

# Saint Louis University Law Journal

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Volume 64  
Number 4 *American Election Law in a Post-Truth World (Summer 2020)*

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Article 5

5-7-2020

## Motivated Reasoning, Post-Truth, and Election Law

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### Recommended Citation

Guy-Uriel E. Charles, *Motivated Reasoning, Post-Truth, and Election Law*, 64 St. Louis U. L.J. (2020).  
Available at: <https://scholarship.law.slu.edu/lj/vol64/iss4/5>

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**MOTIVATED REASONING, POST-TRUTH, AND ELECTION LAW**

GUY-URIEL E. CHARLES\*

In his Richard J. Childress Memorial Lecture at St. Louis University School of Law, entitled *Deep Fakes, Bots, and Siloed Justices: American Election Law in a “Post-Truth” World*, Professor Richard Hasen argues that “some of today’s most urgent election law questions seem fundamentally different and less Court-centric than those of the past.”<sup>1</sup> This is because, he maintains, we now live in a “post-truth era,” abetted by “rapid technological change” and hyperpolarization, which has made it hard for voters to “separate truth from falsity.”<sup>2</sup> In his view, campaigns now “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.”<sup>3</sup> Voters are only exposed to information from people on their side, which they tend to believe, and discount information from the other side, which they distrust.<sup>4</sup>

Professor Hasen contends that election law’s court-centricity leaves election law ill-equipped to address these problems, which are fundamentally different from the ones that have preoccupied the field.<sup>5</sup> For example, in the past, the field has been concerned with the constitutionality of the Voting Rights Act, the constitutionality of campaign finance regulation, or the constitutionality of photographic voter identification requirements.<sup>6</sup> The current issues in the field, Professor Hasen argues, center around social media and technological innovations such as deep fakes and bots.<sup>7</sup> As a consequence of technological innovations in our social media landscape, coupled with polarization, voters have an increasingly difficult time of separating true information from false information. This problem is made worse when political actors deliberately

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1. Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a “Post-Truth” World*, 64 ST. LOUIS U. L.J. 535, 536 (2020).

2. *Id.*

3. *Id.* at 537.

4. *Id.* at 537–38.

5. *Id.* at 537.

6. Hasen, *supra* note 1, at 535–36.

7. *Id.* at 536.

disseminate false information into the political marketplace. The field's court-centricity makes election law particularly ill-equipped to address these two problems because polarization, which has infected American electoral institutions, particularly Congress, has also affected the Supreme Court.<sup>8</sup> Professor Hasen observes, "polarization has changed everything on the Supreme Court."<sup>9</sup> As he sees it, the problem of polarization is exacerbated by where the Justices receive their news sources.<sup>10</sup> Just as the rest of our society is "experiencing rapid technological change in which social media amplifies and reinforces existing ideas, and where people get exposed to information from increasingly siloed sources," the Court is as well.<sup>11</sup> "The Justices are not going to be immune from this phenomenon."<sup>12</sup> He thus asks, whether "we [can] 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."<sup>13</sup> Facts will matter increasingly less to the judges and the Justices just as facts matter less to the rest of society.<sup>14</sup>

In sum, Professor Hasen makes two claims. The first claim is that we are dealing with different types of election law problems today than the ones that we have dealt with in the past. Unlike the election law issues of the past, we live in a post-truth world and though we use to agree on basic facts about our world, we no longer do so. That is his major premise. His minor premise is that we will have a hard time resolving modern election law issues because election law relies on courts, in particular, the Supreme Court, to resolve election law disputes. Election law is too court-centric. This court-centricity he argues, is a problem because courts, particularly the Supreme Court, are similarly afflicted by the post-truth environment, just like the rest of society. Consequently, they cannot objectively analyze the issues and provide solutions to modern-day problems. His preferred solution is to change campaign finance laws. However, he believes that solution is unlikely to be implemented because the Justices on the Court, who live in a post-truth world, will probably not allow it.

