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### Deep Fakes, Bots, and Siloed Justices: American Election Law in a “Post-Truth” World

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## DEEP FAKES, BOTS, AND SILOED JUSTICES: AMERICAN ELECTION LAW IN A “POST-TRUTH” WORLD

RICHARD L. HASEN\*

### INTRODUCTION

About a decade or so ago, the major questions in the field of election law were familiar to scholars and centered on the Supreme Court: Would the Supreme Court overrule cases upholding limits on corporate and labor union campaign spending in candidate elections?<sup>1</sup> Would the Court strike down a key provision of the Voting Rights Act requiring jurisdictions with a history of racial discrimination in voting to get federal approval before changing their voting rules?<sup>2</sup> Would the Court rein in the use of strict voter identification laws, which (mostly Republican<sup>3</sup>) state legislatures imposed in the name of preventing voter fraud and promoting voter confidence, but that opponents believed were a means of suppressing the votes of those likely to vote for Democrats?

We all know how the Court answered those questions, with controversial opinions in *Citizens United v. Federal Election Commission*,<sup>4</sup> striking down the corporate spending limits; *Shelby County v. Holder*,<sup>5</sup> killing a key provision of

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\* Chancellor’s Professor of Law and Political Science, UC Irvine School of Law. An earlier version of this Essay was delivered as the Richard J. Childress Memorial Lecture at St. Louis University School of Law, October 11, 2019. Thanks to Guy Charles, Justin Levitt, and Dan Tokaji, who offered thoughtful commentary on the lecture, to other symposium participants, and to Erwin Chemerinsky, Bobby Chesney, Howard Gillman, Rebecca Green, Rick Pildes, Song Richardson, Charlotte Stanton, Eugene Volokh, and Sonja West for useful comments and suggestions.

1. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 224 (2003) (upholding key provisions of the Bipartisan Campaign Reform Act, more commonly known as the “McCain-Feingold” law, including those limiting corporate and union campaign spending on “electioneering communications”), *overruled in part by* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 669 (1990), *overruled by* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010).

2. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197–99 (2009) (questioning the constitutionality of the formula in Section 4(b) of Voting Rights Act determining which jurisdictions must obtain preclearance before making changes in their voting rules).

3. See RICHARD L. HASEN, *THE VOTING WARS*, 41–73 (2012).

4. *Citizens United*, 558 U.S. at 365 (holding unconstitutional under the First Amendment the federal ban on spending corporate treasury funds on certain campaign activity in federal elections).

5. *Shelby Cty. v. Holder*, 570 U.S. 529, 556–57 (2013) (striking down as unconstitutional under a principle of “equal sovereignty” the coverage formula contained in Section 4(b) of the

the Voting Rights Act; and *Crawford v. Marion County Election Board*,<sup>6</sup> allowing Indiana to enforce its strict voter identification law. And while issues related to these cases continue to churn in the courts and remain of vital importance to American democracy,<sup>7</sup> some of today's most urgent election law questions seem fundamentally different and less Court-centric than those of the past, thanks to rapid technological change during a period of hyperpolarization that has called into question the ability of people to separate truth from falsity.

These questions include: What can be done consistent with the First Amendment and without raising the risk of censorship to ensure that voters can make informed election decisions despite a flood of virally-spread false and misleading speech, audio, and images? How can the United States minimize foreign disinformation campaigns aimed at American elections and attempts to sow social discord via bot armies? How can voters obtain accurate information about who is trying to influence them via social media and other new forms of technology? How can we expect judges to evaluate contested voting rights claims when they, like others, may live in information cocoons in which the one-sided media they consume affects their factual priors? Will voters on the losing end of a close election trust vote totals and election results announced by election officials when voters are bombarded with conspiracy theories about the reliability of voting technology and when foreign adversaries target voting systems to undermine confidence?

This Essay considers election law in the post-truth era, one in which it has become increasingly difficult for voters to separate true from false information relevant to election campaigns. As I have explained elsewhere,<sup>8</sup> rapid technological change and the rise of social media have upended the traditional

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Voting Rights Act). For a critique of this principle, see Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207 (2016).

6. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 185, 189–89, 204 (2008) (rejecting facial constitutional challenge under the Equal Protection Clause to Indiana's strict voter identification law).

7. On campaign finance, for example, the Court continues to consider the constitutionality of other campaign finance limits in light of *Citizens United*. See, e.g., *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 192 (2014). On voting rights, for example, courts continue to consider whether jurisdictions should be "bailed in" to preclearance under Section 3 of the Voting Rights Act. See *Perez v. Abbott*, 390 F. Supp. 3d 803, 807, 820 (W.D. Tex. 2019) (rejecting request to bail in Texas despite finding of intentional racial discrimination by the state). On voter identification laws, courts continue to struggle with whether strict voter identification laws violate Section 2 of the Voting Rights Act. See *Veasey v. Abbott*, 830 F.3d 216, 272 (5th Cir. 2016) (en banc) (divided Fifth Circuit, sitting en banc upholds district court finding that Texas voter identification law violates Section 2 of the Voting Rights Act), *cert. denied*, 137 S. Ct. 612 (2017); *Veasey v. Abbott*, 888 F.3d 792, 795–96 (5th Cir. 2018) (divided Fifth Circuit panel rejects district court order enjoining Texas voter identification law based upon finding of racially discriminatory purpose in passing the law).

8. Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200 (2018) [hereafter Hasen, *Cheap Speech*].

media's business model and radically changed how people communicate, educate, and persuade. The decline of the traditional media as information intermediaries has transformed—and coarsened—social and political communication, making it easier for misinformation and vitriol to spread. The result? Political campaigns that increasingly take place under conditions of voter mistrust and groupthink, with the potential for foreign interference and domestic political manipulation via new and increasingly sophisticated technological tools. Such dramatic changes raise deep questions about the conditions of electoral legitimacy and threaten to shake the foundation of democratic governance.

Part II of this Essay briefly describes what I mean by the “post-truth” era in politics. Part III examines the effects of the post-truth era on campaign law, arguing for a new law requiring social media to label as “altered” synthetic media, including so-called “deep fakes.” I defend such a law as necessary to support the government’s compelling interest in assuring voters have access to truthful political information. Part IV considers campaign finance law, arguing for campaign disclosure laws requiring those who use online and social media to influence voters, including those using bots and other new technology, to disclose their true identities and the sources and amounts of their spending. Part V considers the difficulty of using courts to adjudicate voting rights claims when there is fundamental disagreement about the basic facts related to issues such as voter fraud in our hyperpolarized, cocooned political environment. The Essay concludes with some thoughts on whether election law is up to the task of dealing with technological change and polarization that threaten some of the key suppositions of how democracy is intended to function, including as an aid to the peaceful transition of power.

## II. THE “POST-TRUTH” ERA IN POLITICS

To start with definitions: When I say we are living in a “post-truth” era in the United States,<sup>9</sup> I do not mean there is no such thing as objective truth. Far from it. I mean we are living in a time when there is fundamental disagreement among members of the public regarding basic facts about the state of the world, and there is no generally accepted arbiter whom a broad spectrum of the public will rely upon to resolve public factual disputes. Emotions often drive views

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9. I do not mean to suggest that the post-truth era exists only in the United States. This may well be a more global phenomenon, but that question is beyond the scope of this Essay. Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CAL. L. REV. 1753, 1786 n.139 (2019) (“The Edelman Trust Barometer, which measures trust in institutions around the world, recorded a drop of nine points in the Trust Index for the United States from 2017 to 2018. Even among the informed public, the US dropped from a Trust Index of 68 to 45.”). See also Lori A. Ringhand, *First Amendment (Un)Exceptionalism: A Comparative Taxonomy of Campaign Finance Reform Proposals in the US and UK* (July 19, 2019) (unpublished draft) (on file with the author).

more than evidence,<sup>10</sup> trust is in decline, and views commonly divide along partisan and ideological lines. Social media amplifies partisanship, raising emotions and concomitantly hardening positions about facts. And the public increasingly recognizes that “basic facts,” and not just opinion, are at stake.<sup>11</sup>

For example, on climate change, a Pew Research Center survey found that “[t]hree-quarters of Democrats (including independents who lean to the Democratic Party) said in 2018 that the Earth is warming mostly due to human activity. In contrast, only about one-quarter of Republicans (26%, including leaners) said the same.”<sup>12</sup> Further,

[i]n 2016, 93% of Democrats (including leaners) with a high level of knowledge about science said climate change is mostly due to human activity, compared with 49% of Democrats with low science knowledge, based on a nine-item index. By contrast, Republicans and GOP-leaning independents with a high level of scientific knowledge were no more likely than those with a low level of knowledge to say climate change is mostly due to human activity.<sup>13</sup>

On the question of Russian interference in the 2016 elections, a *Washington Post*-Schar School survey found that “[a]n 83 percent majority of Democrats say the Russian government tried to influence the election; a 54 percent majority of Republicans say Russia did not try to influence the vote.”<sup>14</sup> And on immigration, 42 percent of Republicans say that undocumented immigrants are more likely than U.S. citizens to commit serious crimes compared to 46 percent who say they are not.<sup>15</sup>

The causes for the rise of the post-truth era are beyond the scope of this project. But roughly speaking, this era arose thanks to an unlucky confluence of

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10. The Cambridge English Dictionary defines “post-truth” as “relating to a situation in which people are more likely to accept an argument based on their emotions and beliefs, rather than one based on facts.” *Post-truth*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/post-truth> [<https://perma.cc/2NXM-54UM>] (last visited July 3, 2019).

11. *In Presidential Contest Voters Say ‘Basic Facts’ Not Just Policies Are in Dispute*, PEW RES. CTR. (Oct. 14, 2016), <https://www.people-press.org/2016/10/14/in-presidential-contest-voters-say-basic-facts-not-just-policies-are-in-dispute/> [<https://perma.cc/S66J-XWPL>].

12. Cary Funk & Brian Kennedy, *How Americans See Climate Change in 5 Charts*, FACT TANK, PEW RES. CTR. (Apr. 19, 2019), <https://www.pewresearch.org/fact-tank/2019/04/19/how-americans-see-climate-change-in-5-charts/> [<https://perma.cc/BZ3U-4F9A>].

13. *Id.*

14. Scott Clement & Karoun Demirjian, *Mueller Report Findings Upend Partisan Views of Probe Poll Finds*, WASH. POST (Mar. 30, 2019), [https://www.washingtonpost.com/politics/mueller-report-findings-upend-partisan-views-of-probe-poll-finds/2019/03/30/55058c98-51b2-11e9-88a1-ed346f0ec94f\\_story.html](https://www.washingtonpost.com/politics/mueller-report-findings-upend-partisan-views-of-probe-poll-finds/2019/03/30/55058c98-51b2-11e9-88a1-ed346f0ec94f_story.html) [<https://perma.cc/6DNA-VFMK>].

