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Was the 2016 Election Legitimate?

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WAS THE 2016 ELECTION LEGITIMATE?

CHAD FLANDERS*

INTRODUCTION

On November 10, 2016—the day after the American presidential election—Americans woke up to find that Donald Trump was going to be America’s next president. It was a shock to many, because nearly all the polls predicted that Trump was going to lose to Hillary Clinton.¹ In one sense, the polls *were* right: Trump *did* lose to Clinton in the popular vote.² It even could be said that he had decisively lost, by nearly three million votes.³ But that is not how American democracy works. American democracy works, at least on the presidential level, by means of the electoral college, and Trump had won that. And if you look at the map of the United States, it is Trump who looks to have won decisively; by winning the most states, thirty to twenty, and the most electoral votes, 304 to 227.⁴ Trump is America’s *legal* president.

But in the days, weeks, and years since that fateful election day, questions have been raised about the legitimacy of Trump’s election to the presidency, and thus of his presidency itself. We can start with maybe the most obvious one: in a democracy, that purports to represent the “will of the people” through its elections, how can it be that a president who has *lost* the popular vote is the

* Thanks to Christopher Bradley, John Inazu, Sean Oliveria, Yasmin Dawood, and participants at talks at Fudan University (Shanghai) and Nanjing University for comments on an earlier draft of this essay. Thanks especially to the audience at the Childress Symposium, especially comments by Guy Uriel-Charles and Dan Tokaji, which inspired the last part of the Conclusion. Dan Blair and Angela Torbla gave me exceptional editorial assistance.

1. See, e.g., Maurice Tamman, *Clinton has 90 percent chance of winning*, *Reuters/Ipsos States of the Nation*, REUTERS (Nov. 7, 2016), <https://www.reuters.com/article/us-usa-election-poll/clinton-has-90-percent-chance-of-winning-reuters-ipsos-states-of-the-nation-idUSKBN1322J1> [<https://perma.cc/RZ8H-7M6B>].

2. Gregory Krieg, *It’s official: Clinton swamps Trump in popular vote*, CNN (Dec. 22, 2016), <https://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/index.html> [<https://perma.cc/EP6E-CKLS>].

3. *Id.* (“The Democrat outpaced President-elect Donald Trump by almost 2.9 million votes, with 65,844,954 (48.2%) to his 62,979,879 (46.1%), according to revised and certified final election results from all 50 states and the District of Columbia.”)

4. Christina Gregg, *How many states did Trump win?*, AOL (July 5, 2017), <https://www.aol.com/article/news/2017/07/05/how-many-states-did-trump-win-state-by-state-look-back-2016-presidential-election/23017643/> [<https://perma.cc/VR6K-4M7J>].

winner of the election? And it is important to be clear here: it is not just that Trump did not get over 50% of the vote; it is that he did not even get more votes than the person he defeated. He did not even win a plurality of the vote. *Could a president who has not won a plurality of the votes in an election really be a legitimate president?*

If this was the thought of illegitimacy in the immediate aftermath of the election, the emerging probe by Robert Mueller into Russian interference with the 2016 election raised other, and more ominous, specters of illegitimacy. First, there were allegations that Russians had tried to *hack* the election by manipulating vote totals in various states.⁵ *Did the Russians delegitimize the election by actually changing people's votes?* Second, there was the more general and diffuse (and harder to measure) claim that Russians had *influenced* American citizens via “fake” social media accounts—Twitter, Facebook, and the like—changing or hardening their positions on various issues.⁶ *Did Russians delegitimize the election by persuading people to vote one way rather than another?*

“Illegitimacy” is a hard word to get a handle on, but it seems one that people increasingly have used to pinpoint what is plaguing American democracy. To take one notable, recent example, in her loss to Brian Kemp in the 2018 Georgia Governor’s race, Stacy Abrams pointedly refused to concede that his election had been “legitimate” even though it was “legal.”⁷ More recently, a North Carolina election was declared void because of credible evidence of absentee ballot fraud.⁸ The winner in that race, Mark Harris, went back on his prior statement that there was no reason to doubt the legitimacy of the outcome in his race; instead, he agreed that there should be another election.⁹ Citing health

5. David E. Sanger & Catie Edmondson, *Russians Targeted Election Systems in All 50 States, Report Finds*, N.Y. TIMES (July 25, 2019), <https://www.nytimes.com/2019/07/25/us/politics/russian-hacking-elections.html> [<https://perma.cc/3PPP-XVVB>].

6. Issie Lapowsky, *How Russian Facebook Ads Divided and Targeted US Voters Before the 2016 Election*, WIRED (April 16, 2018), <https://www.wired.com/story/russian-facebook-ads-target-ed-us-voters-before-2016-election/> [<https://perma.cc/U2AA-DPSM>].

7. Caroline Kelly, *Stacey Abrams Calls Kemp Georgia's 'Legal' Governor, Won't Say He's Legitimate*, CNN (Nov. 18, 2018), <https://www.cnn.com/2018/11/18/politics/abrams-kemp-georgia-race-legal-winner-sotu-cnntv/index.html> [<https://perma.cc/22LE-GHPY>].

8. Leigh Ann Caldwell & Dartunorro Clark, *New election ordered in North Carolina House district after possible illegal activities*, NBC NEWS (Feb. 21, 2019, 3:04 PM), <https://www.nbcnews.com/politics/congress/repUBLICan-candidate-mark-harris-calls-new-election-north-carolina-disput-ed-n974176> [<https://perma.cc/V7DB-Z2XZ>].

