
PUTTING A BAND-AID ON A GUNSHOT WOUND

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Over the last two decades, Professor Richard L. Hasen has been a trusted source of vital information and insight into the arcane field of election law for the public and scholars alike. Years ago, when such tools were relatively new, Hasen created an indispensable listserv for scholars, journalists, and practitioners who continue to receive a free near-daily roundup of news stories, reports, and developments in the law concerning elections, voting rights, and campaign finance. Through this platform and his prolific journalism and scholarship, Hasen has built a well-deserved reputation as one of the nation's top experts on election law.

*Election Meltdown: Dirty Tricks, Distrust, and the Threat to American Democracy*¹ is Hasen's fifth book for a nonspecialist audience. In it, he sounds the alarm and argues that trust in our electoral institutions is being dangerously eroded by four features of American partisan politics: an escalation in voter suppression tactics and laws, pockets of incompetent election administration, the persistence of campaign dirty tricks, and the increase of incendiary and false rhetoric about nonexistent voter fraud and rigged elections such as that routinely spewed by our norm-busting president. The corrosion of confidence in the fairness and accuracy of our elections threatens the peaceful transition of power that is a hallmark of democratic societies. In the concluding chapter, Hasen presents reforms he argues will lessen the risk of an election meltdown and will mitigate the corrosive impact our hardened politics are having on the public's faith in elections as mechanisms of democratic self-government.

This could not be a more timely book, and, building on Hasen's earlier analysis of our electoral dysfunction, *The Voting Wars*,² it strengthens the case for the reforms Hasen has been advocating for many years. What reasonable person would be against challenging laws passed with either the intent to suppress voting or simply the effect of suppressing voting, or both; improving election technology to enhance election security; providing better training and more resources for election administration; or even legislating to establish clear, national standards for fair electoral procedures?

Hasen's book was published right before the COVID-19 pandemic shut down the economy and disrupted our lives beyond recognition. It became clear pretty

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

² RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (2012).

quickly that we were going to need to make a huge shift to mail balloting for the 2020 election cycle, which immediately raised a whole host of problems of the kind Hasen fastens on in *Election Meltdown*. The infrastructure for running a national election by mail simply did not exist nor was it easy to see how it could be built in the time available or in the face of Republican intransigence to fund necessary upgrades to state and local election administration and machinery.³

To his enormous credit, Hasen convened an ad hoc task force to quickly come up with concrete short-term actions that leaders, election administrators, and the media could take to shore up public confidence in what will be an unprecedented mail ballot election.⁴ Again, the call to action in the task force's report is reasonable and achievable, and in fact, a number of states are acting to reduce restrictions on absentee balloting, to expand its availability, and to prepare for polling place voting options that observe safety recommendations promoted by public health experts;⁵ public education campaigns have been launched by a wide range of organizations to help inform voters of what for many are new rules and procedures for casting their ballots;⁶ and social media companies have begun to act more aggressively toward misinformation about the elections spread across their platforms.⁷

And there are more ideas in the book. A number of them call for bipartisan leadership to promote core democratic principles of procedural fairness, including fraud-free administration of elections, equal access to voting, full and inclusive participation, and the importance of acceptance and validation by the losers of an election's results. The strength of *Election Meltdown* is its clarity in identifying recognizable problems that can be solved and showing through expert storytelling how they could combine to cause catastrophic failure in the administration of the upcoming general election.

Where I differ with Hasen is in his assessment of the impact of "election meltdown" on trust and confidence in our electoral institutions and his deliberate

³ See Alexa Corse & Lindsay Wise, *Senate GOP Coronavirus Package Omits Additional Elections Funding*, WALL STREET J. (July 29, 2020, 11:34 AM), <https://www.wsj.com/articles/senate-gop-coronavirus-package-omits-additional-elections-funding-11596036853> [<https://perma.cc/WHK8-K99G>].

⁴ Press Release, Univ. of Cal., Irvine Sch. of Law, Fair Elections During a Crisis: Bipartisan and Diverse Blue-Ribbon Group of Scholars and Thinkers Releases Report on Urgent Changes Needed for November U.S. Elections (Apr. 28, 2020), <https://www.law.uci.edu/news/press-releases/2020/fair-elections-report.html> [<https://perma.cc/F7L7-DJDM>].

⁵ See *COVID-19 and Elections*, NAT'L CONF. ST. LEGISLATURES (July 2, 2020), <https://www.ncsl.org/research/elections-and-campaigns/state-action-on-covid-19-and-elections.aspx> [<https://perma.cc/5GQ4-EPG8>].

⁶ See, e.g., SAFE ELECTIONS NETWORK, <https://www.safeelectionsma.org/> [<https://perma.cc/M7ZP-L4P3>] (last visited Sept. 23, 2020).

⁷ See, e.g., Yoel Roth & Nick Pickles, *Updating Our Approach to Misleading Information*, TWITTER (May 11, 2020), https://blog.twitter.com/en_us/topics/product/2020/updating-our-approach-to-misleading-information.html [<https://perma.cc/NW7L-3R3X>].

avoidance of the politics of election meltdown. At a symposium on *Election Meltdown* earlier this year,⁸ Hasen's friendly critics offered a similar critique, that the problems he diagnoses are but symptoms of much deeper systemic and structural flaws in our constitutional order. While I do not disagree that incompetent election administration, misinformation campaigns, and voter suppression laws are huge problems that must be addressed, I think that the causes of declining public confidence in free and fair elections are much deeper and that they can only be addressed through politics. I do not think Hasen would disagree, but because he rejects a political analysis, one is left a bit puzzled about why, for example, he thinks there is such a deep partisan divide over support for voter photo identification laws, or who is funding misinformation campaigns that target Black neighborhoods, or why Republicans in Congress have refused to support needed federal resources for election administration during a global pandemic.