Professor Hasen addresses some important issues in his paper and in his lecture. Specifically, his focus on deliberate misinformation and falsehoods in electoral campaigns points us to a truly challenging and difficult problem. And his argument that campaign finance regulation can only ignore the internet at its peril is a point that must be considered. But I don't think Professor Hasen has accurately diagnosed the problem. Professor Hasen's important point about misinformation is obscured by an unnecessary and conceptually inaccurate

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8. *Id.* at 563.

9. *Id.* at 564.

10. *Id.*

11. Hasen, *supra* note 1, at 565.

12. *Id.*

13. *Id.* at 536.

14. *Id.* at 566.

framing, post-truth. I disagree with his central claim that we live in a post-truth world. As I will show, the problem that he describes is not post-truth but motivated reasoning.

Second, I disagree with Professor Hasen that contemporary election law issues, as least as he describes them, are difficult to solve because our tools are too court-centric. I agree with Professor Hasen that misinformation, deep fakes, and bots are a challenge to our commitment to making electoral decisions on the basis of accurate facts and empirical realities, but courts have been addressing the problems of lying and misinformation in election law for a long time. I don't view these challenges as categorically different from the election law problems of the past. I think Professor Hasen misses the boat when he argues that court-centricity is the reason that modern campaign finance law, in particular, and election law more broadly, cannot address lying and misinformation in democratic politics. Moreover, some issues, such as the fact that campaign finance law has declared the internet a de-regulatory zone has nothing to do with court-centricity. Congress can address that problem. It is not new, nor does it depend upon courts to resolve.

Part I of this short commentary takes issue with the post-truth framing. It argues that the problem Professor Hasen identifies is not the grandiose-sounding post-truth but partisan motivated reasoning. Part II questions whether deep fakes and bots present different challenges to truth and accurate information than the ones that courts routinely address. It argues court-centricity does not put election law at a particularly distinctive disadvantage in addressing these issues. Or more precisely, the Court is not any more or less disadvantaged in addressing the challenge posed by deep fakes or bots than it is to the challenge posed by partisan gerrymandering or malapportionment. I commend Professor Hasen for focusing on some important questions—misinformation, deliberate misinformation by candidates, deliberate misinformation by supporters, foreign interference in elections, distrust in election outcomes, the integrity of voting machines. However, I think that the attempt to link all that currently ails election law as emanating from a singular phenomenon, post-truth, and a function of the purported court-centricity in election law, is unhelpful to addressing different events, with potentially different causal mechanisms, and different solutions.

#### DIAGNOSIS AND MISDIAGNOSIS: POST-TRUTH OR PARTISAN MOTIVATED REASONING?

In order to assess whether Professor Hasen has accurately identified the problem, we first need conceptual clarity on one of his key claims. Professor Hasen's animating claim is that that we live in a post-truth world.<sup>15</sup> I argue in this part that this post-truth claim is not just unnecessarily sensationalist, but

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15. *Id.* at 537.

more importantly, it is analytically unhelpful. It is hard to understand what Professor Hasen means by post-truth, but based upon the examples that he provides, Professor Hasen seems to mean that we live in a political environment where voters filter public policy issues through their partisan identities and they decide what to believe on salient public policy questions from the partisan political elites who share the voters' political identities. This is not post-truth; it is partisan motivated reasoning for which there is a long and rich literature.

To evaluate Professor Hasen's argument, we need to first understand what he means by post-truth. One obvious answer is that post-truth means the absence of objective truth. That is, we live in a world in which there is no objective truth. Professor Hasen forswears that definition. "I do not mean," he writes, that "there is no such thing as objective truth."<sup>16</sup> Another possible definition could be that there is objective truth, but our society behaves as if there is not. This seems to be closer to what Professor Hasen has in mind. Post-truth, according to Professor Hasen, refers to a world in which there are "fundamental disagreement[s] 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."<sup>17</sup> Put differently, there are objective basic facts, but we disagree about them, and there is no authority figure with the epistemic authority to resolve our factual disputes.