15. *Shifting Public Views on Legal Immigration into the U.S.*, PEW RES. CTR. (June 28, 2018), <https://www.people-press.org/2018/06/28/shifting-public-views-on-legal-immigration-into-the-u-s/> [<https://perma.cc/Y6FH-68CN>]. For a summary of the empirical evidence on this question, see Robert Farley, *Is Illegal Immigration Linked to More or Less Crime?*, FACTCHECK.ORG (June 27, 2018), <https://www.factcheck.org/2018/06/is-illegal-immigration-linked-to-more-or-less-crime/> [<https://perma.cc/V7Z5-422X>].

two different phenomena: the hyperpolarization of our politics,<sup>16</sup> in which the two major political parties have become more homogenous and ideologically distinct along a liberal-conservative axis; and the decline in trusted intermediaries, especially the news media, who had helped people to separate truth from fiction. In *Cheap Speech and What It Has Done (to American Democracy)*,<sup>17</sup> I explain how technology's transformation to allow cheap speech, such as social media posts, "usher[ed] in radical new opportunities for readers, viewers, and listeners to custom design what they read, see, and hear, while concomitantly undermining the power of intermediaries including publishers and bookstore owners."<sup>18</sup> But this transformation killed the economics of the traditional news media business, and despite the democratization of speech, the rise of cheap speech has had a definite dark side, with truth as one of the primary casualties:

No doubt cheap speech has increased convenience, dramatically lowered the costs of obtaining information, and spurred the creation and consumption of content from radically diverse sources. But the economics of cheap speech also have undermined mediating and stabilizing institutions of American democracy including newspapers and political parties, with negative social and political consequences. In place of media scarcity, we now have a media fire hose which has diluted trusted sources of information and led to the rise of "fake news"—falsehoods and propaganda spread by domestic and foreign sources for their own political and pecuniary purposes. The demise of local newspapers sets the stage for an increase in corruption among state and local officials. Rather than democratizing our politics, cheap speech appears to be hastening the irrelevancy of political parties by facilitating the ability of demagogues to secure support from voters by appealing directly to them, sometimes with incendiary appeals. Social media also can both increase intolerance and overcome collective action problems, both allowing for peaceful protest but also supercharging polarization and raising the dangers of violence in the United States.<sup>19</sup>

The status of the news business has further deteriorated since I wrote the *Cheap Speech* article. Between January and May of 2019, approximately 3000 American journalists were laid off or offered a buyout.<sup>20</sup> These latest losses are on top of a tremendous decline in the industry as a whole, with journalism falling off twenty-three percent from 2008 to 2017,<sup>21</sup> and by sixty-five percent looking

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16. The best explanation for the causes of our current period of hyperpolarization appears in Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273 (2011).

17. Hasen, *Cheap Speech*, *supra* note 8, at 201.

18. *Id.* at 200.

19. *Id.*

20. Gerry Smith, *Journalism Job Cuts Haven't Been This Bad Since the Recession*, BLOOMBERG (July 1, 2019), <https://www.bloomberg.com/amp/news/articles/2019-07-01/journalism-layoffs-are-at-the-highest-level-since-last-recession> [<https://perma.cc/C442-HR2B>].

21. *Id.*

over the last two decades.<sup>22</sup> Indeed journalists have lost their jobs at a faster rate in that period than coal miners.<sup>23</sup>

Social media and polarization act synergistically in a detrimental way. A recent experimental study by Michael Thaler found that people overestimate the truth of news reports that are in line with their preexisting beliefs, discount those that are contrary to those beliefs, and are overconfident in their ability to tell true from false statements.<sup>24</sup>

Of course, the post-truth era creates many dangers for different aspects of society. For example, if enough people do not believe that humans caused climate change and need to fix it, there could be detrimental environmental consequences. The ability to spread false images of world leaders can imperil national security.<sup>25</sup>

My focus here is on the serious implications of the post-truth era for elections and American democracy. Political science models do not expect voters to be busily studying policy all day, but they do posit that voters are able to have enough access to the truth via reliable shortcuts and intermediaries to figure out what is going on and to make decisions consistent with their interests.<sup>26</sup> The post-truth era undermines that supposition for a vibrant democracy.<sup>27</sup>

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22. John Bonazzo, *Despite Trump Rhetoric Journalists Are Losing Jobs at a Faster Rate than Coal Miners*, THE OBSERVER (Oct. 23, 2018), <https://observer.com/2018/10/jobs-trump-coal-miners-journalism/> [<https://perma.cc/J7SQ-A67S>].

23. *Id.*

24. Michael Thaler, *The “Fake News” Effect: An Experiment on Motivated Reasoning and Trust in News* 29 (Nov. 1, 2019) (unpublished manuscript), available at [https://scholar.harvard.edu/files/mthaler/files/mthaler\\_fake-news-effect.pdf](https://scholar.harvard.edu/files/mthaler/files/mthaler_fake-news-effect.pdf) [<https://perma.cc/EL7Y-U8V6>] (“Subjects substantially over-trust Pro-Party news and Fake News in an environment with uninformative signals, real monetary stakes, and little room for self-deception. Furthermore, political partisans of all demographics engage in motivated reasoning, suggesting that this is a widespread bias. This bias leads to other errors and biases such as over-trust in Fake News, underperformance, and overconfidence.”). *But see* Katherine Clayton et al., *Partisan Motivated Reasoning and Misinformation in the Media: Is News from Ideological Uncongenial Sources More Suspicious?*, JAPANESE J. POL. SCI. (forthcoming), <https://www.cambridge.org/core/journals/japanese-journal-of-political-science/article/partisan-motivated-reasoning-and-misinformation-in-the-media-is-news-from-ideologically-uncongenial-sources-more-suspicious/BCD0B8E0558FD72E8A3E0931FCB4E35A#> [<https://perma.cc/FZL9-7S39>] (finding that people tend to believe false information when they are exposed to it, regardless of whether it is from an ideologically compatible source).

25. Chesney & Citron, *supra* note 9, at 1783.

26. Andrew Gelman & Gary King, *Why Are American Campaign Polls So Variable When Votes are So Predictable?*, 23 BRIT. J. POL. SCI. 409 (1993) (positing that during the campaign period, voters receiving information through the media helps them to make decisions consistent with their enlightened self-interest). For a brief review of the literature on how campaigns affect voter choice, see DANIEL H. LOWENSTEIN ET AL., ELECTION LAW—CASES AND MATERIALS 674–79 (6th ed. 2017).

27. See Nathaniel Persily, *The Internet’s Challenge to Democracy: Framing the Problem and Assessing Reform* 22–23 (2019), available at <https://storage.googleapis.com/kofiannanfoundation>.

And so, I now turn to my key question: What, if anything, can and should election law do to ameliorate the problems for American democracy caused by the post-truth era?

### III. CAMPAIGN LAW

It was the ultimate October surprise, actually back-to-back surprises, in the 2016 presidential election between Democratic candidate Hillary Clinton and Republican candidate Donald Trump. On October 7, 2016, the *Washington Post* revealed the “Access Hollywood” tape. The *Post* described the leaked video as one in which

Donald Trump bragged in vulgar terms about kissing, groping and trying to have sex with women during a 2005 conversation caught on a hot microphone, saying that “when you’re a star, they let you do it.” The video captures Trump talking with Billy Bush, then of “Access Hollywood,” on a bus with the show’s name written across the side. They were arriving on the set of “Days of Our Lives” to tape a segment about Trump’s cameo on the soap opera.<sup>28</sup>

The video led to immediate condemnation from people across the political spectrum and predictions of the Trump campaign’s collapse. Yet the campaign did not collapse. One reason for Trump’s survival may have been what came right after the tape leaked. According to Special Counsel Robert Mueller’s investigation into Russian interference in the 2016 elections, “[l]ess than an hour after the video’s publication, WikiLeaks released the first set of emails stolen by [agents of a Russian army unit known as] the GRU from the account of Clinton campaign chairman John Podesta.”<sup>29</sup> After embarrassing material surfaced in the Podesta emails and from other stolen materials, Trump went on to narrowly beat Clinton in the election.

Trump was “extremely upset” about the “Access Hollywood” tape, according to his former aide, Hope Hicks.<sup>30</sup> And yet after issuing a rare apology

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org/2019/02/a6112278-190206\_kaf\_democracy\_internet\_persily\_single\_pages\_v3.pdf [https://perma.cc/A97Z-72PX].

28. David A. Farenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), [https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4\\_story.html?utm\\_term=.13108edfa3b6](https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html?utm_term=.13108edfa3b6) [https://perma.cc/W2RP-TQ TQ]. (The most salacious comments in the conversation between Trump and “Access Hollywood” host Billy Bush included: “And when you’re a star, they let you do it,” Trump says. “You can do anything.” “Whatever you want,” says another voice, apparently Bush’s. “Grab them by the p—y,” Trump says. “You can do anything.”)

29. SPECIAL COUNSEL ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 58 (Mar. 2019) (hereafter, MUELLER REPORT).

30. *Id.* at 79 (“The President then told Sessions he should resign as Attorney General. Sessions agreed to submit his resignation and left the Oval Office. Hicks saw the President shortly after Sessions departed and described the President as being extremely upset by the Special Counsel’s



one day following the video's release,<sup>31</sup> Trump did something extraordinary—he suggested the video was fake. The *New York Times* reported that Trump told a senator and an advisor a year after his apology that the tape was not authentic, further telling the senator that he was looking to hire someone to ascertain whether or not it was his voice on the tape.<sup>32</sup>

It is hard to know if anyone who was paying attention to the controversy believed Trump's denials: after all, people know what they saw and heard. Even Trump's press secretary at the time, Sarah Sanders, would not weigh in to defend him.<sup>33</sup> However, there is good reason to believe that future candidates in Trump's position will be luckier.

As technology improves, it is quickly getting easier, even for those without great technical sophistication, to use artificial intelligence technology to create synthetic media (more commonly known as "deep fakes"). Such audio and video clips can be manipulated using machine learning and artificial intelligence and can make a politician, celebrity, or anyone else appear to say or do anything that the manipulator wants.<sup>34</sup> Within a few years, any politician could be made to

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appointment. Hicks said that she had only seen the President like that one other time, when the Access Hollywood tape came out during the campaign.") (footnotes omitted).

31. Chris Cillizza, *Here's What Donald Trump Really Meant When He Apologized Friday Night*, WASH. POST (Oct. 8, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/10/08/donald-trump-finally-apologized-for-his-lewd-remarks-here-it-is/?utm\\_term=.66b03fc19d38](https://www.washingtonpost.com/news/the-fix/wp/2016/10/08/donald-trump-finally-apologized-for-his-lewd-remarks-here-it-is/?utm_term=.66b03fc19d38) [<https://perma.cc/G8W2-83D2>] ("I've never said I'm a perfect person, nor pretended to be someone that I'm not. I've said and done things I regret, and the words released today on this more than a decade old video are one of them. Anyone who knows me knows these words don't reflect who I am. I said it, I was wrong, and I apologize.").

