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## BUG OR FEATURE: THE LONG-INTERTWINED LEGACY OF DISINFORMATION, RACE, AND VOTING

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The crisis Professor Hasen despaired of in *Election Meltdown*<sup>1</sup> is already happening. His book gives a snapshot of the current moment through its confluence of rhetorical and administrative malfeasance, hyper-partisanship and disinformation, and risk of outright disaster. Hasen’s objective is to lay bare these problems and recommend short- and long-term solutions that will allow the broader democracy to endure. Any casual observer of American democratic practice would think that the lived experience of the 2020 election season picks up seamlessly from where Hasen’s account ends in 2019.

Race figures significantly in Hasen’s account. Among other things, he discusses the ramifications of *Shelby County v. Holder*,<sup>2</sup> which dismantled § 5 of the Voting Rights Act of 1965 (“VRA”) and the statute’s aftermath of strict voting regulations that appear to make it harder for minorities to vote.<sup>3</sup> This led to cases like *North Carolina Conference of NAACP v. McCrory*,<sup>4</sup> in which the North Carolina legislature targeted minorities for disenfranchisement “with almost surgical precision.”<sup>5</sup> Race is also key to Hasen’s account of the targeting of Russian disinformation agents who sought to use social media to sow distrust among minority voters in the 2016 elections.

But the fault lines of race and disinformation are even more dangerous than Hasen suggests.

Racial subordination continues to be a feature of the American electoral process. We often understand race and disinformation as “bugs” or viruses that interfere with the otherwise sensible electoral machine, and we tend to blame bad actors (like those in *NAACP v. McCrory*) for their bad acts. But I cannot help but wonder if those tied problems are—and continue to be—features of American democracy.

We often premise the fairness of the American political process on the constitutional and statutory commands against overt racial discrimination, such as those contained in the Fourteenth and Fifteenth Amendments and in the VRA.

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<sup>1</sup> RICHARD L. HASEN, *ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY* (2020)

<sup>2</sup> 570 U.S. 529 (2013).

<sup>3</sup> *Id.* at 557.

<sup>4</sup> 831 F.3d 204 (4th Cir. 2016), *cert. denied* 137 S. Ct. 1399 (2017).

<sup>5</sup> *Id.* at 214.

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From this perspective, the problems of racial subordination and disinformation are perceived as faults or bugs in otherwise legitimately functioning election infrastructure, and the law serves to correct the fault when it arises. These threats create stress for the system but, in this view, are not the system itself.

This makes perfect sense when seen through the lens of the twenty-first century, the era on which Hasen focuses. But from a longer perspective, the rhetoric of voter fraud, the alchemy of race, and the long campaign concerning the worthiness of voters shape the system in which American democracy is practiced. These devices of racial subordination are features and not mere errors or stressors just because the law as yet has failed to completely block these bad acts.

Rather than framing the task as solely about creating a firewall against specific bad actors, the task of saving American democracy is to discover a vision of election integrity that creates a structure that reverses the long trend towards allowing racial subordination through democratic structures.<sup>6</sup>

Hasen's account of twenty-first century voting wars undersells the depth of how racial subordination and democracy are intertwined and how the type of betrayal we have seen in *NCAAP v. McCrory* and similar cases echoes the long history of racial disenfranchisement. I read Hasen's account as describing the tip of the iceberg around this concern. Part of this comes from the fact that the electoral "machine" was originally written in a code of legalized segregation of worthy voters from unworthy voters through legal, societal, and extralegal mechanisms. Even after passage of the Reconstruction Amendments, the idea of racial worthiness was rewritten into American democratic practice by disenfranchisers through state level poll taxes, felon disenfranchisement laws, literacy tests, grandfather clauses, and the unfettered discretion of the voting registrar.

The VRA served as a patch that, for a time, rewrote the system. It achieved the goal that the framers of the Reconstruction amendments sought. It did so through the abolition of the aforementioned practices and the installation of a firewall against practices that emerged to replicate racial subordination through the preclearance mechanism. But the old code was not eradicated.