If this is what Professor Hasen means, he does not provide any support for it. There are lots of matters that Americans agree on from the trivial and mundane to the serious and profound. For example, Americans by and large agree that the Toronto Raptors were the champions of the National Basketball Association in 2019, even though some Americans would have wished it otherwise. More seriously, Americans by and large respect the fact that same-sex marriage is the law of the land, even though some Americans may object on moral or religious grounds. I don't read Professor Hasen as arguing that there once was a time where we agreed on basic facts, like whether African Americans are humans worthy of dignity and equality or whether women are equal to men or whether a Catholic ought to be President of the United States, but today we disagree on those basic facts. That claim is too broad to be taken seriously. Either we have always lived in a post-truth world, as defined by Professor Hasen, or we have never lived in a post-truth world, as defined by Professor Hasen. By his definition, post-truth means that we no longer agree about the fundamental facts of our world, and this claim strikes me as much too broad to do any real work.

Though Professor Hasen's definition seems too capacious to do the type of analytical work that would enable us to figure out whether we live in a post-truth world or not, he usefully provides a few examples to illustrate what he means by his nomenclature post-truth. The first example addresses partisan differences on

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16. Hasen, *supra* note 1, at 537.

17. *Id.*

climate change.<sup>18</sup> Democrats tend to believe in global warming and highly educated Democrats tend to believe that climate change is due to human activity. By contrast, Republicans tend to be skeptical about global warming and less likely to believe that humans are responsible for climate change. He cites similar partisan divides on Russian interference in the 2016 presidential election—Democrats tend to believe that the Russian government tried to interfere in the election and Republicans much less so—and on immigration.<sup>19</sup> All of Professor Hasen’s examples are about how partisanship affects decisions that are supposed to be made on the merits or facts but that are instead made on the basis of partisan identity or loyalty.<sup>20</sup>

Based on his examples, Professor Hasen’s claim appears to be that our political evaluations, instead of being based on the merits—whether they are true or not—are instead biased by our partisan lens.<sup>21</sup> In the last few years, political scientists have exhaustively documented the electorate’s partisan motivated reasoning, which researchers have concluded is a consequence of hyperpartisanship.<sup>22</sup> For issues that are politically salient, Americans generally tend to filter their policy preferences or policy evaluations through their partisan identities. Or as one political scientist noted, “partisans . . . bend reality to make it fit their preconceptions.”<sup>23</sup> Social scientists have called this phenomenon partisan motivated reasoning.<sup>24</sup> Citizens evaluate political issues through a partisan lens.<sup>25</sup> Voters tend to discount negative information about co-partisans and tend to believe negative information about people or leaders of the other

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18. *Id.* at 538.

19. *Id.*

20. *Id.* at 538–39.

21. There is a fairly robust legal literature here. See e.g., Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236 (2018); Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993 (2018); Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351 (2017); Heather K. Gerken, Commentary, *Playing Cards in a Hurricane: Party Reform in an Age of Polarization*, 54 HOUS. L. REV. 911 (2017); Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415 (2004).

22. For a review of the literature, see Charles & Fuentes-Rohwer, *supra* note 21, at 261–66.

23. Martin Bisgaard, *Bias Will Find a Way: Economic Perceptions, Attributions of Blame, and Partisan-Motivated Reasoning During Crisis*, 77 J. POL. 849, 849 (2015).

24. See, e.g., Toby Bolsen, James N. Druckman, & Fay Lomax Cook, *The Influence of Partisan Motivated Reasoning on Public Opinion*, 36 POL. BEH. 235 (2014); Thomas J. Leeper & Rune Slothuus, *Political Parties, Motivated Reasoning and Public Opinion Formation*, 35 ADVANCES POL. PSYCH. 129 (2014).