9. *Id.* (“Through the testimony I listened to over the past three days, I believe a new election should be called. It’s become clear to me that the public’s confidence in the ninth district seat general election has been undermined to an extent that a new election is warranted”). See also Amy Gardner, *In N.C., a surprise: In the end, everyone agreed it was election fraud*, WASH. POST (Feb. 23, 2019, 7:41 AM), https://www.washingtonpost.com/politics/in-nc-a-surprise-in-the-end-everyone-agreed-it-was-election-fraud/2019/02/22/52e9f226-36c5-11e9-854a-7a14d7fec96a_story.html [<https://perma.cc/V5JY-36TP>].

problems, Harris decided not to run again, although Republicans retained control of the seat.¹⁰

In this brief Essay written for the occasion of Rick Hasen's Childress Lecture,¹¹ I use Trump's election in 2016 to look at various types and claims of illegitimacy in elections. I divide those into three types. The first, and probably the most serious, is illegitimacy due to what I will call "hacking" of an election. An election is "hacked" if because of some sort of fraud, or even some sort of mistake, the vote is not accurately counted or tabulated, with the result that there is a strong possibility that the wrong person won. This probably didn't happen in the 2016 presidential election, but if it did, I think it represents a clear case of an illegitimate election.

The second kind of illegitimacy I look at is structural unfairness. In cases like this the election goes as planned—or as reasonably well as could be planned—but the rules that govern the election are flawed somehow. This is the case, some allege, with America's electoral college—the rules are fixed in such a way that they can lead, at least sometimes, to the wrong person winning. In contrast to election hacking, this unfairness *was* present in the 2016 election (and other elections as well). But, and I add some important qualifications to this conclusion, I do not think it made the election illegitimate.

Third, I will look at perhaps the most elusive kind of illegitimacy, which I will call manipulating public opinion. Here the problem is when, even though the rules may be fair and the election may not be "hacked," something has gotten into the heads ("the hearts and minds") of voters,¹² so that they end up not voting the way they *might* have had they not been influenced by some bad "outside" force. This is the type of illegitimacy most people mean when they talk about Russians—by means of leaks, or social media—causing American voters to vote for Trump, or at least against Clinton. This type of manipulating almost certainly *did* happen in 2016; however, it is not obvious that it makes Trump's presidency illegitimate; although I do conclude it raises the possibility that it is given certain other conditions.

10. Aaron Navarro & Eleanor Watson, *Republican Dan Bishop wins North Carolina 9th Congressional District special election*, CBS NEWS (Sept. 11, 2019), <https://www.cbsnews.com/news/north-carolina-holds-special-election-for-last-house-seat-of-2018/> [<https://perma.cc/KPY6-L7LA>].

11. Richard L. Hasen, Chancellor's Professor of Law and Political Science, Univ. of Cal., Irvine, Keynote Address at the Saint Louis University School of Law Childress Memorial Lecture: American Election Law in a Post-Truth World (Oct. 11, 2019).

12. To borrow a phrase from Justin Levitt, in this case, our machines are not hacked; rather, we are hacked. See Justin Levitt, *Kavanaugh, Foreign Agents, and American Elections*, ELECTION LAW BLOG (Sept. 4, 2018, 6:40 AM), <https://electionlawblog.org/?p=100965> [<https://perma.cc/DX4R-MQNW>].

I. “HACKING” ELECTIONS

In a particularly illuminating section of Michael Isikoff and David Corn’s bestselling book, *Russian Roulette*, about Russian influence in the 2016 campaign (and on Trump), there is the following passage:

The Russian scans, probes, and penetrations of state voting systems changed the top-secret conversations under way. Administration officials now feared the Russians were scheming to infiltrate voting systems to disrupt the election or affect tallies on Election Day. And the consensus among Obama’s top advisers was that potential Russian election tampering was far more dangerous . . . [M]essing with voting systems could raise questions about the integrity of the election and the results. That was, they thought, the more serious threat.¹³

The passage is illuminating for at least two reasons. First, it shows that, from the Obama administration’s perspective, the “more serious threat” from Russia was not the dumping of the Wikileaks emails, or even their overall social media-influencing campaign, but the possibility that the Russians might somehow hack state voting systems and mess with the final tallies. And it shows, second, that the threat that this disruption posed was not necessarily that it would flip the vote—so that Trump and not Clinton would win—but that people would wonder about the “integrity” of the election. The passage thus suggests the possibility that hacking an election need not involve changing the result of that election to make it illegitimate, but just in sowing enough doubt about the result of the election.

But let us start with the most obvious case where we should wonder about an election’s legitimacy because by some means the tabulation of the votes—either in the casting of the votes or in the counting—is altered so dramatically that the wrong person wins. I take it that this is what probably happened in North Carolina in the race between Dan McCready and Mike Harris. In that race, an employee of Mike Harris fraudulently submitted over 1000 absentee ballots.¹⁴ It seemed that, based on testimony from the hearings held after the election was over, that this election fraud tipped the election against McCready and for Harris. Harris, in fact, won by only about 900 votes. In other words, in that election we had: 1) obvious evidence of fraud, and 2) fraud that was probably outcome-determinative. With these two facts being proved almost beyond a reasonable doubt, the election was held to be void, and a new election was called for.

I think this gives us the start of a good test for illegitimacy, when it involves hacking or rigging an election so that the actual vote count in the election is

13. MICHAEL ISIKOFF & DAVID CORN, *RUSSIAN ROULETTE: THE INSIDE STORY OF PUTIN’S WAR ON AMERICA AND THE ELECTION OF DONALD TRUMP* 188 (2018).