32. Emily Stewart, *Trump Has Started Suggesting The Access Hollywood Tape is Fake. It's Not*, VOX (Nov. 28, 2017), <https://www.vox.com/policy-and-politics/2017/11/28/16710130/trump-says-access-hollywood-tape-fake> [<https://perma.cc/L5T4-26GN>]; Jonathan Martin, Maggie Haberman, and Alexander Burns, *Why Trump Stands by Roy Moore, Even as It Fractures His Party*, N.Y. TIMES (Nov. 25, 2017), <https://www.nytimes.com/2017/11/25/us/politics/trump-roy-moore-mcconnell-alabama-senate.html> [<https://perma.cc/UDS9-RSC9>]. Trump apparently has never publicly made the claim that the tape was fake.

33. Stewart, *supra* note 32 (quoting Sarah Sanders: "Look, the president addressed this. This was litigated and certainly answered during the election by the overwhelming support for the president and the fact that he's sitting here in the Oval Office today.").

34. Chesney & Citron, *supra* note 9, at 1758 (explaining that deep fake technology "leverages machine-learning algorithms to insert faces and voices into video and audio recordings of actual people and enables the creation of realistic impersonations out of digital whole-cloth. The end result is realistic-looking video or audio making it appear that someone said or did something. Although deep fakes can be created with the consent of people being featured, more often they will be created without it."); see also CARNEGIE ENDOWMENT FOR INT'L PEACE, SUMMARY OF JUNE 19TH MEETING ON SAFEGUARDING THE U.S. 2020 ELECTION FROM SYNTHETIC AND MANIPULATED MEDIA n.1 (July 2019) (on file with the author) ("We define synthetic media as audio, video, or image generated with artificial intelligence that depicts someone saying or doing something they neither said nor did. Manipulated media is audio, video, or image that depicts someone saying or doing something they neither said nor did without the aid of artificial intelligence."); Rebecca

appear to say the odious words on the “Access Hollywood” tape, and that content could spread virally via Facebook, Twitter, and other social media. We will no longer be able to trust what we see and hear.

As Professor Brendan Nyhan has argued,<sup>35</sup> the primary danger of current (lower-tech-driven) misinformation spread via social media is not that people will necessarily believe false information and make decisions based upon it; but that people will discount the veracity of *all* information based on the potential for it to be false.<sup>36</sup> This trend will likely only increase as deep fakes improve in technical sophistication and it becomes harder for humans to differentiate true from false images without technical help. The effect also seems likely to be more pronounced among younger people, who are more prone to be suspect of the veracity of content.<sup>37</sup> Nyhan also worries that false videos might have more serious effects than false written statements given how human cognition works.<sup>38</sup>

The situation with synthetic media creates something akin to what Nobel Prize-winning economist George Akerlof described as the “market for lemons” effect.<sup>39</sup> Akerlof’s theory explained problems with the proper functioning of a market for used cars, when people have a difficult time differentiating between a good used car and a bad one—or a “lemon.” In the market, good used cars are less likely to remain for sale because everyone discounts what they will pay for a used car by the chances that it is a lemon. This information problem creates a spiraling down effect, where people with good used cars take them off the

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Green, *Counterfeit Campaign Speech*, 70 HASTINGS L.J. 1445, 1447–48 (2019) (using label of “counterfeit” campaign speech for “a faked version of the real thing fabricated with the intent to deceive”).

35. Brendan Nyhan, *Why Fears of Fake News Are Overhyped*, MEDIUM (Feb. 4, 2018), <https://medium.com/s/reasonable-doubt/why-fears-of-fake-news-are-overhyped-2ed9ca0a52c9> [<https://perma.cc/V877-RKCD>]; see also Andrew Guess et al., *Selective Exposure to Misinformation: Evidence From the Consumption of Fake News During the 2016 Presidential Campaign*, EUR. RES. COUNCIL (Jan. 9, 2018), <https://www.dartmouth.edu/~nyhan/fake-news-2016.pdf> [<https://perma.cc/7G8D-HAXN>].

36. Max Read, *Can You Spot a Deepfake? Does It Matter?*, N.Y. MAG. (June 27, 2019), <http://nymag.com/intelligencer/2019/06/how-do-you-spot-a-deepfake-it-might-not-matter.html> [<https://perma.cc/MT4P-539R>] (“If you want a vision of the future, don’t imagine an onslaught of fake video. Imagine an onslaught of commenters calling every video fake.”).

37. Jeffrey M. Jones, *U.S. Media Trust Continues to Recover from 2016 Low*, GALLUP (Oct. 12, 2018), <https://news.gallup.com/poll/243665/media-trust-continues-recover-2016-low.aspx> [<https://perma.cc/BJ45-PP7Q>] (“53% of those aged 65 and older trust in the media, compared with just 33% of those under age 30. Younger adults have come of an age in an era marked by partisan media and fake news, while older Americans’ trust may have been established long ago in an era of widely read daily newspapers and trusted television news anchors.”).

38. Nyhan, *supra* note 35.

39. George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488, 489 (Aug. 1970).

market because the price is too low, leading to more lemons on the market and greater depression of the price.

Here too, the market for information from reputable news organizations will suffer with the flood of plausible fake information: bad information crowds out the good information as people are willing to pay less for all information given the increased chances of receiving false information.<sup>40</sup>

Further, the proliferation of artificial intelligence-generated deep fakes would allow a future Donald Trump to take advantage of what Professors Bobby Chesney and Danielle Citron have called the “Liar’s Dividend”: the decreasing possibility that any image of a politician or celebrity is genuine “makes it easier for liars to avoid accountability for things that are in fact true.”<sup>41</sup> As Trump has said in the context of sexual harassment allegations, the strategy is “deny, deny, deny.”<sup>42</sup> Denial becomes easier as bad information increasingly floods the market.

Social media platforms do not yet know how to deal with the arrival of deep fakes. Facebook flags some ordinary misinformation (such as a post falsely stating that President Obama was born in Kenya) as false, and sometimes the company demotes posts containing misinformation in users’ feeds and makes fact check information available to those who click on links flagged as containing false information.<sup>43</sup> However, Mark Zuckerberg, Facebook founder and CEO, told an audience at the Aspen Ideas Festival in the summer of 2019 that perhaps the company should treat deep fakes differently from regular misinformation. He gave no indication as to the precise nature of the different handling, other than to say that the company was “evaluating” the issue. Elsewhere in the interview, Zuckerberg suggested government action and

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40. The rise of used car intermediaries such as CarMax and the cheaper spread of information over the internet have somewhat solved the market failure for used cars. But we have not yet seen a market solution to deal with problems of the easy spread of misinformation.

41. Chesney & Citron, *supra* note 9, at 1758; see also Samantha Cole, *We Are Truly Fucked: Everyone Is Making AI-Generated Fake Porn Now*, MOTHERBOARD (Jan. 24, 2018), [https://motherboard.vice.com/en\\_us/article/bjye8a/reddit-fake-porn-app-daisy-ridley](https://motherboard.vice.com/en_us/article/bjye8a/reddit-fake-porn-app-daisy-ridley) [<https://perma.cc/RN69-U97V>].

42. Maya Openheim, *Donald Trump Says ‘You’ve Got to Deny’ Accusations by Women, According to Bob Woodward Book*, THE INDEPENDENT (Sept. 12, 2018), <https://www.independent.co.uk/news/world/americas/us-politics/trump-women-bob-woodward-deny-sexual-assault-stormy-daniels-book-fear-a8534061.html> [<https://perma.cc/G4TM-XEM7>] (“‘You’ve got to deny, deny, deny and push back on these women,’ Mr. Trump said, according to Mr. Woodward. ‘If you admit to anything and any culpability, then you’re dead. That was a big mistake you made.’”).

43. See Daniel Funke, *In the Past Year Facebook Has Quadrupled Its Fact Checking Partners*, POYNTER (Apr. 29, 2019), <https://www.poynter.org/fact-checking/2019/in-the-past-year-facebook-has-quadrupled-its-fact-checking-partners/> [<https://perma.cc/57JU-7ZDU>].

regulation may be the answer to some of the company's problems with attempted political manipulation on the company's platforms.<sup>44</sup>

Does election law provide an avenue for preventing the erosion of truth through misinformation and synthetic media? The question is urgent given that about three-quarters of Americans in a recent survey favored steps to restrict altered videos and images, with Democrats and Republicans similarly supporting restrictions over freedom to publish such images.<sup>45</sup>

I begin with the idea that any law purporting to regulate the content of media being used for political communications would be subject to heightened First Amendment scrutiny,<sup>46</sup> either strict scrutiny in which the government would have to show that any regulation satisfied a compelling interest and that the means adopted were narrowly tailored to that interest, or some intermediate level of scrutiny. For this reason, there are limits to how much the law can help to solve these problems with our democracy.

The compelling interest portion of the argument for regulation of false media is surprisingly easy to make. Courts should recognize that the government has a compelling interest in assuring that voters have access to truthful political information and to the tools to discover its truth or falsity. The Supreme Court has long recognized the value of an "active, alert" citizenry,<sup>47</sup> and democracy depends upon voters' ability to evaluate arguments in order to make political and electoral decisions. As the Supreme Court stated in *Citizens United*, quoting

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44. Barbara Ortutay, *Zuckerberg Says Company Evaluating 'Deep Fake' Policy*, ASSOCIATED PRESS (June 26, 2019), <https://www.apnews.com/506bfacda55540e1921a2dd101926fdf> [https://perma.cc/3E99-F89J]. The video of the portion of the exchange about deep fakes begins at 16:10 here: <https://www.aspenideas.org/sessions/mark-zuckerberg-at-aspen-ideas-festival-2019> [https://perma.cc/RX48-3A7Y].

45. Jeffrey Gottfried, *About Three-Quarters of Americans Favor Steps to Restrict Altered Videos and Images*, PEW RES. CTR. (June 14, 2019), <https://www.pewresearch.org/fact-tank/2019/06/14/about-three-quarters-of-americans-favor-steps-to-restrict-altered-videos-and-images/> [https://perma.cc/G24M-UKUN].

46. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) ("it is well established that the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."); commercial speech is subject to an intermediate standard of scrutiny, and here government efforts to require business entities to tell the truth are likely on firmer constitutional footing. *CTIA v. City of Berkeley*, 928 F.3d 832, 842 (9th Cir.), cert. denied, 140 S. Ct. 658 (2019) ("Under *Zauderer* [*v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985)] as we interpret it today, the government may compel truthful disclosure in commercial speech as long as the compelled disclosure is reasonably related to a substantial governmental interest, and involves 'purely factual and uncontroversial information' that relates to the service or product provided.") (cleaned up); see also *infra* footnotes 75–80 and accompanying text (considering the reach of *Zauderer*).

47. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 768–69 (1978) ("Preserving the integrity of the electoral process, preventing corruption, and sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government are interests of the highest importance") (cleaned up).

its seminal 1976 campaign finance decision, *Buckley v. Valeo*, “[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.”<sup>48</sup> Further, the Court in *New York Times v. Sullivan*<sup>49</sup> famously held that the state can punish those who engage in false, defamatory speech made with actual malice.

The problem with a law regulating deep fakes or other false information instead is one of the means to achieve the compelling interest. There is no easy way for the government to define what counts as truthful political information, and the process of mandating that the government police truth and falsity raises dangers of viewpoint discrimination and government manipulation. Again, we need look no further than President Trump, who routinely labels reporting he does not like as “fake news,”<sup>50</sup> even when the reporting follows ordinary journalistic standards and reasonable observers believe it to contain only truthful information. Any government agency charged with separating true from false information that is under the control of a Trump-like leader could manipulate the process of declaring falsity. The cure would be worse than the disease.

