

# ASSESSING THE VALIDITY OF AN ELECTION'S RESULT: HISTORY, THEORY, AND PRESENT THREATS

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*In the wake of President Trump's acquittal in the Senate impeachment trial, and even more so because of the COVID-19 pandemic, the United States will need to hold a presidential election in unprecedented circumstances. Never before has an incumbent president run for reelection after the opposing party in Congress has declared that the fairness of the election cannot be "assured" as long as the incumbent is permitted on the ballot. Nor have states been required to plan for a November presidential election not knowing, because of pandemic-related uncertainties, the extent to which voters will be able to go to the polls to cast ballots in person rather than needing to do so by mail. These uniquely acute challenges to holding an election that the public will accept as valid follow other stresses to electoral legitimacy unseen before 2016. The Russian attack on the 2016 election caused Americans to question, in an unprecedented way, the nation's capacity to hold free and fair elections.*

*Given these challenges, this essay tackles the basic concept of what it means for the outcome of an election to be valid. Although this concept had been considered settled before 2016, developments since then have caused it to become contested. Current circumstances require renewing a shared conception of electoral validity. Otherwise, participants in electoral competition—winners and losers alike—cannot know whether or not the result qualifies as authentically democratic. Accordingly, after reviewing the history that has led to the present difficulties, this essay offers a renewed conception of electoral validity. This essay then explains the theoretical basis for this renewed conception and applies it to some of the most salient threats to electoral validity that are foreseeable in the upcoming 2020 election, as well as in future elections.*

*In brief, the proposed standard of electoral validity distinguishes sharply between (1) direct attacks on the electoral process that negate voter choice and (2) indirect attacks that improperly manipulate voter choice. Direct attacks undermine electoral validity, whereas indirect attacks do not. It is essential, however, that the category of direct attacks encompasses both the disenfranchisement of eligible voters—which prevents*

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\* Copyright © 2020 by Edward B. Foley, Ebersold Chair in Constitutional Law & Director, *Election Law @ Moritz*, at the Ohio State University Moritz College of Law. I am grateful for the opportunity to present earlier versions of this essay at a University of Southern California symposium and a University of Iowa workshop. I very much appreciate all of the constructive feedback received at those events, especially the comments of Abby Wood (who served as discussant at the USC symposium). Josh Douglas and Chad Flanders read an earlier draft and provided very valuable input. Also, I had the opportunity to discuss some of the ideas in this essay during the first episode of the new podcast "Free and Fair with Franita and Foley." See *Are Our Elections Free and Fair?*, FREE & FAIR WITH FRANITA & FOLEY (Feb. 2020), <https://soundcloud.com/freeandfair>. I am deeply appreciative of that discussion and, more generally, the ongoing collaboration with my podcasting partner, Franita Tolson.

*them from casting a ballot—as well as the falsification of votes reported in the tallies of counted ballots.*

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## INTRODUCTION

This topic is urgent. Voting in the 2020 election has already occurred, at least in the primary phase of the process. The November general election is only a few weeks away. Yet, as America undertakes what many people view as the most important presidential election in decades,<sup>1</sup> the nation lacks a shared conception of the standard by which the success—or failure—of the

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<sup>1</sup> Steve Schmidt, John McCain’s campaign strategist, called this year’s election the most important since at least 1940 and perhaps since 1864. *Campaign HQ with David Plouffe: Steve Schmidt on New Hampshire and the General*, APPLE PODCASTS (Feb. 5, 2020), <https://podcasts.apple.com/us/podcast/steve-schmidt-on-new-hampshire-and-the-general/id1479487160?i=1000464672934>; see also Reid Wilson, *On the Trail: Why 2020 Is the Most Important Election in Our Lifetime*, THE HILL (Jan. 26, 2020, 8:30 AM), <https://thehill.com/homenews/campaign/479580-on-the-trail-why-2020-is-the-most-important-election-in-our-lifetime> (“The presidential contest . . . will represent perhaps the starkest choice between two competing visions for the nation’s future since the elections of 1860 that set the Union on course for a civil war.”). The hyperbole could be even greater. See Edward-Isaac Dove, *Why 2020 Is the Most Consequential Election Ever*, THE ATLANTIC (May 17, 2019), <https://www.theatlantic.com/membership/archive/2019/05/why-2020-most-consequential-election-ever/589732>.

election as an exercise of democracy should be judged.

This situation is dangerous. How do you know if electoral accountability—the essential idea from the Declaration of Independence that “Governments . . . deriv[e] their just powers from the consent of the governed”<sup>2</sup>—is or is not working if you do not have a standard by which to make this determination? For unique historical reasons, America is currently rudderless in this respect. Yet, for some of the same historical reasons (most especially, the first reelection bid of a president impeached because of improper conduct specifically related to that reelection effort),<sup>3</sup> America needs now, more than ever, a collective measure of its own capacity for self-government. Specifically, the very same factors that have created the acute level of polarization and acrimony in contemporary American politics—including the impeachment and acquittal of President Trump—are the reasons why the 2020 presidential election will be so precarious, particularly so if Americans are as divided on what counts as a successful election as they are on which party’s candidate should win.<sup>4</sup>

A healthy democracy requires competitive elections. No one-party state is a flourishing democracy.<sup>5</sup> But competitive elections require some shared premises among the political parties that compete, even fiercely, to win.<sup>6</sup> Since the emergence of two-party electoral competition in America, first in the 1790s and then more thoroughly in the 1830s, there has largely been a shared commitment to conducting electoral competition according to some basic principles and established ground rules, including the idea of a “loyal opposition” and that political parties take turns in holding the reins of government depending on the changing preferences of the electorate.<sup>7</sup> Yet

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<sup>2</sup> DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>3</sup> H.R. REP. NO. 116-346, at 2 (2019) (providing the report of the House of Representatives’ Committee on the Judiciary outlining the impeachment of President Trump for, amongst other crimes, abuse of power, as demonstrated by efforts to “solicit[] the interference of a foreign government, Ukraine, in the 2020 United States Presidential election”).

<sup>4</sup> The literature on the hyperpolarization of contemporary politics is becoming voluminous. One excellent place to start is EZRA KLEIN, *WHY WE’RE POLARIZED* (2020) (providing a discussion of the current polarized state of our nation and describing the way in which loyal partisans rationalize their party’s actions and support their candidates).

<sup>5</sup> For one example, consider Putin’s Russia. See Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 555 (2018) (describing Russia as having “fallen completely out of the family of global democracies”).

<sup>6</sup> On the essential role of norms in a democracy, including specifically—and especially—the norm of fair play, see DANIEL ZIBLATT & STEVE LEVITSKY, *HOW DEMOCRACIES DIE* 9 (2018). See also Brendan Nyhan, *Norms Matter*, POLITICO MAG. (Sept./Oct. 2017) (stating that norms “reflect a commitment to a set of shared rules and values that is an important indicator of the health of our politics”).

<sup>7</sup> The essential text on this point remains RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840*, at 122, 258 (2d prtg. 1970).

the growing sense that American politics is now a game played for keeps provides reason to fear that these shared premises have deteriorated precipitously in the last several years since the 2016 election,<sup>8</sup> and even more so with the circumstances surrounding President Trump's impeachment and acquittal.<sup>9</sup>

While this fear broadly concerns the norms and practices of democracy, the focus here is the specific norm of electoral validity. This norm requires the political parties, the candidates, their supporters, and the citizenry writ large to share an understanding of what makes the outcome of an election valid, entitling the winner to govern in the name of democracy and prompting the loser to accept defeat as a result of the electorate's expression of its will.<sup>10</sup> Other aspects of democracy are important, but this norm is

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<sup>8</sup> See, e.g., Patrick Healy & Jonathan Martin, *Donald Trump Won't Say If He'll Accept Result of Election*, N.Y. TIMES (Oct. 19, 2016), <https://www.nytimes.com/2016/10/20/us/politics/presidential-debate.html> (noting that during a 2016 presidential debate, then-candidate Trump made "a remarkable statement that seemed to cast doubt on American democracy," asserting "that he might not accept the results of next month's election if he felt it was rigged against him"); Daniel Block, *How Trump Could Lose the Election and Remain President*, WASH. MONTHLY (Apr./May/June 2019), <https://washingtonmonthly.com/magazine/april-may-june-2019/how-trump-could-lose-the-election-and-remain-president> (discussing what may occur if President Trump loses the 2020 election, yet refuses to concede); see generally LAWRENCE DOUGLAS, WILL HE GO?: TRUMP AND THE LOOMING ELECTION MELTDOWN IN 2020 x, 4–5 (2020) (discussing election experts' concerns about the possibility that Trump loses the 2020 election, but refuses to acknowledge or accept his defeat). The necessity of politics being a recursive game, with each side willing to win or lose a turn at a time, rather than attempting to achieve a permanent victory, is a point repeatedly emphasized by Ezra Klein. See Emily Heller, *5 Books Making the Case that American Democracy Is in Trouble*, VOX, <https://www.vox.com/2018/4/23/17268250/ezra-klein-show-book-recommendations-yascha-mounk-democracy-amazon> (last updated Apr. 23, 2018, 4:30 PM) (discussing Klein's views on this point). Conservatives have increasingly viewed politics in such do-or-die existential terms, as indicated by the pre-2016 essay, *The Flight 93 Election*. Publius Decius Mus, *The Flight 93 Election*, CLAREMONT INST. (Sept. 5, 2016), <https://claremontreviewofbooks.com/digital/the-flight-93-election>. See Conor Friedersdorf, *An Attack on Founding Principles at the Claremont Institute*, THE ATLANTIC (Sept. 9, 2016), <https://www.theatlantic.com/politics/archive/2016/09/an-attack-on-founding-principles-at-the-claremont-institute/499094> (criticizing the Flight 93 article and arguing that its arguments are a radical departure from traditional conservatism).

<sup>9</sup> See *infra* Part I.E.

<sup>10</sup> On the need for losers to accept defeat, see generally EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* (2016). If the candidate and party that lose an election do not accept defeat as the valid product of the electorate's will, then the winners must govern through the exercise of raw military force, and not based on voluntary acceptance of the result. See RICHARD L. HASEN, *ELECTION MELTDOWN* 12–13 (2020) ("The central norm at stake . . . is the peaceful transition to power after hard-fought but fair elections. . . . Democracy takes work, and it begins through recognition of the stresses on the American system of producing clear and fair winners and losers.").

especially so.<sup>11</sup> Elections are at the heart of democracy. Therefore, knowing when an election is or is not valid is essential to successfully operating a democracy. (Otherwise, how can we tell whether we are operating government “by the people”?) Hence the urgency of the concern that America is entering the 2020 election without this crucial component of the electoral enterprise.

This essay, like Caesar’s Gaul and so much else, has three parts. First is history—more specifically, a form of intellectual history that offers a brisk overview of America’s conception of what makes the outcome of an election valid. Second is theory, in particular a bit of philosophizing, including suggesting some analytic clarity, on what America’s conception of electoral validity should be going forward in this crucial election year and in the future. Third is a more practical survey of the current threat environment, which potentially challenges America’s ability to conduct an election in 2020 that satisfies a shared conception of electoral validity—assuming the nation can settle upon a shared notion for purposes of making this assessment—as well as a few words on what constructively might be done to mitigate identifiable threats.

## I

### THE IDEA OF ELECTORAL VALIDITY: A BRIEF HISTORY

It is hard to imagine a period in U.S. history when Americans have been more confused about how to know whether their elections can be relied upon to produce outcomes worthy of acceptance as a valid exercise of popular sovereignty.

America’s self-conception as a democracy has always been somewhat muddled.<sup>12</sup> The Constitution purports to speak for “We the People,”<sup>13</sup> but of course it was ratified through a process that eliminated a majority of American adults from the eligible electorate. Women could not vote, excluding half the population, and on top of that, slavery and property qualifications denied many more Americans the right to exercise the

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<sup>11</sup> See ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989). America recognized this early in its history when, after the contentious election of 1800, John Adams and the Federalist party ceded power to Thomas Jefferson and his Jeffersonian supporters in what was the first peaceful transition of presidential—and thus federal executive—authority from one party to another. See, e.g., *Creating the United States: Peaceful Transition*, LIBR. OF CONGRESS, <https://www.loc.gov/exhibits/creating-the-united-states/peaceful-transition.html> (last visited June 29, 2020).

<sup>12</sup> For a masterful exploration of the basic tensions in America’s self-understanding throughout its history, see generally JILL LEPORE, *THESE TRUTHS* (2018).

<sup>13</sup> U.S. CONST. pmb1.

franchise.<sup>14</sup>

Even so, at its founding, America had a workable, or serviceable, conception of electoral validity—meaning it worked, or served, well enough to settle disputes over electoral outcomes that occurred in the era. This workable conception translated roughly into accurately counting all the votes cast by eligible voters.<sup>15</sup> An election that satisfied this standard would be deemed valid, even though the eligible electorate was severely restricted. Conversely, an election that did not meet this standard—like, arguably, New York’s gubernatorial election of 1792—could be condemned as an undemocratic breach of electoral validity, and thus popular sovereignty, without opening up for argument who should have been eligible to cast ballots in the first place.<sup>16</sup>

#### A. 1876: Disenfranchisement and Missing Votes

There have been times when this workable conception of electoral validity has been sorely tested. In the disputed Hayes-Tilden election of 1876, there was a monumental clash over the standard, or principle, by which to judge the validity of the election’s outcome. The Democrats in support of Tilden were stressing this workable conception, as it had developed over the nation’s first century.<sup>17</sup> Their outrage was over the fact that Republicans were stuffing the ballot box with invalid votes, committing electoral fraud that was flatly inconsistent with the basic functional conception of electoral validity

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<sup>14</sup> See ALEXANDER KEYSAR, *THE RIGHT TO VOTE* xx–xxi (2000) (providing a historical account of the franchise).

<sup>15</sup> See FOLEY, *supra* note 10, at 12–13.

<sup>16</sup> See *id.* at 49–61; see also Edward B. Foley, *The Founders’ Bush v. Gore: The 1792 Election Dispute and Its Continuing Relevance*, 44 *IND. L. REV.* 23, 26–27 (2010) (framing the disputes from the 2000 election in the context of the 1792 election). The 1792 dispute is especially useful not only because John Jay, one of the *Federalist Papers* authors, was a candidate in this gubernatorial election, but also because other Founders—including Hamilton, Madison, and Jefferson—all opined on how the dispute should be handled in light of their collective Founding commitment to the republican principle of popular sovereignty. See JOHN STILWELL JENKINS, *HISTORY OF POLITICAL PARTIES IN THE STATE OF NEW YORK* 42 (1846) (noting that John Jay was nominated as a New York gubernatorial candidate in 1792); see also Akshitha Ramachandran & William L. Wang, *Law Professor Recounts U.S. Disputed Elections*, *HARV. CRIMSON* (Oct. 21, 2016), <https://www.thecrimson.com/article/2016/10/21/edward-foley-election-disputes-hks> (noting that in “the hotly contested 1792 New York gubernatorial election between John Jay and George Clinton . . . founding father Alexander Hamilton advised Jay to concede defeat”). Disagreements among the Founders over this dispute, as well as fascinating and illuminating details of this historically rich narrative, should not obscure the larger point relevant here: An accurate count of ballots cast, which matched the electoral preferences of the eligible voters who cast those ballots, would be considered a valid election according to the Founders and their view of elections as an instrument of republican self-government.

<sup>17</sup> See FOLEY, *supra* note 10, at 121–25 (providing an overview of the Hayes-Tilden dispute).

as the obligation to abide by an accurate count of valid votes.<sup>18</sup>

Republicans supporting Hayes, however, cried foul about something else that occurred in the 1876 election: the systematic disenfranchisement of eligible voters—mostly African Americans—conducted largely through terror campaigns perpetrated by white supremacist Redeemers along the lines of the KKK and other similar organizations.<sup>19</sup> This complaint was not about an inaccurate count of valid ballots cast, nor was it about who should be eligible to vote, as the Fifteenth Amendment unambiguously guaranteed the right to vote regardless of race.<sup>20</sup> Rather, it was about the missing ballots from valid voters who wanted to participate in the election but were prevented from doing so through the wholesale denial of this right. If ballots have not been cast, they cannot be counted.

Thus, which conception of electoral validity should prevail? The Democrats' version, which would award the election to Tilden after rectifying the count of valid ballots actually cast by removing the taint of fraudulent ballots wrongfully added to the count?<sup>21</sup> Or the Republicans' alternative conception, which would award the election to Hayes on the ground that the exclusion of eligible African Americans was an evil that swamped the fraud that occurred? Had eligible African Americans been able to cast ballots, their votes would have been more than enough to erase the numerical advantage that the ballot-box-stuffing fraud had produced for Hayes.<sup>22</sup> Never mind that both parties' conceptions of electoral validity were conveniently self-serving in the disputed election at hand. There still was a titanic clash of electoral values, and there was no authoritative institution to resolve this normative conflict.<sup>23</sup>

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<sup>18</sup> See *id.* at 120 (citing example of “little joker” ballots “smuggled into the ballot-box,” which Democrats vociferously denounced as the kind of “trick” that caused the reported result to deviate from the will of the electorate).

<sup>19</sup> See MICHAEL F. HOLT, *BY ONE VOTE: THE DISPUTED PRESIDENTIAL ELECTION OF 1876*, at 181 (2008) (“Had blacks been allowed to vote freely, Hayes easily would have carried all three states in dispute . . .”). Americans who do not know the history of terrorism that occurred in the American South as Reconstruction ended and gave way to white supremacist hegemony for another hundred years owe it to themselves to learn this wretched truth, however unpleasant it may be. One place to start is ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877* (1988). Foner encapsulates the “reign of terror” in the 1876 campaign by quoting a white South Carolinian as saying, “opponents of Reconstruction planned to carry the election ‘if we have to wade in blood knee-deep’”—a threat fulfilled when, as one African American lamented, “‘They have kill[ed] col’d men in every precinct.’” *Id.* at 574.

<sup>20</sup> U.S. CONST. amend. XV, § 1.

<sup>21</sup> Even some Republicans acknowledged that Tilden would prevail if the ballots actually cast were tallied accurately and consistently. See FOLEY, *supra* note 10, at 121.

<sup>22</sup> HOLT, *supra* note 19, at 181.

<sup>23</sup> One of the serious problems that surfaced in the Hayes-Tilden dispute was the absence of any tiebreaker in the event that the two chambers of Congress deadlocked over decisive Electoral

The nation survived the disputed Hayes-Tilden election of 1876, but not by resolving the philosophical fight over how best to define electoral validity in order to be able to decide whether a particular election has produced a result that authentically accords with the will of the electorate. Instead, the nation largely swept the issue under the rug, through the congressional compromise that ended Reconstruction and pulled the troops out of the South who had been attempting to protect African Americans' voting rights.<sup>24</sup> In the aftermath of that abandonment, the nation largely returned to its previous conception of electoral validity: Election results are valid if they reflect an accurate count of ballots cast by eligible voters. The systematic disenfranchisement of African Americans, whose eligibility should have been protected by the Fifteenth Amendment, was essentially ignored after the demise of Reconstruction,<sup>25</sup> and election results in the South were deemed officially correct as long as they conformed to the standard of accurately counting the votes cast by valid voters.<sup>26</sup> When old-fashioned ballot box stuffing occurred, as it infamously did in the 1948 Texas U.S. Senate race, this kind of fraud was castigated as inconsistent with electoral validity, and thus popular sovereignty, without regard to the number of African American citizens in the state who at the time were wrongly disenfranchised through Jim Crow measures.<sup>27</sup> In essence, although Tilden lost his fight for the White House, the conception of electoral validity advanced by his supporters—rather than Hayes'—ultimately prevailed.

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College votes, as they did for the 1876 election. *See id.* at 127. Congress attempted to solve this problem with an ad hoc Electoral Commission, but this fifteen-member body repeatedly split 8-7 along party lines on every consequential issue it was required to address. *See id.* at 125. The nation was thus left with an election settled based on which side held more political power, rather than neutral principles that both sides equally accepted. *See FOLEY, supra* note 10, at 148-49.

<sup>24</sup> The exact details surrounding the Compromise of 1877 are much debated, but its basic terms are undisputed: The federal troops left the south, abandoning civil and voting rights for African Americans, after Hayes entered the White House. *See FONER, supra* note 19, at 581-83.

<sup>25</sup> *See* LAWRENCE GOLDSTONE, *INHERENTLY UNEQUAL: THE BETRAYAL OF EQUAL RIGHTS BY THE SUPREME COURT, 1865-1903*, at 93 (2011); MICHAEL PERMAN, *STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888-1908*, at 10-11, 21, 68-69 (2001).

<sup>26</sup> During Jim Crow, southern courts, like their northern counterparts, routinely considered challenges to election outcomes based on allegations that vote tallies were inaccurate. *See, e.g., Black v. Pace*, 130 Ala. 514, 528-29 (1901) (allowing the rejection of ballots whose "marks used are inappropriate to express the voter's intention or are so distinct and individual in character as to furnish means of identifying the ballot as that of the particular voter.").

<sup>27</sup> *See FOLEY, supra* note 10, at 206-07. In the debate of the two Roberts—Caro and Dallek—over how best to understand this pivotal 1948 election, Dallek emphasizes the extent to which Coke Stevenson, Lyndon Johnson's opponent in the race, was an ardent segregationist. *See* Josiah Daniels III, *LBJ v. Coke Stevenson: Lawyering for Control of the Disputed Texas Democratic Party Senatorial Primary Election of 1948*, 31 *REV. LITIG.* 1, 27 n.165 (2012). While not denying that truth, Caro is skeptical of its explanatory power. *See id.*



B. *Florida 2000: Renewed Focus on Accuracy in the Counting of Cast Ballots*

The conception of electoral validity that is rooted in the accuracy of counting cast ballots is the one that governed in *Bush v. Gore*.<sup>28</sup> To be sure, there were plenty of other reasons to question the democratic legitimacy of the result of the 2000 election. First of all, there was the much-familiar discrepancy between the Electoral College and the national popular vote.<sup>29</sup> Beyond that, there were erroneous purges of validly registered voters, who were turned away at the polls without an opportunity to cast a ballot.<sup>30</sup> (This was before the era of federally mandated provisional ballots.)<sup>31</sup> But once again, ballots never cast cannot be counted.

There was also the problem of faulty ballot design, most notoriously the “butterfly ballot” of Palm Beach County,<sup>32</sup> but even more consequentially the double-paged ballot of Duval County, on which voters were confusingly told “to punch a hole on every page,” thereby causing uncountable overvotes in the presidential election.<sup>33</sup> A conception of electoral validity that attempted to match the outcome of the election with what the eligible voters who cast ballots actually wanted would have attempted to rectify these faulty ballot designs based on a considered statistical judgment that recognized that what voters thought they were voting for was not actually what they were casting their ballots for.<sup>34</sup>

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<sup>28</sup> 531 U.S. 98 (2000).

<sup>29</sup> Bush won the Electoral College 271-266, while Gore was the plurality winner of the national popular vote, 48.38% to 47.87%. See *2000 Official Presidential General Election Results*, FED. ELECTION COMMISSION, <https://transition.fec.gov/pubrec/2000presgeresults.htm> (last updated Dec. 2001). On the historical and normative relationship between the Electoral College and the national popular vote, as well as between majority and plurality winners, see generally EDWARD B. FOLEY, *PRESIDENTIAL ELECTIONS AND MAJORITY RULE* (2020).

<sup>30</sup> See FOLEY, *supra* note 10, at 339.