14. Leigh Ann Caldwell, *Key Witness Testifies to Tampering with Absentee Ballots in N.C. House Race*, NBC NEWS (Feb. 18, 2019, 6:25 PM), <https://www.nbcnews.com/politics/elections/key-witness-testifies-tampering-absentee-ballots-n-c-house-race-n972896> [<https://perma.cc/5SD7-W7VH>].

rendered suspect. The test has two steps. First, there must be some irregularity in the casting or the counting (the “tabulation”) of the votes. This could be absentee ballot fraud, as in the North Carolina race; hacking voting machines so that they do not count the actual votes made; or it could involve widespread fraud at the ballot box, e.g., by people voting in an election that they are not qualified to vote in (by not being registered, by not being a citizen, etc.). But—and this is important—the irregularity does not have to be deliberate fraud, as in the North Carolina race, or with the feared Russian hacking. It could also be a matter of simple mistake: maybe the ballot was defective, or the voting machine malfunctioned. The point is that the voting process was in some way “flawed”—that is, there is an irregularity in the process, whether intended or accidental—so that the true vote count ends up not being correct, that is, does not match the way voters actually voted.

Not every mistake or every instance of fraud matters though. And here we get to the second step, the threshold condition for when mistakes or fraud matters to electoral legitimacy. Again, we should start with the clearest case, when there is such massive voter fraud¹⁵ or such a pervasive mistake in tabulation that we know the result was different: that Harris beat McCready rather than the other way around, for example. When we know that the election would have turned out differently but for the irregularity, we have a strong case that the election as it actually happened was illegitimate. In a democracy, the fact that the people’s choice lost is *prima facie* evidence of illegitimacy. In the North Carolina case, this was recognized, and the appropriate remedy was ordered, *viz.*, a new election. No other outcome seems correct.

But it will not always be the case that we will be certain that “but for” the irregularity the other candidate could have won. Still, there can be a problem with legitimacy. Consider the case that so troubled members of the Obama administration: Russian hacking could raise serious doubts about the election’s legitimacy. People might wonder if the election had been hacked or rigged by the Russians, so that there was a chance that the wrong candidate got elected. It might be enough, for illegitimacy, that people could wonder about whether the wrong candidate got elected.

So, this leads us to another insight about legitimacy: if there is doubt about the rightness of the election result, this could also mean that the election was not legitimate. As is often the case, it is not enough that the right process be followed, there must also be the appearance that the right process was followed. That is, part of legitimacy is not just that the rules are followed, but that people *accept* the result as one that came about because the rules were followed. Of course, there should be some basis in the people’s belief—it cannot just be that their candidate lost, so they don’t like the result. It has to be a well-founded

15. Chad Flanders, *How (and Why) to Think About Voter Fraud*, 41 CREIGHTON L. REV. 93, 122 (2007) (discussing the idea of massive voter fraud).

belief (or fear) that something went so wrong, or wrong enough, that the wrong candidate might have won.

This leads me to the second part of the test for legitimacy. The first part of the test was that there was some irregularity. But not all irregularities will be bad enough for an election to be labeled illegitimate, which means the test needs an additional, second part. That second part is: irregularities are bad enough for elections to be illegitimate when they lead to a widespread, reasonable belief that there is a *good chance* that, but for the irregularities, the election would come out differently.¹⁶ I mean this to be a rather high bar, met in only rare cases. It happened in North Carolina because the margin of the election was close enough and the evidence was clear enough that there was fraud of a magnitude that the election would have ended up differently. I do not think that there was this kind of evidence in the 2016 presidential election, however. There was no proof that the Russians actually did hack voting machines or cause any disruption on election day, let alone evidence that this hacking was pervasive enough to have flipped key states in the 2016 election.¹⁷ It may be that the decentralized—and sometimes chaotic—voting process in presidential elections actually may have helped, rather than harmed, the legitimacy of the 2016 election by spreading out and multiplying the places hackers would have to hit in order to change the outcome.

But now we have at least the start of a working test for an illegitimate election. First, there has to be some irregularity—fraud or mistake or interference—and second, that irregularity has to be so great that it generates a reasonable doubt that the election came out the right way. In circumstances where both parts of the test are met, we can call that election illegitimate. Of course, there will be judgment calls, especially when we get to the second step: what are reasonable grounds? When is there in fact a reasonable doubt about the outcome? But such judgment calls are unavoidable with such a broad concept of illegitimacy. The goal here is simply to try to flesh out the concept and not to generate specific answers in every electoral controversy. We might nevertheless be able to identify some clear cases where the election was illegitimate, and others where we can say—maybe something went wrong, but the election was, on the whole, legitimate.¹⁸

16. This is meant to mirror part two of the *Strickland v. Washington* test for ineffective assistance of counsel. As the majority in that case put it: “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

17. For a slightly polemical statement of this fact, see Jim Geraghty, *The Russian Hackers Who Didn’t Hack Anything*, NAT’L REV. (July 26, 2019), <https://www.nationalreview.com/the-morning-jolt/the-russian-hackers-who-didnt-hack-anything/> [https://perma.cc/3Z83-Z428].