However, this does not mean that all regulation to help voters discern truth from lies is unconstitutional. The matter is complicated and gets us into a tangle of some First Amendment doctrines.

To begin with, the Supreme Court has not yet weighed in on laws regulating synthetic media created to influence elections or politics. The Court has, however, moved from a position that false political speech made with actual malice can be penalized toward a position very skeptical of such laws. In a 1982 case, *Brown v. Hartlage*,<sup>51</sup> the Court rejected an attempt to declare an election result void after the winner was accused of violating a Kentucky law that barred a candidate from certain corrupt practices.<sup>52</sup> The candidate had promised not to take a salary if elected and Kentucky courts had previously held that promises not to take a salary violated the statute and could be grounds for voiding the election.<sup>53</sup> In the course of holding the Kentucky law unconstitutional, the Court in dicta stated that “demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements.”<sup>54</sup>

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48. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976)).

49. *New York Times v. Sullivan*, 376 U.S. 254, 283 (1964).

50. Hasen, *Cheap Speech*, *supra* note 8, at 208.

51. *Brown v. Hartlage*, 456 U.S. 45, 58 (1982). The discussion in the next few paragraphs draws from Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 58, 65–68 (2013).

52. *Brown*, 456 U.S. at 58.

53. *Id.*

54. *Id.* at 60. The statement was dicta because there was no evidence in this case that the candidate made the statement in anything other than good faith.

By 2012, however, the Court appeared to have shifted its view on the protection of false political speech. It strongly suggested in *United States v. Alvarez*,<sup>55</sup> a case involving a person who lied about receiving a Medal of Valor for bravery in combat, that laws penalizing false political speech would violate the First Amendment.

There was no majority opinion. Justice Kennedy's plurality opinion for four Justices rejected the argument that the First Amendment categorically does not protect false statements, just as the First Amendment categorically does not protect other types of speech, such as obscenity and fighting words.<sup>56</sup> He wrote that "counterspeech" is normally the constitutionally acceptable response to false political speech and that the Stolen Valor Act violated the First Amendment.<sup>57</sup> Justice Breyer, in a concurring opinion for himself and Justice Kagan, applied intermediate scrutiny in agreeing the Stolen Valor Act was unconstitutional.<sup>58</sup> Importantly, Justice Breyer recognized that laws punishing false political speech raised difficult questions of balancing, and that counterspeech was the usual appropriate remedy.<sup>59</sup>

Even Justice Alito, dissenting on the constitutionality of the Stolen Valor law, argued that

there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing

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55. *United States v. Alvarez*, 567 U.S. 709, 713, 729–30 (2012).

56. *Id.* at 720–22.

57. *Id.* at 726–27.

58. *Id.* at 730 (Breyer, J. concurring in the judgment).

59. Justice Breyer wrote:

I recognize that in some contexts, particularly political contexts, such a narrowing will not always be easy to achieve. In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas. Thus, the statute may have to be significantly narrowed in its applications. Some lower courts have upheld the constitutionality of roughly comparable but narrowly tailored statutes in political contexts. See, e.g., *United We Stand America, Inc. v. United We Stand, America New York, Inc.*, 128 F.3d 86, 93 (C.A.2 1997) (upholding against First Amendment challenge application of Lanham Act to a political organization); *Treasurer of the Committee to Elect Gerald D. Lostracco v. Fox*, 150 Mich. App. 617, 389 N.W.2d 446 (1986) (upholding under First Amendment statute prohibiting campaign material falsely claiming that one is an incumbent). Without expressing any view on the validity of those cases, I would also note, like the plurality, that in this area more accurate information will normally counteract the lie. And an accurate, publicly available register of military awards, easily obtainable by political opponents, may well adequately protect the integrity of an award against those who would falsely claim to have earned it. And so it is likely that a more narrowly tailored statute combined with such information-disseminating devices will effectively serve Congress' end.

*Id.* at 738 (citation omitted).

truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat. The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth . . . .<sup>60</sup>

Putting the three *Alvarez* opinions together, we see a Court unanimously expressing deep skepticism of laws penalizing false speech in political campaigns. Despite *Alvarez*, however, the Court has left room for some regulation in related areas.

First, the government likely could prohibit what I will term false *election* speech, which is false speech about the mechanics of voting. In *Minnesota Voters Alliance v. Mansky*,<sup>61</sup> the Court acknowledged that the government could ban false speech about when and how to vote, such as false speech directing people to the wrong polling place, at least in a nonpublic forum like a polling place. Under *Mansky*, the government may punish those who engage in such speech. Such speech does not raise the risk of the state having to make judgment calls about truth or falsity. For example, the location of a polling place is objectively verifiable.

Further, although *Mansky* did not reach the issue, the government likely could require websites and platforms with large numbers of users, such as major social media companies, to remove false election speech from their sites.<sup>62</sup> Such regulation does not raise the risk of censoring controversial political ideas. If the law mandates that voting take place on Tuesday, a false social media post saying “Democrats vote on Wednesday” is demonstrably false and requires no value judgment on behalf of a government regulator and raises no issues of ambiguity.<sup>63</sup>

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60. *Alvarez*, 567 U.S. at 751–52 (Alito, J., dissenting).

61. *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1889 n.4 (2018) (“We do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures.”).

62. The limitation to websites with large numbers of users is meant to limit the burden of such a law on those who are engaged in personal expression without much societal impact.

63. Such a law may not even be subject to strict scrutiny under *Alvarez*, which leaves uncertain the level of First Amendment protection that applies to knowing falsehoods. A law that would go further and prohibit “misleading” campaign speech is more problematic despite *Mansky*’s reference to “messages intended to *mislead* voters about voting requirements and procedures.” Consider a flyer which was distributed some years ago in University of Wisconsin dormitories telling voters to vote “at the polling place of your choice.” See HASEN, *supra* note 3, at 94 (containing an example of such a flyer). A vote cast anywhere but in the voter’s actual voting place would be a provisional ballot which would not count. The statement is misleading but it does not contain a falsity, and it may be impossible to write a law that would allow for this policing without raising a risk of political censorship. Professor Green argues for a narrower scope for regulation, only those featuring the names or likenesses of candidates. “Other counterfeits—like a fabricated video of a riot, faked evidence of a ‘crisis actor’ in a school shooting, or a doctored image of an immigrant toddler—even if attempting to distort an electoral result, would not be implicated. Counterfeit speech relating

A law requiring companies to remove such content would be supported by the same compelling interest the Court implicitly recognized in *Mansky*: the protection of the integrity of the voting process. And while such a law would reach into the private property of websites, it is less intrusive than laws which prohibit other unprotected speech on private property, such as laws banning obscenity, and supported by a truly compelling state interest in assuring that voters have accurate information about how to participate in a democracy.<sup>64</sup>

Second, nothing would prevent a government agency from declaring what is true or false about elections, politics, and policy, and then voters could take that information for what it is worth: a credible government agency is likely to be believed, while an agency headed by a charlatan yelling “fake news” would be less likely to be believed. Under the government speech doctrine, as the Supreme Court recognized recently in *Matal v. Tam*, “[w]hen a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture.”<sup>65</sup>

Third, the government likely has the power under the Constitution to mandate a truth-in-labeling law requiring social media platforms and other websites with large numbers of users to deploy the best reasonably available technology to label synthetic media containing altered video and audio images as “altered.” The technology to detect the most sophisticated deep fakes is not there yet,<sup>66</sup> but with the investment of significant resources—which are in the country’s national security interest to develop quickly<sup>67</sup>—adequate means to ferret out when someone has posted altered media may well be on the way.<sup>68</sup>

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to policy issues would also be excluded from the proposed prohibition.” Green, *supra* note 34, at 1451.

64. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (“these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content [obscenity, defamation, etc.]”).

65. 137 S. Ct. 1744, 1757 (2017).

66. Chesney & Citron, *supra* note 9, at 1787 (expressing skepticism of a technological solution in the short term); Evan Halper, ‘Deep Fakes’ Video Could Upend an Election—But Silicon Valley Could Have a Way to Combat Them, L.A. TIMES (Nov. 5, 2019), <https://www.latimes.com/politics/story/2019-11-05/deep-fakes-2020-election-silicon-valley-cure> [<https://perma.cc/A9FV-AE97>]. The “best reasonably available technology” standard would have to be developed, perhaps via Federal Trade Commission regulations, taking into account the cost and efficacy of such technology. Similarly, regulation would have to specify what counts as an alteration of a video. The regulation would exclude from those videos requiring the “altered” label those videos which used commercially ordinary cropping and color correction, for example.

67. See Chesney & Citron, *supra* note 9, at 1784 (discussing dire national security implications of deep fakes).

68. Drew Harwell, *White House Shares Doctored Video to Support Punishment of Journalist Jim Acosta*, WASH. POST (Nov. 8, 2018), [https://www.washingtonpost.com/technology/2018/11/08/white-house-shares-doctored-video-support-punishment-journalist-jim-acosta/?utm\\_term=.60](https://www.washingtonpost.com/technology/2018/11/08/white-house-shares-doctored-video-support-punishment-journalist-jim-acosta/?utm_term=.60)



As detection technology continues to develop, a truth-in-labeling regime should be the top way to deal with the deep fake problem and is supported by the government's interest in preventing consumer and voter deception. Such labeling would help solve the market-for-lemons problem, at least with respect to doctored audio and video. The market for lemons in the used car market arose because consumers do not have adequate tools to separate good used cars from lemons. Just like a law that would require sellers of used cars to disclose earlier problems with a car (akin to "show me the Carfax"<sup>69</sup>), a labeling law requiring social media platforms to label video and audio as altered would help cure the market failure. Viewers would become more confident that the videos they observed or audio they heard were genuine and not a "lemon" when the media arrived into their feed without a label indicating alteration.

Such a truth-in-labeling requirement would be viewpoint neutral, and it would not enmesh the government or websites in the difficult business of determining what is legitimate satire. Media altered for satirical purposes, for example, would be labeled just the same way as that manipulated for malicious reasons. The labeling will not interfere with any satiric purpose.<sup>70</sup>

Nor would such a law run afoul of prohibitions on certain forms of compelled speech. In *National Institute of Family and Life Advocates v.*

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1cddabc808 [https://perma.cc/KA6R-GPU7]. In the meantime, there often will be adequate proof that a particular audio or video of an elected official, candidate, or other public figure has been altered, and that the media portrayal is not a truthful representation. One recent such example where a fraud was quickly uncovered with conventional technology involved CNN reporter Jim Acosta. As the *Washington Post* reported:

White House press secretary Sarah Sanders on Wednesday night shared a video of CNN reporter Jim Acosta that appeared to have been altered to make his actions at a news conference look more aggressive toward a White House intern.