<sup>31</sup> In the Help America Vote Act of 2002, Congress responded to the problem of erroneous purging of voter registration lists by requiring states to let voters cast a provisional ballot if poll workers cannot verify voter registration status by examining the poll books. Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 GEO. WASH. L. REV. 1193, 1193 (2005). If it turns out that the voter is correct and the poll book is in error, the provisional ballot will subsequently count as part of the certified vote totals in the election. See *id.*

<sup>32</sup> Stephen J. Mulroy, *Substantial Noncompliance and Reasonable Doubt: How the Florida Courts Got It Wrong in the Butterfly Ballot Case*, 14 STAN. L. & POL'Y REV. 203, 203 & n.3 (2003).

<sup>33</sup> Raymond Bonner & Josh Barbanell, *Counting the Vote: Duval County; Democrats Rue Ballot Foul-Up in a 2nd County*, N.Y. TIMES (Nov. 17, 2000), <https://www.nytimes.com/2000/11/17/us/counting-the-vote-duval-county-democrats-rue-ballot-foul-up-in-a-2nd-county.html>.

<sup>34</sup> See Mulroy, *supra* note 32, at 203 & n.6; Jonathan N. Wand, Kenneth W. Shotts, Jasjeet S. Sekhon, Walter R. Mebane, Jr., Michael C. Herron & Henry E. Brady, *The Butterfly Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida*, 95 AM. POL. SCI. REV. 793, 793–95 (2001) (describing the butterfly ballot and the resulting litigation).

But there's the rub. If the operative conception of electoral validity is an accurate count of ballots actually cast by eligible voters, then the valid result must be based on what the cast ballots actually say, not on what the voters intended to do when they marked their ballots as they did. On this view, as regrettable as it may be, there was nothing remedial to be done about the hugely consequential faulty ballot designs in Palm Beach and Duval counties.

Thus, the *Bush v. Gore* litigation focused solely on attempting to tabulate an accurate count of the actual markings of the ballots that were produced using an antiquated “punch card” technology, whereby voters recorded their votes by dislodging perforated “chads,” some of which were imperfectly dislodged, in large part because of the clogging of the machines by the detritus of previously cast ballots.<sup>35</sup> It turned out that the dispute still left plenty to fight about, and the Supreme Court left one side unhappy when it issued a 7-2 ruling, holding that the way Florida's judiciary was trying to count these imperfectly dislodged chads was unconstitutional because it treated identically marked ballots cast by equally eligible voters differently.<sup>36</sup> In a separate 5-4 ruling, the Court further held that time had run out under state law for rectifying this differential treatment of equivalent ballots.<sup>37</sup> But whichever side of the fight in *Bush v. Gore* one is on, then or now, the fight is still confined to how best to determine what votes are actually recorded on the ballots cast by valid voters—and to do so, presumably, within some timeframe so that the election's winner can be declared and then take office.<sup>38</sup> The *Bush v. Gore* litigation lacked any effort to expand or alter the nation's functional conception of electoral validity to address the disenfranchisement of eligible voters who were denied the right to cast a ballot, much less to embrace other ways to conceptualize whether the outcome of the election conforms to some appropriate standard of democratic validity.<sup>39</sup>

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<sup>35</sup> See Edward B. Foley, *Bush v. Gore: The Court Stops the Recount*, in *ELECTION LAW STORIES* (Joshua A. Douglas & Eugene D. Mazo eds., 2016).

<sup>36</sup> *Bush v. Gore*, 531 U.S. 98, 109 (2000) (“The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter . . .”).

<sup>37</sup> *Id.* at 112 (holding that because December 12, the deadline established by federal statute, had already arrived, “there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards,” and that “it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed”).

<sup>38</sup> On the significance of finality as a basic principle for vote-counting litigation, see *PRINCIPLES OF THE LAW: ELECTION ADMIN.* §§ 201–16 (AM. LAW INST. 2019).

<sup>39</sup> Other changes in America's political culture have occurred since 2000, including rapidly accelerating hyperpolarization, that make it more difficult for the nation to peacefully resolve razor-thin, disputed presidential elections. See KLEIN, *supra* note 4. This essay, however, does not attempt to address all aspects of American political culture that might bear on the nation's capacity to handle

C. 2016: Does Disinformation Negate an Election's Validity?

Then came the 2016 election, which has seemingly unsettled everything.<sup>40</sup> Russia's attack on America's election was a new development, and it caused Americans to question the validity of U.S. elections in a whole new way. Russia may have wanted to manipulate the actual count of votes in 2016 but ultimately did not do so.<sup>41</sup> Instead, they hacked email accounts associated with Hillary Clinton's campaign and dumped those purloined emails into public discourse using Wikileaks.<sup>42</sup> Russians also distributed intentionally deceptive and manipulative disinformation through systematic and targeted use of social media, with the goal to hurt Clinton and help Trump—in part by persuading some voters to stay home rather than vote for Clinton or support a third-party candidate instead.<sup>43</sup>

Whether or not Russia was successful in swaying enough voters away from Clinton to be responsible for Trump's victory is a highly debatable—and ultimately unprovable—question.<sup>44</sup> But what is important here is that the issue of whether or not Russia was successful in depriving Clinton of a sufficient number of votes to sway the outcome of the election has seeped into Americans' conception of electoral validity.<sup>45</sup> According to this post-2016 conception, if Russia was successful in persuading enough voters to make a difference in the electoral outcome, then Russia was able to undermine the validity of the election—even though one cannot completely prove it. Many Clinton supporters, and even Clinton herself, seem to take

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a potentially disputed presidential election in 2020. Instead, this essay focuses on one key issue: the normative standard by which to evaluate whether or not the election successfully produces the outcome that the electorate itself chooses.

<sup>40</sup> One new and strange phenomenon in the 2016 election involved then-candidate Donald J. Trump questioning—both before and after ballots were cast—whether the results would be, or were, accurate. *See* HASEN, *supra* note 10, at 106–07. As unprecedented as this was, however, it was not a change in the basic conception of whether an election's result is valid or not. Although Trump's claims had no factual basis, he asserted a discrepancy between the reported results of the election's votes and the actual number of valid votes in the election. *Id.* at 107. It was something else about the 2016 election that would challenge the very standard of judging the validity of an election's results.

<sup>41</sup> *See id.* at 92.

<sup>42</sup> *Id.* at 90–91.

<sup>43</sup> *See* KATHLEEN HALL JAMIESON, *CYBERWAR: HOW RUSSIAN HACKERS AND TROLLS HELPED ELECT A PRESIDENT* 1–17, 104 (2018).

<sup>44</sup> *See* HASEN, *supra* note 10, at 82.

<sup>45</sup> *See, e.g.,* Susan Milligan, *A Growing Lack of Faith in Elections*, U.S. NEWS (May 10, 2019), <https://www.usnews.com/news/the-report/articles/2019-05-10/after-russian-election-interference-americans-are-losing-faith-in-elections> (noting that “even if voting machines in all jurisdictions are secured against hacking and social media sites are scrubbed of fake stories posted by Russian bots, the damage may already have been done, experts warn, as Americans' faith in the credibility of the nation's elections falters”).

this view.<sup>46</sup> In fact, much of the media and public discussion of how to protect America's election in the aftermath of the 2016 election has proceeded on the premise that a successful disinformation campaign of the kind that Russia perpetrated undermines the legitimacy of America's electoral system, negating its capacity to be an exercise of popular sovereignty by the American electorate.<sup>47</sup> The subtitle of the Pulitzer-winning *Washington Post* reporter's book *The Apprentice: Trump, Russia, and the Subversion of American Democracy* is a sufficient indicator of the public perception that the Russian attack threatened America's capacity for self-government.<sup>48</sup>

But this new conception of electoral validity is very different from the traditional view. It is not at all confined to ascertaining an accurate count of actual votes cast by eligible voters. Instead, it seemingly proposes that an election result can be compromised or tainted as illegitimate if enough eligible voters have been improperly persuaded to vote in a certain manner on the basis of disinformation. This new conception opens a whole new avenue for challenging the outcomes of U.S. elections.

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<sup>46</sup> See Philip Rucker, *'I Would Be Your President': Clinton Blames Russia, FBI Chief for 2016 Election Loss*, WASH. POST (May 3, 2017), [https://www.washingtonpost.com/politics/hillary-clinton-blames-russian-hackers-and-comey-for-2016-electionloss/2017/05/02/e62fef72-2f60-11e7-8674-437ddb6e813e\\_story.html](https://www.washingtonpost.com/politics/hillary-clinton-blames-russian-hackers-and-comey-for-2016-electionloss/2017/05/02/e62fef72-2f60-11e7-8674-437ddb6e813e_story.html). Former President Jimmy Carter also publicly expressed this view, noting that he believed that "a full investigation would show that Trump didn't actually win the election in 2016," but rather, "[h]e lost the election, and he was put into office because the Russians interfered on his behalf." Sarah Cammarata, *Jimmy Carter Says a Full Investigation Would Show Trump Lost in 2016*, POLITICO (June 28, 2019, 11:20 AM), <https://www.politico.com/story/2019/06/28/jimmy-carter-russia-investigation-trump-lost-1387634>. For a former president to take this view, especially one who has devoted a large portion of his post-presidency to monitoring the validity of elections worldwide, is remarkable.

<sup>47</sup> See, e.g., JAMIESON, *supra* note 43; Albert R. Hunt, *Yes, Russian Election Sabotage Helped Trump Win*, BLOOMBERG OPINION (July 24, 2018, 12:37 PM), <https://www.bloomberg.com/opinion/articles/2018-07-24/russian-meddling-helped-trump-win-in-2016>; Jane Mayer, *How Russia Helped Swing the Election for Trump*, NEW YORKER (Sept. 24, 2018), <https://www.newyorker.com/magazine/2018/10/01/how-russia-helped-to-swing-the-election-for-trump>. Perhaps most significantly, former Director of National Intelligence James Clapper asserted without qualification, "'Of course the Russian effort affected the outcome. Surprising even themselves, they swung the election to a Trump win.' . . . 'Less than 80,000 votes in three key states swung the election. I have no doubt that more votes than that were influenced by this massive effort by the Russians.'" Brooke Seipel, *Clapper: 'No Doubt' Russia Is the Reason Trump Won*, THE HILL (May 23, 2018, 8:09 AM), <https://thehill.com/homenews/news/388939-clapper-no-doubt-russia-is-the-reason-trump-won> (quoting Clapper's own book and appearance on MSNBC's Rachel Maddow Show).

<sup>48</sup> GREG MILLER, *THE APPRENTICE: TRUMP, RUSSIA, AND THE SUBVERSION OF AMERICAN DEMOCRACY* (2018). The title of another new book on the same topic makes the same point: DAVID SHIMER, *RIGGED: AMERICA, RUSSIA, AND ONE HUNDRED YEARS OF COVERT ELECTORAL INTERFERENCE* (2020). A myriad of speeches and commentary echoed the same fear.

*D. 2018: Vote Suppression and Effect on Election Outcomes?*

America's collective conception of electoral validity—which had already been unsettled by the 2016 election—took a further hit in the 2018 midterm elections. With pernicious efforts to disenfranchise eligible voters undertaken in Georgia and other states,<sup>49</sup> there emerged increasingly loud accusations that election results were illegitimate due to voter “suppression” or other disenfranchising tactics.<sup>50</sup> These accusations echoed the position of Hayes' supporters in 1876, but they were more loosely tied to the counting of actual votes than the earlier protests of disenfranchisement had been. While Hayes' supporters had been on solid ground in arguing that far more than enough African Americans had been kept away from the polls in 1876 to make a difference in the electoral outcome,<sup>51</sup> such robust evidence did not exist to support analogous arguments made in 2018.<sup>52</sup>

Yes, wrongful voter disenfranchisement had occurred.<sup>53</sup> Yes, it was an

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<sup>49</sup> In Georgia, the incumbent Secretary of State, Brian Kemp, was running for governor. Kemp used the powers of incumbency, which involved supervising elections in the state, to advantage his campaign. See HASEN, *supra* note 10, at 66–72. Richard Hasen, perhaps the nation's most prominent election law scholar, was among those who saw Kemp's distortion of the electoral process to his own electoral advantage as “the most egregious partisan action by an election official in the modern era . . .” Richard L. Hasen, *Why Democrats Should Not Call the Georgia Governor's Race “Stolen”*, SLATE (Nov. 18, 2018, 6:57 PM), <https://slate.com/news-and-politics/2018/11/georgia-stacey-abrams-brian-kemp-election-not-stolen.html>; see also Edward B. Foley, *Democratic Legitimacy Is on the Line in Georgia*, WASH. POST (Nov. 8, 2018, 5:03 PM), [https://www.washingtonpost.com/opinions/democratic-legitimacy-is-on-the-line-in-georgia/2018/11/08/957fee80-e394-11e8-b759-3d88a5ce9e19\\_story.html](https://www.washingtonpost.com/opinions/democratic-legitimacy-is-on-the-line-in-georgia/2018/11/08/957fee80-e394-11e8-b759-3d88a5ce9e19_story.html) (criticizing and describing measures taken by Kemp during the election). Among the specific acts that Kemp took to advantage his own gubernatorial campaign was an aggressive database-matching protocol that attempted to keep over fifty thousand new voter registrations off the rolls because of trivial clerical errors. See HASEN, *supra* note 10, at 68 (“A discrepancy as small as a missing hyphen in a name was enough to disenfranchise voters under Kemp's exact-match rules . . .”).

<sup>50</sup> See HASEN, *supra* note 10, at 112–13. Hasen, in particular, cites Senator Sherrod Brown's allegation that the Georgia election was “stolen” from Stacey Abrams. *Id.* at 113; see also Aaron Blake, *Democrats Are Now Going There on ‘Stolen’ Elections*, WASH. POST (Nov. 15, 2018, 7:19 AM), <https://www.washingtonpost.com/politics/2018/11/15/democrats-are-now-going-there-stolen-elections/> (providing statements from prominent Democratic politicians).

<sup>51</sup> HOLT, *supra* note 19, at 181.

<sup>52</sup> See HASEN, *supra* note 10, at 116; Amy Sherman, *No Proof Voter Suppression Kept Stacey Abrams From Governorship, As Democrats Said in Atlanta Debate*, POLITIFACT (Nov. 21, 2019), <https://www.politifact.com/article/2019/nov/21/no-proof-voter-suppression-kept-stacey-abrams-gove>.

<sup>53</sup> The federal district court repeatedly enjoined Georgia's Secretary of State from administrative practices that if left unremedied would unconstitutionally disenfranchise eligible voters. See *Common Cause Ga. v. Kemp*, 347 F. Supp. 3d 1270, 1294–95 (N.D. Ga. 2018); see also *Democratic Party of Ga. v. Crittenden*, 347 F. Supp. 3d 1324, 1346 (N.D. Ga. 2018) (issuing another injunction against the Georgia Secretary of State to prevent disenfranchisement); *Georgia Coal. for People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1269 (N.D. Ga. 2018) (same); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338, 1341 (N.D. Ga. 2018) (same). Federal court litigation

affront to democracy, for this kind of wrongful disenfranchisement should never happen. But no, it was not factually established that the magnitude of this wrongful disenfranchisement was large enough to cause the outcome of the disputed race. Thus, from the perspective of whether the result of the race should be considered electorally valid, there was reason to doubt that the disenfranchisement—as pernicious as it was—undermined the electoral validity of the outcome.

Given that the goal of the election is to produce a winner whom the electorate as a whole wants to hold office, then as long as the outcome accords with that overall electoral preference, the result must be viewed as valid even though reprehensible disenfranchisement occurred; otherwise, the electorate as a whole would be denied a result that they indeed had sought. For example, egregiously long lines had marred President Obama’s reelection in 2012,<sup>54</sup> but this unfortunate fact—although it undoubtedly caused the wrongful disenfranchisement of some voters who could not endure the excessive time waiting on line—did not negate the validity of Obama’s reelection victory, since that is the outcome that the electorate as a whole wanted despite the wrongful disenfranchisement. But, by 2018, much rhetoric among voting rights advocates was unwilling to accept the validity of the election victory in Georgia just because of the disenfranchisement that had occurred, without proof that the disenfranchisement is what produced the result.<sup>55</sup>

Even worse, outright disenfranchisement of eligible voters was sometimes coupled with much vaguer allegations of “voter suppression.” For example, it was suggested that votes might be “suppressed” as a result of fewer days or hours of “early voting” than had been previously available.<sup>56</sup>

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in the aftermath of the 2018 election continues over claims of wrongful disenfranchisement. *See* Fair Fight Action, Inc. v. Raffensperger, 413 F. Supp. 3d 1251, 1262, 1292 (N.D. Ga. 2019) (denying in part motion to dismiss, permitting factfinding to go forward).

<sup>54</sup> This problem was significant enough that Obama later created a commission to investigate it. *See* Jeff Zeleny, *Election Opponents Team Up on Panel to Fix Voting System*, N.Y. TIMES (Feb. 14, 2013), <https://www.nytimes.com/2013/02/15/us/politics/opposing-election-lawyers-to-lead-obama-voting-panel.html>; *Obama Proposes Commission to Address Long Lines at Polls*, USA TODAY (Feb. 12, 2013, 10:05 PM), <https://www.usatoday.com/story/news/2013/02/12/obama-voting-election-commission-lines/1914249>.

<sup>55</sup> Carol Anderson has been a leading voice in asserting that Kemp’s gubernatorial victory in Georgia lacked legitimacy. *See* Carol Anderson, *Brian Kemp’s Lead in Georgia Needs an Asterisk*, ATLANTIC (Nov. 7, 2018), <https://www.theatlantic.com/ideas/archive/2018/11/georgia-governor-kemp-abrams/575095>; *see also* Rick Hasen, “*Election Meltdown, Part 4. Rhetoric and Reality: When Is It OK to Say an Election Was ‘Stolen’?*,” ELECTION L. BLOG (Feb. 15, 2020, 9:44 AM), <https://electionlawblog.org/?p=109572>.

<sup>56</sup> *See* *Cutting Early Voting Is Voter Suppression*, ACLU, <https://www.aclu.org/issues/voting-rights/cutting-early-voting-voter-suppression> (last visited June 2, 2020); Timothy Smith, *How Voter Suppression Threatens Our Democracy*, WASH. POST (Sept. 20, 2018, 9:26 AM),

Ohio, for example, reduced its period of early voting from thirty-five to twenty-nine days, which of course was twenty-nine more than many states at the time.<sup>57</sup> Some states, such as New York and Pennsylvania, offered zero days of early voting, and Ohio, unlike New York and Pennsylvania, was accused of vote suppression because of its insufficiently generous availability of early voting.<sup>58</sup> While Ohio's reduction might be bad policy, it is not equivalent to outright disenfranchisement, like felon disenfranchisement, which actually denies felons the right to vote, or the disenfranchisement of women prior to the ratification of the Nineteenth Amendment.<sup>59</sup> Nor is it a basis for saying that the result of the election is illegitimate because valid voters were denied the opportunity to cast a ballot. Accusations over what occurred in the 2018 midterm elections accentuated this kind of analytical confusion. When one says it is necessary to put an asterisk next to Georgia governor Brian Kemp's title—as in “Governor\* Kemp”—without evidence that denial of the franchise was actually responsible for his victory,<sup>60</sup> it is as if America's shared understanding of electoral validity had lost its moorings.

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[https://www.washingtonpost.com/outlook/how-voter-suppression-threatens-our-democracy/2018/09/20/c1dd3b8a-aad3-11e8-b1da-ff7faa680710\\_story.html](https://www.washingtonpost.com/outlook/how-voter-suppression-threatens-our-democracy/2018/09/20/c1dd3b8a-aad3-11e8-b1da-ff7faa680710_story.html) (reviewing CAROL ANDERSON, *ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY* (2018)); Terri Gross, *Republican Voter Suppression Efforts Are Targeting Minorities*, *Journalist Says*, NPR (Oct. 23, 2018, 2:04 PM), <https://www.npr.org/2018/10/23/659784277/republican-voter-suppression-efforts-are-targeting-minorities-journalist-says> (interviewing Ari Berman).

<sup>57</sup> Jim Siegel, *GOP Legislators Pass Bill Shrinking Early-Voting Period*, COLUMBUS DISPATCH (Feb. 19, 2014, 12:01 AM), <https://www.dispatch.com/article/20140219/NEWS/302199776>.

<sup>58</sup> See *Ohio Democratic Party v. Husted*, 834 F.3d 620, 623 (6th Cir. 2016).

<sup>59</sup> In addition to providing for twenty-nine days of early voting, Ohio's alleged “voter suppression” regime also provided for “no excuse” absentee voting, which enabled any registered voter to vote by mail rather than in person if that mode of voting was easier or preferential. See Laura A. Bischoff, *All Ohio Voters to Get Absentee Ballot Applications in Mail Soon*, DAYTON DAILY NEWS (Sept. 14, 2016), <https://www.daytondailynews.com/news/all-ohio-voters-get-absentee-ballot-applications-mail-soon/62iT01r2hxDC5TBiT67lIJ> (noting that “[i]n 2005, Ohio went to no-fault absentee and early voting, meaning voters no longer needed a valid excuse for doing so”). At the same time as offering these two forms of non-traditional voting, Ohio continued to maintain traditional in-precinct voting at neighborhood polling places on Election Day itself. See *Voting in Ohio*, BALLOTEDIA, [https://ballotpedia.org/Voting\\_in\\_Ohio#cite\\_note-2014update-18](https://ballotpedia.org/Voting_in_Ohio#cite_note-2014update-18) (last visited June 29, 2020). The idea that Ohio's menu of voting options, far more generous than many states', was equivalent to the disenfranchisement of voters—preventing them by law from casting a ballot—is a form of analytic confusion, and it is dangerous insofar as it disables the ability to distinguish in future elections whether or not the government has actually disenfranchised voters, denying them the right to cast a ballot.

<sup>60</sup> See Anderson, *supra* note 55; see also @GeorgiaDemocrat, TWITTER (Jan. 14, 2019, 12:44 PM), <https://twitter.com/GeorgiaDemocrat/status/1084868905254948869>.

### E. *Impeachment and Its Relationship to Electoral Validity*

Such was the precarious setting in which President Trump's impeachment began. The impeachment did not occur over Trump's previous presidential misdeeds (as chronicled in the Mueller Report and elsewhere),<sup>61</sup> but rather it focused specifically on new evidence—emerging from a whistleblower's complaint—that President Trump had asked Ukraine's President Volodymyr Zelensky to investigate former U.S. Vice President Joe Biden.<sup>62</sup> Given that, at the time, Biden was the leading contender for the Democratic presidential nomination, and because there was little if any reason to believe that there were justifiable grounds for suspecting Biden of Ukraine-related wrongdoing, Trump's request for a “favor” seemed like a transparent effort to get Ukraine to unfairly smear his most probable reelection opponent.

The House Democrats referred to Trump's actions as “cheating” to win reelection, and they framed the case in the Senate impeachment trial around the need to stop this kind of “cheating.”<sup>63</sup> Democrats argued that, given the unacceptable risk that President Trump would continue to cheat in his quest for a second term, he must be removed from office and not permitted to run for reelection. In his opening argument, Adam Schiff (the lead House Manager prosecuting the impeachment case) explicitly said that the result of the 2020 election could not be trusted as long as Trump was allowed to remain a candidate for reelection. Schiff proclaimed that “[t]he president's misconduct cannot be decided at the ballot box, for we cannot be assured that the vote will be fairly won.”<sup>64</sup>

Thus, Schiff rested the case for the President's removal on the grounds that Trump's presence on the ballot would inevitably undermine the very

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<sup>61</sup> See John Bresnahan, Heather Caygle & Kyle Cheney, *Why Democrats Sidelined Mueller in Impeachment Articles*, POLITICO (Dec. 10, 2019, 6:26 PM), <https://www.politico.com/news/2019/12/10/democrats-sidelined-mueller-trump-impeachment-080910>.