25. See, e.g., Matthew J. Lebo & Daniel Cassino, *The Aggregated Consequences of Motivated Reasoning and the Dynamics of Partisan Presidential Approval*, 28 POL. PSYCH. 719 (2017); Martin Bisgaard, *Bias Will Find a Way: Economic Perceptions, Attributions of Blame, and Partisan-Motivated Reasoning During Crisis*, 77 J. POL. 849 (2015).

party.<sup>26</sup> Additionally, they tend to take their cues on issues based upon the positions taken by leaders of their party.<sup>27</sup> As Professor Fuentes-Rohwer and I stated in summarizing the literature:

the relevant inquiry is not: What do Americans think about particular issue? Rather, the inquiry is: What do Republicans and Democrats think? Furthermore, what the rank-and-file Republican or Democrat thinks about a particular public policy issue is often strongly influenced if not determined, by the cues the rank and file receive from partisan elites and how the issue has been framed by these elites.<sup>28</sup>

Thus, what Professor Hasen refers to as post-truth is best understood as partisan motivated reasoning.<sup>29</sup>

#### PROBLEM, SYMPTOM, AND CAUSATION

Professor Hasen argues that because we live in post-truth era, it is “increasingly difficult for voters to separate true from false information relevant to information campaigns.”<sup>30</sup> This epistemic difficulty is, presumably, exacerbated by the deliberate attempts by partisans, candidates, and foreigners to deliberately spread misinformation during an election campaign. He intimates that in a post-truth era “voters on the losing end of a close election” will be less likely to “trust vote totals and elections 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.”<sup>31</sup> In view of this harm he asks whether “election law provides an avenue for preventing the erosion of truth through misinformation and synthetic media?”<sup>32</sup> His main suggestion is essentially a disclosure regime. He proposes that campaign finance law compel individuals who are disseminating misinformation to disclose their identity.<sup>33</sup> He also proposes that

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26. *Id.*

27. *Id.*

28. Charles & Fuentes-Rohwer, *supra* note 21, at 264.

29. This literature is extensive and growing. For a sample of the recent literature, in addition to the sources cited *supra* note 24 and 25, see LILLIANA MASON, *UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY* (2018); KEVIN ARCENEUX & RYAN J. VANDER WIELEN, *TAMING INTUITION: HOW REFLECTION MINIMIZES PARTISAN REASONING AND PROMOTES DEMOCRATIC ACCOUNTABILITY* (2017); ERIK W. GROENENDYK, *COMPETING MOTIVES IN THE PARTISAN MIND: HOW LOYALTY AND RESPONSIVENESS SHAPE PARTY IDENTIFICATION AND DEMOCRACY* (2013); ALAN I. ABRAMOWITZ, *THE POLARIZED PUBLIC?: WHY AMERICAN GOVERNMENT IS SO DYSFUNCTIONAL* (2013).

30. Hasen, *supra* note 1, at 536.

31. *Id.*

32. *Id.* at 537.

33. *Id.*

the government compel social media platforms “to label synthetic media containing altered video and audio images as ‘altered.’”<sup>34</sup>

Professor Hasen raises a number of important problems. He is right to focus on the problem of misinformation, including intentional misinformation using deep fakes and bots. Furthermore, I don’t quarrel with his concern that voters who voted for a losing candidate may not accept the results of the election if the election was close and if there were rumors about foreign interference or allegations that voting machines are not reliable.

In this part, I raise some objections to Professor Hasen’s general claim about misinformation. My main quarrel with Professor Hasen here is that, under the rubric of misinformation, he treats as similar a number of election law problems that are likely different, that probably have different causal origins, and more than likely different solutions. The paper does not differentiate, for example, between foreign interference in elections, intentional misinformation by candidates, intentional misinformation by supporters of the candidates, problems with voting machines, general misinformation, mistrust in election results, and the like. Some of these issues, such as the problem with misinformation in election law, is not new. Campaign finance law has long struggled with the issue of misinformation and untruths. Some commentators have advocated deregulation and more information. Others have advocated, like Professor Hasen, disclosure and substantive regulations. These are perennial debates in the field. And there is no reason to believe that courts are at an epistemic disadvantage in resolving these types of problems.