The edited video looks authentic: Acosta appeared to swiftly chop down on the arm of an aide as he held onto a microphone while questioning President Trump. But in the original video, Acosta's arm appears to move only as a response to a tussle for the microphone. His statement, "Pardon me, ma'am," is not included in the video Sanders shared.

Critics said that video—which sped up the movement of Acosta's arms in a way that dramatically changed the journalist's response—was deceptively edited to score political points. That edited video was first shared by Paul Joseph Watson, known for his conspiracy-theory videos on the far-right website Infowars.

*Id.*

69. Press Release, Carfax, 'Show Me the Carfax Campaign' Wins Coveted Effie Award (June 16, 2011), <https://www.carfax.com/press/show-me-the-carfax-campaign-wins-coveted-effie-award> [https://perma.cc/97LH-846A] ("Carfax and its partner Zimmerman Advertising have received a Silver Effie Award for the 'Show Me the Carfax' national advertising campaign. The two companies collaborated on the campaign that helps consumers buy used cars with more confidence and shop at dealerships that provide Carfax Vehicle History Reports for the cars they sell.").

70. Such a law could exempt from coverage certain technical minor alterations, such as color correction of video content.

*Becerra*,<sup>71</sup> the Supreme Court struck down two California laws requiring certain “crisis pregnancy centers” to give notices to clients about the availability of publicly funded family planning services, including abortion and contraception. The Court held that such disclosures were a form of compelled speech on a controversial topic that were not justified under even intermediate scrutiny. It held that the law was underinclusive in providing information about state-sponsored services to low-income women.<sup>72</sup> And it held that California could have provided the information to California women directly without burdening the centers.<sup>73</sup>

In reaching this conclusion, however, the Court reaffirmed that the government could mandate “purely factual and uncontroversial disclosures about commercial products.”<sup>74</sup> It pointed to its earlier decision in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*<sup>75</sup> upholding an Ohio law requiring attorneys who advertised contingency fee services to disclose that clients may have to pay certain fees and costs.<sup>76</sup>

The Court described *Zauderer* as an illustration of the Court applying a lower level of scrutiny of compelled disclosure in certain contexts, and it stressed the commercial, factual context of permissible disclosures: “Noting that the disclosure requirement governed only ‘commercial advertising’ and required the disclosure of ‘purely factual and uncontroversial information about the terms under which . . . services will be available,’ the Court explained that such requirements should be upheld unless they are ‘unjustified or unduly burdensome.’”<sup>77</sup> Lower courts have read *Zauderer* as at least applying to disclosures aimed at preventing consumer deception, if not going even further to allow the government to mandate further factual and uncontroversial disclosures.<sup>78</sup>

A requirement that websites and social media platforms with large number of users label altered videos as “altered” would mandate the disclosure of purely factual and uncontroversial information in a commercial context.<sup>79</sup> It would not require the websites to make value judgments about the reasons for the alteration

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71. Nat’l Inst. of Family and Life Advocates v. *Becerra*, 138 S. Ct. 2361, 2378 (2018).

72. *Id.* at 2375–76.

73. *Id.* at 2376.

74. *Id.*

75. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 629 (1985).

76. *Becerra*, 138 S. Ct. at 2372.

77. *Id.* (quoting *Zauderer*, 471 U.S. at 651).

78. Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 394 & nn.194–95 (2018). See also *id.* at 380 (reading a line of Supreme Court cases to “suggest[] that perhaps pure compulsions to convey facts are generally permissible”).

79. That people post on social media for political purposes does not negate the essentially commercial nature of enterprises such as Facebook and Twitter.

and it would be something that is objectively verifiable. It would protect consumers and voters from deception.

My proposal for truth in labeling of deep fakes stands a greater chance of being held constitutional than laws that would punish deep fakes or require their removal from websites and social media platforms. For example, a recently enacted California law (in effect only until January 1, 2023) makes it illegal for anyone “within 60 days of an election at which a candidate for elective office will appear on the ballot, [to] distribute, with actual malice, materially deceptive audio or visual media . . . of the candidate with the intent to injure the candidate’s reputation or to deceive a voter into voting for or against the candidate” unless the video or audio was labeled as “manipulated.”<sup>80</sup> The bill contains exemptions for the news media and for “satire or parody.”<sup>81</sup> The law allows a candidate injured by a deep fake to obtain an injunction and damages in appropriate cases.<sup>82</sup>

The California law, which was inspired by a crudely altered 2019 video (sometimes referred to as a “cheap fake”<sup>83</sup>) making it appear that House Speaker Nancy Pelosi was drunk at a press conference,<sup>84</sup> presents greater constitutional problems both because of its wider breadth and its pejorative labeling.

Among other things, a law banning deep fakes raises vagueness and overbreadth problems by preventing the use of synthetic media when one is reckless about distributing “deceptive” video or audio about a candidate to a voter. It is not clear how to define what counts as “parody or satire” under the

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80. Cal. Leg. AB 730 (2019-2020) Regular Session, [http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200AB730](http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB730) [<https://perma.cc/8QF6-RFG6>], amended California Elections Code Section 20010 until 2023. The quoted language appears in section 20010(a). The new section 20010(e) defines “deceptive audio or visual media” as

an image or an audio or video recording of a candidate’s appearance, speech, or conduct that has been intentionally manipulated in a manner such that both of the following conditions are met:

(1) The image or audio or video recording would falsely appear to a reasonable person to be authentic.

(2) The image or audio or video recording would cause a reasonable person to have a fundamentally different understanding or impression of the expressive content of the image or audio or video recording than that person would have if the person were hearing or seeing the unaltered, original version of the image or audio or video recording.

*Id.*

81. *Id.* § (d)(5).

82. *Id.* §§ (c)(1), (c)(2).

83. On the difference between deep fakes and cheap fakes, see Dan Patterson, *From Deepfake to “Cheap Fake,” It’s Getting Harder to Tell What’s True on Your Favorite Apps and Websites*, CBS NEWS (June 13, 2019), <https://www.cbsnews.com/news/what-are-deepfakes-how-to-tell-if-video-is-fake/> [<https://perma.cc/3E3D-WZGZ>].

84. Andrew Sheeler, *California is Moving to Ban Deepfakes. What Are They, Anyway?*, THE SACRAMENTO BEE (July 2, 2019), [www.sacbee.com/news/politics-government/capitol-alert/article232162032.html](http://www.sacbee.com/news/politics-government/capitol-alert/article232162032.html) [<https://perma.cc/F4M5-QH8S>].

law's safe harbor, and how to tell whether someone who is intending to influence an election using manipulated media engaged in an act of deception.

Further, the label "manipulated" is more pejorative than "altered," and that too may raise a constitutional issue because the government would be putting a negative label on political speech. In *Cook v. Gralike*,<sup>85</sup> the Court considered the constitutionality under the Qualifications Clause of a proposed "Scarlet Letter" ballot provision requiring state officials to label some congressional candidates on the ballot as having "disregarded" or "declined" voter instructions on term limits. The Court rejected the requirement, in part based upon the pejorative nature of the ballot descriptions: "In describing the two labels, the courts below have employed terms such as 'pejorative,' 'negative,' 'derogatory,' 'intentionally intimidating,' 'particularly harmful,' 'politically damaging,' 'a serious sanction,' 'a penalty,' and 'official denunciation.'"<sup>86</sup>

Unlike the California law, a truth-in-labeling requirement is not government censorship, because it stops no one from being able to create and post whatever altered video they like.<sup>87</sup> It does not pejoratively label the material as "manipulated." It raises no issues of prior restraint of speech as the California law may raise through the availability of injunctive relief.

Any further actions that platforms may choose to take with synthetic media would be a private decision for the platform companies and not a requirement of law. The platforms, acting as private citizens, could choose to remove some or all altered videos, downgrade them, put them through additional review—or for that matter promote them however the platform prefers. The Supreme Court recently reaffirmed in *Manhattan Community Access Corporation v. Halleck*<sup>88</sup> that even regulated private television broadcasters are private actors, not state actors bound by the First Amendment. The point is that a truth-in-labeling law would not require the government to remove any content, and any removal choices would be private decisions not limited by the First Amendment.

In this way, the deep fakes problem is surprisingly *easier* to solve (once the technology is in place) than the problem of low-tech false information. When it comes to whether video or audio has been manipulated, there is an objective

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85. *Cook v. Gralike*, 531 U.S. 510, 513–14 (2001).

86. *Id.* at 524.

87. At the time this Essay went to press, Twitter began voluntarily experimenting with labeling altered videos as "manipulated." Cat Zakrzewski, *Twitter Flags Video Retweeted by President Trump as 'Manipulated Media'*, WASH. POST, Mar. 9, 2020, <https://www.washingtonpost.com/technology/2020/03/08/twitter-flags-video-retweeted-by-president-trump-manipulated-media/> [<https://perma.cc/EMA6-T8CA>]. My proposal is also less intrusive than Professor Green's, which "would impose criminal sanction for the knowing manufacture of fake images, audio or other material of an identifiable candidate for public office, published within [a specified number of] days prior to an election, with intent to deceive voters and distort the electoral process." Green, *supra* note 34, at 1456. She would exempt counterfeit campaign speech clearly labeled as "fake." *Id.* at 1457.

88. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1934 (2019).

truth of the matter: a scientific comparison of original content with content posted online. As noted above, it is much harder to use law to deal with false campaign speech, such as the outrageous claims made in the 2016 election that Hillary Clinton was a murderer<sup>89</sup> or that Democrats were responsible for the murder of DNC staffer Seth Rich, a false claim suggested by Wikileaks to take the heat off the Russians for leaking DNC documents.<sup>90</sup> A law that told platforms to remove factually false content would be much more difficult to enforce. Who decides what is true or false, and how? Mandating that platforms determine truth does not solve the First Amendment problem. For the problem of “mere” misinformation and not synthetic media, the best hope for now is not the use of election law but instead public pressure to force private social media platforms to police it. If the platforms do not respond to pressure, the next lever might be antitrust law to create smaller companies more responsive to consumer demand and pressure.<sup>91</sup>

#### IV. CAMPAIGN FINANCE LAW

Alabama voters looking at Facebook for information about whom to support in the 2017 special election to replace Jeff Sessions for the United States Senate may well have come across the “Dry Alabama” website, which was backing Republican candidate Roy Moore against Democrat Doug Jones. The *New York Times* explained that the Facebook page,

illustrated with stark images of car wrecks and videos of families ruined by drink, had a blunt message: Alcohol is the devil’s work, and the state should ban it entirely. Along with a companion Twitter feed, the Facebook page appeared to be the work of Baptist teetotalers who supported the Republican, Roy S. Moore, in the 2017 Alabama Senate race. “Pray for Roy Moore,” one tweet exhorted.<sup>92</sup>

The teetotalers, however, were not behind the Dry Alabama page on Facebook and they did not support Moore. Instead, those behind the page “thought associating Mr. Moore with calls for a statewide alcohol ban would

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89. Jeet Heer, *Minutes*, NEW REPUBLIC (June 27, 2019), <https://newrepublic.com/minutes/133694/donald-trump-suggests-hillary-clinton-might-murdererand-no-one-bats-eye> [<https://perma.cc/W68J-HUJS>] (“Donald Trump suggests Hillary Clinton might be a murderer—and no one bats an eye.”)