<sup>62</sup> See H.R. REP. NO. 116-346, at 4 (2019) (noting that on a call with President Zelensky of Ukraine, President Trump asked President Zelensky to “do us a favor,” and in particular, “[h]e asked Ukraine to announce two bogus investigations: one into former Vice President Joseph R. Biden, Jr., then [President Trump's] leading opponent in the 2020 election, and another to advance a conspiracy theory that Ukraine, not Russia, attacked [the United States'] elections in 2016”).

<sup>63</sup> Michael D. Shear, *In Impeachment Case, Schiff Accuses Trump of Trying 'to Cheat' in Election*, N.Y. TIMES (Jan. 22, 2020), <https://www.nytimes.com/2020/01/22/us/politics/impeachment-case-trump.html> (updated Jan. 24, 2020).

<sup>64</sup> @CNNnewsroom, TWITTER (Jan. 22, 2020, 1:46 PM), <https://twitter.com/cnnnewsroom/status/1220055237857247233?lang> (reporting Rep. Schiff's opening statement in the Senate impeachment trial).



validity of the 2020 election.<sup>65</sup> (It is simply too risky to let Trump be a candidate for reelection, Democrats in essence claimed, even though Trump remained the Republican Party's preferred choice for its 2020 nominee. Why the Democrats thought they had the unilateral right to deny Republicans the candidate of their choice based on a fear of future misdeeds the candidate might commit, rather than insisting upon protective measures that would prevent any such misdeeds from undermining the right of voters to choose whichever candidate they preferred, the Democrats did not say.) This impeachment-related argument was a very different conception of electoral validity than determining an accurate count of the votes cast by eligible voters. It was not as if Trump's "cheating" was actually stuffing ballot boxes with invalid votes, although some commentators attempted to equate the two.<sup>66</sup> Schiff seemed to be saying that votes cast in November 2020 for Trump, even if counted accurately, and even if cast by eligible voters, could not be "assured" of democratic authenticity—as an exercise of popular sovereignty by the American electorate—because of Trump's inherently untrustworthy character ("he is who he is")<sup>67</sup> and thus the inevitable risk that he will continue attempting to cheat his way to a reelection victory.

Moreover, the kind of continued cheating that Schiff had in mind consisted of further invitations of foreign interference in the upcoming election. If Putin decided to meddle again in the 2020 election, just as he had in 2016, would Trump do anything to stop it? Of course not, Schiff said, answering his own rhetorical question.<sup>68</sup> For Schiff, this point confirmed that the validity of the election was inherently compromised as long as Trump remained the incumbent president seeking a second term.

But observe, again, that the fear is not Trump, or even Putin, managing to stuff the ballot box with fake votes, or otherwise manipulate the casting or counting of ballots to produce a reported result other than what the

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<sup>65</sup> See David Winston, *Adam Schiff Throws the Ballot Box Under the Bus*, ROLL CALL (Jan. 29, 2020, 5:30 AM), <https://www.rollcall.com/2020/01/29/adam-schiff-throws-the-ballot-box-under-the-bus> (arguing that the Democrats have effectively revealed that they would not accept the outcome of the 2020 election if Trump were on the ballot).

<sup>66</sup> See, e.g., Will Wilkinson, *Trump Has Disqualified Himself from Running in 2020*, N.Y. TIMES (Oct. 1, 2019), <https://www.nytimes.com/2019/10/01/opinion/trump-impeachment-2020.html> (arguing that, in light of the President's effort to coerce Ukraine into helping his campaign, "[r]esolving the question of the president's fitness at the ballot box isn't really an option, much less the best option, when the question boils down to whether the ballot box will be stuffed").

<sup>67</sup> Lisa Mascaró, Eric Tucker & Zeke Miller, *Rep. Adam Schiff Says Trump 'Is Who He Is,'* PBS NEWSHOUR (Jan. 24, 2020), <https://www.pbs.org/newshour/politics/watch-rep-adam-schiff-says-trump-is-who-he-is>.

<sup>68</sup> See 166 CONG. REC. 529 (statement of Rep. Schiff) ("Let's say [the Russians] start blatantly interfering in our election again to help Donald Trump. Can you have the least bit of confidence that Donald Trump will stand up to them and protect our national interests over his own personal interests? You know you can't . . .").

participating eligible voters actually chose. Instead, Schiff's concern is that Putin will distort the public discourse surrounding the campaign once more and that Trump will have signaled his acceptance or even encouragement of this distortion. Schiff's example on this point is telling. Invoking the revelation that Russia hacked into Burisma, the Ukrainian company with which Hunter Biden (Joe Biden's son) was associated, Schiff warned that Russia might dump documents stolen from Burisma into the public domain, as Russia had done with Clinton's emails in 2016.<sup>69</sup> Or, even worse, Russia might manufacture fake documents and claim that they were the real ones retrieved in their hacking.<sup>70</sup> Either way, Schiff argued, Putin would be polluting America's election discourse, to the point that the outcome of the election could no longer be trusted, and Trump should be held responsible—and disabled from being a candidate for reelection—insofar as his pattern of behavior has created an environment that invites this kind of electoral interference from Putin.<sup>71</sup>

Even setting aside the question of whether Trump deserves disqualification from reelection because of whatever Putin might decide to do going forward, we should be troubled by a conception of electoral validity that condemns American elections as inherently unreliable exercises of popular sovereignty whenever there has been informational pollution in the campaign environment leading up to the vote. Yes, we should be concerned about disinformation, especially because it has become ever more sophisticated with new technologies, such as “deepfakes” swirling in the cesspools of social media.<sup>72</sup> And, yes, we should be particularly concerned if the informational pollution comes from foreign, rather than domestic, sources, especially when it is orchestrated as a form of information warfare by the military arm of an adversarial government.

But we ourselves are contributing to the incapacitation of democracy as a form of government if we believe that elections are inherently incapable of authentically reflecting popular sovereignty whenever public discourse during the campaign has been polluted by false and misleading messages. The image of a credulous electorate, incapable of making a genuine choice

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<sup>69</sup> Alexander Bolton, *Schiff Pleads to Senate GOP: “Right Matters. And the Truth Matters.”*, HILL (Jan. 24, 2020, 1:05 AM), <https://thehill.com/homenews/senate/479697-schiff-pleads-to-senate-gop-right-matters-and-the-truth-matters>.

<sup>70</sup> See 166 CONG. REC. 529 (statement of Rep. Schiff) (“We just saw last week a report that Russia tried to hack or maybe did hack Burisma . . . Let’s say they start dumping some fake things they didn’t hack from Burisma, but they want you to believe they did.”).

<sup>71</sup> See *id.* (warning that if he were to stay in office, the President’s ongoing behavior would invite interference from Russia or China).

<sup>72</sup> See Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1757 (2019) (highlighting the impending political and social harms posed by “highly-realistic” fake media).

between candidates unless all the messaging it receives during the campaign is thoroughly truthful and straightforward, is obviously unsustainable as a practical matter.<sup>73</sup> So, an alternative conception of democracy is required—one with a less stringent standard of electoral validity—in order to live with election results that are democratically acceptable, even if they were produced in a campaign environment muddled with all sorts of misleading and deceptive messages.

Yet, after the conclusion of Trump's impeachment trial, there is no shared consensus in the U.S. body politic on what is required to make an election valid. The chasm on this crucial point is not only the result of the hyperpolarized partisanship that has increasingly bedeviled American politics in recent decades. True, the "voting wars" between Republicans and Democrats ever since *Bush v. Gore* has made disagreement over standards and principles for judging election results more likely.<sup>74</sup> Nevertheless, the acute dissensus on what counts for electoral validity is also in large part a product of the fight over the Trump presidency itself, including the impeachment proceedings. Debating Trump's actions, debating Trump's dealings with Ukraine, and debating whether or not voters are entitled to give Trump a chance at a second term—this has all become a debate about what Americans currently believe about the nature of American democracy itself. And, if the public discourse surrounding the impeachment trial is any indication, this debate about American democracy—and what is necessary to make the outcome of an election valid—is as confused as it is divided.

Emblematic of this problem is the fact that the term "hacking" is used to refer to disinformation, and not just cyberattacks that penetrate the security

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<sup>73</sup> There may be a connection between this point and issues concerning the regulation of campaign finance. Cf. Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 895 (1998) (arguing that some calls for campaign finance reform rely on an undemocratic conception of credulous and naïve voters). But I do not want, or need, to make any such claim or connection in order to sustain my argument here. One can have views about appropriate or inappropriate ways of regulating campaign finance, because of a belief that the marketplace of campaign discourse would be improved, without believing any such improvement of campaign discourse would affect the validity of election results when campaign discourse is suboptimal. At the extreme, to be sure, if an election is conducted in an environment when there is no freedom of campaign discourse, then vote tallies cannot be taken as indicating a genuine choice on the part of the electorate. But Americans have been making genuine electoral choices between candidates for decades—choosing, for example, FDR over Wendell Willkie in 1940, or Ronald Reagan over Jimmy Carter in 1980—even if campaign finance laws in the United States were suboptimal at the time, for being either overly regulatory or overly deregulatory (depending upon one's preferred conception of optimal campaign finance laws).

<sup>74</sup> See RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* 4 (2012) (noting that the number of lawsuits stemming from contested elections has exploded since 2000, and will likely only get more acrimonious and harmful in the future).

perimeter of a website.<sup>75</sup> “Hacking [e]lections by [h]acking [v]oters” is the way one scholar expressed it.<sup>76</sup> This use of the term may be metaphorical, and rhetorically elegant, but to suggest that voters may be “hacked” by being persuaded by messaging in a way that is analogous to how vote-counting machines may be “hacked” by cyberattacks that could falsify the counting of ballots, is to exacerbate conceptual confusion rather than add analytic clarity.

#### F. COVID-19 and the New Threat to Electoral Validity

The Senate’s vote to acquit President Trump on the Ukraine-related impeachment charges occurred on February 5, 2020.<sup>77</sup> Just a couple of days earlier, on February 3, Iowa held its caucuses and thus began voting in the 2020 presidential election.<sup>78</sup> The complete collapse of the Iowa Democratic Party’s electronic system for reporting caucus results, causing cable networks to have no preliminary returns to share with their viewers on the night of the caucuses, signaled that the 2020 election would be fraught with

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<sup>75</sup> “Hacking the mind” is how one law review article puts it, immediately juxtaposed to “hacking the vote.” See Karl Manheim & Lyric Kaplan, *Artificial Intelligence: Risks to Privacy and Democracy*, 21 YALE J.L. & TECH. 106, 134, 137 (2019) (discussing attacks that seek to corrupt election data and attacks that manipulate voter attitudes under the same rubric of “cyberthreats to the electoral process”). “Hacking voter confidence” is another term that election experts are increasingly using. See, e.g., Ben Popken, *Election Security Experts Say Hack of Voters’ Confidence May Be Biggest Threat to 2020*, NBC NEWS (Sept. 21, 2019, 2:55 AM), <https://www.nbcnews.com/politics/elections/election-security-experts-say-hack-voters-confidence-may-be-biggest-n1057246> (“The greatest threat to the 2020 presidential election may not be hacking of voting systems, but the hacking of Americans’ faith in their elections . . .”); A New Way to Hack Democracy? How to Deal with the ‘Digital Disinformation Mess,’ DEMOCRACY DIG. (Oct. 3, 2019), <https://www.demdigest.org/a-new-way-to-hack-democracy-how-to-deal-with-the-digital-disinformation-mess>. Senator Michael Bennet has used the same terminology in the title of a self-published book associated with his own presidential campaign: “Dividing America: How Russia Hacked Social Media and Democracy.” See Makena Kelly, *2020 Democrat Michael Bennet Sounds the Alarm on Election Interference and Social Media*, VERGE (Aug. 20, 2019, 9:00 AM), <https://www.theverge.com/2019/8/20/20813368/michael-bennet-colorado-2020-democrat-russia-interference-election-hacked-podcast-vergecast>.

<sup>76</sup> Nathaniel Persily, one of the nation’s foremost election law scholars, recently gave a lecture with this title. Nathaniel Persily (@persily), TWITTER (Feb. 4, 2020, 7:44 AM), <https://twitter.com/persily/status/1224675004421271554>.

<sup>77</sup> Nicholas Fandos, *Trump Acquitted of Two Impeachment Charges in Near Party-Line Vote*, N.Y. TIMES (Feb. 5, 2020), <https://www.nytimes.com/2020/02/05/us/politics/trump-acquitted-impeachment.html>. The decisive Senate vote in refusing to call John Bolton as a witness occurred a few days earlier, on January 31, 2020. See Grace Segers, Kathryn Watson & Stefan Becket, *Senate Rejects New Witnesses in Trump Impeachment Trial, Paving the Way for Acquittal*, CBS NEWS (Jan. 31, 2020), <https://www.cbsnews.com/live-updates/trump-impeachment-trial-day-10-voting-witnesses-2020-01-31-live-updating>.

<sup>78</sup> See Maura Barrett & Ben Popken, *How the Iowa Caucuses Fell Apart and Tarnished the Vote*, NBC NEWS (Feb. 21, 2020, 3:58 PM), <https://www.nbcnews.com/politics/2020-election/how-iowa-caucuses-fell-apart-tarnished-vote-n1140346>. Early voting had already started in primaries officially held on later dates, but the Iowa caucuses marked the beginning of the presidential election calendar.

peril.<sup>79</sup> Nerves were already frayed as a result of the impeachment process, and anxiety levels were high with fears that Russia or some other malefactor might try a repeat of the kind of cyberattack that afflicted 2016—or even worse.<sup>80</sup> In an uncanny coincidence, on February 4, the morning after Iowa's disastrous debacle, Professor Richard Hasen (a nationally prominent election law scholar) released his aptly-titled book *Election Meltdown*.<sup>81</sup>

Little did Americans yet know that worse—much worse—was still to come, creating a crisis that would put all that preceded it into a secondary category. The first case of COVID-19 was reported in the United States on January 21.<sup>82</sup> But it was not until mid-March that the United States began to shut down much of the economy and adopt shelter at home measures in an effort to “flatten the curve” to avoid overwhelming American hospitals with patients needing ICUs and ventilators.<sup>83</sup> In the midst of this growing crisis, on March 10, 2020, Michigan went ahead and held its primary election as previously scheduled—with what in hindsight looks like insufficient concern about the health risks involved.<sup>84</sup> By contrast, one week later, Ohio abruptly

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<sup>79</sup> See *id.* (describing the failure of the Iowa Democratic Party's app for caucus reporting and the immediate consequences that followed).

<sup>80</sup> See Peter Stone, *Cyber Attacks and Electronic Voting Errors Threaten 2020 Outcome, Experts Warn*, GUARDIAN (Jan. 2, 2020), <https://www.theguardian.com/us-news/2020/jan/02/elections-2020-cyber-attacks-democrats-experts>.

<sup>81</sup> *Election Meltdown*, YALE U. PRESS, <https://yalebooks.yale.edu/book/9780300248197/election-meltdown> (last visited July 28, 2020) (noting the publication date of Hasen's book as February 4, 2020).

<sup>82</sup> Elisabeth Brier, *Forbes' Time Line of the Coronavirus*, FORBES (Mar. 23, 2020, 3:51 PM), <https://www.forbes.com/sites/elisabethbrier/2020/03/23/forbes-timeline-of-the-coronavirus> (highlighting key events related to the pandemic, including the timeline of state shutdowns).

<sup>83</sup> See Eliza Barclay, Dylan Scott & Christina Animashaun, *The US Doesn't Just Need to Flatten the Curve. It Needs to "Raise the Line."*, VOX (Apr. 7, 2020, 3:45 PM), <https://www.vox.com/2020/4/7/21201260/coronavirus-usa-chart-mask-shortage-ventilators-flatten-the-curve>.

<sup>84</sup> On the day of the primary, for example, the *Detroit Free Press* ran an article headlined “Avoiding the coronavirus, flu at Michigan primary polls: How to protect yourself.” Kristen Jordan Shamus, *Avoiding the Coronavirus, Flu at Michigan Primary Polls: How to Protect Yourself*, DETROIT FREE PRESS (Mar. 10, 2020, 1:27 PM), <https://www.freep.com/story/news/health/2020/03/10/coronavirus-michigan-primary-election/5009647002>. Since then, going forward with the primary has been attributed as a reason why COVID-19 hit Michigan more severely than other states, including Ohio. See Emily Bamforth, *Michigan Now Has Quadruple Ohio's Coronavirus Cases: What's Causing the Difference?*, CLEVELAND.COM (Apr. 4, 2020), <https://www.cleveland.com/news/2020/04/michigan-now-has-close-to-quadruple-ohios-coronavirus-cases-what-could-be-causing-the-difference.html>; Susan J. Demas, *Did Michigan's March 10 Primary Play a Role in COVID-19's Spread?*, MICH. ADVANCE (Apr. 6, 2020), <https://www.michiganadvance.com/2020/04/06/did-michigans-march-10-primary-play-a-role-in-covid-19s-spread>; Julie Mack, *6 Reasons Michigan Has Four Times More Coronavirus Cases than Ohio*, MLIVE (Apr. 14, 2020), <https://www.mlive.com/public-interest/2020/04/6-reasons-michigan-has-four-times-more-coronavirus-cases-than-ohio.html>.

*Wired* magazine has identified March 11—the day after Michigan's primary—as the day America

cancelled in-person voting for its March 17 primary on the night before neighborhood polling places were supposed to open.<sup>85</sup> Although the last-minute decision was chaotic and caused confusion—and required electoral remediation in the form of making vote-by-mail available for an extra six weeks—it appears to have saved a significant number of lives and protected preciously scarce medical resources.<sup>86</sup>

In the aftermath of Ohio's decision, other states quickly cancelled or postponed in-person voting as part of this year's presidential primary process.<sup>87</sup> Except Wisconsin, which turned into an electoral disaster. Its primary was scheduled for April 7. Rather than quickly deciding to order no in-person voting for reasons of public health in reliance on the Ohio precedent, Wisconsin's Governor Tony Evers (a Democrat) waited and hesitated, indecisively.<sup>88</sup> When he finally acted unilaterally, on the eve of the election, he did so by purporting to change the date of the election itself, rather than banning public gatherings at polling places (as Ohio's health director had done). The Republican-controlled state legislature immediately challenged the Governor's decision in the state's supreme court, which nullified the Governor's decree by a 4-2 vote that was widely understood as along party lines (although the court is nominally nonpartisan).<sup>89</sup> The consequence was that the polls were supposed to be open on Election Day, April 7, even though government officials—including the White House—were telling all Americans at the time that they should stay at home if at all

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woke up to the new reality of living with the coronavirus. See Garrett M. Graff, *An Oral History of the Day Everything Changed*, WIRED (Apr. 24, 2020, 6:00 AM), <https://www.wired.com/story/an-oral-history-of-the-day-everything-changed-coronavirus>.

<sup>85</sup> Sarah Ewall-Wice, *Ohio Delays Primary in Late Night Decision amid Coronavirus Outbreak*, CBS NEWS (Mar. 17, 2020, 8:09 AM), <https://www.cbsnews.com/news/ohio-delays-primary-coronavirus-governor-dewine-health-emergency>.

<sup>86</sup> See Bamforth, *supra* note 84.

<sup>87</sup> See Nick Corasaniti & Stephanie Saul, *16 States Have Postponed Primaries During the Pandemic. Here's a List.*, N.Y. TIMES (May 27, 2020), <https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html> (providing a timeline of state primary postponements and how each state has chosen to implement its primary).

<sup>88</sup> See Daniel Bice & Molly Beck, *Gov. Tony Evers Comes Under Criticism from Some Democrats for Handling of Tuesday Election*, MILWAUKEE J. SENTINEL (Apr. 3, 2020, 10:51 AM), <https://www.jsonline.com/story/news/politics/elections/2020/04/03/gov-tony-evers-coming-under-fire-some-within-his-own-party-not-doing-more-postpone-tuesdays-election/5118254002>; see also Molly Ball, *What Went Wrong in the Wisconsin Election, and What We Can Learn From It Before November*, TIME (Apr. 9, 2020, 4:18 PM), <https://time.com/5818773/wisconsin-coronavirus-elections> (“The day before the vote, [Governor Tony Evers] issued an executive order delaying in-person voting until June. But Republicans immediately sued to block the action and won in state court.”).

<sup>89</sup> Molly Beck & Patrick Marley, *Wisconsin Election Will Move Forward After State Supreme Court Overturns Governor's Order*, USA TODAY (Apr. 6, 2020, 2:08 PM), <https://www.usatoday.com/story/news/politics/elections/2020/04/06/covid-19-wisconsin-governor-tony-evers-shuts-down-tuesdays-election/2955850001>.

possible, not even to go grocery shopping if they were able to avoid it that particular week (a particularly crucial time for “flattening the curve”). Milwaukee, in particular, could not find poll workers to work the polls, and consequently only 5 of 180 polling places opened in the city (with the assistance of the National Guard).<sup>90</sup> Photographs of voters standing in excruciatingly long lines for hours—reportedly as many as five hours in some places—demonstrated extraordinary civic courage and virtue in the face of tragically unnecessary risk to health and life. One particular photo—of a woman in line to vote holding a homemade sign “THIS IS RIDICULOUS”—quickly became iconic.<sup>91</sup>

Meanwhile, a record number of Wisconsin voters requested absentee ballots for the April 7 election, hoping to avoid the need to go to the polls in the midst of the pandemic.<sup>92</sup> But this spike in vote-by-mail applications overwhelmed local election officials, and thousands of eligible voters who properly requested their ballots on time (according to previously specified deadlines under state law) never received them from the government.<sup>93</sup> Indeed, on Election Day itself, the state’s Election Commission reported on its website that the government had yet even to *send* to voters timely requested absentee ballots—thereby making it obviously impossible for those voters to cast and return the ballots to local election officials by 8 PM on Election Day, as required by state law.<sup>94</sup>

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<sup>90</sup> John McCormack, *Why Were Only Five Polling Places Open in Milwaukee This Week?*, NAT’L REV. (Apr. 10, 2020, 5:37 PM), <https://www.nationalreview.com/2020/04/wisconsin-election-milwaukee-did-not-have-enough-polling-places>.

<sup>91</sup> See Henry Grabar, *An Interview with the College Senior Behind the Iconic Photo of Wisconsin’s Pandemic Election*, SLATE (Apr. 7, 2020, 6:49 PM), <https://slate.com/news-and-politics/2020/04/this-is-ridiculous-wisconsin-election-photo-interview.html>.

<sup>92</sup> In the end, about 80% of votes cast in the election were by absentee ballots compared to historical levels of under 10% absentee voting in presidential primaries. Nathaniel Rakich, *What Went Down in the Wisconsin Primary*, FIFETHIRTYEIGHT (Apr. 13, 2020, 11:43 PM), <https://fivethirtyeight.com/features/what-went-down-in-the-wisconsin-primary>.

<sup>93</sup> Nick Corasaniti & Stephanie Saul, *Inside Wisconsin’s Election Mess: Thousands of Missing or Nullified Ballots*, N.Y. TIMES (Apr. 9, 2020), <https://www.nytimes.com/2020/04/09/us/politics/wisconsin-election-absentee-coronavirus.html> (“Three tubs of absentee ballots that never reached voters were discovered in a postal center outside Milwaukee. At least 9,000 absentee ballots requested by voters were never sent, and others recorded as sent were never received.”).