The Court in *Shelby County* caused part of the old racial subordination code to reemerge through gutting the practice-targeting mechanism in § 5 of the VRA. Without § 5, new practices that have raised substantial objections of racial oppression have flourished. The practices that Hasen emphasized fit within this mold of frustrating election integrity in the name of excluding legitimate voters—primarily disfavoring minorities, particularly racial minorities. The "code" of this new disenfranchisement follows the same formula as the old disenfranchisement—target disfavored people through creating barriers that implicate their status and use the patina of rational relationship to a facially

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<sup>6</sup> This recognizes that most election officials throughout the country work to administer fair elections; but the true problem is the power of legislators to reestablish the heart of the underlying structures which tend to lead to racially discriminatory outcomes.

neutral objective to avoid constitutional scrutiny. In short, the “meltdown” of repeating Jim Crow—authoritarianism has new life since *Shelby*.

I have argued that voter identification laws have this effect through increasing the indirect cost of voting, thus barring the small minority who cannot afford to take the time off or to obtain the documentation necessary to register.<sup>7</sup> Others have observed that similar outcomes exist when we consider voter purges<sup>8</sup> and proof of citizenship laws.<sup>9</sup> Similarly, the legacy of felon disenfranchisement shows that it has served as a means of exclusion through felony convictions for status crimes that have disproportionately targeted people of color.

In some ways, the modern trend of felon disenfranchisement laws shows a legacy of repair when it comes to fulfilling the democratic promise around race and exclusion. All fifty states have modified permanent felon disenfranchisement bans for most crimes (though many still require that onerous procedural hurdles be overcome before re-enfranchisement).<sup>10</sup> But the fact that the Florida legislature has circumvented the Amendment 4 referendum (to remove the permanent ban) to impose a fee-and-fine regime as a precondition to re-enfranchisement, which the U.S. Court of Appeals for the Eleventh Circuit recently affirmed<sup>11</sup> (despite a district court’s finding that this law is tantamount to an illegal poll tax<sup>12</sup>), gives weight to the argument that exclusion based on status, wealth, and race is part of the design of the American voting process.

This form of racial subordination—whether actual or perceived—taints the nature of the election integrity and voter access that Hasen so persuasively argues for in this book. Certainly, overt racism is in itself easy to target and measure and refute. The deeper challenge is the covert misinformation that the new disenfranchiser legislatures use to shape voting laws and civic life to foster the belief that heightened standards of worthiness based on baseless threats of

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<sup>7</sup> Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1053-64 (2009).

<sup>8</sup> Matt Vasilogambros, *The Messy Politics of Voter Purges*, PEW CHARITABLE TR. (Oct. 25, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/10/25/the-messy-politics-of-voter-purges> [<https://perma.cc/4KZP-ZQZH>] (noting that advocates liken voter purges to voter identification laws and other forms of voter suppression).

<sup>9</sup> Bill Chappell, *Judge Tosses Kansas’ Proof-of-Citizenship Voter Law and Rebukes Sec. of State Kobach*, NPR (Jun 19, 2018, 10:49 AM), <https://www.npr.org/2018/06/19/621304260/judge-tosses-kansas-proof-of-citizenship-voter-law-and-rebuked-sec-of-state-kobach> [<https://perma.cc/7JNJ-GSCE>] (noting disproportionate exclusionary effects of such laws).

<sup>10</sup> *Felon Voting Rights*, NAT’L CONF. OF ST. LEGISLATURES (July 28, 2020), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [<https://perma.cc/XJ5E-8DSB>] (detailing state-by-state practices concerning felon voting rights).

<sup>11</sup> *Jones v. DeSantis*, No. 20-12003, 2020 WL 5493770, at \*1 (11th Cir. Sept. 11, 2020).

<sup>12</sup> *Jones v. DeSantis*, No. 4:19-cv-00300, 2020 WL 2618062, at \*27-29 (N.D. Fla. May 24, 2020), *rev’d and vacated*, No. 20-12003, 2020 WL 5493770 (11th Cir. Sept. 11, 2020).