90. See MUELLER REPORT, *supra* note 29, at 48–49.

91. There is a rigorous debate on the question of using antitrust law to break up social media companies, an issue beyond the scope of this Essay. See Jacob M. Schlesinger, Brent Kendall, & John D. McKinnon, *Tech Giants Google, Facebook and Amazon Intensify Antitrust Debate*, WALL ST. J. (June 12, 2019), <https://www.wsj.com/articles/tech-giants-google-facebook-and-amazon-intensify-antitrust-debate-11559966461> [<https://perma.cc/4T3U-4MVP>].

92. Scott Shane & Alan Blinder, *Democrats Faked Online Push to Outlaw Alcohol in Alabama Race*, N.Y. TIMES (Jan. 7, 2019), <https://www.nytimes.com/2019/01/07/us/politics/alabama-senate-facebook-roy-moore.html> [<https://perma.cc/LAV4-7DND>].

hurt him with moderate, business-oriented Republicans and assist the Democrat, Doug Jones, who won the special election by a hair-thin margin.”<sup>93</sup>

Nor were the scores of purportedly Russian bots with their Cyrillic names and symbols popping up on Twitter and supporting Roy Moore during the campaign actually from Russia. Instead, in a story I tell in greater detail elsewhere,<sup>94</sup> a liberal group supporting Jones, working independently and apparently without his knowledge, engaged in a concentrated social media campaign to flip the votes of moderate Republicans, or at least get them to stay home and not vote at all in the normally deep red state. This was an unusual Democratic voter suppression effort in a red state aimed at white Republicans.

“Project Alabama” was funded by billionaire LinkedIn cofounder, Reid Hoffman, through an outfit called American Engagement Technologies.<sup>95</sup> Some of the political operation’s activities disseminated misinformation, but others involved circulation of truthful information or non-factual opinion, where the real chicanery was not in the *content of the message* but in lying about or obscuring the *identity of the speaker*.<sup>96</sup> Alabama voters deciding who to vote for might well have cared that progressive Democrats, and not teetotalers or Russians, were the ones trying to influence who they voted for and how.

But information about the source of the influence campaign was not available to voters when they voted. It came to light only after the election through leaks to the *New York Times*<sup>97</sup> and *Washington Post*.<sup>98</sup> Without those leaks, we still might not know of these efforts, just like we only learned of some of the Russian activity aimed at sowing social discord swinging the election to Donald Trump thanks to the work of American intelligence agencies and the prosecutors who produced the Mueller report.

Campaign finance disclosure law has long been concerned with making sure busy voters have the information they need to make informed decisions. Social

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93. *Id.*

94. RICHARD L. HASEN, ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THREAT TO AMERICAN DEMOCRACY 75–80 (2020).

95. *Id.* at 78–79.

96. *Id.* at 75–76.

97. Scott Shane & Alan Blinder, *Secret Experiment in Alabama Senate Race Imitated Russian Tactics*, N.Y. TIMES (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/us/alabama-senate-roy-jones-russia.html> [<https://perma.cc/8WNA-LHXW>]; Scott Shane, Alan Blinder, & Sydney Ember, *Doug Jones “Outraged” by Russian-Style Tactics Used in His Senate Race*, N.Y. TIMES (Dec. 20, 2018), <https://www.nytimes.com/2018/12/20/us/politics/doug-jones-social-media.html> [<https://perma.cc/KEE6-N8A8>].

98. Craig Timberg, Tony Romm, Aaron C. Davis, & Elizabeth Dwoskin, *Secret Campaign to Use Russian-Inspired Tactics in 2017 Ala. Election Stirs Anxiety for Democrats*, WASH. POST (Jan. 6, 2019), [https://www.washingtonpost.com/business/technology/secret-campaign-to-use-russian-inspired-tactics-in-2017-alabama-election-stirs-anxiety-for-democrats/2019/01/06/58803f26-0400-11e9-8186-4ec26a485713\\_story.html?utm\\_term=.86cbec124752](https://www.washingtonpost.com/business/technology/secret-campaign-to-use-russian-inspired-tactics-in-2017-alabama-election-stirs-anxiety-for-democrats/2019/01/06/58803f26-0400-11e9-8186-4ec26a485713_story.html?utm_term=.86cbec124752) [<https://perma.cc/73SB-A7PS>].

science demonstrates that voters use shortcuts to make decisions, and one reliable piece of information voters rely upon is who is behind an election message aimed at them.<sup>99</sup> For example, in 2010, California voters turned down a ballot proposition that would have benefited Pacific Gas and Electric (“PG&E”). PG&E provided almost all of the \$46 million to the “Yes on 16” campaign, compared with very little spent opposing the measure. “Thanks to California’s disclosure laws, PG&E’s name appeared on every ‘Yes on 16’ ad, and the measure narrowly went down to defeat.”<sup>100</sup>

The Supreme Court in *Buckley v. Valeo*<sup>101</sup> recognized that campaign finance disclosure laws may serve this *information* interest, as well as interests in preventing the *corruption* of elected officials, by allowing voters to follow the money and look for special treatment given to campaign donors or those who spend to favor or oppose candidates, and the *enforcement* interest, ensuring that no other campaign finance laws are broken. For example, it is illegal for foreign governments, other foreign entities, and most noncitizens (except green card holders residing in the United States) to spend money on American candidate campaigns,<sup>102</sup> and adequate disclosure allows regulators, the press, and the public to ensure that prohibited foreign sources are not secretly participating in our elections.

Our current campaign finance disclosure laws are not up to the task of ferreting out the true sources of new social media campaigns aimed at trying to influence opinions in elections, such as the activities of the Russians in 2016 or the pro-Jones forces in Alabama in 2017.

Roughly speaking, federal campaign finance disclosure law requires the disclosure of spending by persons or entities who engage in express advocacy, such as an advertisement directly urging a vote for or against a candidate.<sup>103</sup> The law also requires disclosure of some advertising appearing on television or radio which mentions or features a candidate in a small time window before the election.<sup>104</sup> Candidates, political parties, and campaign committees also have to disclose their election-related spending.<sup>105</sup> Courts have split over whether political organizations that have as a major purpose the election or defeat of

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99. Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295 (2005).

100. For more details on PG&E example, see Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J. L. & POL. 557, 570 (2012).

101. 424 U.S. at 66–68.

102. 52 U.S.C. § 30121 (2019); 11 C.F.R. § 110.20 (2019).

103. *Id.* § 30101(9)(A). See *Buckley*, 424 U.S. at 44 n.52 (defining express advocacy).

104. 52 U.S.C. § 30104(f)(1) (2019).

105. 52 U.S.C. §§ 30101(9)(A), 30104 (2019).

candidates may constitutionally be compelled to disclose their expenses as well.<sup>106</sup>

Unfortunately, these rules leave open a great deal of important campaign activity for which there is no compelled disclosure, making it impossible for law to fulfill its information, anticorruption, and enforcement purposes.<sup>107</sup> Most of the paid social media advertising that the Russians engaged in did not contain express advocacy. It likely would surprise non-specialists in the area, but spending money on online advertising saying “Hillary Clinton is a Satan!,” as Russian operatives did in 2016,<sup>108</sup> is not considered campaign activity under federal campaign finance rules. And unless “Dry Alabama” registered as a political action committee, it too likely would have been able to avoid disclosing who paid for its activities unless it engaged in express advocacy. “Pray for Roy Moore” is not express advocacy.

Campaign finance disclosure laws should be updated to deal with the changing campaign landscape, and in particular to deal with the use of social media and artificial intelligence to influence elections.

First, Congress should extend the same rules that apply to television and radio advertisements to advertising distributed online, including via social media. Years ago, I was among those arguing that the Federal Election Commission’s failure to extend the rules to the online space would leave one of the most important arenas for campaigning unregulated and without adequate disclosure.<sup>109</sup> But libertarian opposition to any regulation related to campaigns and the Internet has successfully beat back most efforts to extend the rules for almost two decades as the use of new technologies for campaigning has exploded.<sup>110</sup> Had those nascent efforts succeeded, those who spend significant sums seeking to support or oppose candidates for office and who mention candidates’ names or feature their likenesses in online content would have had to comply with disclosure rules. Today, with so much campaign and political

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106. Zachary R. Clark, Comment, *Constitutional Limits on State Campaign Finance Disclosure Laws: What’s the Purpose of the Major Purpose Test?*, 2015 U. CHI. LEGAL F. 527 (2015).

107. See Hasen, *Cheap Speech*, *supra* note 8, at 219 n.84 (describing narrow reach of foreign spending ban according to court decision in *Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281, 292, *aff’d*, 565 U.S. 1104 (2012)).

108. See the indictment filed by Special Counsel Robert Mueller, Feb. 16, 2018, at page 20, <https://www.justice.gov/file/1035477/download> [<https://perma.cc/3T8R-U2U3>], for the “Hillary is a Satan!” example.

109. Richard L. Hasen, *The Ripple Effects of the FEC’s Rules on Political Blogging: Why They Will End Up Undermining Limits on Corporation and Union Campaign Finance Activities*, FINDLAW (Apr. 5, 2005), <https://supreme.findlaw.com/legal-commentary/the-ripple-effects-of-the-fecs-rules-on-political-blogging.html> [<https://perma.cc/3WLA-9A7T>].

110. Ashley Balcerzak, *Federal Officials Struggle to Drag Political Rules into the Internet Age*, CTR. FOR PUB. INTEGRITY (June 27, 2018) (corrected Oct. 26, 2018), <https://publicintegrity.org/federal-politics/federal-officials-struggle-to-drag-political-ad-rules-into-the-internet-age/> [<https://perma.cc/7QJZ-UP6F>].



activity moving online, there is no good argument that government regulation which is generally applicable to campaign activity should not apply to online campaign activity. The world is topsy-turvy when online political activity requires the least disclosure but needs it the most.

The proposed Honest Ads Act<sup>111</sup> would close the loophole for traditional campaigns ads disseminated over social media and the Internet, but simply bringing the McCain-Feingold era disclosure laws on “electioneering communications” to social media will not be enough to deal with cutting-edge methods of influence. Today, campaigns and others use data harvested from a voter’s online activity to target ads aimed at that voter’s views and interests.<sup>112</sup> View the Audubon Society website? You might be hit with an advertisement criticizing or praising a candidate’s environmental record.

Such microtargeting, which gained popularity in 2016, is no longer the cutting edge of campaign persuasion techniques. Already campaigns are experimenting with programmable non-human “bots” that send direct messages to users and engage in political conversations with these users in an effort to influence their voter choice. As Noam Cohen explained,

When they were invented, back in the nineteen-sixties, they weren’t capable of manipulating their users. Most bot creators worked in university labs and didn’t conjure these programs to exploit the public. Today’s bots have been designed to achieve specific goals by appearing human and blending into the cacophony of online voices. Many have been commercialized or politicized. In the 2016 Presidential campaign, bots were created to support both Donald Trump and Hillary Clinton, but pro-Trump bots outnumbered pro-Clinton ones five to one, by one estimate, and many were dispatched by Russian intermediaries.<sup>113</sup>

Already California has passed a law to ban the practice of using anonymous bots.<sup>114</sup> And it is impossible to know what technological innovations will next be harvested for campaign purposes.