<sup>94</sup> See WIS. ELECTIONS COMM’N, ABSENTEE BALLOT REPORT - APRIL 7, 2020 SPRING ELECTION AND PRESIDENTIAL PREFERENCE PRIMARY (Apr. 13, 2020), <https://elections.wi.gov/node/6847> (providing the number of absentee ballot applications reported and absentee ballots reported sent by county and demonstrating that there were numerous counties in which the number of absentee ballots sent was lower than the number of ballots requested as of April 13, 2020); WIS. ELECTIONS COMM’N, ABSENTEE BALLOT REPORT - APRIL 7, 2020 SPRING ELECTION AND PRESIDENTIAL PREFERENCE PRIMARY (Apr. 5, 2020), <https://elections.wi.gov/index.php/node/6815> (providing the number of absentee ballot applications

Voters disenfranchised by the government's own inability to process these timely vote-by-mail requests sued the state in federal court.<sup>95</sup> Plaintiffs initially asked for only a remedy that would have permitted ballots postmarked by Election Day to be counted as long as local officials received them during the following week.<sup>96</sup> But when it became apparent at the court's preliminary injunction hearing that this remedy would be insufficient to protect voters from wrongful disenfranchisement—since thousands of voters still had not received their absentee ballots and thus could not postmark them by Election Day—the federal district court permitted ballots to count as long as they arrived during the subsequent week, even if they had not been cast or postmarked on or before Election Day.<sup>97</sup> Although the Seventh Circuit sustained the district court's remedy, the U.S. Supreme Court, by a 5-4 vote, modified it in a crucial respect.<sup>98</sup> The Court's majority could not accept a preliminary injunction that would force the state to count ballots cast after Election Day was over. It saw that remedy as “fundamentally alter[ing] the nature of the election.”<sup>99</sup> At the same time, the Court left in place the district court's deviation from the state statute insofar as it required the counting of ballots postmarked on or before Election Day but arriving afterwards. Justice Ginsburg's vigorous dissent, on behalf of the Court's four Democratic appointees, protested that the majority's modification of the district court's decree left the wrongful disenfranchisement of innocent—and fully eligible—voters unremedied.<sup>100</sup>

The partisan nature of the Court's 5-4 split—with all Republican appointees on one side, and all Democratic appointees on the other—was the most disconcerting aspect of the whole Wisconsin debacle. With the name of the case transparently announcing the partisan interests on each side, *Republican National Committee v. Democratic National Committee*, the sight of the five Republican-appointed Justices supporting the RNC and the four Democratic-appointed Justices supporting the DNC was awful optics,

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reported and absentee ballots reported sent by county and demonstrating that there were numerous counties in which the number of absentee ballots sent was lower than the number of ballots requested as of April 5, 2020, two days before the election); *Wisconsin Primary Recap: Voters Forced to Choose Between Their Health and Their Civic Duty*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-primary-election.html> (“Official state figures showed that of 1,282,762 ballots requested, 1,273,374 had been sent, a shortfall of about 9,000. Voters had returned 864,750 ballots by Tuesday morning.”).

<sup>95</sup> See *Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-284-wmc, 2020 WL 1638374, at \*1 (W.D. Wis. Apr. 2, 2020).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at \*2.

<sup>98</sup> See *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1206 (2020) (per curiam).

<sup>99</sup> *Id.* at 1207.

<sup>100</sup> *Id.* at 1209–10.



to put it mildly. Ideology rather than raw partisanship might have explained this 5-4 split, but that possibility did not ameliorate the especially ugly appearance of this particular 5-4 split.

Each side had a valid point. The majority was correct to be concerned about ballots cast after the polls have closed. (Just imagine, for the November 3 election, ballots cast on November 4, 5, 6, and so on. That would not be good.) But the dissent was right to complain about the wrongful disenfranchisement of the voters who could not cast an absentee ballot in this pandemic-afflicted election because, despite their timely and proper request, they never received their ballot from the government. One of the great tragedies of this Wisconsin election was that the legal system was unable to see a solution that could have preserved Election Day as the last day for casting ballots while at the same time making sure that no voter lacked an absentee ballot who had properly requested one.<sup>101</sup>

Wisconsin avoided an even worse electoral calamity only because the most significant race on the ballot—a seat on the state’s supreme court (the presidential primary having become inconsequential with Biden having effectively secured the nomination already)—was not nearly as close as anticipated.<sup>102</sup> Previous elections for seats on the state supreme court had been extremely close, some decided by under 10,000 votes.<sup>103</sup> This one was expected to be the same, and if it had been, then it would have sparked a second round of major litigation over its outcome. With at least 9000 voters wrongly disenfranchised because they had never received their timely requested absentee ballots,<sup>104</sup> any margin of victory under 9000 votes would

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<sup>101</sup> One possible solution, unadopted, lies in something called the Federal Write-In Absentee Ballot. See Edward B. Foley & Steven F. Huefner, *The Simplest Way to Avoid a Wisconsin-Style Fiasco on Election Day*, POLITICO (Apr. 21, 2020, 4:30 AM), <https://www.politico.com/news/agenda/2020/04/21/simplest-way-avoid-wisconsin-fiasco-election-day-196625> (highlighting that the “Federal Write-In Absentee Ballot”—a blank ballot available only for military and overseas voters that can be downloaded, printed out, and mailed from anywhere—could similarly be made available to domestic voters).

<sup>102</sup> Reid J. Epstein, *Upset Victory in Wisconsin Supreme Court Race Gives Democrats a Lift*, N.Y. TIMES (Apr. 13, 2020), <https://www.nytimes.com/2020/04/13/us/politics/wisconsin-primary-results.html> (“The victory, by upward of 120,000 votes . . . came as a shock to Republicans and Democrats alike in Wisconsin . . .”).

<sup>103</sup> Wisconsin Supreme Court Elections, 2019, BALLOTPEdia, [https://ballotpedia.org/Wisconsin\\_Supreme\\_Court\\_elections,\\_2019](https://ballotpedia.org/Wisconsin_Supreme_Court_elections,_2019) (“With 100 percent of precincts reporting, Hagedorn led Neubauer by 5,960 votes or 0.5 percentage points.”); Patrick Marley, *State Board Declares Prosser Winner*, MILWAUKEE J. SENTINEL (May 23, 2011), <http://archive.jsonline.com/blogs/news/122443704.html?page=1> (“State elections officials on Monday certified the results of the recount of the April 5 election for state Supreme Court, declaring that Justice David Prosser has been re-elected to another 10-year term on the court by 7,004 votes.”).

<sup>104</sup> Corasaniti & Saul, *supra* note 93.

have been within the proverbial “margin of litigation.”<sup>105</sup> In that case, a court would have been required to rule on whether a certified victory with those vote totals could be considered valid, or instead must be rendered void, because of the magnitude of wrongful disenfranchisement affecting the race. But when the actual margin of victory surprisingly ended up over 120,000 votes, and the losing candidate quickly conceded defeat on Election Night, the need for this second round of litigation evaporated.<sup>106</sup>

Nonetheless, this COVID-affected Wisconsin election raises the obvious question: What if the same problem occurs in November, but the presidential election—unlike the state’s supreme court race—is close enough to be within the margin of litigation? This is easy to imagine. Michigan and Pennsylvania, like Wisconsin, are Electoral College battlegrounds that require, by state statute, that absentee ballots arrive to local election officials by 8 PM on Election Day in order to be counted.<sup>107</sup> But Michigan and Pennsylvania, like Wisconsin, do not have experience with high volumes of vote-by-mail in past elections, and officials there could easily become overwhelmed by a deluge of absentee ballot applications for the November election, just as Wisconsin officials were for its April 7 primary (and perhaps even more so, given expected high “turnout” for the November general election—with that “turnout” being mostly in the form of vote-by-mail).<sup>108</sup> What if tens of thousands of Michigan or Pennsylvania voters do not receive the absentee ballots that they are entitled by law to cast, despite their doing everything they are required to receive a ballot? What if these tens of thousands of wrongly disenfranchised Michigan or Pennsylvania voters might have made a difference in the outcome of the popular vote for president in either state, and what if that state is pivotal to the entire outcome of the Electoral College? Is the result of the presidential

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<sup>105</sup> See Richard L. Hasen, *Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 946 (2005) (defining the “margin of litigation” as a function of the closeness of the election results—in the presidential context, it is the closeness of election results in a state whose electoral votes might decide the election).

<sup>106</sup> Epstein, *supra* note 102.

<sup>107</sup> See MICH. COMP. LAWS ANN. § 168.759b (West 2020); PA. STAT. AND CONS. STAT. ANN. § 3146.6(c) (West 2020); The Office of Sec’y of State Jocelyn Benson, *Absentee Voting Allows You to Vote by Mail*, MICHIGAN.GOV, [https://www.michigan.gov/sos/0,4670,7-127-1633\\_8716\\_8728-21037-,00.html](https://www.michigan.gov/sos/0,4670,7-127-1633_8716_8728-21037-,00.html) (last visited July 14, 2020); *Voting in Pennsylvania*, COMMONWEALTH PA., <https://www.pa.gov/guides/voting-and-elections> (last visited July 15, 2020); see also Nate Cohn, *In Poll, Trump Falls Far Behind Biden in Six Key Battleground States*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/2020/06/25/upshot/poll-2020-biden-battlegrounds.html> (listing Michigan and Pennsylvania as battleground states).

<sup>108</sup> See Nick Corasaniti & Michael Wines, *Beyond Georgia: A Warning for November as States Scramble to Expand Vote-by-Mail*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/10/us/politics/voting-by-mail-georgia.html> (discussing expected high voter turnout and the likely surge in voting by mail in the 2020 presidential election).

election valid—should it be considered so—if it is dependent in this way upon the wrongful disenfranchisement of innocent, eligible voters who attempted to participate by properly requesting an absentee ballot? This last question is an especially urgent one to consider before November, and it remains unsettled as a matter of law by the U.S. Supreme Court's decision in *RNC v. DNC*, which concerned only the propriety of a preliminary injunction that would have extended the date for casting ballots, and which explicitly disclaimed any intent to resolve other issues including whether an election outcome tainted by this kind of wrongful disenfranchisement is entitled to stand as a valid result under either state law or the federal Constitution.<sup>109</sup>

Thus, as this year's November election rapidly approaches, American democracy perilously needs conceptual clarification about the principle, or standard, by which to determine whether a reported result of vote totals counts as a valid victory. This point was pressingly true even before the arrival of the coronavirus. The Trump impeachment trial already had acutely added to previous stresses to American democracy, necessitating a major national rethinking of what electoral validity means to Americans. The coronavirus adds an entirely new dimension to this essential national inquiry. What might happen in a U.S. election, either related to COVID-19 or otherwise, that should cause Americans to reject the result as not being a valid exercise of popular sovereignty? Conversely, what might happen in a U.S. election (again, either related or unrelated to the virus) that, while undesirable, does not undermine the outcome as an authentic expression of the electorate's choice? This type of basic question about electoral validity may have been considered to be well-settled in previous periods of American history, but it is no longer.

With this urgency in mind, we now turn to the task of rebuilding a shared consensus of what standard to employ to determine whether the result of a U.S. election should be accepted as valid.

## II

### A REVITALIZED CONCEPT OF ELECTORAL VALIDITY

An earlier version of this essay used the term *legitimacy*, rather than *validity*, in order to analyze the concept that should guide the key question of whether the losing side in an election should accept the officially certified final vote tally as conferring upon the election's winner the right to hold office as a consequence of the election having been held. But responses from readers of that early draft exposed a problem with the term *legitimacy*: in

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<sup>109</sup> See *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1208 (2020) (per curiam).

ordinary, colloquial usage it is capacious enough to capture attacks on electoral outcomes that are broader than appropriate for determining whether the losing candidate, based on the officially certified vote tallies, should concede defeat and respect the right of the winner to hold office because of the election's result.<sup>110</sup> To take one obvious example, many Americans believe that the Electoral College is fundamentally undemocratic insofar as it sometimes produces winners different from the candidate who receives the most popular votes cast by citizens nationwide (as was true in both 2000 and 2016). In attacking this fundamentally undemocratic character of the Electoral College, many Americans wish to employ the term *legitimacy*, or its opposite, to characterize an Electoral College victory that deviates from the winner of the national popular vote as "illegitimate" in a society that professes a commitment to basic principles of democracy, like one-person-one-vote.

While it is important to respect this critique of the Electoral College, and indeed the strength of feeling often associated with it, it is also necessary to distinguish this kind of attack on the Electoral College as a system for choosing a president from an attack on the *validity* of a vote tally produced by that system as being inconsistent with its own rules and procedures. Donald Trump did not win the national popular vote in 2016, and so from the perspective of core democratic values that fact alone might tarnish, or even "delegitimate," his Electoral College victory in the eyes of some Americans (as presumably it would any time an Electoral College winner prevailed without also winning the national popular vote).<sup>111</sup> Nonetheless, after several recounts (requested by Jill Stein), there was no doubt that Trump's Electoral College victory was *valid* according to the Electoral College system itself and the way that it tallies popular votes on a state-by-state basis and produces an overall Electoral College result. Accordingly, the victory entitled him to hold office based on the result of that election.<sup>112</sup>

This point about the Electoral College is an illustration of a broader, more fundamental point: there are potentially multiple bases for questioning

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<sup>110</sup> "Legitimacy" is a notoriously elusive concept in political philosophy, especially as applied to elections. See generally DENNIS F. THOMPSON, JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES 2–4 (2002).

<sup>111</sup> See, e.g., Jonathan Chait, *The Rigged 2000 Florida Recount and the Path to Donald Trump*, N.Y. MAG.: INTELLIGENCER (Oct. 19, 2016), <https://nymag.com/intelligencer/2016/10/the-rigged-2000-florida-recount-and-the-path-to-trump.html>.

<sup>112</sup> It is of course important to be concerned about the structural fairness of the electoral system. See FOLEY, *supra* note 29, at 7 (discussing one issue of structural fairness relating to the Electoral College). However, for reasons elaborated in the text, the design of the electoral process is best considered separately from its operation. It is imperative to know whether the system did or did not work according to its own design, and that inquiry becomes clouded if issues of structural fairness are included.

the fairness or even democratic legitimacy of America's existing electoral system, but those critiques are analytically distinct from questioning the validity of vote tallies produced by elections held pursuant to the existing system. Felon disenfranchisement is another obvious illustration of this broader point. Felon disenfranchisement, especially before Florida's reforms (which remain in flux, depending on the outcome of litigation),<sup>113</sup> undoubtedly accounts for more outright denial of the right to vote among American adults than any other feature of the nation's existing electoral system. As a matter of terminology, it is hardly incoherent to characterize as "illegitimate" any election affected by felon disenfranchisement—in other words, an election in which one has sound reason to believe the outcome would have been different if convicted felons (especially those who had completed their sentences) had not been denied the right to vote in the election as a matter of law. If the concept of democracy is to give all adult citizens an equal right to vote, then felon disenfranchisement is inconsistent with that concept, and an election outcome dependent upon it would seem fundamentally undemocratic. Still, if felon disenfranchisement is part of the existing electoral system (right or wrong), then it becomes necessary to be able to determine whether a particular election result is or is not valid as a product of that existing electoral system. Did Candidate X win a valid result according to the rules of who was entitled to vote (even if those rules themselves could be criticized), and thus is Candidate X entitled to hold office based on a valid electoral victory within the electoral system as it currently exists?

We need a concept of electoral *validity* that is different from—and narrower than—the more diffuse idea of democratic *legitimacy*. As Americans, we need this concept of electoral validity so that we can decide whether or not a candidate, even one we did not vote for, is entitled to take and hold office as a product of the votes cast and counted in the election. Lincoln's victory in 1860 was valid, whatever one thought (or thinks) of the electoral system in which he won. So too were Barack Obama's victories in 2008 and 2012, as well as Donald Trump's in 2016. Likewise, we need to be able to know whether the result of this year's November election is or is not

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<sup>113</sup> As of this writing, a Florida district court has held that a statute requiring formerly-disenfranchised residents with felony convictions to pay all fines and fees before voting is an impermissible poll tax. *See Jones v. DeSantis*, 410 F. Supp. 3d 1284 (N.D. Fla. 2019). But that ruling has been stayed pending an appeal, which was heard on August 18. *See also* Pete Williams, *Court Struggles with Felon Vote in Fla., Case Could Determine Participation in November*, NBC NEWS (Aug. 18, 2020, 2:39 PM), <https://www.nbcnews.com/politics/2020-election/appeals-court-struggles-felon-vote-florida-n1237124>.

valid.

The essence of this narrower idea of electoral validity is the genuineness or authenticity of the result. The election produces a final certified vote tally. Does that tally genuinely reflect the aggregate choice of the eligible and participating electorate? This question entails two subsidiary inquiries. First, is there anything incorrect about the count of ballots cast—and specifically something that would suggest that the vote tally does not accurately reflect the electoral choices of the eligible voters who cast those ballots? Second, is there anything missing from the count of ballots cast—caused, for example, by the absence of ballots from eligible voters who attempted to cast them—so that the count of cast ballots, even if accurate, does not reflect the will of the eligible electorate endeavoring to participate in the election? As we shall see, both of these subsidiary inquiries are crucial components of a complete standard for assessing the validity of an election’s result. But first it is necessary to clarify an even more basic distinction: the difference between (1) *negating* the collective choice of the eligible and participating electorate; and (2) *manipulating* this collective choice.<sup>114</sup>

A. *The Distinction Between Negating and Manipulating Voter Choice*

Although the validity of Donald Trump’s 2016 Electoral College victory should not be in doubt, there has been enough confusion in the public discussion of Russia’s malign interference in that election to require clarification on this essential point. As we saw in Part I, some prominent public figures speak of Russia having possibly caused Trump’s victory, suggesting that, if Russia did, that undermines the validity of Trump’s election. But even if Russia was successful in persuading enough voters to cast ballots for Trump, or not to cast them for Hillary Clinton, that success

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<sup>114</sup> Chad Flanders develops an analytical distinction related to but somewhat different from the one advanced here. Chad Flanders, *Was the 2016 Election Legitimate?*, 64 ST. LOUIS U. L.J. 635 (2020). First, Flanders uses the term “legitimacy,” whereas this essay introduces the term “validity” in an effort to convey something narrower and more precise. *See id.* at 637. Second, Flanders seeks a three-part distinction: in addition to what this essay refers to as direct and indirect attacks on an election, Flanders identifies a third category of electoral “illegitimacy,” what he calls “structural unfairness” of the electoral process itself. *See id.* at 641. In contrast, for reasons already stated in the text, this essay proceeds on the belief that issues of “structural fairness” should be set aside entirely when focusing on whether attacks or interference on a particular election, while it is underway, undermines the validity of that specific election; thus, this essay sets aside such considerations. Moreover, since the term “legitimacy” is appropriately associated with issues of system design and structural fairness, an additional reason to use the narrower term “validity” when focusing on interferences or attacks on the operation of the system in its current design is to clarify that the fairness of the existing system is an altogether separate matter. Finally, although Flanders conceptually differentiates direct and indirect attacks in a way that is similar to the analysis here, he does not draw or emphasize the importance of this distinction as sharply as this essay does. *See id.* at 645.

would not have rendered Trump's victory invalid. Persuading voters on how to exercise their right to vote does not negate the choice they make. Given the possibility that Russia again, or some other foreign or domestic actors may perpetrate a disinformation campaign that could be successful in persuading voters how to cast their ballots this November, it is necessary to have a standard of electoral validity that does not permit this kind of disinformation to render an election result invalid.

It is thus imperative that Americans clearly distinguish between two very different types of "attacks" on American democracy, irrespective of whether those attacks come from foreign or domestic sources. The first type of attack affects the casting and counting of the votes themselves, including the official determination of the count and thus the election's officially reported result. The second type of attack affects the preferences voters have about their options in the election, including the relative merit of the candidates on the ballot and whether or not they should bother to cast a vote for any of them or, instead, just abstain.

Although the terms "direct" and "indirect" often cause more confusion than clarity in legal analysis,<sup>115</sup> if used carefully and cautiously in this particular context, it may be helpful to distinguish the first type of attack as a *direct* interference with the exercise of popular sovereignty by the American electorate, whereas the second type of attack is an *indirect* interference with the choice that the American electorate makes as an exercise of popular sovereignty. Whether expressed in terms of this direct-versus-indirect terminology or otherwise, this fundamental analytical distinction should be a basic foundation for assessing whether or not the result of a U.S. election qualifies as valid. This essay will generally use the terms "type-1" and "type-2" when drawing the distinction between (1) *negating* and (2) *manipulating* voter choice, but occasionally will invoke the terminology of direct-versus-indirect insofar as that additional gloss may help illuminate the distinction in particular contexts.<sup>116</sup>

If something transpires during the course of a U.S. election that apparently has caused the officially reported result to deviate from what the eligible voters actually cast their ballots for, then there are grounds for

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<sup>115</sup> For example, after employing this distinction in the context of Commerce Clause jurisprudence, the Supreme Court abandoned it as unhelpful. *See Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (finding that Congress could regulate certain activity under its Commerce Clause power irrespective of whether that activity could be characterized as having a "direct" or "indirect" effect on interstate commerce).

<sup>116</sup> In using the terms "type-1" and "type-2" in this context, this essay does not attempt to draw upon other uses of this terminology, including the distinction between two different types of statistical errors: false positives and false negatives. In the context of this paper, this terminology is intended only to track the conceptual distinction between direct attacks that negate voter choice (type-1) and indirect attacks that manipulate voter choice (type-2).

asserting that the officially reported result flunks the basic test of electoral validity, since it does not conform to the will of the electorate that it purports to express. The fundamental discrepancy between the electorate's will, as expressed in actual votes cast, and the election's official outcome is reason to say that the election failed in its essential purpose, and therefore, the result is invalid. Consider, for example, a recount that shows the candidate initially ahead by 137 votes actually lost by 102; Vermont had a statewide recount of this nature in 2006.<sup>117</sup> To let the initial count stand, when the recount is more accurate, would be to put the wrong candidate in office. The officeholder would be the candidate that the eligible and participating voters wanted to lose, not to win. In this situation, the result of the election would be inconsistent with the idea that the election is supposed to put into office the candidate chosen by the eligible and participating voters.

Indeed, if such a discrepancy can be factually proven in a court of law, employing ordinary standards of evidence, it would provide a basis for judicial correction (or invalidation) of the election's result.<sup>118</sup> A judicial remedy would be justified on the ground that, unless rectified, the discrepancy renders the election null and void because the result cannot be understood as consistent with the reason for holding the election in the first place. Given that the goal of holding the election is to ascertain the electorate's choice, if this kind of discrepancy exists, then to accept the result as valid would be pure fantasy because the result—as proven factually—has been entirely disconnected from a determination of what the participating electorate actually decided.<sup>119</sup> Yes, you could just accept the result by fiat and move on, but you might as well just flip a coin, because the result (given these facts) is no better an indication of the electorate's choice, and maybe

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<sup>117</sup> FOLEY, *supra* note 10, at 334.

<sup>118</sup> The jurisprudence that governs judicial rectification of improper election results is largely a product of state, not federal, law and thus necessarily varies to some extent among the fifty states. Nonetheless, since the nineteenth century there has been some commonality in how common-law courts handle these cases. See GEORGE W. MCCRARY, A TREATISE ON THE AMERICAN LAW OF ELECTIONS ch. 12 (Henry L. McCune ed., 4th ed. 1897) (laying out general legal principles for judicial responses to contested elections). Depending upon their particular circumstances, these cases can raise difficult conceptual and evidentiary issues. The leading scholarship on this topic in this century is Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. LEGIS. 265 (2007). See also Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL'Y REV. 350 (2007). To help bring coherence and clarity to this area of law, the American Law Institute produced PRINCIPLES OF THE LAW: ELECTION ADMIN. (AM. LAW INST. 2019), Part II of which contains a somewhat code-like set of sixteen provisions for the adjudication of ballot-counting disputes. Readers of this essay are invited to study Huefner's article or the ALI principles for additional insight into the jurisprudence of this topic.

