–52; *see also* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988).

99. *See* Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994); New York Times Co. v. U.S., 403 U.S. 713 (1971); Near v. State of Minnesota ex rel. Olson, 283 U.S. 697 (1931).

100. Near v. Minnesota, 283 U.S. 697, 701–02 (1931).

101. *Id.* at 703.

102. *Id.* at 723.

standard imposed under *New York Times Co. v. Sullivan*. But the effectiveness of this remedy is undercut by the nature of the internet. Fake information can be disseminated from all parts of the globe. Even if a potential plaintiff could locate the purveyor of false information, which might be difficult since it is often conveyed anonymously, the purveyor may be judgment proof. At the very least, the plaintiff may be forced to sue in a foreign country in order to obtain jurisdiction over the defendant. All things considered, a defamation suit might not be worth the trouble.

Another potential remedy may be responsive speech. Certainly, the government could at times weigh in with its own version of truth. To a greater or lesser extent, government has always engaged in attempts to influence public opinion. For example, the Obama Administration argued in favor of its view of climate change, and the Trump Administration has adopted its own (contrary) view of climate change. Likewise, even though Holocaust deniers cannot be prosecuted in the U.S., the government has not remained neutral on the question of whether the Holocaust actually occurred. Indeed, it helped establish the Holocaust Memorial Museum. Of course, many people are distrustful of government, particularly the U.S. government, and it is not clear whether the American people would be inclined to accept the declarations of a Truth Commission as the true and last word on any issue.

E. Third Party Remedies

Given the decline of the traditional media, and the rise of the internet, much speech now runs through private entities such as Twitter and Facebook.[103] In recent years, these private entities have tended to assert much greater control over the speech that occurs on their networks.[104] This trend can be regarded as positive in that private entities may be making much greater efforts to control fake news and other harmful speech.[105] However, the trend can also be troubling in the sense that private companies are serving as gatekeepers, as they are attempting to censor and control the flow of ideas to the public.[106]

Governmental regulation of private networks would have troubling First Amendment implications. For example, suppose that the Truth Commission sought to prohibit private networks (such as Twitter or Facebook) from transmitting fake information. Could the private networks be criminally prosecuted when fake news is aired through their

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103. *See* Rachel Martin, *Ex-Head Of Twitter News: Social Media Companies Alone Shouldn't Regulate 'Fake News*,' Nat'l Pub. Radio: Weekend Edition Sunday (Nov. 20, 2016), https://www.npr.org/2016/11/20/502770866/ex-head-of-twitter-news-social-media-companies-alone-shouldn-t-regulate-fake-new.

104. *Id.*

105. *Id.*

106. *Id.*

systems? Alternatively, could they be subject to content licensing or injunctions in order to prevent them from transmitting fake news? Presumably, any attempt by the Truth Commission to act against private networks would run afoul of the same constitutional restrictions that would arise if the Truth Commission tried to act against private individuals.

One potential restriction on private networks might be valid: a disclosure requirement. During the 2016 presidential campaign, concerns were expressed regarding the fact that foreign entities (allegedly, the Russian government) were trying to influence the outcome of the U.S. election through such devices as fake advertisements run on Facebook.[107] There has been some talk of requiring companies like Facebook to reveal the sources of their advertisements.[108] If that were done, it would at least be more apparent when outsiders are trying to influence a U.S. election.

As private entities, social media networks can exercise a higher degree of editorial control than the government can exercise.[109] However, for a variety of reasons, their attempts to exercise such control can be troubling. Those who operate social media platforms may have ideological or political biases, and may use their censorial power to favor information that accords with their view and biases.[110] In addition, so much "fake news" is distributed over social media platforms that the reviewers are overwhelmed and have very little time to fairly evaluate information before censoring it.[111]

CONCLUSION

Democratic government is premised upon the consent of the governed, and freedom of expression is essential to the effective expression of that consent. Attempts to undermine freedom of expression, through the injection of fake or false news into the public debate, is particularly troubling in democratic systems because it tends to undermine the quality of the public debate.

The difficulty is that there are no effective legal solutions to the dissemination of fake news. In the U.S., it will typically be highly offensive for the government to criminally prosecute those who

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107. *See* Aarti Shahani, *Facebook's Advertising Tools Complicate Efforts To Stop Russian Interference*, Nat'l Pub. Radio: All Things Considered (Oct. 30, 2017), https://www.npr.org/sections/alltechconsidered/2017/10/30/560836775/facebooks-advertising-tools-complicate-efforts-to-stop-russian-interference.

108. *Id.*

109. *See* Russell L. Weaver, *Social Media Platforms and Democratic Discourse*, 23 Lewis & Clark L. Rev. 1385, 1406 (2020).

110. *Id.* at 1408–09.

111. *Id.*

propagate false information, and injunctions would be regarded as anathema as a prior restraint on publication.

In the final analysis, James Madison's lament regarding the press remains as true today as it was then: "That this liberty [press liberty] is often carried to excess; that it has sometimes degenerated into licentiousness, is seen and lamented, but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn."[112] Similar principles apply to governmental regulation of fake news: the remedy may be worse than the disease. In the U.S. system, the only potentially effective response to fake news is responsive speech that points out the defects and lies inherent in that speech.

112. James Madison, *Address of the General Assembly to the People of the Commonwealth of Virginia*, *in* 6 The Writings of James Madison 332, 336 (Gaillard Hunt ed., 1906) (emphasis omitted); *see also* Near v. Minnesota, 283 U.S. 697, 718 (1931) ("Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness?").