Some issues, like foreign interference with elections, have absolutely nothing to do with the courts. The problem there is Congress. Congress needs to pass laws and take measures to secure American elections against foreign attacks. Some issues, such as the reliability of voting machines or problems with ballot design, are a function of the fact that American election administration is extremely decentralized and has generally been—though this has changed and is changing—insufficiently professionalized. There is no centralized mechanism for resolving election administration disputes. Election administration might differ from one local unit to another in the same county, much less the same state, much less across states. There is no central entity that compels local election officials toward professionalization and to adopt best practices in election administration.

In addition, there is the very separate question of how partisan motivated reasoning might affect election law disputes. Take two scenarios. In the first scenario, which assumes a deeply polarized environment, candidates might be more motivated to lie about their opponents, given the low cost of broadly disseminating misinformation through social media and knowing that motivated reasoning will make it more than likely that their supporters will believe in-

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34. *Id.*



group lies. In the second scenario, a losing candidate might urge her supporters to refuse to accept the result of an election because of actual or perceived irregularities in the voting process. These are two separate phenomena. Election law and scholarship have generally believed that the answer to misinformation and disinformation is more information and counter-information. More information seems sensible—at least the burden is on someone arguing otherwise—in the misinformation campaign depicted in the first scenario. But more information might not be effective as a solution in the second scenario. If there are legitimate worries about the integrity of voting machines or that there were irregularities in the voting process, an unscrupulous loser might take advantage of the perception of election maladministration to sow distrust in the outcome. The solution here is not more information but to improve the administration of elections. These are all separate inquiries and they should be disentangled, not enmeshed together.

Professor Hasen is right to focus on the problem of the intentional deployment of misinformation to influence electoral politics. But the intentional deployment of misinformation to influence electoral politics is not new. It is not a function of a “post-truth” world. Election law has long debated whether the government can substantively prevent candidates from lying and intentional misleading the voting public.<sup>35</sup> And election law has long debated whether simple disclosure is enough to address the issue of misinformation.<sup>36</sup>

Almost fifty-years ago, the New York State Board of Elections enacted a Fair Campaign Code that, *inter alia*, prohibited attacks on a candidate based on the candidate’s race, ethnicity, and religion and prohibited misrepresentations of a candidate’s qualifications, misrepresentations of a candidate’s positions, including “scurrilous attacks.”<sup>37</sup> Two plaintiffs filed suit against the board. One of the plaintiff’s, Joseph Ferris, was a candidate for an Assembly seat. His opponent, Vincent Riccio, reported Ferris to the Board because Ferris misrepresented Riccio’s voting record.

A three-judge court had no qualms striking down the provisions of the Board’s regulations that prohibited misrepresentations of candidate’s positions and qualifications. That court noted: “Undoubtedly, deliberate calculated falsehoods when used by political candidates can lead to public cynicism and apathy toward the electoral process. However, when the State through the guise of protecting the citizen’s right to a fair and honest election tampers with what

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35. See, e.g., William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 285 (2004).

36. See, e.g., James A. Gardner, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. CHI. L. F. 892, 892–93 (1984). For a discussion of these issues outside of the election law context see Jill I. Goldenziel & Manal Cheema, *The New Fighting Words?: How U.S. Law Hampers the Fight Against Information Warfare*, 22 U. PA. J. CON. L. 81, 170 (2019).

37. See *Vanasco v. Schwartz*, 401 F. Supp. 87, 87 (E.D.N.Y. 1976).

it will permit the citizen to see and hear even that important state interest must give way to the irresistible force of protected expression under the First Amendment.”<sup>38</sup> The court exclaimed, “deliberate false statement[s] [are] constitutionally protected when uttered during the course of a political campaign.”<sup>39</sup>