<sup>119</sup> Section 213 of the ALI's principles on elections provide for a judicial remedy if "the Certificate of Election is mistaken in its identification of the election's winner because [of] fraud, error, or other form of impropriety." PRINCIPLES OF THE LAW: ELECTION ADMIN. § 213 (AM. LAW INST. 2019).



even worse.<sup>120</sup> It is in this crucial respect that acceptance of the result on these facts would fail the test of electoral validity: there would be no justification for accepting the result as an expression of voter choice and yet, rather than voiding the result and trying again (or pursuing some other alternative way to fill the vacant office until the opportunity for another election),<sup>121</sup> the result would be accepted under some kind of fictitious pretense that it reflected the electorate's will when in fact it did not.

Conversely, given prevailing principles of free speech in American political discourse, if something happened in the course of a U.S. election that was viewed as *improperly* influencing the choices that voters made, but did not affect the accuracy of the electoral outcome as officially reported, then the result would *not* be invalid as a false or fictitious expression of the electorate's actual choice. Consider, in this respect, the infamous "Swift Boats" attack on John Kerry in the 2004 presidential campaign.<sup>122</sup> Factchecking journalists viewed this attack as a deliberately deceptive mischaracterization of John Kerry's war record, obviously intended to undermine his presidential candidacy.<sup>123</sup> To the extent that it was effective in dissuading enough voters from supporting Kerry to make a difference, as

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<sup>120</sup> A coin toss would give each of two contestants an equal chance of prevailing randomly, and thus a 50-50 chance that the coin toss would conform to the result that the voters actually wanted. By contrast, if the certified vote tally was the product of partisan wrongdoing—like the intentional stuffing of the ballot box—then to let the certified result stand would be even less likely than a coin toss to conform to what the voters actually wanted.

<sup>121</sup> Voiding an election may have the effect, under state law, of leaving the office vacant when the previous term comes to an end. If a new election is not held immediately to fill the vacancy, the office may remain vacant, or state law may permit an appointed replacement until such time as a new election can occur. For example, when the federal judiciary enjoined certification of a local election in Hamilton County, Ohio, the office was filled by a temporary appointment. *See* *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 245 (6th Cir. 2011). In the case of voiding a gubernatorial election, the office might be filled by a separately elected Lt. Governor. *See, e.g.,* CQ PRESS, *GUIDE TO U.S. ELECTIONS* 1639 (Deborah Kalb ed., 7th ed. 2016) (describing the events of Georgia's 1946 gubernatorial election, in which "the state supreme court voided the [election results] and declared that the lieutenant governor-elect[] . . . should take office").

<sup>122</sup> *See* Gerald G. Ashdown, *Distorting Democracy: Campaign Lies in the 21st Century*, 20 WM. & MARY BILL RTS. J. 1085, 1093 n.53 (2012) (providing background on the "Swift Boat Veterans for Truth" controversy).

<sup>123</sup> A group of Vietnam veterans accused Kerry of lying about his war record, but their account was contradicted by others and Navy records. It seemed like a political "hit job" motivated by anger at Kerry becoming an opponent of the war. *See* Edward B. Foley, *A Swift Boat Update: Falsity*, ELECTION L. @ MORITZ (Aug. 30, 2004), [https://moritzlaw.osu.edu/electionlaw/ebook/part3/campaign\\_false04](https://moritzlaw.osu.edu/electionlaw/ebook/part3/campaign_false04) (citing Washington Post investigation); *see also* LUCAS GRAVES, *DECIDING WHAT'S TRUE: THE RISE OF POLITICAL FACT-CHECKING IN AMERICAN JOURNALISM* 60 (2016) (attributing to the "Swift Boat" ad the rise of factchecking); Brooks Jackson, *Republican-Funded Group Attacks Kerry's War Record*, FACTCHECK.ORG (Aug. 6, 2004), <https://www.factcheck.org/2004/08/republican-funded-group-attacks-kerrys-war-record> (evaluating the allegations against then-Senator Kerry).

many—including Kerry himself<sup>124</sup>—believe,<sup>125</sup> this deliberate deception improperly determined the election’s outcome. It should not have done so. It was a “dishonest and dishonorable” attack ad, as John McCain (who was supporting Bush) said at the time.<sup>126</sup> If it maliciously duped enough voters to make a difference in the outcome of the race, one can say that it subverted the electorate’s choice. Even so, it did not negate the fact that the outcome of the election was the choice that the voters themselves made, whatever were the reasons for their electoral preferences. The voters themselves were responsible for what media content persuaded them on the choice between Bush and Kerry. The “Swift Boats” deception may have influenced their choice, or at least enough of them, but it was still their choice. The outcome was not invalid in this key respect.

You may wish that voters had not been swayed, or even duped, by the mendacity of the “Swift Boats” ad. You may wish that the media had not magnified the ad’s dissemination, as it did.<sup>127</sup> You may hope that voters do a better job in the future in exercising their civic responsibility of choosing a Commander in Chief on behalf of the nation. But you cannot deny that Bush, rather than Kerry, was their choice in 2004. Even in Ohio, which was the pivotal state in the Electoral College that year, and where there were significant problems in the voting process (including excessively long lines in multiple polling places), there is no reasonable doubt that more than enough ballots cast and counted for Bush made him the preferred choice of the eligible and participating electorate.<sup>128</sup> Whether or not you think that the “Swift Boat” ad undermines the “legitimacy” of Bush’s victory in some looser sense of electoral morality, because it was “improper” to influence voters in this deceitful way, you cannot—or at least should not—claim that the 2004 election failed to satisfy the basic test of electoral validity. Bush was entitled to be inaugurated for his second term in office on account of the tally of ballots in Ohio and elsewhere that made him the Electoral College victor, and it would have been entirely inappropriate for any court to have attempted to nullify that victory on the ground that the “Swift Boat” ad had

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<sup>124</sup> See JOHN KERRY, EVERY DAY IS EXTRA 301–306 (2018).

<sup>125</sup> See Derek Buckaloo, *Swift Boat Veterans for Truth*, CTR. FOR PRESIDENTIAL HIST.: THE ELECTION OF 2004, <http://cphcmp.smu.edu/2004election/swift-boat-veterans-for-truth> (last visited June 14, 2020) (noting that the debut of the “Swift Boat” ad marked the start of Kerry’s decline in opinion polls).

<sup>126</sup> Jackson, *supra* note 123.

<sup>127</sup> See KERRY, *supra* note 124, at 302 (noting how the media amplified the claims of the “Swift Boat” ad, while the amount actually spent on the ad was minimal).

<sup>128</sup> *America Votes 2004: Bush Defeats Kerry*, CNN.COM, <https://www.cnn.com/ELECTION/2004> (last visited June 30, 2020) (providing the 2004 presidential election results and noting that “the 2004 election was decided by one state[;] Ohio’s 20 electoral votes gave President Bush his margin of victory over Sen. John Kerry”).

improperly influenced the electoral choice that the voters actually made, as indicated by those ballots. (By contrast, if it had been the case that the count of ballots in Ohio was *not* an accurate reflection of the electorate's choice in that state, because all the voting problems—counterfactually—had exceeded Bush's margin of victory in the tallied ballots, then it would have been appropriate for a court to consider whether judicial nullification of the certified result in Ohio was warranted.)

To be clear, the “Swift Boat” ad remains cause for deep disturbance. There should be every reasonable effort, consistent with First Amendment values and the like, to minimize the pernicious effect this kind of deliberate deception can have in American elections.<sup>129</sup> But in employing a standard of electoral validity, we should reserve the label “invalid” for those elections that suffer from type-1 attacks, where the result does not conform to the electorate's will, because that attack truly is a denial of popular sovereignty as reflected in votes cast by valid voters, and we should not extend the term “invalid” to an election affected by type-2 attacks—of which the “Swift Boat” ad is a paradigmatic example—where the will of the electorate remains ascertainable, and the result is an accurate reflection of popular sovereignty (even if one might wish the electorate had not been influenced as it was).

Maintaining this sharp analytical distinction between the first and second types of attacks—direct versus indirect—is especially vital in the wake of the Trump impeachment trial. Irrespective of whether one believes that Trump's Ukraine-related behavior was a sufficient basis for removing him from office,<sup>130</sup> one should be clear that it involved only the second type of attack and not the first. Seen in the light that the House Managers characterized it, Trump's attempt to “cheat” his way to a reelection victory by having Ukraine smear Biden is in the same category as the “Swift Boats” ads. It is, in essence, an attempt to outsource a “Swift Boat” smear to a foreign country. And Trump's attempt relied on the powers of the presidency in a way that the “Swift Boat” ad did not. This is not good—perhaps even worthy of impeachment and removal from office. But Trump's efforts are unequivocally *not* a direct attack on the casting and counting of votes by the

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<sup>129</sup> The literature on the deleterious effect of deceitful campaign attack ads is voluminous. *See, e.g.*, STEPHEN ANSOLABEHRE & SHANTO IYENGAR, *GOING NEGATIVE: HOW ADVERTISEMENTS SHRINK & POLARIZE THE ELECTORATE* (1995). The negative effects of deceptive campaign ads have become much worse in the past quarter-century.

<sup>130</sup> *See, e.g.*, Sheryl Gay Stolberg & Carl Hulse, *Alexander Says Convicting Trump Would 'Pour Gasoline on Cultural Fires,'* N.Y. TIMES (Jan. 31, 2020), <https://www.nytimes.com/2020/01/31/us/politics/alexander-impeachment-witnesses.html> (noting one senator's decision to vote against Trump's removal despite Trump's “clearly inappropriate” behavior involving Ukraine).

electorate, and thus not something that can undermine the validity of the election in the analytically relevant sense. Even if voters had been convinced to vote against Biden in the same way that voters were convinced to vote against Kerry, their votes still would have been their choices, and thus the election would have been an exercise in popular sovereignty.

Again, we should try to eliminate as much “Swift Boat”-type deception as possible from American political campaigns, and we should deplore it as vociferously as we can when it occurs, but we should not say that it destroys the validity of the votes that Americans actually cast as an expression of their electoral choices. The same point applies to whatever disinformation Putin might inject into the 2020 race, with or without Trump’s tacit (or even explicit) assent. Such disinformation, like a “Swift Boat” ad or any other form of malicious campaign deception, will be part of the overall messaging that voters will receive as they make their choices for whom to vote or whether to vote at all. Maybe some will be swayed or duped by Putin’s lies, just as they might have been swayed or duped by “Swift Boat” lies, or lies from any other sources, foreign or domestic. But, ultimately, we have to trust the capacity of voters to discount the lies and decide for themselves. Otherwise, the very concept of self-government self-destructs.<sup>131</sup> In any event, whether voters are successful in this regard or not, the decision of which candidate to vote for is still their choice to make, regardless of the reasons for which they make the decision. We cannot, or at least should not, condemn as “invalid” the choices that voters actually make, even if we might have preferred them to have been persuaded by other messaging instead of what apparently (on this hypothesis) deceptively persuaded them. In short, it might have been a bad choice—even a *misguided* choice—but it was still *their* choice as the electorate’s collective exercise of popular sovereignty. As such, it does not fail the relevant test of electoral validity.

This point—this basic analytical distinction between the two types of attacks, reserving a denial of validity for the first type and not for the second—cannot be emphasized too much as America endeavors to rehabilitate a workable conception of electoral validity in the aftermath of the Trump impeachment trial. As the 2020 campaign unfolds, it is likely that the airwaves, social media, and public discourse generally will be filled with discussions of democracy that conflate this distinction. Extending from the impeachment trial itself, there will be repeated suggestions that the outcome

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<sup>131</sup> Who is going to claim authority to overturn the will of the electorate on the ground that the electorate suffered from an incapacity to make an intelligent choice in light of the information pollution that occurred during the campaign? And even if some institution purported to exercise that kind of authority, by definition it would be inconsistent with the concept of democratic self-government precisely because it would be some entity other than the electorate itself substituting its own judgment for the contrary choice made by the electorate.

of the 2020 vote cannot be trusted as valid if Putin, or others, are successful in a disinformation campaign of the kind perpetrated in 2016.<sup>132</sup>

COVID-19 does not alter this reality; rather, it compounds the problem, for there is now the possibility of disinformation associated with the virus itself or the government's response to it.<sup>133</sup> Suppose Trump loses and blames the loss on a misleading smear campaign that exaggerates his mishandling of the pandemic. He and his supporters might try to assert that the result is invalid because of the media misinformation that caused it. These suggestions must be emphatically and regularly resisted, relying upon the basic analytical distinction between the two types of attacks. Patiently, but firmly, it must be routinely explained—until it sinks in—that the project of democracy, if it is to continue to be successful, requires making this analytical distinction. Election results tainted by type-1 attacks can be justifiably invalidated as contrary to democracy itself. Election results tainted by type-2 attacks, while regrettable, cannot; they are an aspect of democracy in practice.

### *B. Disenfranchisement as Subset of Direct Attacks*

Crucially, a rehabilitated conception of electoral validity that rests on this fundamental analytical distinction (between direct and indirect attacks) is *not* the same as a return to the traditional conception, which focused solely on an accurate count of ballots cast by eligible voters. There is, and should be, room in the rehabilitated conception for negation of electoral choice caused by the disenfranchisement of eligible voters who actually endeavor to participate—the kind of sabotage of self-government that Hayes' supporters complained of in 1876.

One must be careful in the description of exactly what qualifies as disenfranchisement of eligible voters that would render the result of an election “invalid” as a failure to capture the electorate's actual choice as an exercise of popular sovereignty. The fact that some voters who might have voted did not, perhaps because they were turned off by the negativity of the campaign, obviously would not qualify. But if, to borrow an example from Rick Hasen, Putin managed to turn off the electricity in all of Philadelphia on Election Day, and if that sabotage prevented voters who showed up at the polls from casting ballots (even provisional ones), which in turn affected

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<sup>132</sup> See Stone, *supra* note 80.

<sup>133</sup> Independent factcheckers have already accused Democrats of deceitfully distorting the President's words about the virus. See Rem Rieder, *Democratic Ad Twists Trump's 'Hoax' Comment*, FACTCHECK.ORG (Apr. 14, 2020), <https://www.factcheck.org/2020/04/democratic-ad-twists-trumps-hoax-comment> (criticizing a Democratic super PAC ad suggesting that the President referred to the coronavirus as a “hoax”).

enough Philadelphia voters to flip the outcome of the presidential race in Pennsylvania, and finally if Pennsylvania were pivotal in deciding the Electoral College winner, then Putin's attack reasonably could be said to negate the validity of the officially reported result.<sup>134</sup> This sabotage, in other words, would fall into the category of a direct attack on the casting of ballots—a type-1 attack—and would not be an indirect disinformation campaign affecting what voters thought about their electoral choice. Rather, this attack would be directly negating the electoral choice itself—hence its invalidating effect.

Electoral validity, in other words, should not be just about the accurate counting of ballots actually cast. While it is true that it is impossible to count ballots never cast—as observed in both the elections of 1876 and 2000—it is not necessarily impossible to assess the effect of successfully preventing voters who attempt to cast ballots from doing so. Philadelphia voters who go to the polls on Election Day, but who never get a chance to cast a ballot, because Putin has successfully taken down the power grid in Philadelphia, have not recorded their intended votes in a way that can be counted; but the exclusion of their would-be votes from the official count is still a denial of the collective self-government that these Philadelphia voters were attempting to participate in by going to the polls. This situation is not that different from one in which these voters had cast their ballots, but then because of a different type of electrical malfunction all of their votes had been irretrievably wiped away before they had been included in the final official count of the election. In either case, to report the result of only those votes capable of being counted, from outside Philadelphia, would be a false and fictitious pretense of ascertaining the choice that Pennsylvania's voters made in that election. It would be necessary to void the result and try again, or to remedy the problem in some other way, in order to have a result that could be said to *authentically* conform to the choice made by the Pennsylvania voters participating in that election.<sup>135</sup>

Candidly, there may be some unavoidable ambiguity at the margins about how to apply this principle in practice. What about Philadelphia voters who, after hearing of polling place disruptions due to the power outage, decide not to go to the polls? Can we be sure that they would have cast a ballot if the power outage had not happened? What if the power outage was

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<sup>134</sup> See HASEN, *supra* note 10, at 93.

<sup>135</sup> See PRINCIPLES OF THE LAW: ELECTION ADMIN. § 213(g) (AM. LAW INST. 2019) (providing that a court should nullify an election if but only if a contestant can show that (1) eligible voters were prevented from casting ballots by election officials or the opposing party, (2) the number of voters prevented is greater than the certified winner's margin of victory, and (3) other evidence shows that, more likely than not, the certified winner would have lost had those voters not been so prevented).

not citywide, but was localized and it was debatable whether it affected enough would-be voters to make a difference in the statewide outcome? What if despite the power outages some polling places managed to distribute emergency paper ballots to voters waiting in line, while other polling places did not, or at least not for a while, or struggled to keep up with the increasing length of the queue because of their poll workers' unfamiliarity with emergency paper-ballot procedures? These and a myriad of other similar questions illustrate how difficult it might be for a court to decide whether or not to void the statewide vote in Pennsylvania because of some amount of Philadelphia-specific disenfranchisement potentially attributable to power outages—or, as an alternative to voiding the statewide result, permitting some additional polling hours in Philadelphia later on Election Day or even subsequently. Still, as a conceptual matter, we can preserve the principle that it would undermine the validity of an election to let a result stand if that result was affected by the disenfranchisement of voters who would have cast a ballot but for the barrier that resulted in their disenfranchisement.<sup>136</sup>

Enforcing this conceptual principle, by insisting that an election be cleansed of any such disenfranchisement in order to satisfy a democratic standard of electoral validity, is *not* to collapse the fundamental distinction between direct and indirect attacks. Preventing a voter from casting a ballot, whether by means of a power outage or some other method of frustrating that voter's attempt to participate in the electoral choice, is not at all the same as misleading a voter's electoral preference by means of a "Swift Boat"-type deception. The analytical line between *negating* and *manipulating* voter choice is maintained.

Disinformation about the process of voting itself, in contrast to disinformation about candidates or other information relevant to a voter's

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<sup>136</sup> A voter identification law that operates as an insurmountable barrier to otherwise eligible voters who are unable to obtain the required ID would, conceptually, fall into the category of negating voter choice, potentially invalidating the result of an electoral victory dependent upon this outright disenfranchisement of valid voters. By contrast, a voter identification law that is not an absolute barrier in this way, but only a burden that dissuades voters from participating, while objectionable as a matter of electoral policy, would not render the result of an election invalid—because it would not have negated the choice of the eligible voters endeavoring to cast a ballot in the election. In light of COVID-19, the same conceptual distinction must be made regarding different kinds of rules and procedures for voting by mail: those rules or procedures that cause an absolute barrier to casting a ballot—like the government's failure to deliver a ballot to a voter in time to cast it, as occurred for thousands of voters in Wisconsin's April 7 election—conceptually qualifies as a negation of electoral choice that potentially invalidates the result, depending on the magnitude of the disenfranchisement in relationship to the winning candidate's margin of victory. By contrast, procedures for casting an absentee ballot—like Ohio's requirement of mailing a separate absentee ballot application before subsequently mailing the absentee ballot itself (rather than simply requesting an absentee ballot through an easily accessible online portal)—that are a burdensome deterrent to participation, but not an absolute barrier, would not qualify as a negation of voter choice that potentially might invalidate the election's result.

electoral preference, is different and could qualify as a *direct negation* of the voter's participation and thus properly classified within the first type of attacks. The U.S. Supreme Court made this distinction in *Minnesota Voters Alliance v. Mansky*, noting that it “[did] not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures.”<sup>137</sup> In saying this, the Court distinguished disinformation that would negate voter choice from disinformation designed to influence voter choice.

For example, if Putin successfully misled some voters to go to the wrong polling place so that their ballots were ineligible to be counted, that form of sabotage would directly affect the casting of votes itself, and thus be a type-1 attack, rather than an attempt to persuade voters about their electoral preferences (an indirect type-2 attack). If enough voters were actually affected by this type of misinformation about their correct polling location, that might be sufficient reason for a court to void the election results because of this intentional disenfranchisement of eligible voters who attempted to participate—or, alternatively, the court might be persuaded to count provisional ballots cast by these voters who went to the wrong polling place as a result of Putin's misinformation. The court might reach this ruling even if provisional ballots cast in the wrong polling location are otherwise ineligible to be counted under state law.<sup>138</sup> Because the problem was caused by Putin's sabotage, preserving the validity of the election might require counting these provisional ballots notwithstanding the otherwise operative provision of state law, in order to avoid the disenfranchisement and resulting denial of popular sovereignty that the sabotage directly produced.<sup>139</sup>

Undoubtedly, there are other kinds of cases that present difficult line-drawing questions. For example, should vote-buying be classified as a direct (type-1) or indirect (type-2) interference with an election? One might be tempted to classify it as indirect (type-2), if one views the money as

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<sup>137</sup> 138 S. Ct. 1876, 1889 n.4 (2018) (invalidating a Minnesota law restricting the wearing of political apparel inside of polling places, but noting that states may nonetheless limit certain kinds of narrow messages that might mislead voters about the operation of an election).

<sup>138</sup> See *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012) (per curiam) (finding a likely equal protection violation where the state would have rejected provisional ballots that were cast, through poll worker error, in the wrong voting precincts).

<sup>139</sup> Cf. *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 245 (6th Cir. 2011) (holding that the state's prohibition on counting out-of-precinct provisional ballots was unconstitutional as applied to ballots cast out of precinct because of the government's own mistake. *Accord* *Ne. Ohio Coal. for the Homeless*, 696 F.3d at 597. Likewise, insofar as the U.S. Supreme Court upheld a portion of the federal district court's decree that required the counting of absentee ballots postmarked by Election Day, even though the state statute required that local election officials receive them by 8 PM on Election Day, the Supreme Court recognized that in some contexts the avoidance of wrongful disenfranchisement requires deviation from statutory requirements. See *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (per curiam).



improperly *influencing* how the voter *decides* to exercise the franchise. But historically vote-buying has been viewed as negating the integrity of an election's result in a way essentially equivalent to stuffing the ballot box with fake votes.<sup>140</sup> The premise of this historical equivalence is that vote-buying is not merely a form of persuasion in the way that campaign messaging is, even deliberately false messages about a candidate. Instead, paying a voter to vote a certain way is seen as negating the voter's freedom of choice. The voter is no longer exercising independent choice about how to participate in the same way that a voter influenced by deliberately false campaign messaging (like a "Swift Boats"-style smear) is still making an independent choice. Whether or not classifying vote-buying as a direct (type-1) interference is a correct application of this basic analytical distinction, it does not undermine the utility—indeed fundamental importance—of the distinction itself.

### C. *The Due Process Need to Follow Existing Rules*

There is a necessary caveat to the point just made. While in principle the conception of electoral validity must be guided by the democratic ideal of popular sovereignty, and thus it must condemn as invalid the disenfranchisement of eligible voters, it is also imperative that the implementation of this principle in any particular election proceed in accordance with the rule of law. Elections must be conducted according to the rules for running them, as specified in advance of the voting. Or to put the point another way, it is generally inappropriate to change the rules for running an election after the election itself is underway. This point is so significant that it is understood to be an element of due process, as required by the Fifth and Fourteenth Amendments to the U.S. Constitution.<sup>141</sup>

One of the great challenges that may arise in the context of a vote-counting dispute is a clash between two fundamental electoral principles: first, the need to avoid the wrongful disenfranchisement of eligible voters; and second, the need to count ballots according to rules established before those ballots were cast. Both of these principles have constitutional status and thus are part of the supremacy of constitutional law. The need to avoid the wrongful disenfranchisement of eligible voters is an element of equal protection, guaranteed by the Fourteenth Amendment, as recognized by the

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<sup>140</sup> See PRINCIPLES OF THE LAW: ELECTION ADMIN. § 213 cmt. b (AM. LAW INST. 2019) (explaining in an illustration that sufficient proof of vote-buying could trigger judicial action to invalidate the election); MCCRARY, *supra* note 118, §§ 215–216 (explaining that votes obtained for "valuable consideration" ought to be rejected as invalid).