18. Dennis Thompson maintains that only if violations of the electoral process are “widespread, deliberate, and consequential do they undermine legitimacy.” DENNIS THOMPSON,

II. STRUCTURAL UNFAIRNESS

In the last part, we looked at a case where, it was alleged, Russian interference may have resulted in the 2016 election being illegitimate. *If* the Russians interfered in our election by manipulating the results, and the results would have been different absent any Russian interference, then we would have very good grounds for questioning the legitimacy of the 2016 election. A very different kind of illegitimacy comes when we look at cases where the rules in fact have been followed to the letter—there was no one bending or breaking the rules—but where the rules *themselves* create uncertainty about whether the people have spoken by means of the election. The electoral college could be a set of rules of precisely this kind. Here we have a system where the popular vote is “translated” into a result, but arguably the process of translation involves significant distortion of the popular will. More people in the United States voted for Clinton, not for Trump. But because of the electoral college, Trump won. Another example of this type of (what I will be calling) “structural injustice” is when laws are passed that result in the disenfranchisement of various voters—those who lack adequate identification or who have committed a felony.¹⁹ These voters are excluded from voting, but they are still part of the “people,” or so the argument might go. These laws mean that the people who actually vote don’t really represent all the people.²⁰

We might be tempted to run the same formula for illegitimacy from above with these types of structural rules. First, we have rules or laws that are themselves the problem, that are themselves the irregularity. For example, we might say that the effect itself of rules about how votes are tabulated in the electoral college or which voters can and cannot vote amounts to an “irregularity”—that is, the rules *themselves* are a problem that should make us think about whether the right process was followed. Second, we show how following those wrong laws or rules can give us reasonable grounds to think that the wrong person won. In the 2016 election, the electoral college required the result that the person who won the popular vote ended up not winning the presidency. And similarly, in the 2000 election, there is an easy case to make that *but for* the felon disenfranchisement laws in Florida, Al Gore would have won Florida, and so the presidency—and not George Bush. In the 2018

JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES 3 (2002). But I am not sure why violations have to be either widespread or deliberate to threaten the legitimacy of an election. If an isolated computer glitch meant that the wrong person wasn’t elected, might we—rightly—question whether the election gave us the “legitimate” winner?

19. For more on this structural unfairness, see Chad Flanders, *Disenfranchisement Due to Crime*, in *COMPARATIVE ELECTION LAW* (James A. Gardner, 2020) (forthcoming) (discussing arguments for and against felon disenfranchisement).

20. Other examples may be more obvious, and more obviously egregious: laws that disenfranchise people of color, or women, would fall under this heading, and I consider them briefly, below.

Georgia's Governor's race, Stacey Abrams made a compelling case that Brian Kemp's aggressive enforcement of laws about voter eligibility made it the case that she lost votes, so that Kemp was able to win by a large enough margin to avoid a runoff.²¹ Do these cases show that structural unfairness can also lead to calling an election "illegitimate"?

Maybe. I think there is a notable, and significant, difference between the case of fraud or mistake and cases where the rules are being followed, and that is the fact of notice. The candidates in cases where the rules are followed have, at least in principle, been aware of the rules of the game and how they will work. Hillary Clinton knew that she had to win the electoral college in order to win the presidency. It is not as if she believed that she only had to win the popular vote, and things would be fine because then she would have won the election. No, she knew about the electoral college and made campaign choices accordingly—and, presumably, so did Donald Trump. Stacey Abrams knew about the voter registration statutes and worked hard to register and mobilize voters even in the face of Kemp's legal efforts for suppression.²² There is something to be said for the fact of notice, even when rules are not ideal. It means that the candidates were able to adjust and change their expectations and their campaign strategies in light of the rules. There is also something to be said if the rules of the process were themselves the product of a legitimate process; no one was saying that the electoral college was itself unconstitutional or that the laws that Kemp was aggressively using to his advantage were *not laws*.²³ This is not the same as saying that the laws are good or the best; but they were the rules, and at some point they had to be agreed upon and promulgated, and the candidates all knew what the rules were.²⁴

But this is too easy. Fair notice and the procedural legitimacy of the rules themselves cannot be the whole story. First, and just to make the obvious point: on the retail level, there are concrete and particular injustices that result from bad rules being followed, even when they are "the law." If we believe felon disenfranchisement is unjust, then it is wrong when even one former felon has

21. For a persuasive argument to this effect, see Adam Serwer, *Just Because an Election Is Legal Doesn't Mean It's Legitimate*, THE ATLANTIC (Nov. 20, 2019), <https://www.theatlantic.com/ideas/archive/2018/11/fighting-voter-discrimination-not-undermining-democracy/576229/> [<https://perma.cc/5Q9E-GCRN>].

22. Sometimes efforts at suppression have precisely the opposite result: they end up mobilizing voters rather than discouraging them. See, e.g., Arekia Bennett, *Here's How Young Black Voters are Fighting Back Against Voter Suppression in Mississippi*, THE ROOT (Sept. 24, 2019, 11:30 AM), <https://www.theroot.com/here-s-how-young-black-voters-are-fighting-back-against-1838358790> [<https://perma.cc/K8GN-FJ2F>].

23. At the very least, Hillary Clinton was not saying that the electoral college should be ditched prior to the election. Abrams' case is slightly more complicated: she did seem to be alleging that many of Kemp's moves were not just dirty politics, but actual violations of the law.

24. See Chad Flanders, *Election Law Behind a Veil of Ignorance*, 64 FLA. L. REV. 1369, 1369, 1401 (2012) (regarding the importance of following neutral rules in election law cases).

been denied his or her right to vote in an election. But here I am talking about something else, something on the wholesale level. What happens when we agree that a) felon disenfranchisement is unjust and b) the exclusion of that population means that the outcome of an election is altered? Fair notice of a law does not quite solve the problem when the law itself is the problem, that it works an injustice and moreover represents a distortion of the people's will. To take a more extreme example: prior to Reconstruction, and even far, far after that, African Americans were denied the right to vote. Candidates knew this and adjusted their campaigns accordingly.²⁵ But fair notice does not solve the problem that exclusion of African Americans from the vote was unjust—in that respect, was an irregularity—and probably changed the results of many elections and indeed probably changed the results from how elections *should have* come out.