Almost twenty-five years ago, in *McIntyre v. Ohio Elections Commission*,<sup>40</sup> the United States Supreme Court struck down an Ohio statute that prohibited individuals from distributing anonymous campaign literature. The Ohio Supreme Court had upheld the ordinance on the ground that it made it easier to identify individuals who disseminated false statements.<sup>41</sup> The Court stated that the Ohio statute regulates core political speech. The Court conceded that state’s interest in preventing fraudulent and libelous statements have weight and they are particular weight in the context of an election campaign, “when false statements, if credited, may have serious adverse consequences for the public at large.”<sup>42</sup> However, the Court concluded that Ohio regulates fraud directly and requiring individual’s to disclose their identity “is not the state’s principal weapon against fraud.”<sup>43</sup> Consequently, the Court concluded that the statute was overbroad.<sup>44</sup>

As these cases show, states, New York in *Vanasco* and Ohio in *McIntyre*, and courts have wrestled with the issue of false information and misinformation in political campaigns. These are the some of the fundamental questions in the domain of campaign speech. As my co-author James Gardner and I remarked in our election law casebook: “As a normative matter, if political information is critical to the electorate’s choice, shouldn’t the information be truthful? What is the best method of producing truthful information so that voters can make an informed choice?”<sup>45</sup> These are difficult questions with no easy answers, but they are not new questions. And judges have been wrestling with these questions thoughtfully for decades.

#### REGULATING MISINFORMATION?

I do not disagree with Professor Hasen that the use of technology and social media by candidates, individuals, or other entities to intentionally spread misinformation in the course of an electoral campaign raises epistemic worries.

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38. *Id.* at 100.

39. *Id.* at 91.

40. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995).

41. *Id.* at 357.

42. *Id.* at 349.

43. *Id.* at 350.

44. *Id.* at 351.

45. See JAMES A. GARDNER & GUY-URIEL CHARLES, *ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM* 634 (2d ed. 2018).

The real question is whether law—federal or state statutes or constitutional doctrine—can do much about the problem. I address that difficulty in this part.

Professor Hasen seems to be particularly concerned with the use of social media to create misinformation and with two types of modern vehicles that appear to be tailor-made to spread misinformation: deep fakes and bots.<sup>46</sup> He provides two main examples. In the first example, we are basically to imagine a scenario in which the news about Donald Trump’s Access Hollywood tape, which surfaced one month before the 2016 presidential election campaign, was fictional. In the so-called Access Hollywood tapes, Trump was recorded bragging in offensive terms about the methods he uses to have sex with women, which basically amounted to physical and sexual assault.<sup>47</sup>

His worry here is that politicians and political activists will use deep fakes to spread misinformation. He defines deep fakes as “audio and video clips manipulated using machine learning and artificial intelligence that can make a politician, celebrity, or anyone else appear to say or do anything the manipulator wants.”<sup>48</sup> He predicts, “[a]s technology improves, it is quickly getting easier even for those without great technical sophistication to use artificial technology to create” deep fakes.<sup>49</sup> Thus, “[w]ithin a few years, any politician could be made to 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.”<sup>50</sup>

Professor Hasen intimates that the only way to truly address the consequences of deliberate misinformation that uses deep fakes is for Congress to regulate it.<sup>51</sup> Though he concedes that “there are limits to how much law can help to solve these problems with our democracy,” this concession is pragmatic.<sup>52</sup> He recognizes that the Supreme Court would more than likely apply heightened scrutiny to laws regulating the substantive content of speech.<sup>53</sup> His normative preference seems to be in favor of substantive regulation. He thus argues, “[c]ourts should recognize that the government has a compelling interest in assuring voters have access to truthful political information and the tools to discover truth or falsity.”<sup>54</sup> Notwithstanding this language, Professor Hasen is

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46. Hasen, *supra* note 1, at 542–54.

47. 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-TQTQ>].

48. Hasen, *supra* note 1, at 542.

49. *Id.*

50. *Id.* at 542–43.

51. *Id.* at 545.

52. *Id.*

53. Hasen, *supra* note 1, at 545.

54. *Id.*

less than clear as to whether he is making a descriptive claim here—that under current doctrine, Congress could pass a law prohibiting the use of technology to intentionally misinform the electorate for the purposes of influencing an election and therefore should do so—or whether he is making a normative claim—that Congress ought to have the power to regulate deep fakes. He concedes that substantive regulation of deep fakes would be difficult under current doctrine while at the same time noting that the constitutional barrier would not be insuperable.

