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WHAT IS THE VALUE OF PARTICIPATION?

CHAD FLANDERS*

In the days after the 2012 presidential election, the pictures became drearily familiar: long lines at polling places from Election Day; people waiting four, five, even six hours in order to vote.¹ The causes? Not enough polling booths. Not enough election workers. Voting machines that did not work, or were too old. Early voting days that were off, then on, then off again. The results? Confusion. Frustration. What might have been an inspiring picture, had it been the first election in some recently democratized country, instead turned into an embarrassment. Even Russia—a famously dysfunctional polity—got into the act. In a twist, instead of the United States sending election monitors overseas, the Russians had their election monitors monitor *us*.² They reported back that our election machinery was not fit for a first-world country.³ Had it happened anywhere else, we might have called the election illegitimate. Many American commentators piled on, saying that we needed to do something to fix the way we run elections.⁴

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Rick Hasen's work on election law bears special mention as an inspiration and motivation for all who work in the field; his *Election Law* blog is simply essential reading. Rick Hasen, ELECTION LAW BLOG, <http://electionlawblog.org> (last visited July 7, 2013).

Finally, I am also grateful to the searching and provocative responses to this article by Professors Josh Douglas and Michael Pitts. I find it somewhat heartening that they attack me from both sides, which makes me hope that by being in the middle, I may have gotten something right.

1. Lizette Alvarez, *Florida's Votes Go Unclaimed, but This Time Less Depends on Them*, N.Y. TIMES (Nov. 7, 2012), http://www.nytimes.com/2012/11/08/us/politics/floridas-votes-unclaimed-but-less-depends-on-them.html?_r=0 (describing delays and long lines at Florida polling places).

2. *US Voting Far from Ideal—Experts*, RUSSIA TODAY (Nov. 8, 2012, 6:17 PM), <http://www.rt.com/politics/us-presidential-election-system-254> (explaining how monitors found the United States election system not up to standards of a mature democracy).

3. *Id.*

4. See, e.g., David Frum, *America's Voting System Is a Disgrace*, CNN (Nov. 7, 2012, 6:01 AM), <http://www.cnn.com/2012/11/05/opinion/frum-election-chaos/index.html> (urging reform in light of problems at American polling places).

Still, the long lines did demonstrate that we, as Americans, are willing to wait hours to vote and willing to put up with innumerable obstacles placed in our way. But we might ask, naively, *why* are we willing to do it? President Barack Obama, in his November 2012 remarks as President-Elect asked us to “never forget that as we speak, people in distant nations are risking their lives right now just for a chance to argue about the issues that matter, the chance to cast their ballots like we did today.”⁵ Likewise, in his State of the Union address, President Obama paid tribute to a 102-year-old woman who waited in line over three hours to cast her vote, and urged us to follow her example.⁶

An inspiring story, to be sure. But again, *why* is participation in elections such an important value for Americans? It is a very old parlor game of economists to question whether it is, indeed, ever “rational” to vote given the time and effort it takes to vote (let alone to be an educated voter), and how little difference it really makes to the outcome of an election.⁷ Judge Richard Posner, in a famous opinion, mused about how “elusive” the value of voting in fact is, and how some people might rationally conclude that voting is not really worth the bother.⁸

The publication of Professor Richard Hasen’s excellent *The Voting Wars* invites us to inquire more deeply into what the fuss is all about—that is, why participation matters.⁹ Professor Hasen’s book is an exhaustive catalog of the various ways in which participation in elections has been botched,

5. Remarks at a Victory Celebration in Chicago, Illinois, 2012 DAILY COMP. PRES. DOC. 2 (Nov. 7, 2012).

6. Address Before a Joint Session of Congress on the State of the Union, 2013 DAILY COMP. PRES. DOC. 11 (Feb. 12, 2013) (“We should follow the example of a North Miami woman named Desiline Victor. When Desiline arrived at her polling place, she was told the wait to vote might be 6 hours. And as time ticked by, her concern was not with her tired body or aching feet, but whether folks like her would get to have their say. And hour after hour, a throng of people stayed in line to support her, because Desiline is 102 years old. And they erupted in cheers when she finally put on a sticker that read ‘I voted.’”); see also Morgan Whitaker, *Meet Desiline Victor, the 102-Year-Old Voter*, MSNBC (Feb. 12, 2013, 7:27 PM), <http://tv.msnbc.com/2013/02/12/meet-desiline-victor-the-102-year-old-voter-attending-the-sotu/>.