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massive voter-initiated voter fraud *ought* to be the norm for American democracy.

This too is part of the long history of the voter fraud myth that Hasen addresses. But it too has a long pedigree that is coupled with the history of racial voter suppression. The voter fraud myth trades on notions of worthiness of the voter and weaponizes the basic questions that the law asks the electoral system to focus on for participation—citizenship, residency, and age.

For example, proof of citizenship requirements weaponize the citizenship requirement through supposition rather than proof of rampant illegal immigrant voting. This disinformation is used to justify adding burdensome voting registration requirements like showing documentary proof of citizenship. I have called this type of disinformation the “meme of voter fraud,” and I have in my own work relied on Hasen’s and others research to trace the transmission of such memes by purveyors like Kris Kobach, Hans von Spakofsky, and President Trump.<sup>13</sup> And even though Hasen’s account demonstrates that this form of voter suppression is based on evidence that amounts to an “icicle,”<sup>14</sup> the weapon is the ability to conjure the meme of an avalanche of unworthy “illegal alien” voters who taint the process. And despite the trial outcome, the weapon still exists.

This too is a feature of our political process since the process cannot forestall the effects of the ability of our partisans to sow disinformation to their advantage with little obligation to conform to objective fact (other than the dictates of the voters). This is at the expense of entrenched minorities. The power this creates to subjugate voters is a form of majoritarian tyranny. It echoes the Jim Crow—authoritarianism and nativism of the twentieth century. And it creates perverse incentives for the self-interested partisan to decline to address these issues. For if this rhetoric (or opposition to it) can get one elected, then why solve the problem?

This lineage of the intersection of race and disinformation warp Hasen’s ultimate goal of an election integrity that will endure the coming storms. And even the coming storms are about race. The disputes we see today may presage the America of the 2040s, where the majority of voting-age citizens will be people of color and not part of the white political establishment of the previous two centuries. If my hypothesis is correct, that the racial subordination inherent in the system and the disinformation campaigns meant to justify such policies in the voting process will continue to persist due to the reliance on white-majoritarian tyranny, then one would expect the next few decades of democratic practice to be even more rife with veiled, racist, dirty tricks rather than less aggravated by perceived loss of racialized political power.

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<sup>13</sup> See generally Atiba R. Ellis, *The Meme of Voter Fraud*, 63 CATH. U. L. REV. 879 (2014); Atiba R. Ellis, *Voter Fraud as an Epistemic Crisis for the Right to Vote*, 71 MERCER L. REV. 757 (2020).

<sup>14</sup> HASEN, *supra* note 1, at 24 (discussing district court’s ruling on Kris Kobach’s non-citizen voting claims in Kansas).

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Thus, the long-term project of civil education and the betterment of American allegiance to the rule of law for which Hasen argues cannot merely represent adherence to an abstract, colorblind notion of civic duty. It must too include discerning proxies for racial voter suppression, valuing objective truth, and understanding racial disparate impact as the best supportable means to reinforce American democracy.

Ultimately I agree with Hasen that dignity of the voter ought to be the focus of an invigorated right to vote—indeed, I have written on this.<sup>15</sup> By this principle, the state’s role in cooperating with voters to affect the right to vote ought to be constrained to the boundaries of having to explain policy on objective fact and experience to justify why added constraints on the franchise ought to exist. And courts ought to strike down such justifications that lack grounding in such objective fact—particularly if they trade on racist memes. While this view should to apply equally to every voter, regardless of race or national origin, such dignity should not be colorblind, for it is precisely colorblindness in the sense of facial racial neutrality that leads to the nineteenth and twentieth centuries’ legacy of racial subordination that persists today.

A robust norm of dignity can only credibly exist when there is a conscious recognition that racial subordination is part of the code of the process and should be more aggressively rooted out. It is this long-term design flaw in the election machine, in combination with the other faults Hasen names, that undercuts American’s confidence in elections and risks furthering the meltdown.

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<sup>15</sup> See generally Atiba R. Ellis, *The Dignity Problem of American Election Integrity*, 62 HOWARD L.J. 739 (2019).