Professor Hasen offers three potential solutions to this problem but none effectively addresses the problem he sets out to address. First, he argues that “the government could prohibit. . . false speech about the mechanics of voting.”<sup>55</sup> He is certainly right that the government can do so and the government can provide true speech about the mechanics of voting, as could institutions that voters trust—their (not the other side’s) candidates, political parties, civic organizations. This is all true. But this is not the problem that Professor Hasen identified. He did not identify misinformation about the mechanics of voting. He hypothesized deep fakes about a candidate’s character (or issue position) by that candidate’s political opponents.

Second, Professor Hasen states, “nothing would prevent a government agency from declaring what is true or false about elections, politics, or 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.”<sup>56</sup> First, partisan motivated reasoning can affect whether voters believe a government agency is credible or believable on policy or politics.<sup>57</sup> Second, as I noted with Professor Hasen’s first argument, the problem identified by Professor Hasen is not about elections, politics, or policy. The problem is misinformation by political contenders in the course of an electoral campaign. Consequently, this solution is inapposite.

Third, Professor Hasen argues, “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.’”<sup>58</sup> I am less confident than Professor Hasen that the government can compel communications platforms to determine whether a third party’s communication is authentic and then to label that speech

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55. *Id.* at 548.

56. *Id.* at 549.

57. For a classic treatment, see Larry M. Bartels, *Beyond the Running Tally: Partisan Bias in Political Perceptions*, 24 POL. BEHAVIOR 117 (2002). See also Alan S. Gerber & Gregory A. Huber, *Partisanship, Political Control, and Economic Assessment*, 54 AM. J. POL. SCI 153 (2010).

58. Hasen, *supra* note 1, at 549.

as unauthentic. I think such a requirement would run headlong into the Court's compelled speech cases.<sup>59</sup> Professor Hasen seeks refuge in judicial opinions stating that heightened scrutiny may not apply to compelled speech.<sup>60</sup> He concludes, incredibly, that compelled speech of deep fakes about politics and policy is compelled "disclosure of purely factual and uncontroversial information in a commercial context."<sup>61</sup> It seems to me that deep fakes about politics and policy are core political and not commercial speech.<sup>62</sup> Moreover, if the problem is disputes about policy and politics, it is not clear why more speech by campaigns and independent fact-checkers is not sufficiently effective to respond to the problem of misinformation.<sup>63</sup>

Professor Hasen's second example is the 2017 Alabama Senate race between the Republican nominee Roy Moore and the Democratic nominee and the eventual winner of that race Doug Jones.<sup>64</sup> Supporters of Doug Jones, unbeknownst to him, created a social media campaign on both Facebook and Twitter falsely associating Mr. Moore with a campaign to ban alcohol.<sup>65</sup> The Facebook and Twitter pages purported to be from religious supporters of Mr. Moore.<sup>66</sup> These supporters of Mr. Jones were attempting to undermine Mr. Moore's campaign by attempting to link Mr. Moore with an unpopular cause.<sup>67</sup> The misinformation campaign also tried to emphasize a link between Mr. Moore and underage girls and tried to create the, false, impression that Mr. Moore's campaign was supported by Russians.<sup>68</sup> Mr. Moore's opponents created thousands of purported Russian bots that were following Mr. Moore's twitter account.<sup>69</sup>

Perhaps surprisingly, Professor Hasen's objection to the manner in which individuals, partisans, or foreigners might use social media and bots to spread

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59. See, e.g., *Riley v. Nat'l Fed'n of the Blind of N. C.*, 487 U.S. 781 (1988) (striking down a compelled disclosure requirement); *Pac. Gas & Electric v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1 (1986) (striking down regulation forbidding company from putting its own political statements on the billing statements that it sends to its customers).

