
CRACKS IN THE FOUNDATION

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When Richard Hasen wrote *Election Meltdown*,¹ he didn't yet know that Donald Trump had, in the days before taking office, openly delighted in the low turnout among Black voters.² Nor did Hasen know that the President would so brazenly push for reduced voting rates as he sought his own reelection—that he would, for example, threaten to block funding for the Postal Service in an effort to prevent mail-in voting;³ authorize his campaign to sue states for using ballot drop boxes;⁴ or insist, without citing legal authority, that he would send “law enforcement” to the polls.⁵ Of course, Hasen didn't need these data points. He had predicted it all.

In Hasen's prescient work, he identifies the four horsemen of the 2020 elections: administrative incompetence, dirty tricks, inflammatory rhetoric, and—leading the charge—voter suppression. These four phenomena are distinct, and they all pose deep threats to American elections and democracy. Yet it is the last of these four horsemen, what I call intentional voter suppression, that is dominating news cycles as November approaches. This focus is appropriate. Not only does intentional voter suppression exacerbate the three other dangers that Hasen identifies; it fundamentally undermines any meaningful effort at reform.

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

² Nolan D. McCaskill, 'It Was Great': In Leaked Audio, Trump Hailed Low Black Turnout in 2016, *POLITICO* (Aug. 23, 2020, 8:29 AM), <https://www.politico.com/news/2020/08/21/trump-black-voters-turnout-2016-398520> [<https://perma.cc/NXG8-WQ3V>].

³ Jacob Bogage, *Trump Says Postal Service Needs Money for Mail-in Voting, but He'll Keep Blocking Funding*, *WASH. POST* (Aug. 12, 2020, 8:43 PM), <https://www.washingtonpost.com/business/2020/08/12/postal-service-ballots-dejoy>.

⁴ Andy Sullivan & Jarrett Renshaw, *Ballot Drop Boxes Are Latest Battleground in U.S. Election Fight*, *REUTERS* (Aug. 20, 2020, 7:06 AM), <https://www.reuters.com/article/us-usa-election-dropboxes/ballot-drop-boxes-are-latest-battleground-in-u-s-election-fight-idUSKBN25G14I>.

⁵ Fredreka Schouten, *Trump Pledges to Send 'Sheriffs' and 'Law Enforcement' to Polling Places on Election Day, but It's Not Clear He Can*, *CNN POL.* (Aug. 21, 2020, 12:40 PM), <https://www.cnn.com/2020/08/20/politics/trump-election-day-sheriffs/index.html> [<https://perma.cc/2KMM-3XTU>].

By intentional voter suppression, I mean any action taken with the intent to make it less likely that an eligible voter's ballot will be cast or counted.⁶ The emphasis here is on *intent*; if an official makes an election-related decision with the intent to save money, for example, or with the intent to reduce administrative burden, that action may have a suppressive effect.⁷ However, it is not *intentional* voter suppression.⁸ So defined, intentional voter suppression describes only a narrow slice of election-related activity. Yet the implications of this activity are widespread and profoundly corrosive.

At its core, intentional voter suppression, particularly by those charged with election administration, cannot be reconciled with a universalist conception of voting.⁹ This universalist view has dominated mainstream American discourse (including in the courts) since the civil rights movement of the 1960s and 1970s. Under this view, the right to vote inheres in every citizen, not only those that the dominant factions wish to empower.¹⁰ Contrast this understanding with what came before it: a world in which it “was perfectly within the bounds of ordinary political discourse to argue that some citizens were too ignorant, incompetent, corruptible, racially inferior, or poor to deserve the voting rights of full, first-class citizens.”¹¹ It is impossible to overstate the injustice that accompanied this prior regime. Officials openly and aggressively suppressed the votes of Black citizens, among others, in order to maintain a system of oppression that was designed to subordinate those whose votes had been suppressed. This toxic cycle caused unacceptable harm and undermined democratic legitimacy. The country's transition to a universalist conception of voting—coupled with meaningful mechanisms to effectuate it, such as the Voting Rights Act—constitutes one of the most profound advances in civil rights and democratic governance in the history of America and beyond.

⁶ See Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 216.

⁷ Like Hasen, I am reluctant to endorse, even by passing reference, the idea that officials might legitimately engage in a range of suppressive measures for the purpose of combatting “voter fraud”—a concept that, in Hasen's language, has been repurposed to serve as a “sham perpetrated by people who should know better, advanced for political advantage.” HASEN, *supra* note 1, at 128.

⁸ Under my definition, if the official has a mixed intent that also includes the desire to make it harder for eligible voters to cast a ballot or have it counted, that action still would qualify as intentional voter suppression. And unless the official would have taken the same action in the absence of that impermissible intent, it should be considered unconstitutional. See Manheim & Porter, *supra* note 6, at 250.

⁹ See *id.* at 240-41.

¹⁰ It is true that the U.S. Supreme Court has sanctioned (and the U.S. population largely has accepted) a small number of exceptions to this principle of universality, including those relating to age, residence, felon status, and mental capacity, as well as citizenship status. The brevity of this list helps to prove the general rule.

¹¹ Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1342-43 (2011).