Was every election prior to the Voting Rights Act, then, an illegitimate one? Maybe.²⁶ I think we should take this conclusion very seriously. We might make a more limited conclusion in these cases, however. In those cases where a significant portion of the population is excluded from voting by an unjust law, the resulting election is illegitimate as it pertains to them. And I think this is the right result.²⁷ African Americans, up until at least the Voting Rights Act, were being governed by an illegitimate regime—one which could not claim to represent them or to act on behalf of them. The conclusion regarding the electoral college is harder. It does not involve a discrete group that has been denied the right to vote. The claim is broader: the electoral college distorts what we the people are saying. But is this true? To adequately answer this, we would need a broader normative theory about what adequately counts for the people's voice. (I return to this point in the conclusion.)

Here I can give only my preliminary sense, reverting back to my test for electoral illegitimacy. I do not think that the results of the 2016 (or the 2000) election achieved via the electoral college give us strong enough grounds to believe that the result would have been different had the electoral college not been in place, i.e., if the rules that were in place dictated the presidency be decided by popular vote.²⁸ Nor is it obvious that the electoral college is itself an irregularity. In other words, it is not obvious that either of the prongs of our test is met: maybe the electoral college *is* a good proxy for the voice of the people, and it may be that a campaign and an election run with the popular vote tally as

25. The series of cases called the “White Primary” cases attests to this reality. See Chad Flanders, *The White Primaries*, in 2 OXFORD ENCYCLOPEDIA OF AMERICAN POLITICAL AND LEGAL HISTORY 384–85 (Donald T. Critchlow & Philip R. VanderMeer eds., 2012).

26. I return to this question in the Conclusion.

27. People in this situation, being denied the right to vote, may still have the right of revolution. I am indebted to an unpublished paper by Franita Tolson for prompting this thought.

28. To put this another way, it becomes harder to test whether if we re-ran the 2000 and 2016 with the “right” rules, we would end up with a different result than we actually did.

the relevant metric would not have yielded a different result. As a result, I do not think the electoral college makes those elections *illegitimate*, although I admit that this conclusion is a tentative one, at best.

III. MANIPULATING PUBLIC OPINION

The hardest case at issue is not whether Russia hacked the election or whether Clinton, because she won the popular vote, should have been declared the victor. The hardest case is one in which there was no Russian effort to directly manipulate the election results and where the election rules were in fact followed, but where there was a widespread effort to *change people's minds* about the candidates in the election. This is the Russian “influence” campaign which has been variously described in news reports, intelligence reports, and perhaps most exhaustively and meticulously, in a lawsuit against Russian operatives brought by special counsel Robert Mueller. The allegation is that Russians tried to manipulate American public opinion so that Donald Trump would win the election. The Russians did this through several methods. They strategically dumped emails (via Wikileaks) that were damaging to Hillary Clinton. They set up fake Twitter and Facebook accounts, which made inflammatory charges against Clinton and tried to push people in the direction of, if not supporting Trump, then at least opposing Clinton. Many people saw these messages and perhaps were moved to vote one way rather than another—or not to vote at all—because of them.²⁹

What makes this case hard is the means by which the Russians tried to flip the election in the direction of Trump. They did not do it by directly changing votes. Rather, they tried to work through the voters themselves, by changing their minds, by manipulating *voters* rather than votes.³⁰ But the problem is that this is also what legitimate candidates and campaigns try to do; indeed, it is what they should do, and it is what we should want them to. Another way of describing manipulation is persuasion. Candidates sometimes try to do this through information and rational argument, but they also do this by slogans or heated rhetoric and sometimes even outright falsehoods. That's what makes this case hard, in a nutshell. If the messages sent by the Russians via Facebook and Twitter were instead put up by supporters of Donald Trump or by Trump himself, then there would presumably be no problem—or at least not any problem above and beyond the problem that heated rhetoric and sloganeering usually present. Nor would it seem problematic if a disgruntled Democratic staffer had leaked emails from the Democratic National Committee that were

29. For an early, but rather exhaustive discussion of these techniques, see ISIKOFF & CORN, *supra* note 13, at 200. Now, one can consult the Mueller report. *See generally* ROBERT S. MUELLER, III, U.S. DEPARTMENT OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 22 (2019).

30. *See, e.g.*, JOE MCGINNIS, THE SELLING OF THE PRESIDENT 1968 233–34 (1969).

damaging to Hillary Clinton and if voters were responding to that. Those emails were, after all, real emails, and they gave voters true information, information that would normally be highly relevant to them making their decision about whom to vote for.³¹

So, there is a difficulty in understanding how Russian “manipulation” of voters is problematic. And it is a difficulty at step one of our test: it is hard to see how Russian influence is in fact an election irregularity or mistake. It seems to be just a different version of a problem that we have in all elections, if it is a problem: the use of emotional rhetoric or damaging or embarrassing information in order to try and sway voters to reach a particular conclusion. Again, though, in most elections, this is not necessarily even a problem as opposed to just a fact of modern campaigns. These are the sorts of things that at some level probably should influence election outcomes (or at least are not enough to render those outcomes illegitimate). We want voters to sometimes vote based on emotional appeals—or at least there is nothing inherently wrong with that. And we want voters to assess negative information about candidates as they make their choice about how to cast their vote. The problem is one that is related to complaints about “big money” influencing politics. To the extent that big money is used to give voters information, even biased information, there is not an obvious problem. The Supreme Court has even said that much of the information corporations provide could be “valuable.”³² Why is this kind of information-providing and even bare emotional appeal so wrong, given that candidates and their supporters do it all the time, and we practically expect them to do it?