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111. S. 1356, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/1356/text> [<https://perma.cc/Z64G-GV2Y>].

112. On the use of and concerns about campaigns engaging in microtargeting, see Persily, *supra* note 27, at 21–23.

113. Noam Cohen, *Will California’s New Bot Law Strengthen Democracy?*, THE NEW YORKER (July 2, 2019), <https://www.newyorker.com/tech/annals-of-technology/will-californias-new-bot-law-strengthen-democracy/> [<https://perma.cc/X9FS-277E>].

114. CAL. BUS. & PROF. CODE § 17941(a) (2018) (“It shall be unlawful for any person to use a bot to communicate or interact with another person in California online, with the intent to mislead the other person about its artificial identity for the purpose of knowingly deceiving the person about the content of the communication in order to incentivize a purchase or sale of goods or services in a commercial transaction or to influence a vote in an election. A person using a bot shall not be liable under this section if the person discloses that it is a bot.”); Steven Musil, *California Bans Bots Secretly Trying to Sway Elections*, CNET (Oct. 1, 2018), <https://www.cnet.com/news/california-bans-bots-secretly-trying-to-sway-elections/> [<https://perma.cc/J7GT-PBU2>].

Second, modern campaign finance disclosure law should be updated so that it requires the disclosure of the funders behind coordinated and well-funded attempts to influence elections via social media, even if the attempted persuasion comes in the form of bot-generated private messages lacking express advocacy. The best estimate is that Russia spent around \$100,000 on Facebook advertising aimed to influence the 2016 elections,<sup>115</sup> out of billions spent during those elections, and the threshold for disclosure should be set low enough to capture this level of spending.

An updated disclosure law should require that any person or entity who spends over a certain threshold on using social media resources to directly or indirectly influence voters to vote for or against a particular candidate or ballot measure must disclose the amount of their activities and their ultimate source of funding to the government via an online report. And to the extent technologically practicable,<sup>116</sup> the message itself should provide an easy basis, such as the clicking of a link, to determine the identity of the sender (as well as further information about funding).

The spending threshold for mandated disclosure would count not only the funds paid to the platforms for paid services but also expenditures using software engineers, consultants, or others in an effort to influence elections via social media.<sup>117</sup> Those who fall within the reporting threshold would have to certify under penalty of perjury to the website or social media platform they wish to use that they have made the required disclosures to the government before they may use social media resources on the platform. The law would exempt those who can credibly demonstrate that they would face the threat of harassment if their identities were disclosed<sup>118</sup> and media corporations when they are engaged in journalistic enterprises.<sup>119</sup>

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115. Scott Shane & Vindu Goel, *Fake Russian Facebook Accounts Bought \$100,000 in Political Ads*, N.Y. TIMES (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/technology/facebook-russian-political-ads.html> [<https://perma.cc/4SMK-ZYEB>].

116. *But cf.* 11 C.F.R. § 110.11(f)(1) (exempting from disclosure “(i) Bumper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed [and] (ii) Skywriting, water towers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable”).

117. The law would not cover unpaid, non-targeted social media posts, such as that of an individual expressing support or opposition to a candidate.

118. *See* *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87 (1982). The Federal Election Commission has long determined when groups are entitled to such an exemption. *See, e.g.*, Federal Election Commission, Advisory Op. 2016-23 (granting renewed partial disclosure exemption for Socialist Workers Party), <https://www.fec.gov/updates/advisory-opinion-request-2016-23-socialist-workers-party/> [<https://perma.cc/W6DT-5D48>].

119. This of course raises the question of who counts as a journalist in the Internet and social media age. I address this question in detail in RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* 124–45 (2016). My bottom line is to piggyback on a definition of journalism put forward by Professor

No doubt, opponents of an enhanced social media disclosure law would argue that such a law violates the First Amendment. I believe there are strong arguments in favor of the constitutionality of this disclosure under current Supreme Court doctrine, although I am concerned about the direction that the Supreme Court's jurisprudence in this area may go.

Since the 1976 case of *Buckley v. Valeo*<sup>120</sup> and through the 2010 case, *Citizens United v. Federal Election Commission*,<sup>121</sup> the Supreme Court has applied "exacting scrutiny" and upheld most disclosure laws challenged under the First Amendment. These laws do not prohibit any speech, but rather allow voters to know who is paying to influence their political decisions. They are a more narrowly tailored approach to the issue of money in politics than limits or bans on spending. With an exemption for those demonstrating the threat of harassment, disclosure laws generally pass constitutional muster.

Although there have been twists and turns that I have covered elsewhere,<sup>122</sup> the Court has repeatedly held that the government's anticorruption, information, and its enforcement interests can justify generally applicable campaign finance disclosure laws, even if they are targeted at very small contributions. Such laws are constitutional so long as they contain an exemption for those who may demonstrate a realistic threat of harassment.

Federal election law requires disclosure of certain expenditures, and defines an expenditure to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any *person for the purpose of influencing any election for Federal office*."<sup>123</sup> Current Federal Election Commission regulations exempt certain Internet-based activities from regulation.<sup>124</sup> The federal statute and these regulations should be rewritten to ensure disclosure above a certain dollar threshold on Internet and social media efforts undertaken for the purpose of influencing federal elections. Disclosure should no longer be limited to those who spend money on express advocacy or who engage in electioneering communications.

The question is how to write a law or regulation defining what counts as spending "for the purpose of influencing federal elections" without running afoul of vagueness and chilling problems under the First Amendment.<sup>125</sup> Fortunately, when it comes to disclosure, the Supreme Court has held that the

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Sonja J. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2456 (2014), and described on page 140 of my book.

120. 424 U.S. at 16–18.

121. *Citizens United v. Fed. Election Comm'n*, 558 U.S. at 366–71.

122. See Hasen, *supra* note 100, and Hasen, *infra* note 130.

123. 52 U.S.C. § 30101(9)(A)(i) (2012) (emphasis added).

124. 11 C.F.R. § 100.155 (2019).

125. 52 U.S.C. § 30101(9)(A)(i) (2012). See *Fed. Election Comm'n v. Wis. Right to Life*, 551 U.S. 449 (2007) (rejecting under the First Amendment a test for barring nonprofit corporate express advocacy because it required too great an inquiry into the speakers' intent).

government may require disclosure of spending on political activity that goes well beyond express advocacy for elections. Thus, in the 1954 case of *United States v. Harriss*,<sup>126</sup> the Supreme Court upheld a law mandating the disclosure of certain lobbying activities. In the 1978 case, *First National Bank of Boston v. Bellotti*,<sup>127</sup> the Court upheld campaign finance disclosure requirements applicable to ballot measure campaigns, with no involvement of candidates.

Further, in *Citizens United*, the Court rejected the plaintiffs' argument that the government could only require disclosure of spending on express advocacy and its functional equivalent.<sup>128</sup> And in a portion of the earlier *McConnell* case not overruled by *Citizens United*, the Court upheld Bipartisan Campaign Reform Act Section 504's broad "issue request" requirement, requiring broadcasters to keep records of requests made by anyone to broadcast "message[s]" related to a "national legislative issue of public importance" or "otherwise relating to a political matter of national importance."<sup>129</sup> Writing for a Court majority on this point, Justice Breyer's opinion

explained a number of purposes served by the section 504 recordkeeping requirements, including that "recordkeeping can help both the regulatory agencies and the public evaluate broadcast fairness, and determine the amount of money that individuals or groups, supporters or opponents, intend to spend to help elect a particular candidate." He recognized that the "issue request" requirements could impose an administrative burden, and left open the possibility of a challenge to FCC implementing regulations in the future.<sup>130</sup>

Given these precedents, a law targeted at the disclosure of social media expenditures made with a purpose of influencing federal elections should pass constitutional muster, even if it reaches more broadly than express advocacy, for example to cover large spending on political issues related to the election by groups such as those aligned with the Tea Party Movement or Black Lives Matter. The disclosure rule should rely on clear factors for determining what counts as election-related spending subject to disclosure, tied to both content and timing, modeled after the clarity of FEC rules determining what counts as a "coordinated communication."<sup>131</sup> Clear rules avoid the potential for vagueness and administrative and prosecutorial discretion in the application of these rules.

Although I am confident of the constitutionality of such a measure under existing Supreme Court doctrine, the Court's jurisprudence on disclosure will not necessarily remain static. Justices Anthony Kennedy and Antonin Scalia

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126. *United States v. Harriss*, 347 U.S. 612 (1954).

127. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

128. *Citizens United*, 558 U.S. at 368–69.

129. *McConnell*, 540 U.S. at 238–40.

130. Richard L. Hasen, *The Surprisingly Easy Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 3 ELECTION L.J. 251–55 (2004) (citations omitted, quoting *McConnell*).

131. 11 C.F.R. § 109.21(c), (d).

were great proponents among conservatives of the value of campaign disclosure laws,<sup>132</sup> but they no longer are on the Court. Justice Clarence Thomas has long held the view that there is a general right to anonymity when engaging in campaign activity,<sup>133</sup> a view the Court flirted with in a 1995 case called *McIntyre v. Ohio Election Commission*<sup>134</sup> but later all but abandoned. Further, in *Doe v. Reed*,<sup>135</sup> both Justices Thomas<sup>136</sup> and Samuel Alito<sup>137</sup> expressed concern about the greater potential for harassment of campaign donors given the ease with which information about contributors and spenders flows on the Internet, an issue which seems in recent years to have broken along ideological lines, with conservatives expressing greater concern about harassment. These views could well attract the support of the newest Justices, Neil Gorsuch and Brett Kavanaugh, leaving Chief Justice Roberts in the middle.

In short, my proposed disclosure law is likely constitutional under current doctrine (with the longer-term future less certain). Such a law could help voters obtain valuable information about who is trying to influence their votes. It could also help with the enforcement interest by making sure that prohibited foreign sources are not engaged in illegal activities to influence our elections.<sup>138</sup> And it is likely to be much more effective than private efforts to require disclosure. Facebook's efforts have been both overinclusive, including journalists who should be exempt from disclosure,<sup>139</sup> and underinclusive, by allowing people to hide their true identities behind other persons or entities, such as Vice News's successful efforts to pretend to be all 100 U.S. Senators and to post ads in their name.<sup>140</sup>

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132. *Doe v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring) (“Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.”); *Citizens United*, 338 U.S. at 371 (Kennedy, J., majority opinion) (“The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”).

133. *McIntyre v. Ohio Election Comm’n*, 514 U.S. 334, 358 (1995) (Thomas, J., concurring).

134. *Id.*

135. *Doe v. Reed*, 561 U.S. 186 (2010).

136. *Id.* at 229 (Thomas, J., dissenting).

137. *Id.* at 202 (Alito, J., concurring).

138. On the need to rewrite the ban on foreign spending in U.S. elections to be more effective, and potential constitutional issues, see Hasen, *Cheap Speech*, *supra* note 8, at 216–26.