60. Hasen, *supra* note 1, at 551.

61. *Id.*

62. In any event, the Court stated in *Riley* that commercial speech does not "retain[] its commercial character when it is inextricably intertwined with otherwise fully protected speech." *Riley*, 487 U.S. at 796.

63. Amanda L. Wintersieck, *Debating the Truth: The Impact of Fact-Checking During Electoral Debates*, 45 AM. POL. RES. 304 (2017).

64. Hasen, *supra* note 1, at 554.

65. 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>].

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

misinformation is not necessarily with the misinformation itself but with the fact that voters are unaware of the true identity of the individual or entity responsible for the misinformation. As he observed with respect to misinformation campaign in the Jones-Moore race, “information about the source of the influence campaign was not available to voters when they voted.”<sup>70</sup> The information “came to light only after the election through leaks to the *New York Times* and *Washington Post*.”<sup>71</sup> He argues that “Congress should extend the same rules that apply to television and radio advertisements to advertising distributed online, including via social media.”<sup>72</sup> More specifically, he proposes that “modern campaign finance disclosure law should be updated so that it requires 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.”<sup>73</sup>

This is where it is important to accurately characterize the problem. Disclosure might be useful here. But it might not. Without accounting for partisan motivated reasoning, we cannot fully assess the sufficiency of the solution. The literature on partisan motivated reasoning tells us that voters pay attention to information that affirms their priors, confirmation bias. And they also filter information in a manner that is consistent with their partisan frames. So, disclosure might worsen as opposed to alleviate the propensity of voters to make decisions on the basis of their partisan identities and not on the basis of the facts. To assess the relevance of the solution, we need a better sense of the problem.

#### CONCLUSION

One possibility is that deep fakes present a problem that is an order of magnitude different from the traditional misinformation problems that has been the staple of election law disputes. So far, though this may change, the evidence does not yet support that conclusion. In an editorial reporting the findings of an empirical study that he conducted with his co-authors on the effects of false and misleading information published on the internet and on Facebook, Professor Brendan Nyhan states:

[M]any of the initial conclusions that observers reached about the scope of fake news consumption, and its effects on our politics, were exaggerated or incorrect. Relatively few people consumed this form of content directly during the 2016 campaign, and even fewer did so before the 2018 election. Fake news consumption is concentrated among a narrow subset of Americans with the most

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70. Hasen, *supra* note 1, at 555.

71. *Id.*

72. *Id.* at 557.

73. *Id.* at 559.

conservative news diets. And, most notably, no credible evidence exists that exposure to fake news changed the outcome of the 2016 election.<sup>74</sup>

Additionally, in a separate study, Professor Nyhan and his co-authors concluded:

The role of Facebook in the spread of fake news appears to have changed. In 2016, the site differentially appeared in web traffic just before visits to fake news sites, suggesting it played a key role in enabling the spread of fake news. No such pattern is apparent in the 2018 data. This result, which echoes findings from other studies and holds with an updated set of websites we compiled before the 2018 study, suggests that the platform's efforts to limit the reach of fake news are having some impact.<sup>75</sup>

From the available evidence so far, deliberate misinformation through deep fakes has not yet had an impact on our society and it seems that the content providers are being attentive to the problem. That may change. This is an empirical question and we ought to keep our eye on how things are working on the ground.

I don't have a quarrel with Professor Hasen's point that modern campaign finance law and literature needs to think more deeply about how social media and technology should be included within the regulatory framework. I don't have a view on that point, but I think it is one that ought to be taken seriously. I do, however, object to the post-truth frame. Partisan motivated reasoning significantly tests our assumptions that voters make information about politics and policy based upon real world facts. That issue is significant enough and we ought to be paying more attention to it. Talking about post-truth undermines our ability to assess the problem correctly.

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74. Brendan Nyhan, *Why Fears of Fake News are Overhyped*, CNBC (Feb. 4, 2018), <https://www.cnbc.com/2019/02/11/why-fears-of-fake-news-are-overhyped.html> [<https://perma.cc/GR8B-DEMH>].

75. *Id.*