One answer to this question of bad or misleading information can be found in the campaign finance literature. A commonly proposed remedy to the problem of wealthy corporations and billionaires—or people who would make emotional appeals or scurrilous attacks—is not necessarily to stop them from spending

31. For a balanced analysis of the effect of the WikiLeaks e-mail dump in the closing days of the 2016 election, see Harry Enten, *How Much Did WikiLeaks Hurt Hillary Clinton?*, FIVETHIRTYEIGHT (Dec. 23, 2018 5:01 AM), <https://fivethirtyeight.com/features/wikileaks-hillary-clinton/> [<https://perma.cc/5FW3-XF88>]. The author notes that “[t]he evidence suggests WikiLeaks is among the factors that might have contributed to her loss, but we really can’t say much more than that.” *Id.* Further,

[t]he drip, drip, drip of the hacked emails—published weekly during October—makes it all but impossible to measure their effect precisely. So much else happened during the final weeks of the campaign—the “Access Hollywood” tape, the Comey letter, the debates, etc. But we can say two things: (i) Americans were interested in the WikiLeaks releases, and (ii) the timeline of Clinton’s fall in the polls roughly matches the emails’ publishing schedule.

Id.

32. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 364 (2010) (“On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.”).

money to influence elections but to require that they be transparent about it.³³ On this theory, who is spending the money for this ad or that Facebook message is important and salient information about which voters should know. After all, when they know who is funding the message voters are better able to assess the message—to see if it comes from a disinterested or a biased source. So too, might we say that the problem with Russian influence on the elections is that it was behind the scenes; it lacked transparency. Voters were being manipulated by Russian messages without knowing where those messages were coming from—or worse, they were supposing that the messages came from American voters or groups. If voters knew that this or that tweet was coming from a foreign source, and as part of a concerted effort to sway the American electorate, then they might ignore the message or at least give it very little weight.

However, I think that this only gets at part of the wrong involved in the Russian effort to persuade voters in the 2016 election, because there is a meaningful distinction we can make between *domestic* and *foreign* efforts to sway the election. We need to back up a bit. Although Americans sometimes vote on bad information, or lack of information, or passion rather than reason, there is still a sense that *Americans* should decide American elections. A national election is a matter of deciding who we will be as a political community, and that decision should be up to the members of the relevant community and not to those outside of it.³⁴ As one U.S. court put it in a case about foreign nationals spending money in American elections, “It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government.”³⁵ If a person or group or country outside of America tries to surreptitiously influence Americans—and succeeds—then this vision of community self-determination is no longer possible. The American election will be decided by non-Americans, at least in part.

This principle makes salient the difference between non-transparent domestic corporate spending and non-transparent foreign spending in an effort to manipulate American opinions. With the former, at least it is a—somewhat deceptive—effort by Americans to sway other Americans. With the latter, it is an effort by something that is not American to sway America. It is, in this

33. *See id.* at 371 (“The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”).

34. Although this principal may be controversial, as the scope of any given community could be defined in various ways. *See, e.g.*, Robert Goodin, *Enfranchising All Affected Interests, and Its Alternatives*, 35 PHIL. & PUB. AFFAIRS 40, 40 (2007) (discussing the problem of “constituting the demos”).

35. *Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (Kavanaugh, J.), *aff’d*, 565 U.S. 1104 (2012).

respect, analogous to a type of voter fraud, where non-citizens vote and as a result impact the outcome of elections. It is not the same kind of wrong, but it is a similar wrong. It is a foreign power having an impact on elections, when they should not—one does it by means of a fraudulent vote, the other by means of fraudulent information.³⁶

Does this mean that Russian meddling of this sort made the 2016 election illegitimate? It might. If it is a wrong, specifically, for a foreign power to try to influence American votes in a non-transparent way, then we would have to go to the second part of our test: whether there was enough manipulation that we might doubt whether the outcome was really the people's choice. And there is some evidence to this effect. Katherine Hall Jamison has said that there is a better than 50% chance that the Russian influence campaign changed the outcome of the 2016 election.³⁷ Others are more skeptical and cautious in their assessments. The campaign was diffuse, and for it to be effective it would have to especially affect voters in particular states. Maybe, when we have more information, we will learn that the Russian efforts were precisely targeted in that way and, so, did do enough to “flip” the election to Trump's side. Until then, we seem to have clear evidence of an election wrong—both a moral wrong and a wrong involving several illegalities—but not yet enough to show that this wrong made the election illegitimate. (And here the closeness of the election might be what makes it the case that we can't be entirely sure the election would have gone differently absent Russian influence.)

One final point: we might wonder, does the fact that Donald Trump may have colluded with the Russians, both to solicit their help and maybe even to guide their efforts, make a difference to whether the election was legitimate?³⁸ I do not think so—it doesn't matter, on my view, whether Trump orchestrated this. It doesn't, for instance, really make this into a matter of a *domestic* party (i.e., Trump) trying to persuade the American electorate. The fact is the manipulation came from Russian sources, even if the meddling may have had its impetus in Trump.³⁹ Collusion would be a wrong, and a very serious one. But it does not, in my mind, affect the analysis of whether Russian influence made

36. This conclusion does not reach the troubling case that Hasen encourages us to imagine: what if an election is flipped as a result of a convincing “deep fake” launched at the eve of an election, and originating from one of the candidates and not a foreign power? To answer that, we would have to consider more closely the question of whether many people relying on false information could render an election legitimate. I dodge that issue here, relying on the extra fact of foreign interference to support the argument for illegitimacy.