139. Jeremy B. Merrill and Ariana Tobin, *Facebook’s Screening for Political Ads Nabs News Sites Instead of Politicians*, PROPUBLICA (June 15, 2018), <https://www.propublica.org/article/facebook-new-screening-system-flags-the-wrong-ads-as-political> [<https://perma.cc/T3FM-TML9>].

140. William Turton, *We Posed as 100 Senators to Run Ads on Facebook. Facebook Approved All of Them*, VICE NEWS (Oct. 30, 2018), [https://news.vice.com/en\\_ca/article/xw9n3q/we-posed-](https://news.vice.com/en_ca/article/xw9n3q/we-posed-)

The law would not be perfect. Efforts to sow discord, for example, by organizing pro- and anti-Muslim rallies on facing street corners as Russian government operatives did in the 2016 elections,<sup>141</sup> might be revealed only if a social media platform looked closely enough at the activities, flagged the spenders as engaging in these activities for the purpose of influencing U.S. elections, and excluded them for not filling a certification. But to the extent actors would use social media platforms for campaign purposes, the certification requirement will create the right legal incentives for the platforms to look for such activity and improve disclosure.

#### V. VOTING RIGHTS AND SILOED JUSTICES<sup>142</sup>

In an eye-opening 2013 interview with journalist Jennifer Senior, the late Supreme Court Justice Antonin Scalia explained his “media diet.”<sup>143</sup> He said that he read the *Wall Street Journal* and the *Washington Times*.<sup>144</sup> He had dropped his subscription to the *Washington Post* because of what he saw as the newspaper’s “treatment of almost any conservative issue. It was slanted and often nasty. And, you know, why should I get upset every morning? I don’t think I’m the only one. I think they lost subscriptions partly because they became so shrilly, shrilly liberal.”<sup>145</sup> He also said he did not read the *New York Times* and that he got most of his news from talk radio.<sup>146</sup>

Scalia’s media diet was a sign of things to come, and raises perhaps the most difficult issue for election law in the post-truth era: how should we deal with judges and Supreme Court justices who cannot agree on basic facts about the state of the political world?

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as-100-senators-to-run-ads-on-facebook-facebook-approved-all-of-them [https://perma.cc/4PXF-CFHX].

141. Ryan Lucas, *How Russia Used Facebook to Organize Two Sets of Protesters*, NPR (Nov. 1, 2017), <https://www.npr.org/2017/11/01/561427876/how-russia-used-facebook-to-organize-two-sets-of-protesters> [https://perma.cc/F8YK-WQG9]; MUELLER REPORT, *supra* note 29, at 29–32 (describing Russian military operations to organize rallies of Americans in the United States during the 2016 election).

142. This section draws from a post at the Balkinization blog, Richard L. Hasen, *Siloed Justices and the Law/Politics Divide*, BALKINIZATION (Apr. 2, 2019), <https://balkin.blogspot.com/2019/04/siloed-justices-and-lawpolitics-divide.html> [https://perma.cc/8FGY-2P3Z], in a symposium on the book, NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* (2019).

143. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/index.html> [https://perma.cc/6RVJ-PRPW].

144. *Id.*

145. *Id.*

146. *Id.*

In their recent book on Supreme Court decision-making,<sup>147</sup> Neal Devins and Larry Baum argue that the two leading political science models of Supreme Court judicial decision-making—the attitudinalist model positing that Justices vote their values and the strategic model positing that Justices vote strategically to advance their values in light of the potential reactions of other strategic actors, such as Congress and executive agencies—inadequately describe the Justices’ decision-making. They instead offer a psychological model positing that Justices, like others, are the product of the world around them, and Supreme Court Justices traveling in elite social circles seek affirmation and approval from these elites.

As the authors tell it, in an earlier era, a common social circle of other judges, law professors, lawyers at the top of the profession, and journalists at elite news outlets helped shape the Justices’ values and occasionally rein in their votes, and that given an historic liberal bent of the legal elite (at least on civil rights and civil liberties issues), many Justices “evolved” over time toward the left on these issues.<sup>148</sup> The authors wrote of the so-called “Greenhouse effect” where even some conservative Justices were swayed by coverage of the Court and its decisions by the *New York Times*’s former Supreme Court reporter, Linda Greenhouse.<sup>149</sup>

But polarization has changed everything on the Supreme Court. Thanks to polarization in Congress and the Presidency, for the first time in Supreme Court history all of the conservative-leaning Justices have been appointed by Presidents of one party and all the liberal-leaning Justices appointed by Presidents of the other party.<sup>150</sup> The most conservative Democratic-appointed Justice is more liberal than the most liberal Republican-appointed Justice.<sup>151</sup>

Today’s politically polarized elite world both shapes and reflects how Justices view their jobs and decide how to vote, leading to a new polarization on the Supreme Court. Adam Bonica and Maya Sen’s work<sup>152</sup> confirms that the leftward drift of lawyers overall is accelerating, giving plenty of affirmation for the liberal Justices on the Court. At the same time, the ascendancy of conservatives and libertarians in the Federalist Society has created an alternative set of elite actors to whom conservative Justices on the Supreme Court can look for ideas, law clerks, and social affirmation.<sup>153</sup> Lower court judges brought up

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147. DEVINS & BAUM, *supra* note 142.

148. *Id.*

149. *Id.*

150. Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261 (2019).

151. *Id.*

152. Adam Bonica & Maya Sen, *Judicial Reform as a Tug of War: How Ideological Differences Between Politicians and the Bar Explain Attempts at Judicial Reform*, 70 VAND. L. REV. 1781 (2017).

153. See AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* (2015).

from Federalist Society ranks appointed by Republican Presidents frequently advance theories which the (liberal-leaning) legal elite would have considered “off the wall” in an earlier era,<sup>154</sup> and reinforce one another as to the legitimacy of these new views.

This divide means fewer “evolving” Justices and greater division on the Court over time, with social and political issues from abortion to voting rights to the environment increasingly likely to follow the predictable lines one would expect if the Justices were voting their political and ideological orientations. Ironically, the attitudinalist model will increasingly look right because the Justices can more fully vote their values with knowledge of affirmation from their reflective social circles.

Devins and Baum have successfully captured the real phenomenon of polarization on the Supreme Court, even as the Court in its less ideological moments has achieved high rates of unanimity when the Court deals with enforcing uniformity of decision-making in the lower courts on non-ideological questions.<sup>155</sup> When it is an issue that makes it to the front of the *New York Times*, the Justices will frequently now divide by ideology and party.

The divide has been accelerated by the rise of the “Celebrity Justice,”<sup>156</sup> a phenomenon exacerbated by social media. Justice Antonin Scalia, and later Ruth Bader Ginsburg, became rock star Justices, drawing adoring crowds who celebrate these lawyers as though they were teenagers meeting Beyoncé.<sup>157</sup> If we are thinking about the psychological effects on Justices getting affirmation that they are on the right path, cult-like worship can only make the assured even surer in their convictions. This seems especially dangerous during polarized times.

This moment of polarization could not come at a worse time. We are experiencing rapid technological change in which social media amplifies and reinforces existing ideas, and where people get exposed to information from increasingly siloed sources.<sup>158</sup> The Justices are not going to be immune from this phenomenon.

So imagine a Federalist Society-oriented Justice getting bombarded at home and in the car and while listening to podcasts at the gym with talk of a scourge

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154. Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012), <https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/> [https://perma.cc/HLX2-PMF4].

155. Hasen, *supra* note 150, at 267–68 (tracking rates of unanimous and one-vote-margin cases at the Supreme Court).

156. Richard L. Hasen, *Celebrity Justice: Supreme Court Edition*, 19 GREEN BAG 2D 157 (2016).

157. *Id.*

158. See Chesney & Citron, *supra* note 9, at 1765, 1768 (describing literature on “filter bubbles” and how social media exacerbates problem of receiving one-side information).



of “voter fraud” via FOX News, Breitbart, and Twitter, while a liberal Justice hears constant messages about the “myth of voter fraud” and attempts at voter suppression from the *New York Times*, MSNBC, and the like.

The Justices live in the real, and polarized, contemporary United States. It is worth a pause to note that one of the Justices’ spouses frequently touts unsupported voter fraud claims on social media and considered actions at polling places aimed at stopping purported non-citizen voter fraud.<sup>159</sup> This certainly must affect this Justice’s world views of the facts at issue.

When a case makes its way to the Supreme Court involving a restrictive voting law, the Justices come from their silos with different prior beliefs based upon how news has been presented to them, along with a set of legal precedents and presumptions which reinforce their own world views.

Facts should matter to these Justices, as facts always should matter when courts decide cases of social and political importance. But in an increasingly post-fact society, where political tribalism rules and is amplified by social media, and Justices are the product of the world around them, what hope do we have for reasoned deliberation and rational decision-making? Very little, as the already frayed line between law and politics stands ready to collapse.

#### CONCLUSION

The convergence of technology and hyperpolarization raise new risks to our democracy. I have tried to demonstrate that election law can help in some regards, such as through improved campaign truth-in-labeling requirements to deal with deep fakes and with improved campaign finance disclosure laws. Both types of laws would help voters become more informed in making campaign choices and give them a better sense of who is trying to sway their opinion, and how. And they could do so without interfering with robust political campaigns required by the First Amendment and desirable for an advanced democracy.

But the law can only do so much. As society divides on fundamental questions of truth, it becomes harder for everyone, including judges, to make rational decisions and accept data coming from outside informational cocoons. On this point, there seems little that can be done to prevent such divides, other than trying to pick the most open-minded judges possible.

I end this exploration of American election law in a post-truth world by briefly mentioning an even larger issue, raising the final question I noted at the beginning of this essay: Will voters on the losing end of a close election trust vote totals and election results announced by election officials when voters are

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159. Tierney Sneed, *SCOTUS Wife Ginni Thomas Floated Anti-Fraud Campaign for ‘Questionable’ Precincts*, TALKING POINTS MEMO (May 18, 2019), <https://talkingpointsmemo.com/muckraker/virginia-thomas-scotus-christian-adams-voter-fraud-campaign> [<https://perma.cc/GM9G-JMHH>].

bombarded with conspiracy theories about the reliability of voting technology and when foreign adversaries target voting systems to undermine confidence?

I have devoted an entire book to this topic,<sup>160</sup> and, to cut to the chase, I am not optimistic. Democracies depend upon election losers accepting election results and believing that the vote totals announced by election officials accurately represent the reality of the situation: that the winner of the election got more votes than the loser, or at least appeared to do so given the state of our election system.

Election scholars' primary task should be to think about how to update election laws and procedures in the post-truth era to assure continued peaceful transitions of power. People are going to be skeptical, especially when they are on the losing end of elections. Transparency and clarity are the best tools to build into law and into election processes. Transparency and clarity will not convince all skeptics. But in their absence, the volatile combination of hyperpolarization and social media wildfires threatens the bedrock of democracy itself: confidence in free and fair elections.

We owe future generations our best efforts to craft election laws recognizing the challenges that profound technological change during a period of hyperpolarization pose for our great democracy.

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160. HASEN, *supra* note 94.