For half a century, this broad conception of voting rights has survived, despite persistent efforts to undermine it. To take one of many examples, when Senator Cindy Hyde-Smith of Mississippi was caught on camera in 2018 arguing that she didn't want "liberal folks" to vote and that it would be "great" to make the process more difficult for them, she did not double down on this assertion when it received widespread coverage. Instead, her team insisted that the comment was a joke and that the video was misleading.¹² This pattern of denial is common among those seeking to suppress votes. While it is easy to dismiss the pivots as disingenuous, that is beside this particular point: disingenuous or not, these denials help to confirm the power that this universalist conception of voting has, even among those not genuinely committed to the idea. This resilience is important. Assuming history is any guide, voting in this country—not to mention the state of society more generally—is fundamentally more unjust and undemocratic when officials, judges, and others in power openly endorse the idea that the state should facilitate the ability of only some people to vote.

Despite the resilience of this universalist conception of voting, there is no guarantee that a nation or community will remain committed to it. And one of the problems with intentional voter suppression is that it gives credence, at least on the margin, to a more restrictive view of the franchise—one where incumbents decide who is worthy of a vote. This effect threatens to be particularly pronounced when intentional voter suppression is brazen, officially endorsed, or not resoundingly condemned.

In light of these stakes, *Election Meltdown* is right to lead with voter suppression, rather than the other three dangers that Hasen identifies. Of course, they too require attention. Take administrative incompetence. There is no question that it warrants concern. It's just that any competence-related reform relies on a universalist understanding of the franchise; otherwise, the anxiety shifts to whether officials will use this "competence" to prevent some voters from casting a ballot. Likewise, the existence of dirty tricks (which Hasen implicitly defines as illegal or near-illegal activity that disrupts the voting process or manipulates public opinion) unquestionably justifies close attention. It's just that the dirtiest of tricks—widespread disenfranchisement, de facto or otherwise—is suddenly on the table if a community wavers in its commitment to universal voting rights. (Moreover, "dirty tricks" can become "lawful measures" once those in power change the rules.) Finally, inflammatory rhetoric also warrants concern. It's just that, at some point, it becomes appropriate—not inflammatory—to object to an election's legitimacy on the grounds that the state has actively undermined voters' ability to cast ballots.¹³

¹² Michael Brice-Saddler, *GOP Senator: It's a 'Great Idea' to Make It Harder for 'Liberal Folks' to Vote*, WASH. POST (Nov. 16, 2018, 10:08 PM), <https://www.washingtonpost.com/politics/2018/11/16/cindy-hyde-smith-its-great-idea-make-it-harder-liberal-folks-vote>.

¹³ It is impossible to identify with precision—as a matter of theory or description—when exactly this line has been crossed. Cf. James A. Gardner, *Democratic Legitimacy Under*

Despite these overlaps, Hasen persuasively makes the case that all four of these dangers threaten the country as it heads into a presidential election and, accordingly, that each necessitates reforms. And he's right to note that "less sexy" proposals, such as those associated with technical improvements to online voter registration, often get overlooked amid heated fights over voter suppression. Hasen may even be correct to suggest, as an illustration, that, in a world in which such numbers were knowable, "many more votes may be saved by competent election administration than by stopping voter ID laws."¹⁴ Despite these observations, the entire house is built on a foundation—a universalist understanding of voting rights—that intentional voter suppression has been jackhammering. Anyone committed to democracy-minded reforms must be hypervigilant regarding these destructive effects.

There are, in Hasen's words, "no miracle cures."¹⁵ Still, there are options. Voters could, and should, cast their ballots to oust any official who engages in voter suppression. This electoral check does not always work—see, for example, the 2018 gubernatorial election in Georgia,¹⁶ among others—but at times it does, with voter suppression rightfully spurring some constituents to get out and vote. Legislative reforms could also help. One option would be to pull administration of elections apart from electoral accountability. Stated otherwise, jurisdictions could insulate election administrators from political pressure. This approach has great potential so long as the reforms can ensure no corruption or capture. As for the courts, they could, and should, push back against intentional voter suppression by clarifying that the practice is unconstitutional—a basic step that the Supreme Court has failed to take.¹⁷ Courts truly committed to a universal conception of voting rights could go even further by coupling this declaration of unconstitutionality with a burden-shifting regime that would help to suss out illicit intentions.¹⁸

But perhaps most important, from a long-term perspective, is education. Out of context, it may be difficult to convince some people of the profoundly high stakes implicated by fighting over a drop box in Philadelphia or calling for poll

Conditions of Severely Depressed Voter Turnout, U. CHI. L. REV. ONLINE, (June 26, 2020), <https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-gardner/> [<https://perma.cc/4SUP-GZES>] (identifying scenario in which an election is "so thoroughly compromised" by these sorts of problems that it triggers "a full-blown crisis of regime illegitimacy" and describing tipping point as "entirely a matter of inherently standardless political judgment"); *see also id.* (concluding that, notwithstanding these difficulties of measurement, recent developments reveal that "the risks to democratic legitimacy from low turnout [in the 2020 elections] are disturbingly high").

¹⁴ HASEN, *supra* note 1, at 131.

¹⁵ *Id.* at 127.

¹⁶ Maggie Astor, *Georgia Governor Brian Kemp Faces Investigation by House Panel*, N.Y. TIMES (Mar. 6, 2019), <https://www.nytimes.com/2019/03/06/us/politics/governor-brian-kemp-voter-suppression.html>.

¹⁷ *See* Manheim & Porter, *supra* note 6, at 224-32.

¹⁸ *Id.* at 248-54.

watchers in Atlanta—much less “joking” about making it harder for some classes of voters to vote. But in the context of history, the stakes are clear. The universalist conception of voting stops feeling like a debatable abstraction and instead reveals itself to be what it is: a moral, political, and practical imperative.