37. 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> [<https://perma.cc/KKS4-EK99>] (citing Jamison's conclusion that it was “very likely” Russian meddling had a “decisive” impact on the election results).

38. I thank Christopher Bradley for this suggestion.

39. Even this is unclear. It seems just as plausible that the impetus came from *Putin*, and Trump just rode the wave of misinformation.

the 2016 election illegitimate. It may, however, affect whether his *presidency* is illegitimate, a point I get to in my conclusion.

CONCLUSION: WHAT SHOULD BE DONE?

I have looked at three types of illegitimacy in this paper—where there is a mistake or fraud that affects the election outcome; where there is a structural unfairness that distorts the popular will; and where there is outside manipulation of voters. I take these as distinct kinds of legitimacy problems, and that solving one will not solve the others, but out of them I have developed a common formula. First, we must find some irregularity, broadly speaking. Second, we have to decide whether that irregularity is of such a degree that it substantially undermines our confidence in the election result, i.e., whether that result is really what the people wanted.

There is a lot left to flesh out in this account. It is only a start. Most deeply, to fully spell out what makes an election legitimate, we have to have a better idea of what it means to record the popular will. What rules, what laws, have to be in place so that we can generally trust an election gets at “what the people want” or “the people’s voice”? Do voters have to be well informed?⁴⁰ In other words, we can only know when there’s been a major flaw in the system if we know what, ideally, that system should look like. This is the most important in trying to understand structural unfairness. Earlier, I relied on the idea of fair notice to remove some objections to the electoral college. But the more fundamental objection might remain, which is that the electoral college systematically distorts the people’s voice, so that what comes out of the electoral college just *isn’t* what the people want. A related problem is present with manipulation of voters. If outside influence is bad, are there other ways voters are fooled and lied to that might make elections illegitimate? To answer this, we have to have a positive picture of what voters should know. That is, we need to know what the system has to be like, but also what voters have to be like in order for the system to give us something that we can call the decision of “we, the people.” So, there is much work that remains to be done.

There is a further issue worth addressing briefly, which is the role of remedies for an illegitimate election.⁴¹ What follows from a finding of illegitimacy? One answer to this might be to have a re-vote. This certainly was the conclusion of the investigation into the North Carolina voting fraud scandal. The vote had been tampered with, to a degree where it probably affected the outcome, and so the agreed upon remedy (not a court ordered remedy) was to

40. For a discussion of this issue, see Chad Flanders, *Voter Ignorance and Deliberative Democracy*, ETHICS IN POLITICS: THE RIGHTS AND OBLIGATIONS OF INDIVIDUAL AGENTS 128–141 (Emily Crookston et al. eds., 2016).

41. For a comprehensive look at the problem, see Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEG. 265 (2007).

have a do-over. But is this the solution for every problem of illegitimacy? I do not think so, but I will not argue that in depth here. A remedy for a bad structure might be to change that structure, so that the next election will not be so tainted—this seems to be what Abrams is pursuing in her litigation in Georgia.⁴² Or it might be to get voters more informed, so that they are not so susceptible to manipulation. That is to say, the remedy for illegitimacy in elections may not always be backward-looking. Some remedies can be forward-looking, and so we can acknowledge that an election was illegitimate and still allow that the office holder has legal title to the office, at least for now. We should not pressure candidates to acknowledge that an election was legitimate when there are grounds for thinking it is not so. More to the point, we should not pressure candidates to say an election is legitimate solely out of a fear that we will have to have a new election, even if that may result in some instability in the short run.

In the case of Trump, two forward looking remedies suggest themselves if we conclude that Russian manipulation did indeed sway the election in his favor. First, there is the remedy of impeachment and removal of the president. While impeachment and removal are not intrinsically remedies for an illegitimate election, they might become so if there are wrongs that a candidate did during the election that make him or her no longer fit to be president. It is here that Trump's collusion might be most relevant. Second, there is the remedy of voting against Trump in the next presidential election. These are second best remedies, of course. Better that the flawed election had not been flawed and the illegitimate candidate never assumed power. But election law often must deal with the less than ideal, both in the elections themselves and in the solutions to flawed—even illegitimate—elections. And in some ways, throwing the bums out, bums who have come to office illegitimately should be the *preferred* option. It is a way of giving life to the idea that the solution to the ills in democracy is sometimes simply more democracy.

What I think would be a mistake, however, would be to dispense with looking at “legitimacy” as a crucial concept in election law.⁴³ It is important to test whether or not our elections live up to our ideals or whether they are flawed, and whether those flaws end up undermining our faith that our elections actually are measuring the right thing, viz., the will of the people. Of course, it may be the case that there are powerful pragmatic reasons for us to accept the results of imperfect elections. These reasons, I think, explain why Stacey Abrams was condemned in several quarters for questioning whether Kemp's election as

42. Rick Hasen, *Stacey Abrams' New Lawsuit Against Georgia's Broken Voting System Is Incredibly Smart*, SLATE (Nov. 27, 2018, 5:48 PM), <https://slate.com/news-and-politics/2018/11/stacey-abrams-georgia-voting-rights-lawsuit.html> [<https://perma.cc/A9BR-7V2Q>].