<sup>141</sup> See *Roe v. Alabama*, 43 F.3d 574, 580, 581 (11th Cir. 1995) (holding that "a post-election departure from previous practices . . . implicate[s] fundamental fairness" and that fundamentally unfair election processes may violate due process).

Supreme Court in precedents from *Harper v. Virginia Board of Elections*<sup>142</sup> to *Bush v. Gore*.<sup>143</sup> But the need to count ballots according to rules established before those ballots were cast, being an element of due process also guaranteed by the same Fourteenth Amendment, is equivalently obligatory. What to do when these principles collide? The Constitution itself does not say, leaving the judiciary in something of a quandary.

A comparison of two cases can help point the way out of this judicial morass. Both cases involved an election to a seat on a state supreme court, and both concerned absentee ballots that were disqualified from being counted under state law despite being cast by eligible voters. The first case, *Roe v. Alabama*, most clearly exemplifies that the Due Process Clause of the Fourteenth Amendment requires compliances with the principle that ballots must be counted according to the rules existing when they were cast.<sup>144</sup> In that case, an Alabama statute required absentee ballots to be notarized or have two witnesses.<sup>145</sup> The 1994 race for chief justice of the state's supreme court was close enough to turn potentially on ballots cast in violation of this statutory requirement.<sup>146</sup> The members of the state supreme court who did not recuse themselves were willing to let these ballots count despite the statutory violation, arguing that they were "substantially compl[iant]" with state law.<sup>147</sup> The federal district court found, after an evidentiary trial, that Alabama (except for one aberrational county) had never adopted the "substantial compliance" doctrine to justify counting absentee ballots in violation of this particular statutory requirement.<sup>148</sup> Based on this finding, the Eleventh Circuit Federal Court of Appeals held that it would contravene due process for the state's judiciary to count these noncompliant ballots.<sup>149</sup> The Eleventh Circuit affirmed the federal trial judge's view that it essentially would be tantamount to stuffing the ballot box with invalid votes to permit

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<sup>142</sup> 383 U.S. 663, 665 (1966) (holding that "it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment").

<sup>143</sup> 531 U.S. 98, 104 (2000) (noting that "the right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise").

<sup>144</sup> 43 F.3d 574, 581 (11th Cir. 1995) ("[F]ailing to exclude the contested absentee ballots would constitute a post-election departure from previous practice in Alabama. . . . This departure would have two effects that implicate fundamental fairness and the propriety of the two elections at issue.").

<sup>145</sup> *Id.* at 576; see ALA. CODE § 17-10-7 (1980).

<sup>146</sup> *Roe v. Mobile Cty. Appointment Bd.*, 676 So. 2d 1206, 1207-08 (Ala. 1995) (noting that "[w]hen the voting was complete, the preliminary unofficial results showed the race for Chief Justice of the Supreme Court to be extremely close" and that "because of the closeness of the tally, [n]o one knows what the result of the election will be when these ballots are counted").

<sup>147</sup> *Id.* at 1226.

<sup>148</sup> *Roe v. Mobile Cty. Appointing Bd.*, 904 F. Supp. 1315, 1317 (S.D. Ala. 1995).

<sup>149</sup> See *Roe v. Alabama*, 68 F.3d 404, 407-08 (11th Cir. 1995).

the state judiciary to change the rules for counting these noncompliant ballots after they had been cast.<sup>150</sup>

What stands out about *Roe v. Alabama* is that enforcement of the state's statutory rule in this context would *not* impose an equal protection violation. To be sure, the noncompliant ballots had been cast by eligible voters: these ballots were disqualified pursuant to the applicable state statute solely because they failed to comply with the notarization, or two witnesses, requirement. Moreover, this statutory rule was exceedingly strict: most states, even in the 1990s (before the post-2000 expansion of vote-by-mail) did not impose so onerous a requirement for casting an absentee ballot.<sup>151</sup> Nonetheless, the requirement itself did not violate the Equal Protection Clause, and the voters themselves in this particular election were responsible for the failure to comply with the requirement. Thus, the state government had not done anything unconstitutional to cause voters to cast their absentee ballots in violation of this statutory rule. In this specific context, it was inappropriate to change the rule for counting these votes in the midst of the very election in which the outcome was disputed because of these ballots. It would be fine to abandon this strict statutory rule for future elections, but this particular election needed to be completed according to the rules as they existed when voting began.

It is worth contrasting *Roe v. Alabama* with the recent *RNC v. DNC* decision from Wisconsin.<sup>152</sup> There, an existing state statute prohibited the counting of absentee ballots unless local election officials received them by 8 p.m. on Election Day.<sup>153</sup> The Supreme Court majority upheld the federal district court's preliminary injunction barring enforcement of this statutory rule insofar as the injunction applied to ballots postmarked on Election Day.<sup>154</sup> In this way, the Court majority required the counting of thousands of absentee ballots in the state supreme court election already underway—ballots that potentially could determine the outcome of the seat at stake—even though to count these ballots would be to contradict the existing state statute on the precise point in issue.<sup>155</sup> How is it possible to understand the

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<sup>150</sup> See *Roe v. Alabama*, 43 F.3d 574, 581 (11th Cir. 1995). The clearest way to understand the convoluted judicial proceedings in this litigation over the chief justice election is to read the account of it in *BALLOT BATTLES*. See FOLEY, *supra* note 10, at 267–78.

<sup>151</sup> JOHN C. FORTIER, *ABSENTEE AND EARLY VOTING* 13 (2006) (noting that many states adopted “no-excuses” absentee ballot laws in the 1980s and 1990s in continuation of an earlier trend towards eliminating onerous notary public and witness requirements for absentee voting).

<sup>152</sup> *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (per curiam).

<sup>153</sup> WIS. STAT. ANN. § 6.87(6) (West 2020) (“The ballot shall be returned so it is delivered to the polling place no later than 8 p.m. on election day.”).

<sup>154</sup> *Republican Nat'l Comm.*, 140 S. Ct. at 1208.

<sup>155</sup> See Amy Gardner, Dan Simmons & Robert Barnes, *Unexpected Outcome in Wisconsin: Tens*

majority opinion in *RNC v. DNC* as being consistent with the due process principle articulated in *Roe v. Alabama*?

The reason is that it was necessary for the existing Wisconsin statute to give way in order to avoid the wrongful disenfranchisement of eligible voters. Unlike in *Roe v. Alabama*, it was the Wisconsin government's own wrongful conduct that would cause voters to fail to comply with the statutory obligation to deliver their absentee ballots by 8 p.m. on Election Day. Unlike the Alabama voters who failed to get their ballots notarized (or witnessed twice), the Wisconsin voters applied for their ballots on time but never received them.<sup>156</sup> The voters themselves did nothing wrong. The basis for the federal district court's injunction against enforcement of this state statutory rule was that it would violate the Equal Protection Clause of the Fourteenth Amendment to disenfranchise eligible and innocent voters, who had fully complied with the requirements for requesting an absentee ballot, especially when other voters in the state had received an absentee ballot as requested.<sup>157</sup> This differential disenfranchisement of similarly situated voters is particularly problematic under the Equal Protection Clause, as *Bush v. Gore* had held.<sup>158</sup> As such, enforcement of the state statutory requirement of delivery by 8 p.m. on Election Day cannot be permitted to cause this kind of discriminatory disenfranchisement of equivalently innocent, eligible voters, in violation of the Equal Protection Clause.

Thus, the majority opinion in *RNC v. DNC* appears to create an implicit hierarchy between equal protection and due process in the counting of votes. While due process prohibits changing the counting rules when doing so is *not* necessary to vindicate equal protection, as *Roe v. Alabama* illustrates, due process does not require enforcing a state's statute in a way that would violate equal protection. Given the facts of *RNC v. DNC*, the obligation of equal protection superseded the due process principle of *Roe v. Alabama*, and the state statute was required to give way—and, most fundamentally, to avoid discriminatory disenfranchisement, ballots were required to be counted in a way that contradicted the explicit rule of the existing state statute.

But equal protection prevailed only to a point in *RNC v. DNC*. The Supreme Court majority upheld the federal district court's preliminary

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*of Thousands of Ballots That Arrived After Election Day Were Counted, Thanks to Court Decisions*, WASH. POST (May 3, 2020, 5:40 PM), [https://www.washingtonpost.com/politics/unexpected-outcome-in-wisconsin-tens-of-thousands-of-ballots-that-arrived-after-voting-day-were-counted-thanks-to-court-decisions/2020/05/03/20c036f0-8a59-11ea-9dfd-990f9d99d9d9\\_story.html](https://www.washingtonpost.com/politics/unexpected-outcome-in-wisconsin-tens-of-thousands-of-ballots-that-arrived-after-voting-day-were-counted-thanks-to-court-decisions/2020/05/03/20c036f0-8a59-11ea-9dfd-990f9d99d9d9_story.html).

<sup>156</sup> Corasaniti & Saul, *supra* note 93.

<sup>157</sup> See *Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-284-wmc, 2020 WL 1638374, at \*17 (W.D. Wis. Apr. 2, 2020).

<sup>158</sup> *Bush v. Gore*, 531 U.S. 98, 104–05 (2000).

injunction only in part, voiding that injunction insofar as it required the counting of absentee ballots cast or postmarked after Election Day.<sup>159</sup> The Supreme Court majority rejected this component of the district court's relief because, as the short majority opinion stressed twice, to do so "would fundamentally alter the nature of the election."<sup>160</sup> Ballots cast after Election Day, moreover, "gravely affect the integrity of the election process" insofar as they are products of partisan campaign-style dynamics attempting to influence the result based on the additional available time for getting out the vote.<sup>161</sup>

In attempting to understand this aspect of the *RNC v. DNC* decision, it is important to recognize that the problem of discriminatory disenfranchisement has not completely disappeared—or been solved by the sustained portion of the district court's order. On the contrary, there were still eligible voters who properly requested their absentee ballots but who did not receive them in sufficient time to postmark them by Election Day. Indeed, as the Wisconsin government itself acknowledged (and subsequent reporting confirmed), there were thousands of such voters. Avoiding the disenfranchisement of *these* voters—disenfranchisement caused by the government's own failure to process their timely absentee ballot applications with sufficient speed—would require a remedy beyond what the Supreme Court majority approved. Indeed, that was the basic point of Justice Ginsburg's dissent, written for herself and three others.<sup>162</sup> But the majority remained unmoved. It was more important, from the majority's perspective, to preserve the "fundamental[] . . . nature" and "integrity" of the election than to remedy the differential disenfranchisement of eligible and innocent voters caused by the government's own maladministration of the election.<sup>163</sup>

Thus, according to the logic of the *RNC v. DNC* majority, there is an even more complicated hierarchical relationship among equal protection and due process principles. Yes, the equal protection need to avoid discriminatory disenfranchisement sometimes supersedes the due process need to adhere to existing statutory rules for counting votes, but no, not always. Sometimes, when the "fundamental nature" and "integrity" of the election is at stake, equal protection and the avoidance of disenfranchisement must yield—at least to this extent—to adherence to existing statutory rules.

In this respect, the *RNC v. DNC* majority opinion accords with the American Law Institute's (ALI) principles for the resolution of vote-

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<sup>159</sup> *Republican Nat'l Comm.*, 140 S. Ct. at 1207.

<sup>160</sup> *Id.* at 1207–08.

<sup>161</sup> *Id.* at 1207.

<sup>162</sup> *See id.* at 1209–10 (Ginsburg, J., dissenting).

<sup>163</sup> *Id.* at 1207 (majority opinion).

counting disputes.<sup>164</sup> The ALI principles recognize that sometimes there is unavoidable tension between the equal protection value of avoiding disenfranchisement and the due process value of counting votes according to preexisting rules.<sup>165</sup> The ALI principles further recognize that, while ordinarily the equal treatment of eligible voters must prevail, occasionally maintaining the integrity of the election compels the disqualification of ballots cast by eligible voters.<sup>166</sup> As examples, the ALI principles posit the circumstance in which a cyberattack alters the electronic recording of votes on some of the tabulating machines used in an election but there is no backup paper record with which to rectify the alteration, or election officials have violated chain-of-custody rules for maintaining the security of votes during the counting process.<sup>167</sup> In these situations, the ALI principles encourage the adjudicatory tribunal to strive for an impartial resolution of the vote-counting controversy in a way most likely to foster public perception of the election's legitimacy.<sup>168</sup> The ALI principles observe that in some instances the way to do this will require invalidating the reported result of the election, and leaving to officials the task of holding a new election or otherwise providing a remedy for the consequence of a voided election.<sup>169</sup>

Taking these principles into account, a newly rehabilitated standard of electoral validity for 2020 and the future should incorporate the necessity of condemning disenfranchisement of eligible and innocent voters, refusing to accept reported results dependent on such disenfranchisement. At the same time, this standard of electoral validity cannot insist upon the counting of votes in violation of existing state laws when doing so would undermine the integrity of the election itself. Respect for the due process principle of *Roe v. Alabama* blocks that. But, depending on the particular context, it remains open for the standard of electoral validity to condemn an outcome as unsustainable and requiring nullification, even if it cannot be remedied by counting ballots from the disenfranchised voters.

### III

#### PRESENT THREATS AND HOW BEST TO HANDLE THEM

Now it is necessary to turn to some of the specific threats in the current electoral environment that might realistically challenge America's capacity to conduct an election that satisfies the standard of electoral validity just articulated. What follows is not a comprehensive summary of all potential

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<sup>164</sup> See PRINCIPLES OF THE LAW: ELECTION ADMIN. § 204 (AM. LAW INST. 2019).

<sup>165</sup> See *id.* § 204(d).

<sup>166</sup> *Id.* § 203(c).

<sup>167</sup> *Id.* § 204(c)(1).

<sup>168</sup> *Id.* § 204(d).

<sup>169</sup> *Id.* § 204(c)(1).

electoral threats. Indeed, one vexatious nature of electoral threats is that they are manifold and often unforeseeable. Just consider, prior to 2016, how few experts in the field of election integrity thought America's highest priority would be protecting U.S. elections from Russian interference?<sup>170</sup> Likewise, as recently as January and February of 2020, when an earlier version of this essay was under consideration at several scholarly gatherings, the anticipated threats to the November 2020 election were unrelated to COVID-19.

The illustrations that follow will focus on an aspect of the current threat environment that requires special attention in light of the preceding theoretical discussion on electoral validity. More work needs to be done on the “disenfranchisement” subset of type-1 direct attacks on electoral choice. True enough, there is the unsettling possibility of a malicious attack on America's electoral infrastructure that could prevent an accurate count of the ballots actually cast by eligible voters.<sup>171</sup> Putin, for example, could conduct a successful cyberattack of voting technology, causing votes to be counted differently from how they were cast or perhaps adding extra, artificial votes that would alter the election outcome. Although these forms of type-1 attacks are extremely unlikely given the “hardening” of America's electoral infrastructure over the last three years, one can assume that their risk has not been reduced all the way to zero.<sup>172</sup>

Even so, these forms of altering election outcomes deserve less attention here for another reason: if something like this actually happened—and was detected—our legal regime, generally speaking, would know how to handle it for this simple reason: a cyberattack that changes votes, or adds fake votes, is a twenty-first century form of ballot-box stuffing. While the method may be new, and technologically more sophisticated than anything James Madison could have imagined, the basic concept of ballot-box stuffing was far from unfamiliar to the Founders.<sup>173</sup> They viewed ballot-box stuffing as exactly the kind of electoral theft that contradicted their core

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<sup>170</sup> SHIMER, *supra* note 48, at 7 (explaining how the U.S. government was caught by surprise by what was new and unexpected about the Russian 2016 cyber operation in comparison with a century of previous low-technology disinformation efforts).

<sup>171</sup> See Miles Park, *Cyber Experts Warn of Vulnerabilities Facing 2020 Election Machines*, NPR (Sept. 4, 2019, 5:01 AM), <https://www.npr.org/2019/09/04/755066523/cyber-experts-warn-of-vulnerabilities-facing-2020-election-machines>.

<sup>172</sup> See Andrea Córdova McCadney, Elizabeth Howard & Lawrence Norden, *Voting Machine Security: Where We Stand a Few Months Before the New Hampshire Primary*, BRENNAN CTR. (Aug. 13, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/voting-machine-security-where-we-stand-few-months-new-hampshire-primary> (highlighting potential cybersecurity vulnerabilities in our electoral infrastructure).

<sup>173</sup> See generally FOLEY, *supra* note 10, at 25–47 (describing early instances of ballot-box stuffing).

understanding of electoral validity.<sup>174</sup> America's election laws have reflected this core understanding ever since, making ballot-box stuffing the paradigmatic reason for requiring judicial intervention to overturn the reported result of the election.<sup>175</sup> Thus, if ballot-box stuffing by means of a cyberattack were to occur in the November 2020 election, and such an attack was detected in time for the judiciary to provide a remedy (with "in time" varying depending on the particular office affected),<sup>176</sup> the judiciary most likely would have adequate jurisprudential tools with which to remedy this twenty-first century form of ballot-box stuffing.<sup>177</sup>

By contrast, given the history set forth in the first part of this essay, America's judiciary is, generally speaking, less jurisprudentially well-equipped if the direct type-1 attack takes a form that falls within the "disenfranchisement" subset, successfully preventing voters from casting ballots capable of being counted at all. Consequently, as a matter of intellectual triage, in preparing for the 2020 election, it makes sense to concentrate attention on this more undeveloped subset of potential threats that could undermine the validity of the election by successfully negating the electorate's choice. Further consideration must be given to how various possible forms of disenfranchisement would be best handled, consistent with existing laws, in order to avoid the winner of an election taking office despite the election outcome being condemned as invalid on account of such disenfranchisement.

Moreover, and more unsettling, various "disenfranchisement" scenarios seem like more realistic threats that might actually materialize. The idea of Putin attacking the power grid in a pivotal state on Election Day does not seem far-fetched.<sup>178</sup> Perhaps Putin will be deterred by actions and warnings undertaken by U.S. Cyber Command.<sup>179</sup> But Putin's capacity to inflict a power outage that would cause actual disenfranchisement seems more likely than his capacity to infiltrate vote-counting machines to change tallies.<sup>180</sup> In

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<sup>174</sup> See *id.* at 40–44 (describing how several Founders found alleged ballot stuffing in Congressman Jackson's 1791 reelection bid to contradict the idea of democracy).

<sup>175</sup> See *id.* at 337–38 (noting the importance of fair and honest ballots to the Founders). See generally MCCRARY, *supra* note 118 (discussing judicial responses to contested elections).

<sup>176</sup> See PRINCIPLES OF THE LAW: ELECTION ADMIN. § 204 cmt. a (AM. LAW INST. 2019).

<sup>177</sup> See generally *id.* (describing review procedures and "safety valve mechanism[s]").

<sup>178</sup> Indeed, for Rick Hasen, who is widely recognized as one of the nation's foremost authorities on the topic, this scenario is at the top of his list of concerns. See HASEN, *supra* note 10, at 93–96.

<sup>179</sup> See Ellen Nakashima, *U.S. Cybercom Contemplates Information Warfare to Counter Russian Interference in 2020 Election*, WASH. POST (Dec. 25, 2019, 5:45 PM), [https://www.washingtonpost.com/national-security/us-cybercom-contemplates-information-warfare-to-counter-russian-interference-in-the-2020-election/2019/12/25/21bb246e-20e8-11ea-bed5-880264cc91a9\\_story.html](https://www.washingtonpost.com/national-security/us-cybercom-contemplates-information-warfare-to-counter-russian-interference-in-the-2020-election/2019/12/25/21bb246e-20e8-11ea-bed5-880264cc91a9_story.html).

<sup>180</sup> See HASEN, *supra* note 10, at 94–95; Terry Gross, 'Election Meltdown is a Real Possibility'



anticipation of a potential threat materializing, and out of precaution, America's courts need to be ready to adjudicate lawsuits seeking judicial relief, perhaps in the form of extending polling hours (or vote-by-mail) beyond what has been statutorily or administratively provided, or perhaps even in the form of invalidating a certified election result, in connection with a malicious attack.<sup>181</sup> Likewise, if COVID-19 causes litigation over the outcome of the 2020 election, one obvious form of this litigation would be a lawsuit claiming that eligible voters were denied an adequate opportunity to cast a ballot because of conditions associated with the pandemic.

#### A. *ICE Agents at or Near Polling Places*

An even more disconcerting possibility, but one that must be contemplated nonetheless, is a domestically perpetrated disenfranchisement effort. Imagine, for example, President Trump ordering Immigration and Customs Enforcement (ICE) agents to engage in a show of force near polling places in Arizona in the hope that their presence will deter eligible voters from the polls.<sup>182</sup> While previously it would have been preposterous to suggest that the President would do such a thing, in the current context, that is no longer the case.<sup>183</sup> Indeed, in the lead up to the 2018 midterm election, Customs and Border Patrol agents in El Paso planned a "crowd control" exercise, but widespread public outrage forced its cancellation.<sup>184</sup> There is

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in *2020 Race, Author Warns*, NPR ILL. (Jan. 29, 2020, 10:34 AM), <https://www.nprillinois.org/post/election-meltdown-real-possibility-2020-presidential-race-author-warns#stream/0> (interviewing Richard L. Hasen and quoting Hasen as discussing an example from his book "of a nightmare scenario involv[ing] a hack by the Russians of the power grid in a Democratic city like Detroit or Milwaukee in a swing state, which could happen on Election Day and could affect the vote in that state, which could affect the national vote totals").

<sup>181</sup> The Federal Judicial Center has compiled a website of materials on emergency litigation concerning election issues, an indication that federal courts need to be ready for the possibility that they will be called upon to issue emergency orders of this nature in order to protect voting rights in connection with the 2020 election. See *Election Litigation: Case Studies in Emergency Litigation*, FED. JUD. CTR., <https://www.fjc.gov/content/overview-6>.

<sup>182</sup> Several members of Congress have introduced new legislation that would prohibit ICE agents from interfering with voting. See Polling Access Safety Act, H.R. 4718, 116th Cong. (2019); Benjamin Wermund, *Texas Democrats Push Bill to Ban ICE Action on Election Day*, HOUS. CHRON. (Oct. 19, 2019, 7:45 PM), <https://www.houstonchronicle.com/politics/texas/article/Texas-Democrats-push-bill-to-ban-ICE-action-on-14541603.php>.

<sup>183</sup> See Fredreka Schouten, *Trump Pledges to Send 'Sheriffs' and 'Law Enforcement' to Polling Places on Election Day, but It's not Clear He Can* (<https://www.cnn.com/2020/08/20/politics/trump-election-day-sheriffs/index.html> (last updated Aug. 21, 2020, 12:40 PM)) ("We're going to have sheriffs, and we're going to have law enforcement, and we're going to have, hopefully, US attorneys, and we're going to have everybody and attorney generals.") (quoting President Trump).

<sup>184</sup> See Robert Moore, *Border Patrol Cancels El Paso Crowd-Control Exercise Amid Concerns About Voter Suppression*, WASH. POST (Nov. 6, 2018),

no evidence that this misguided move on the part of federal immigration officials was directly attributable to President Trump himself. Even so, the decision-making dynamic within the Executive Branch might be quite different in the context of President Trump's own reelection campaign. It is not difficult to contemplate that President Trump would insist that "his" ICE agents do as he says, and he might demand that they patrol near polling places on Election Day as an effort to deter noncitizens from voting.<sup>185</sup> But it is even possible to attribute a different motive to President Trump's demand: a simple desire to suppress voter turnout from eligible citizens in order to win reelection.<sup>186</sup> After all, President Trump has publicly announced that he opposes vote-by-mail solely because it would facilitate robust turnout, which he envisions as causing Democrats to win—and on this view Republicans are capable of winning only if they prevent enough eligible voters from casting ballots.<sup>187</sup> In any event, regardless of motive, it is certainly conceivable that such a show of federal force at or near polling places on Election Day might deter even eligible voters from casting ballots out of fear of being harassed by immigration enforcement agents.