Procedural reform is necessary and achievable, and Hasen is well aware of all of the good ideas out there for protecting the right to vote and ensuring electoral integrity. But procedural reform does not get us very far if the problem is persistent lying about voter fraud and rigged elections by the highest source of political authority in the country—the President of the United States—supported by elected officials in his own political party, promoted as propaganda by a media organization with the highest ratings of any news programming in the United States (Fox News),⁹ and then spread like a cancer on the body politic through social media.

How did we get here? As noted, Hasen's book deliberately does not take up the bigger political questions, but I am not convinced that the strategy of focusing on what we may be able to achieve will have the outcome he hopes for. To be clear, Hasen does not seem entirely convinced himself. He says that, "coming up with short-term solutions to defuse potential nightmare 2020 scenarios in a Trumpian polarized society is somewhat of a fool's errand";¹⁰ he concludes, "The bottom line is that there are no miracle cures."¹¹ He sees that there is "no easy way out should the [2020] election be extremely close or targeted for manipulation of the results"¹² and that his longer-term preferred reforms of moving toward nonpartisan election administration and improving civics education "feel a little like putting a band-aid on a gunshot wound."¹³

⁸ Jack Balkin, *Symposium on Richard L. Hasen, Election Meltdown: Collected Posts*, BALKINIZATION (Mar. 9, 2020, 9:30 AM), <https://balkin.blogspot.com/2020/03/symposium-on-richard-l-hasen-election.html> [<https://perma.cc/WT9D-FW7M>].

⁹ Michael M. Grynbaum, *Boycott or Not, Fox News Bolts Past Networks*, N.Y. TIMES, Aug. 10, 2020, at A1.

¹⁰ HASEN, *supra* note 1, at 125.

¹¹ *Id.* at 127.

¹² *Id.*

¹³ *Id.* at 125.

Well-run, transparent elections are, of course, important to the public's trust in outcomes, especially for those on the losing side. But they cannot begin to address the more important sources of delegitimation. Consider, for example, the obscene levels of influence peddling via the way we finance political campaigns and the anti-democratic functioning of the Electoral College. Both problems will likely require constitutional amendments to rectify and align our politics with core democratic values like political equality. Hasen has responded to this criticism by arguing for the tractability of administrative reforms and stepped up civic leadership and education as more "prudent" and of higher priority than removing the distortions of the Electoral College and the outsized influence of wealth in determining electoral outcomes.

But it is those outcomes themselves that now threaten democracy and undermine public faith in our political institutions. It is not clear at all that a better run election in Florida in the 2000 presidential contest, the absence of Florida's severely restrictive felony disfranchisement laws, or even nonpartisan election administration at the time would have produced a different national winner. If we directly elected the president, however, the debacle in Florida would have been worrisome, but it is difficult to believe that Americans' faith in their political institutions would have been as challenged as it was when in an unprecedented and partisan-motivated move, the Supreme Court intervened to stop the state's recount and give us a President who lost the popular vote by hundreds of thousands of legitimate ballots.¹⁴

I would argue that the consequences of this action contributed more to shake faith in our electoral institutions than did Florida's performance in the election because we not only got a president who came to office when courts stopped a recount but then his leadership further undermined trust in government, which had been increasing under his predecessor.¹⁵ What happened in 2000 had inevitable negative consequences for public confidence in elections.¹⁶

¹⁴ See *Bush v. Gore*, 531 U.S. 98, 110-11 (2000).

¹⁵ *Public Trust in Government: 1958-2019*, PEW RES. CTR. (Apr. 11, 2019), <https://www.pewresearch.org/politics/2019/04/11/public-trust-in-government-1958-2019/> [https://perma.cc/L32W-ETVK].

¹⁶ We only need remind ourselves of the price we have paid in blood and treasure for George W. Bush's reckless and unjustified war in Iraq. Putting the country on a permanent war footing, as Bush did, has meant a vast expansion of the surveillance state that consumes GDP at an unsustainable rate and threatens civil liberties for all Americans. The Bush Administration also laid the foundation for the Trump Administration's dangerous politicization of the Justice Department when it fired U.S. attorneys for failing to engage in the political theater of bringing voter fraud charges and when it sanctioned torture with flimsy official legal opinions to support the Administration's human rights violations. And lest we not further forget, the collapse of the housing and then financial markets—which destroyed trillions of dollars of wealth and forced millions of ordinary Americans into financial ruin—was a direct consequence of deregulation. It is true that Democrats and Republicans alike have advanced such deregulation, but nevertheless it was brought to a crisis point through the negligence of the Bush Administration.

Elections matter, which takes us back to where we began with Hasen's analytical decision to locate the key drivers of election meltdown in procedural competence and fairness rather than politics. I agree with Hasen's well-intentioned reforms, and I agree that we should pursue them with haste. But it is important to not overstate their likely impact on the core problem of political legitimacy at the root of his diagnosis of election meltdown.