43. I thank Dan Tokaji and Guy Charles for pressing me on this issue. I have also benefitted from reading an incisive unpublished paper by Ned Foley on this subject.

governor was “legitimate,” even though she conceded that his election was “legal” and that she would accept him as Georgia’s Governor.⁴⁴ Legitimacy is not the only good thing; social peace is also an important good, and it may be necessary to accept the results of imperfect elections in order to maintain social peace.⁴⁵ Moreover, given the limited remedies to flawed elections, it may make more sense to focus on reforms for the next election rather than bemoaning the imperfections of the last election. Certainly, we should reject spurious accusations of illegitimacy or “rigging,” such as those made by Donald Trump both before and after the 2016 election.⁴⁶ But there is no reason not to consider empirically supported claims of illegitimacy when considering elections in this

44. See, e.g., Joshua Douglas, *What Stacey Abrams should say about Brian Kemp’s victory*, CNN (Nov. 19, 2018), <https://www.cnn.com/2018/11/19/opinions/stacey-abrams-should-accept-brian-kemp-win-as-legitimate-douglas/index.html> [<https://perma.cc/GQ7B-VXQ4>] (“Losing candidates should recognize the legitimate claim of the winner to the elected office.”); Rick Hasen, *Why Democrats Should Not Call the Georgia Governor’s Race “Stolen,”* SLATE (Nov. 18, 2019), <https://slate.com/news-and-politics/2018/11/georgia-stacey-abrams-brian-kemp-election-not-stolen.html> [<https://perma.cc/43FF-MHD8>] (“Democrats should stop with the rhetoric that the race was ‘stolen,’ as Sen. Sherrod Brown, an Ohio Democrat, has said, and they should not follow the lead of Kemp’s Democratic opponent Stacey Abrams, who repeatedly refused to acknowledge Kemp as the ‘legitimate’ winner of the election when questioned Sunday by CNN’s Jake Tapper.”); David Leonhardt, *Was Georgia’s Election ‘Legitimate’?* N.Y. TIMES (Nov. 19, 2018), <https://www.nytimes.com/2018/11/19/opinion/georgia-election-legitimate-abrams.html> [<https://perma.cc/K3F5-BFKL>].

45. As Thompson writes in articulating his modest conception of legitimacy, Even in well-established democracies, electoral legitimacy facilitates political cooperation after a hard-fought campaign, and enables the winners to serve without facing persistent challenges to their authority. Especially after a close election, if the electoral process did not come to a legitimate conclusion in a timely manner, the protests could continue indefinitely, and the business of government would suffer.

DENNIS F. THOMPSON, *JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES* 3 (2017). At the same time, it is important not to conflate legitimacy and the good of social peace. That accepting the results of an election would make it easier for the “winners” to govern is not an argument for calling the results of the election “legitimate.” See also, *infra* note 48 (on Hasen making a similar point).

46. See, e.g., Steve Benen, *Trump uses false claims to try to undermine confidence in elections*, THE MADDOWBLOG (July 24, 2019), <http://www.msnbc.com/rachel-maddow-show/trump-uses-false-claims-try-undermine-confidence-elections> [<https://perma.cc/4N7T-LP7F>]; David Cottrell, et al., *An exploration of Donald Trump’s allegations of massive voter fraud in the 2016 General Election*, 51 ELECTORAL STUD. 123, 8 (2018) (Trump’s claims of massive fraud “ungrounded”). See also Leonhardt, *supra* note 44 (“Many conservatives are arguing that these statements are no different from the recent accusations of vote-counting fraud made by President Trump, Marco Rubio, and others. I disagree. Trump, Rubio, and others did something much worse: They alleged fraud where none existed and tried to discredit legitimate processes for counting votes.”).

country, or for that matter any country.⁴⁷ Of course, there will be degrees.⁴⁸ Not every election will be hopelessly flawed, and most elections will be “good enough.”⁴⁹ We should not make the perfect the enemy of the good. At the same time, we should not make the good the enemy of the *better*, especially when it comes to something as important as the legitimacy of our elections.

47. Consider, in this regard, what Douglas says about Kemp’s victory:

We will probably never know for sure if Kemp’s actions, leading to voter suppression, may have changed the result in Georgia. Yet that’s not as important as the underlying problem: voter suppression is never appropriate and we must do everything we can to make it easy for all voters—and especially racial minorities, given our sorry history of discrimination—to participate in our democracy.

See Douglas, *supra* note 44. But if Kemp’s actions were both a) inappropriate and b) led to a different outcome than the actual election, isn’t this the same as raising questions about whether Kemp’s election was “legitimate”? Douglas’s conclusion that “[l]osing candidates should recognize the legitimate claim of the winner to the elected office” begs the question of whether Kemp’s victory was legitimate. For a near-exhaustive catalog of Kemp’s misdeeds, see Ari Berman, *Brian Kemp’s Win In Georgia Is Tainted by Voter Suppression*, MOTHER JONES (Nov. 16, 2018), <https://www.motherjones.com/politics/2018/11/brian-kemps-win-in-georgia-tainted-by-voter-suppression-stacey-abrams/> [<https://perma.cc/Z4LR-CUDN>].

48. As Hasen recognizes:

A democratic polity depends on losers accepting election results, even if the election was not conducted perfectly. I would hold “stolen” election rhetoric for conduct even more outrageous than Kemp’s decisions, which, while odious, either have not been found to be illegal or that courts allowed to remain in place for this election.

See Hasen, *supra* note 44. Where I may disagree with Hasen is when he writes, “It [stolen election rhetoric] focuses attention on the wrong question: whether there was enough suppression to change election outcomes. As I’ve long argued, the right question is why the state gets to put stumbling blocks in front of voters.” *Id.* But why can’t *both* questions be right? Why can’t we both argue that the state should be restricted in the “stumbling blocks” it puts in front of voters, and also be concerned about whether those stumbling blocks have made a meaningful difference to the election outcome?

49. On this Thompson and I agree. See THOMPSON *supra* note 45, at 2–3 (suggesting legitimacy may not be a “high standard”).