It is cruelly ironic to contemplate the federalism implications of such an effort at disenfranchising valid voters on the part of the federal government, even the Oval Office. During Reconstruction, before it collapsed as part of the compromise that ended the Hayes-Tilden dispute,<sup>188</sup> it was the federal government—and indeed President Grant specifically—who insisted that the reconstructed southern states respect the voting rights of African Americans as required by the newly adopted Fifteenth Amendment.<sup>189</sup> The basic supremacy of federal law, and certainly federal military power in the immediate aftermath of the Civil War, was supposed to be a structural feature that would aid the protection of voting rights from

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[https://www.washingtonpost.com/politics/border-patrol-to-conduct-a-crowd-control-exercise-in-el-paso-on-election-day/2018/11/06/147dd678-e18f-11e8-8f5f-a55347f48762\\_story.html](https://www.washingtonpost.com/politics/border-patrol-to-conduct-a-crowd-control-exercise-in-el-paso-on-election-day/2018/11/06/147dd678-e18f-11e8-8f5f-a55347f48762_story.html).

<sup>185</sup> See Mark Abadi, *Trump Won't Stop Saying 'My Generals' - and the Military Community Isn't Happy*, BUS. INSIDER (Oct. 26, 2017, 2:50 PM), <https://www.businessinsider.com/trump-my-generals-my-military-2017-10>.

<sup>186</sup> See Robert Farley, *More Voter Fraud Misinformation from Trump*, FACTCHECK (Jan. 30, 2019), <https://www.factcheck.org/2019/01/more-voter-fraud-misinformation-from-trump> (discussing Trump urging greater enforcement against voting by non-citizens despite a lack of evidence that a meaningful number of non-citizens vote).

<sup>187</sup> See Aaron Rugar, *Trump Isn't Even Trying to Hide His Self-Interested Reasons for Opposing Mail-in Voting*, VOX (Apr. 8, 2020), <https://www.vox.com/2020/4/8/21213416/trump-mail-in-voting-wisconsin-coronavirus> (compiling tweets in which Trump expressed opposition to vote by mail).

<sup>188</sup> See generally FONER, *supra* note 19, at 575–87.

<sup>189</sup> Ron Chernow's biography of Grant is masterful on this point. See generally RON CHERNOW, GRANT (2017).

hostile state-based governments and actors.<sup>190</sup> By contrast, if state and local officials endeavored to protect the voting rights of their eligible citizens from the unwarranted deterrent effect of federal ICE agents' activities, a question would arise as to whether the supremacy of federal law would preempt state and local efforts to impede ICE's vote-suppressing behaviors.<sup>191</sup>

To avoid thorny supremacy clause questions, one could look to the possibility that federal law itself might be a barrier to voter suppression efforts undertaken by federal ICE agents, whether on direct order from the President or otherwise. There is, indeed, a federal statute on the books specifically prohibiting the stationing of federal troops at polling places.<sup>192</sup> But there is a question as to whether this statutory prohibition applies only to military personnel and thus would not apply to ICE or other Homeland Security agents.<sup>193</sup> Furthermore, there is the question of whether federal

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<sup>190</sup> This was the whole constitutional theory upon which Reconstruction was premised. *See generally* ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* xix–xxx, 148–49 (2019) (discussing the effects of the Reconstruction amendments, which “greatly enhanced the power of the federal government” and detailing federal enforcement of voting rights).

<sup>191</sup> The “sanctuary cities” movement and related matters concerning the relationship between state and federal officials in the immigration enforcement context present analogous federalism issues, some of which are currently pending before the Supreme Court in *United States v. California*. *See* Petition for Writ of Certiorari at I, *United States v. California*, 921 F.3d 865 (9th Cir. 2019) (No. 19-537) (presenting the question of “[w]hether provisions of California law that . . . prohibit state law-enforcement officials from providing federal immigration authorities with release dates and other information about individuals subject to federal immigration enforcement, and restrict the transfer of aliens in state custody to federal immigration custody, are preempted by federal law”).

<sup>192</sup> 18 U.S.C. § 592 (2018). The statute mandates sanctions for “an officer of the Army or Navy, or other person in the civil, military, or naval service of the United States, [who] orders, brings, keeps, or has under his authority or control any troops or armed men at any place where a general or special election is held.” *Id.* The sole exception provided is if “force [is] necessary to repel armed enemies of the United States.” *Id.* An earlier version of this statute, enacted in 1865, contained the additional exception of permitting federal troops at polling places “to keep the peace at the polls.” Law of Feb. 25, 1865, ch. 52, § 1, 13 Stat. 437, 437 (current version at 18 U.S.C. § 592 (2018)). This additional exception was removed in 1909, as part of an effort to conform the statutory language to the rollback of Reconstruction, which had removed troops from the South as part of the compromise that ended the disputed Hayes-Tilden election. H.R. REP. NO. 60-2319, at 5 (1909); *see also* 43 CONG. REC. 3713 (1909) (Mississippi Senator’s recollection of hostility to federal troops at the polls to protect African Americans voting during Reconstruction: “The troops were to be sent down to see that nobody but negroes should vote.”). As white “Redeemers” associated with Democrats in the South increasingly regained political power, despite losing the Civil War, they insisted upon keeping federal troops from interfering with their systematic plans to nullify the effectiveness of the Fifteenth Amendment. *See* Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done*, 175 MIL. L. REV. 86, 109–10 (2003).

<sup>193</sup> The strongest textual argument that 18 U.S.C. § 592 already bans “armed” ICE agents at polling places is that ICE, although not in existence at the time of the statute’s enactment, would

agents stationed *near* polling places, but not actually *at* them, would be violating this federal law, notwithstanding the fact that the close proximity of ICE agents might have an equivalent deterrent effect on the turnout of eligible voters as would their presence immediately inside the polling station.<sup>194</sup> After the contentious incident with Border Patrol agents in the 2018 midterm election, a member of Congress introduced new legislation to clarify what constitutes unlawful interference with voting by federal Homeland Security officials.<sup>195</sup> Even though this legislation may be seen as unnecessarily redundant, given the existing law on the books, this is at least a signal that the existing statute is troublingly ambiguous on crucial points.

Despite this existing statutory ambiguity, one would hope that federal courts would find the wherewithal, in the fundamental tenets of equal protection principles, to enjoin ICE activities intended to suppress eligible turnout on Election Day or, even without strong evidence of a disenfranchisement intent, likely to have this effect without any significant countervailing law enforcement justification.<sup>196</sup> The practicalities of litigation trying to convince a federal court to issue this kind of injunction order would, or should, be challenging.<sup>197</sup> There would be questions of

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be part of the “civil . . . service” of the federal government—as armed federal tax collectors, or armed federal investigators (predecessors of FBI agents)—and, even if the statute was aimed primarily at federal military troops, it was clearly written to encompass non-military federal agents, if they are “armed,” from being stationed at any polling place “unless . . . force be necessary to repel armed enemies of the United States.” 18 U.S.C. § 592.

<sup>194</sup> The concern in the 2018 midterm election was not that federal immigration agents would be stationed at the polling places themselves, but that their show of force nearby polling places on Election Day would be enough to deter eligible voters from going to the polls. *See* Rafael Bernal, *Border Patrol Cancels Exercise Near Voting Site After Criticism*, HILL (Nov. 6, 2018, 4:28 PM), <https://thehill.com/homenews/news/415284-border-patrol-cancels-exercise-near-border-area-voting-site-after-criticism> (noting that “the timing and relative proximity to polling stations drew the ire of civil rights activists and Democrats, who accused the Border Patrol of voter intimidation”).

<sup>195</sup> *See supra* note 182 and accompanying text.

<sup>196</sup> Since the 1960s, the Court has interpreted “equal protection” to encompass basic equality of voting rights for adult citizens, as encompassed in the fundamental doctrine of “one person, one vote.” *See* *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (noting that “all qualified voters have a constitutionally protected right to vote[] . . . and to have their votes counted”). This doctrine undergirds the Supreme Court’s 7-2 equal protection holding in *Bush v. Gore*, as well as the recognition that other forms of barriers to voting—like voter ID laws that cause actual disenfranchisement without adequate policy justification—trigger federal constitutional concern. *See* *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008) (the plurality and dissent dividing on whether, in this context, unconstitutional disenfranchisement should be remedied in the context of facial or as-applied challenges).

<sup>197</sup> It would be even more challenging if President Trump attempted to call out the National Guard on Election Day, purporting to protect against fear of a terrorist attack but perhaps based on a view that this kind of order would suppress turnout. The Supreme Court has held that deployment of the National Guard, at least in some cases, is nonjusticiable under the political question doctrine. *See* *Gilligan v. Morgan*, 413 U.S. 1, 2 (1973).

standing: is the proper plaintiff seeking the injunction?<sup>198</sup> There would be the need to present non-speculative evidence of the deterrent effect of the ICE activities on the turnout of eligible voters—evidence that is necessarily probabilistic in nature and perhaps dependent on a form of expert testimony.<sup>199</sup> Presumably, the Department of Justice would vigorously resist such litigation in defense of the Department of Homeland Security, and especially the President if named as a defendant in the suit.

Even so, seeking an injunctive decree to protect fundamental constitutional rights, such as voting rights, in emergency litigation is an intensely practical exercise. It is referred to as a “balancing of the equities,” and is thoroughly familiar to federal judges; it involves a weighing of the pros and cons of judicial intervention, versus judicial abstinence, in the specific context of the particular case, recognizing the uncertainties and imponderables involved.<sup>200</sup> Part of this inquiry is to tailor an equitable remedy, where appropriate, to fit the exact circumstances. Thus, for example, if a federal court got wind of a White House plot, perhaps hatched by Stephen Miller,<sup>201</sup> to order ICE to undertake an aggressive Election Day show of force, and this information was presented to the court several weeks in advance of the election, it would be easier for the court to hold an evidentiary hearing. If the court was satisfied that the planned ICE initiative was purely a disenfranchisement effort with no credible law enforcement basis, then the

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<sup>198</sup> See *Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 550 (6th Cir. 2004) (acknowledging, in case concerning the presence of “challengers” at polling places that “[s]tanding in this case is a difficult issue, considering the nature of the alleged injuries”).

<sup>199</sup> See *Pa. Democratic Party v. Republican Party of Pa.*, No. 16-5664, 2016 WL 6582659, at \*1 (E.D. Pa. Nov. 7, 2016) (holding that plaintiff’s voter suppression claim was unsuccessful due to plaintiff’s lack of substantial evidence other than speculative media reports).

<sup>200</sup> See *A. Phillip Randolph Inst. v. Husted*, 907 F.3d 913, 922 (6th Cir. 2018) (asserting that “the balancing of the equities favors granting the injunction” when “qualified voters may be turned away at the polls” and there is insufficient countervailing justification). Sam Issacharoff invokes the term “rule of reason” to signal the practical nature of the judicial inquiry in these cases. See Samuel Issacharoff, *Voter Welfare: An Emerging Rule of Reason in Voting Rights Law*, 92 *IND. L. J.* 299, 324 (2016). In emergency election-related litigation concerning the casting of ballots, when the litigation occurs close to when the polls open and voting is underway, the balancing of the equities can involve an additional question of timing, including whether the same claims could have been brought sooner and whether consideration of them at this late moment unduly risks destabilizing the administration of the voting process. See Richard L. Hasen, *Reining in the Purcell Principle*, 43 *FLA. ST. U. L. REV.* 427, 464 (2016) (“[C]ourts should weigh the risk of voter confusion and the burdens on election administrators when courts make changes to election rules close to an election.”).

<sup>201</sup> Stephen Miller is a senior adviser to President Trump; he has a particular focus and influence over immigration issues. See Jonathan Blitzer, *How Stephen Miller Manipulates Donald Trump to Further His Immigration Obsession*, *NEW YORKER* (Feb. 21, 2020), <https://www.newyorker.com/magazine/2020/03/02/how-stephen-miller-manipulates-donald-trump-to-further-his-immigration-obsession> (noting that “Miller . . . is an anomaly in Washington: an adviser with total authority over a single issue that has come to define an entire Administration”).

court could issue a fairly categorical injunction, barring the implementation of any such scheme.<sup>202</sup> Conversely, if the federal court did not learn of these ICE activities—which were arguably deterring turnout from eligible voters—until Election Day, the court might need to make a quick decision, on the basis of uncertain information, as to whether to extend polling hours in particular precincts as a remedy for the alleged disenfranchisement activities.<sup>203</sup> Given the obvious risk that an extension of polling hours, especially in precincts populated by immigrant communities, might be perceived as a judicially biased attempt to tilt the electoral playing field in favor of one party, any federal court would need to deliberate carefully in “balancing the equities” in this especially difficult context.<sup>204</sup> Even so, depending on the evidence presented—even in the inherently uncertain context of emergency Election Day litigation—the court might conclude an extension of polling hours is warranted.<sup>205</sup> Moreover, the fact that ballots cast as a result of a court-ordered extension of polling hours must be provisional, so that they can be disqualified if a higher court overrules the extension, would mitigate against the claim that the extension itself was an unfair tilting of the electoral playing field.<sup>206</sup>

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<sup>202</sup> The issue of Executive Branch motive has arisen recently in the context of both immigration and census litigation. *See, e.g., Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (majority and dissent disagreeing on whether executive actions were motivated by anti-Muslim animus or national security concerns); *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2597 (2019) (Alito, J., concurring in part and dissenting in part) (“[T]oday’s decision is either an aberration or a license for widespread judicial inquiry into the motivations of Executive Branch officials.”). While the majority of the Supreme Court is understandably reluctant to attribute improper motive to presidential behavior, *see Trump v. Hawaii*, 138 S. Ct. at 2421, the current situation is unprecedented given the incumbent president running for reelection after being impeached for improper motive in abusing foreign policy powers in an effort to secure a campaign advantage in the reelection effort.

<sup>203</sup> *See Election Litigation: Poll Hours*, FED. JUD. CTR., <https://www.fjc.gov/content/poll-hours> (collecting cases resulting in an extension of polling hours).

<sup>204</sup> *See* Edward B. Foley, *Federal Court Extension of Polling Hours: Problem, Proposal, Example (Part 3)*, OHIO STATE U.: MORITZ C. OF L. (Apr. 15, 2008), <https://moritzlaw.osu.edu/electionlaw/freefair/index.php?ID=401> (discussing the importance of crafting an injunction extending polling hours so as to ensure that “competing candidates, if being reasonable, should feel obligated to accept as fair”).

<sup>205</sup> *See, e.g., FED. JUDICIAL CTR., CASE STUDIES IN EMERGENCY ELECTION LITIGATION: KEEPING POLLS OPEN BECAUSE THEY WERE MOVED WITH INADEQUATE NOTICE* (2017), <https://www.fjc.gov/sites/default/files/2017/EE-ID-1-16-cv-491-Idaho-Democrats.pdf> (discussing a case in which a court ordered an extension of polling hours by relying in part on the fact that plaintiffs had not “cherry-picked” the particular polling locations where they sought extended hours).

<sup>206</sup> The Help America Vote Act of 2002 specifically requires that “[a]ny individual who votes in an election for Federal office as a result of a . . . court order . . . extending the time established for closing the polls . . . may only vote in that election by casting a provisional ballot under subsection (a).” 52 U.S.C. § 21082(c) (2018). Furthermore, “[a]ny such ballot . . . shall be separated

The federal court would be in an even harder position if the claim for injunctive relief came, not before the polls closed, but afterwards, at which time the request would be for a court order to overturn the result of the election on the ground that ICE-induced disenfranchisement was outcome-determinative. Here the court would need to proceed extremely cautiously.<sup>207</sup> Even if the federal judge was sympathetic to the concern that ICE had been improperly deployed to change the outcome of an election, the judge would need to ask a series of tough questions: How do you know that it was ICE's activities that were responsible for eligible voters not casting ballots? Is it possible to quantify the magnitude of this alleged disenfranchisement? And even if so, how do we know beyond speculation which candidate these disenfranchised voters would have cast ballots for? Therefore, can there be a basis for overturning the reported result of ballots actually cast and counted? Assuming a willingness to go down this judicial road at all, how can the court make sure that it would be limiting its remedy solely to consequential disenfranchisement actually caused by ICE, and not merely the fact that turnout in these precincts was "suppressed" in part by generally anti-immigrant rhetoric and public discourse affecting the last days of the campaign, but not directly attributable to ICE's own specific deterrent activities undertaken on Election Day?

Under the distinction between direct (type-1) and indirect (type-2) attacks on an election, as set forth in this essay, campaign messaging that dissuaded eligible voters from going to the polls because "the government is anti-immigrant"—and thus voting is perceived as worthless—would fall within the category of indirect (type-2) attacks. Thus, such messaging would not be a basis for judicial invalidation of the election outcome. By contrast, messaging that told naturalized citizens that they were ineligible to vote because "only natural born citizens can vote for the president, just like only natural born citizens can serve as president" would qualify as a direct (type-1) attack because, if successful at keeping eligible voters away from the polls, it would negate electoral participation by eligible voters rather than affecting the participatory decisions that eligible voters choose to make. No court should overturn an election because of such nefarious messaging unless there is sufficient evidence indicating that this messaging determined the election outcome. But under the analysis presented in this essay, it would

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and held apart from other provisional ballots cast by those not affected by the order." *Id.* Thus, no federal judge is in a position to give an unfair advantage to one side in an election by keeping the polls open in an unjustified manner.

<sup>207</sup> For guidance on how a court ought to proceed in such a situation, see *Election Litigation: Recounts*, FED. JUD. CTR., <https://www.fjc.gov/content/recounts> (last visited July 29, 2020), for a collection of cases on recounts. See also *Election Litigation: Voting Irregularities*, FED. JUD. CTR., <https://www.fjc.gov/content/voting-irregularities> (collecting cases on voting irregularities).

be open to judicial consideration whether this kind of direct attack required a remedy, whereas indirect attacks would be beyond the scope of judicial remediation, at least with respect to challenging the election result itself.

A more difficult intermediary case is one in which public messaging is of this nature: “If you are a naturalized citizen, you better not go to the polls, because ICE agents will be watching out for you, and they might track down your undocumented family members, or just harass you and your family even if you have proper documents.” This kind of message does not attempt to persuade a voter about the merits of voting for a particular candidate. It also contains disinformation aimed at dissuading a voter from casting a ballot, suggesting it operates more like a direct type-1 attack. Nonetheless, it may fit best in the indirect type-2 category, since it does not contain false information about eligibility itself; in this respect, it differs from the previous example. Therefore, it is not a direct negation of voter participation in the way that false messaging about the voting process itself is. Instead, this kind of message endeavors to provide the voter with a *reason* not to cast a ballot. Insofar as it operates as *persuasion*, it belongs in the type-2 category for indirect attacks. To be sure, if the messaging is inherently coercive—e.g., “we will kill you if you vote” or even “we will deport your undocumented family members if you vote”—it negates the freedom of choice to participate and thus qualifies as direct type-1 attacks.

These, and presumably a multitude of similar difficult questions, would present a daunting task for any conscientious federal judge presented with this kind of case. Nonetheless, the key point here is that this judicial inquiry should not be entirely off-limits. The standard of electoral validity going forward should encompass the issue of improper disenfranchisement, for the reasons discussed in Part II. Thus, if the evidence ultimately warranted the conclusion that ICE’s Election Day activities directly disenfranchised enough eligible voters to shift the outcome of the presidential election in Arizona, and Arizona was the pivotal Electoral College state, then the inevitable implication would be that the reported result of the election failed the standard of electoral validity. It would be, in essence, an invalid election because the ICE disenfranchisement would have caused the reported result to be the opposite of what would have occurred had ICE not prevented the effected eligible voters from participating. Of course, no federal court—or anyone else—should jump to this conclusion when it is unwarranted. The analysis offered in this essay is one that, in my judgment, the judiciary should employ to evaluate whether or not an election’s result is a valid exercise of democracy.<sup>208</sup>

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<sup>208</sup> There is the additional question whether the media should be guided by the same standard of



Conversely, if the actual facts on the ground necessitate reaching this kind of conclusion, one should not shy away from it, however disconcerting it may be. It is as necessary to label an actually invalid electoral result for what it is, in order to protect democracy itself, as it is to validate a genuinely authentic electoral result—the reported winner is indeed the electorate’s choice—even if the voting process was regrettably marred with “irregularities,” including even some pernicious disenfranchisement of eligible voters. If the same candidate would have won without the disenfranchisement occurring, then the outcome itself is not invalid; there has been no negation of the overall electorate’s choice. When this is the situation, it is important to say so, in the name of democracy.

On the other hand, however, when disenfranchisement—even disenfranchisement perpetrated by federal ICE officials—has in fact negated the electorate’s choice, it is imperative to acknowledge that democracy-defeating reality. Exactly how a federal court might remedy that failure of democracy requires consideration of additional questions, which will be context dependent, but the key point is that the inquiry should not be entirely off the table. Otherwise, the judiciary would be categorically unable to safeguard the democratic validity of America’s elections.

### *B. Private-Sector Vigilante Groups at or Near Polls*

It is not just federal immigration agents that present a risk of disenfranchising voters by preventing or deterring eligible voters from casting ballots. There is also the possibility that non-governmental, self-styled “militia” groups might attempt to engage in such tactics.<sup>209</sup> This kind of activity facilitated the disenfranchisement of African American voters in pivotal southern states in the 1876 election—and continued to disenfranchise African Americans for another century thereafter, until the passage of the 1965 Voting Rights Act.<sup>210</sup>

Unrelated to elections specifically, there has been a noticeable increase

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election validity as the judiciary. The media has more latitude to criticize the fairness of an election than does the judiciary, which is confined to the task of determining whether the result must be modified or nullified. Even so, the media serves the public by explaining the standard of validity that the judiciary will use to make this judgment—and thus, in this regard, the media should track the judicial standard. For a set of electoral recommendations that recognizes the interrelated roles of law, media, and social norms (as well as technology), see AD HOC COMM. FOR 2020 ELECTION FAIRNESS & LEGITIMACY, *FAIR ELECTIONS DURING A CRISIS* vi-vii (2020).

<sup>209</sup> This particular concern arose in 2016. See Kevin Sullivan, *Militia Group Calls on Members to Patrol Polls on Election Day*, WASH. POST (Oct. 27, 2016, 5:45 PM), <https://www.washingtonpost.com/news/post-nation/wp/2016/10/27/militia-group-calls-on-members-to-patrol-polls-on-election-day> (reporting that militias planned to monitor the polls on election day for criminal activity).

<sup>210</sup> See FONER, *supra* note 19, at 574.

in paramilitary-style demonstrations as part of American political activities in recent years. What happened in Charlottesville in 2017 is the most well-known example.<sup>211</sup> But there have also been more displays of armed political activity in Virginia<sup>212</sup> and elsewhere.<sup>213</sup> The brandishing of assault rifles at rallies that protest government measures aimed at protecting public health from COVID-19 represents an escalation of intimidation as a political tactic.<sup>214</sup> While one does not wish to be overly alarmist, one cannot ignore the possibility that similar activities might interfere with voting on Election Day in 2020.

As with any claim that the disenfranchisement of voters may have determined the outcome of an election, one must proceed carefully with what inevitably must be a fact-dependent inquiry. How can one be sure that enough voters were prevented from casting ballots to make a difference in the election? Perhaps voters who stayed away from the polls would have stayed away anyway.

Even so, if it can be credibly shown that more than enough eligible voters were specifically deterred by intimidation tactics designed to suppress turnout, and it can be reasonably demonstrated based on appropriate statistical analysis that these “lost” ballots would have been outcome-determinative, then there needs to be a remedy in order to avoid an invalid result. It should make no difference in this example that the “lost” ballots are a consequence of nongovernmental paramilitary-style disenfranchisement, rather than equivalent disenfranchisement caused by similarly threatening behavior of federal immigration agents. Either way, it is a loss of ballots that would have been cast but for the voter disenfranchisement, and it is a loss of ballots that would have been consequential in determining the election’s winner. Allowing the result to stand without a remedy for this

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<sup>211</sup> See Hanna Kozłowska, *Who Were the Armed, Camouflaged Men in Charlottesville Who Have Nothing to Do with the Military?*, QUARTZ (Aug. 15, 2017), <https://qz.com/1053604/who-were-the-armed-camouflaged-men-in-charlottesville-who-have-nothing-to-do-with-the-military>.

<sup>212</sup> See, e.g., Timothy Williams, Adam Goldman & Neil MacFarquhar, *Virginia Capital on Edge as F.B.I. Arrests Suspected Neo-Nazis Before Gun Rally*, N.Y. TIMES (Jan. 16, 2020), <https://www.nytimes.com/2020/01/16/us/fbi-arrest-virginia-gun-rally.html> (describing instances of armed political activity in Virginia).

<sup>213</sup> Sarah Ladd & Billy Kobin, *‘Never Felt Safer’ or Extreme ‘White Privilege’? Kentucky Gun Rally Sparks Debate*, COURIER J. (Feb. 2, 2020, 1:29 PM), <https://www.courier-journal.com/story/news/politics/2020/02/02/kentucky-gun-rally-what-rep-kyle-massie-david-hogg-said/4634348002> (describing an instance of armed political activity in Kentucky).

<sup>214</sup> For example, a group called “Ohio Gun Owners” has openly acknowledged that it is attempting to use a show of weaponry as a way of forcing Governor DeWine to change his COVID-19-related policies. See Darrel Rowland, *Capitol Insider: ‘Impeach Mike DeWine’ Movement Backed by Fellow Republicans*, COLUMBUS DISPATCH (May 10, 2020, 9:58 AM), <https://www.dispatch.com/news/20200510/capitol-insider-lsquoimpeach-mike-dewinersquomovement-backed-by-fellow-republicans>.

disenfranchisement would constitute a direct attack (type-1) on electoral validity, and would thus amount to a denial of democracy.<sup>215</sup>

To be sure, it would not be an American government engaged in this direct sabotage of democracy, as would be the case if federal immigration agents caused the disenfranchisement. But this distinction should not be dispositive when evaluating an election's validity. In either case, if no remedial measures were taken, the government would be letting the electoral result stand, despite the outcome-determinative disenfranchisement designed to frustrate the will of the electorate seeking to participate in the electoral process. In this respect, the government would be responsible for installing into office a "winner" whom the electorate did not actually choose.

Here, again, the analogy to disenfranchisement caused by Putin is worthwhile. Putin is no more an agent of an American government than are private-sector paramilitary groups. But if Putin were successful in disenfranchising eligible voters in Philadelphia by attacking the city's electrical power grid, there would need to be a remedy for outcome-determinative disenfranchisement of this type. Otherwise, the validity of the election as an expression of the electorate's will would have been lost. The same must be true of an equivalent amount of outcome-determinative disenfranchisement in Philadelphia caused, not by Putin, but by domestic nongovernment paramilitary groups aimed at suppressing turnout from eligible inner-city voters. If the government failed to provide a remedy for this direct negation of the electorate's will, the government would be perpetrating the invalidity of the outcome by treating it as a valid exercise of democratic choice.

### *C. Accidental Disenfranchisement*

The analysis is more complicated if the disenfranchisement is accidental. It is easy to imagine a situation where ballots are "lost"—voters unable to cast ballots despite attempting to—not because of deliberate efforts to prevent these ballots from being cast, but instead because of unintended circumstances. It could be the accidental loss of electric power in a city,<sup>216</sup> not a Russian attack on the power grid. It could be unusually heavy traffic that prevents eligible voters from getting to the polls, not intimidation tactics by either ICE agents or private-sector paramilitary groups. It could even be

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<sup>215</sup> Section 213(g) of the ALI principles provide that "[a] court shall declare an election null and void on the ground that eligible voters were denied the opportunity to cast any ballot . . . by persons acting on behalf of another candidate or political party." *PRINCIPLES OF THE LAW: ELECTION ADMIN.* § 213(g)(1) (AM. LAW INST. 2019). This formulation would encompass intimidation of voters by paramilitary-style groups whenever those groups were engaging in this intimidation with the goal of influencing the outcome of a pending election.

<sup>216</sup> See HASEN, *supra* note 10, at 93–166.

bad weather.<sup>217</sup>

How an electoral system should handle the risk of accidental disenfranchisement is itself an issue subject to reasonable democratic disagreement. Personally, one might prefer a system that protects innocent voters from disenfranchisement when they themselves have not been negligent, particularly if the accidental disenfranchisement really made a difference in the race.<sup>218</sup> The equities especially favor the voter if the accidental disenfranchisement was caused by the government officials administering the election, rather than a third party—like the postal system when it accidentally loses ballots that voters put in the mail.

But it is possible that a democracy might decide to take an “assumption of risk” approach, assuming that voters themselves bear some of the risk and will avoid accidental problems in casting their ballots, especially if the electoral system gives voters ample opportunity for “early voting” or “voting by mail”—and the accident happens at the last minute on Election Day.<sup>219</sup> In any event, however an electoral system decides to handle the risk of an accident, deliberate disenfranchisement is different.<sup>220</sup> The system cannot tolerate eligible voters being deliberately prevented from casting ballots and

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<sup>217</sup> See FED. JUDICIAL CTR., KEEPING POLLS OPEN LONGER BECAUSE OF WEATHER (2012), <https://www.fjc.gov/sites/default/files/2017/EE-OHN-1-08-cv-562-Obama-for-America.pdf> (collecting cases on how courts have handled bad weather on election day).

<sup>218</sup> Consider, for example, *Lecky v. Virginia State Board of Elections*, where some voters accidentally received the wrong ballots, ones intended for residents of different districts. 285 F. Supp. 3d 908 (E.D. Va. 2018). As a result, the affected voters had ballots that omitted candidates for their elections (and listed candidates for elections in which they were ineligible to participate). *Id.* The error was substantial enough that it might have made a difference in a close (and politically consequential) state legislative race. Nonetheless, the court refused to grant a remedy, because of the accidental nature of this disenfranchisement, noting that “the allegations in the amended complaint attribute these election irregularities largely to innocent human or mechanical error in entering the addresses assigned to each precinct, and at most, negligence on the part of election officials in failing to correct those errors.” *Id.* at 916. The circumstances were such, however, where another judge reasonably might have reached the opposite conclusion. *Cf.* *Whitley v. Cranford*, 119 S.W.3d 28, 31–32 (Ark. 2003) (invalidating election for similar mistake); *Gunaji v. Maclas*, 31 P.3d 1008, 1018 (N.M. 2001) (requiring judicial remedy in similar circumstance).

<sup>219</sup> When an absentee ballot is returned past the deadline provided by state law, even if it is the post office’s fault and not the voters, courts generally will not provide relief because the risk of postal error is an element of vote-by-mail. See FED. JUDICIAL CTR., LITIGATING A CLOSE ELECTION (2019), <https://www.fjc.gov/sites/default/files/materials/10/EE-VAE-1-17-cv-1295-Cole.pdf>.

<sup>220</sup> To be clear, accidental disenfranchisement is a subcategory of direct (type-1) interferences with voting, not a form of indirect (type-2) interference. Accidental disenfranchisement negates voter choice; it does not influence voter choice. Nonetheless, for reasons discussed in the text of the essay, one can conceive of an election result being valid even though it was affected by accidental disenfranchisement (because the electoral system was designed to tolerate a certain amount of accidental error, even when consequential). This point applies not only to accidental disenfranchisements that prevent eligible voters from casting ballots that are capable of being counted; it also applies to accidental errors that miscount ballots actually cast.

declaring results with these ballots missing when they would have altered the outcome.

Another distinction between accidental and intentional disenfranchisement is worth emphasizing. Implicit in the idea of an accident is its random quality. In the context of an election, this randomness equally could harm either electoral competitor. Intentional disenfranchisement, by contrast, is designed to give one side an electoral advantage. To permit intentional disenfranchisement to produce its desired outcome is to conduct the election in a way that deliberately denies the electorate its choice. Tolerating random error, even when consequential, is not to structure the electoral process in a way that is deliberately biased. If it turns out that the risk of error is not random, such that an accident is more likely to harm one side rather than the other, that would be a reason to treat accidental disenfranchisement as a negation of voter choice that requires a remedy.

#### *D. COVID-Related Complexities*

Developing and applying a generally accepted standard of electoral validity for the 2020 presidential election was going to be plenty challenging, for reasons already elaborated, even before the arrival of COVID-19. But the enormous difficulties of holding an election while a life-threatening pandemic is crippling the nation's economy and forcing the adoption of unprecedented public health measures has imposed an entirely new urgency to the topic of election validity. Given the inevitable adjustments to the electoral process that need to be made for voting in November because of COVID-19, how are Americans to judge whether or not the result of the election should be considered a valid product of their collective electoral choice?

The basic principle should remain the same: Is the reported tally of votes a genuine reflection of the electoral choice in the aggregate of the eligible voters endeavoring to participate in that collective choice? It undoubtedly will be more difficult for this November's election to satisfy this standard of electoral validity due to the pandemic. But the election still should be held to the same standard. Otherwise, the nation would be tolerating results that are not genuine; winners would be holding office based on sham, not real, results insofar as they were purporting to reflect the will of the electorate.

The added difficulty in achieving a valid election attributable to COVID-19 is largely the risk of disenfranchisement. There is no reason to think that ballots actually cast in the November election are more likely to be counted inaccurately because of the virus (although there may be some modest heightened risk of a counting error if local election offices are

understaffed or otherwise operating sub-optimally). Instead, the major concern is that ballots from eligible voters will be missing from the count because voters were unable to cast them, despite trying valiantly to do so, because of pandemic-related conditions.

There are two main ways that voters could be disenfranchised because of the pandemic. The first is the failure to receive a properly requested absentee ballot because the government lacked the capacity to handle the historically unprecedented high volume of timely absentee ballot requests. These voters would be disenfranchised—unable to cast a ballot in the election despite their attempt to do so—if (1) there is no emergency backup way for them to vote by mail without having received their official absentee ballot from the government and (2) they have a reasonable health-related basis for avoiding in-person voting, such that even if in-person voting is available for the November election, it is not a realistic option for this particular voter.

The second type of disenfranchisement would occur if voters go to the polls for in-person voting on November 3 but the lines are so long that they cannot reasonably be expected to wait for hours to cast their ballots and accordingly give up and go home without having voted. We saw in Wisconsin's primary election the kind of excessively long lines that can occur when the number of staffed polling places available is insufficient to meet the demand for voters who turn out to cast ballots,<sup>221</sup> and that was in a situation where in-person turnout was relatively low. If in-person turnout on November 3 is anything close to normal for a presidential election, but if the government cannot staff the normal number of polling places because poll workers—who tend to be elderly—refuse to volunteer given the pandemic, the consequence could be horrifically long lines that cause massive disenfranchisement.

Obviously, the paramount priority between now and November should be the adoption of administrative measures that diminish the risk that either form of disenfranchisement occurs. This means either sending every eligible voter an absentee ballot well ahead of time, or else hiring enough employees to expeditiously process a historically unprecedented high volume of absentee ballot requests. It also means making sure that some form of emergency backup absentee ballot is available to voters who do not receive their official ballot in time to return it by the voter's own deadline for doing

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<sup>221</sup> Katelyn Burns, *Wisconsin Voters Are Waiting in 5-Hour Lines in the Middle of a Deadly Pandemic*, VOX (Apr. 7, 2020, 2:18 PM), <https://www.vox.com/policy-and-politics/2020/4/7/21211879/wisconsin-voters-lines-election-primary>.

so.<sup>222</sup> And with respect to in-person voting, it means figuring out a way to provide for enough staffing of polling places so that voters can come and go in a reasonable amount of time—and that, while they are there, the polling place is being operated in an appropriately safe and hygienic manner so that voters do not put their health at risk by casting their ballots.

But if the government fails to do this and disenfranchisement occurs as a result, and if that disenfranchisement is responsible for which candidate wins, then the government's failure to prepare adequately in light of the pandemic will have produced an election result that cannot meet the test of validity. In this situation, by hypothesis, the other candidate would have won absent the pandemic-induced disenfranchisement. The result, then, cannot be said to correspond to the electorate's genuine choice. It is an entirely artificial result, dependent upon the disenfranchisement.

While the disenfranchisement may not have been intentional—at least not in the specific sense that the government was hoping that voters would be disenfranchised because of its inadequate preparations in light of the pandemic—the disenfranchisement in this context cannot be considered entirely accidental either. It is entirely foreseeable that eligible and innocent voters will be disenfranchised through no fault of their own if the government does not adequately prepare for the specific circumstances of voting in the midst of an ongoing pandemic that started over a half-year earlier (which will be true by November). Indeed, this very essay by discussing this particular point is foreseeing what could occur from a lack of adequate preparation by the government. If this risk is ignored once foreseen, it would be a case of deliberate indifference on the part of the government—an irresponsibility for which the government itself was clearly at fault and blameworthy. Especially if the reason for the government's indifference to the obviously foreseeable risk of disenfranchisement was a partisan preference for disenfranchisement rather than a fair opportunity for all eligible voters to cast ballots, the government's deliberate indifference to the consequences of inadequate planning would approach the kind of culpability that exists when the government sets out to produce disenfranchisement that potentially could swing an election (as would be true if ICE agents attempted to suppress turnout at the polls in order to favor the President's reelection).

To be crystal clear on this point, let us assume for sake of argument that the following occurs, although a nonpartisan goal of voters able to elect the candidate of their choice requires hoping that it does not: President Trump

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<sup>222</sup> See Edward B. Foley & Steven F. Huefner, *The Simplest Way to Avoid a Wisconsin-Style Fiasco on Election Day*, POLITICO (Apr. 21, 2020), <https://www.politico.com/news/agenda/2020/04/21/simplest-way-avoid-wisconsin-fiasco-election-day-196625> (arguing that “. . . any voter who requests an absentee ballot on time but does not receive it on time” should receive a Federal Write-In Absentee Ballot).

wins one or more pivotal states—perhaps Pennsylvania, Michigan, or Wisconsin—solely because of massive disenfranchisement of eligible voters in Philadelphia, Detroit, or Milwaukee, and the reason for this massive disenfranchisement is that the legislatures of those states have starved their biggest cities of the resources those municipalities need in order to adequately administer the election given pandemic conditions. These cities lack enough employees to process absentee ballot applications efficiently, and they cannot hire enough replacement poll workers to adequately staff polling places on November 3. The electoral system essentially collapses. Huge numbers of voters trying to cast a ballot are unable to do so.

Despite this utter collapse of the electoral system, there are still reported results from the counting of ballots that were able to be cast statewide. But to say that these results are valid given the system's collapse would make a mockery of the concept of voter choice. The results would not be a real reflection of the electorate's will. The election would be a sham—to treat it otherwise, a pretense. An adequate standard of electoral validity—one capable of distinguishing between genuine and sham exercises of electoral choice—must be prepared to make this kind of pronouncement, if the conditions regrettably occur that warrant it.

Conversely, however, not everything that might go wrong in connection with the November election would necessarily undermine its validity. If voters have a genuine opportunity to cast a ballot but decline to do so, that “self-disenfranchisement,” while unfortunate, does not negate the election's validity. Some such “self-disenfranchisement” might result from the pandemic: voters who decide neither to vote by mail, given its various steps (like, at a minimum, filling out the absentee ballot envelope) or vote in person, not wanting to incur any additional risk that might be associated with going to a polling place—even one that scrupulously follows the most cautious pandemic-related protocols. Turnout in November might be lower also because traditional forms of get-out-the-vote activities, like going door to door in neighborhoods, are drastically curtailed due to the coronavirus. Likewise, the lack of campaign rallies may dampen enthusiasm, thereby further reducing turnout. But all these causes of voluntary abstention from voting do not render the election invalid.

Likewise, we can anticipate some forms of disinformation affecting the November election. All of this disinformation will be contemptible, but insofar as it operates solely to persuade voters on what electoral choice they should make—to support Trump, Biden, or just abstain—this disinformation does not negate the election's validity for the reasons previously explained. Some of this disinformation might be COVID-related, manipulating data related to the disease or otherwise attempting to persuade voters how the pandemic should affect their electoral choice. We must hope that voters



consider intelligently all the information they receive relevant to the electoral choice they make, including information relating to the economic consequences of the pandemic and the various policy decisions the government should make. All of this public discussion on the coronavirus and its effect on society is fair game in a democracy, and voters will be called upon to exercise the responsibility of popular sovereignty as best as they can. Whatever decision they make is valid, whether any of us personally agree with it or not, as long as the decision was made under conditions in which all eligible voters have a genuine choice to participate.

There is a sub-category of disinformation about the coronavirus that, at least conceptually, might have the capacity to negate genuine voter choice. If the disinformation concerned the safety conditions at the polls, or the facts about the process of voting by mail, such that it caused the disenfranchisement of voters who otherwise were endeavoring to participate, then the disinformation might fall into the category of a type-1 (direct) rather than type-2 (indirect) attack on electoral choice. This line may be a tricky one to police, depending on the particular circumstances. For example, if the disinformation *persuaded* a voter not to bother to vote, rather than truly *prevented* the voter from voting (by negating the voter's understanding of the relevant facts concerning the voter's local polling place), then the disinformation might be more appropriately considered a pernicious type-2 attack, deplorable but ultimately not causing the result of the election to be invalid. But before the election actually occurs, the most we can do is to draw the conceptual distinction between type-1 and type-2 attacks and be prepared to police the distinction as faithfully as possible should the need arise.<sup>223</sup> If

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<sup>223</sup> If a candidate's own campaign engages in a maliciously deliberate falsehood about an opposing candidate, and if there is evidence that this falsehood persuaded enough voters to make a difference in the outcome of the race, is that a situation where the result should be considered *invalid*, because it was the product of the candidate's own misconduct, even though it is an indirect (type-2) attack on the voter's considerations in what choice to make? Other countries may negate election results in this situation. See *Watkins v. Woolas* [2010] EWHC (QB) 2702 [19]–[23] (Eng.) (setting aside election results upon a finding that the winning candidate had made intentionally false statements of fact in relation to his opponent's personal character in violation of statutory law). The United States traditionally does not void elections because of campaign lies, even if the lies proved effective. In any event, the theoretical argument of this essay is that the sharp analytical distinction between direct (type-1) and indirect (type-2) attacks should be maintained in evaluating whether or not the result of an election is in fact the electorate's choice. In undertaking this inquiry, it makes no difference whether a "Swift Boat"-style smear is perpetrated by the opposing candidate's supporters, as was the case in the 2004 election, or the candidate's own campaign. There may be other remedies appropriate for a candidate caught telling a blatantly deliberate lie about an opponent, including perhaps impeachment and removal from office—not because the election's result was an invalid report of the electorate's actual choice, but because the candidate did something so wrong as to be unfit to hold the office, even though validly elected. The point of this essay, however, is not to make judgments about a winning candidate's fitness for office, but

we do not attempt to maintain the distinction at all, however, then we will have lost the capacity to distinguish invalid and valid elections and thus, in a fundamental sense, lost the capacity to make and declare genuine electoral choices as an exercise of popular sovereignty.

#### CONCLUSION

The test of electoral validity offered here makes a sharp analytical distinction between direct (type-1) attacks that negate electoral choice and indirect (type-2) attacks that merely affect electoral choice. This distinction builds upon a prevailing conception of electoral validity that existed throughout American history, through *Bush v. Gore*, but became challenged as a result of the 2016 election. This analytical distinction, moreover, is theoretically sustainable because it rests on the fundamental principle that democratic elections exist to effectuate the will of the participating electorate. Thus, any interference with the electoral process that deprives the electorate of its ability to effectuate its will contravenes the principle of popular sovereignty, which underlies the entire enterprise of democratic elections. By contrast, any interference that persuades the electorate to make a collective choice different from what it would choose otherwise does not deprive the electorate of its capacity to make a choice in the exercise of popular sovereignty.

Although derived in part from history, this renewed conception of electoral validity is innovative insofar as it encompasses within its definition of direct (type-1) interference those attacks of disenfranchisement that prevent enough voters from casting a ballot to make a difference in which candidate wins the election. Outcome-determinative disenfranchisement is difficult to prove and to remediate, precisely because there are no ballots to review (and potentially recount) from deliberately disenfranchised voters. But if the standard of electoral validity is to assess whether the electorate has been able to employ the electoral process to make the choice that accords with its collective electoral preferences, then deliberate disenfranchisement that negates the electorate's capacity to make this collective choice must be considered as rendering the election's results invalid. In this situation, the results are just as much a fiction from the perspective of identifying the electorate's will as if the ballots actually cast had been deliberately miscounted to produce an official winner opposite to what the electorate wanted. Either scenario is a negation of the popular sovereignty that is a democratic election's essential purpose, and thus both must be considered as different forms of direct (type-1) attacks that, when successful, negate

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instead to provide a workable measure of whether an election's outcome conforms to the electorate's will.

electoral validity.

The need to define the standard of electoral validity so that it tests for outcome-determinative disenfranchisement as part of its inquiry is, moreover, particularly urgent this year. The risk of activities deliberately designed to disenfranchise eligible voters is, regrettably, not negligible. These deliberately disenfranchising activities may come from abroad, perhaps in the form of an attack on the infrastructure necessary for the casting of ballots on Election Day. Or, these deliberately disenfranchising activities may come from domestic actors, including in the form of nongovernmental vigilante-type groups—a kind of disenfranchisement that shamefully has occurred in America's past. Worse still, it is not inconceivable that the impetus for such disenfranchisement may come from the White House itself and perhaps take the form of presidential efforts to use federal government resources and personnel—such as immigration officials—to deter eligible voters from casting ballots. The difficulties of conducting the election in the midst of the COVID-19 pandemic significantly increase the risk of disenfranchisement in November. Whatever the source of such disenfranchisement, it must not be permitted to affect the election's result if the democratic validity of that result is to be maintained.

To close with a key clarifying point: a sound standard of electoral validity permits identifying when an election satisfies its test, just as it permits determining when an election does not. In other words, it both *validates* and *invalidates* depending on the facts at hand. In this respect, it is neutral and impartial, not biased in either direction or towards any party or candidate. Applied with integrity, it permits America's electorate to achieve its goal of identifying a winner that the electorate collectively wanted to win.

America should thus use this test to determine whether the 2020 election is or is not valid. The courts, if called upon to adjudicate an actual dispute over the election's result, should employ this test to measure whether or not the result will stand—at least to the extent that using this test is compatible with existing law. The media should also use this measure to inform the public whether or not the electoral system was successful in producing a result that conformed with the electorate's will.

Using this test of electoral validity, however, requires discipline. The media must not stray from this standard when considering the election's success or failure. Otherwise, the public will become confused and will unnecessarily doubt the result, questioning whether it is an authentic reflection of democratic choice.

This discipline means acknowledging that, even if the election has problems, its result is not necessarily invalid. The question is whether there has been direct (type-1) interference sufficient to negate genuine electoral choice. If so, that failure must be recognized and remedied in order to have

a winner who the voters actually chose. But, if there is interference of this type insufficient to have altered the election's outcome, that fact too must be recognized. In that case, the winner must be accepted as the candidate that the electorate collectively wanted, whichever candidate it is and for whatever reasons.