7. See, e.g., JASON BRENNAN, *THE ETHICS OF VOTING* (2011); BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* (2007) (examining the puzzle of why people vote, or become educated voters, when it is costly to do so and one’s vote does not make much of a difference).

8. See *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff’d*, 553 U.S. 181 (2008).

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

delayed, or defeated, and the consequences this has for electoral integrity.¹⁰ Professor Hasen does not give a fully-developed theory of why compromising participation is bad (this is not his aim) although he clearly thinks it is.¹¹ His book is more descriptive than normative in this respect.

But we can nonetheless use Professor Hasen's book as a jumping off point to say why we think participation matters. For participation can be a value in many ways, just as participation can be frustrated in many ways (as the long lines in Florida and elsewhere attest). First, participation can be a *foundational legitimating value*: this explains why we have voting in the first place. Second, participation has an obvious *expressive value*: this is why people will vote, and stand in long lines to vote, even if one vote might not matter all that much in the end. We vote to be heard. Third, and relatedly, participation has an important *informational* value by giving rulers and representatives feedback about what the people are thinking. Finally, participation is relevant to larger claims of substantive *equality* between citizens. All of these values can be frustrated, of course, and the way these values can be frustrated gives us insight into the values themselves. Here, how certain values are frustrated (intentionally or unintentionally) can tell us more about why we value participation.

This paper proceeds in three parts. Part I gives a typology of the values at play in democratic participation. That is, what makes participation so important? Part II tries to fix what parts of the value of participation are at play in what Professor Hasen calls "the voting wars." Part III looks at possible solutions to (or resolutions of) the voting wars: what we can hope for, what we should hope for, and what we can be content with.

10. *Id.* According to Professor Hasen:

The legitimacy of democratic government itself thus depends on faith in the rules for casting and counting votes, and in the fairness with which these rules are followed and enforced.

When belief in election integrity is lacking, bad consequences follow: people think their leaders do not serve the popular will or common good but the interests of some faction; they doubt their leaders' legitimacy and thus the legitimacy of their laws and executive actions; and they are apt to believe that if one group is working to fix elections, it's not only acceptable but necessary for others to do so as well. A lack of faith in elections becomes a self-fulfilling prophecy that undermines faith in democratic governance itself.

Id. at ix.

11. *See, e.g., id.* at 73, 130, 159-67, 193-97.

I. *The Values of Participation*

The value of participation is not single, as should be expected from such a basic value in American democracy.¹² Rather, it encompasses at least four separate ideas.¹³ Some of these ideas have been more or less settled in American democracy; others are more controversial. This Part gives a typology of some of those values (I make no claim to be exhaustive) because doing so will help us get a better idea of what is at stake in what Professor Hasen calls “the voting wars.” Diagnosing what values are in play in participation will help us better understand *how* to resolve the voting wars, or at least to prioritize our responses to them.

A. *Participation and Legitimacy*

We begin at the beginning: with first principles. There are several ways of looking at political legitimacy, but the way that we, that is Americans, have settled on is the idea of the consent of the governed.¹⁴ No regime can be legitimate (we think) if it does not allow the people in some fashion to choose its rules and its rulers. That “in some fashion” is important, at least at this level of the value of participation. The value of participation is the value of giving the people *some* input in choosing their leaders. If we did not have that, we could not be said to be living in a legitimate political regime—at least this is America’s story about legitimacy.¹⁵ We would be living in something else—maybe something better on some other measure (economic growth or personal security), but failing on the metric of legitimacy.

How are we to understand this foundational value? In political theory, the argument goes something like this: In order to be ruled legitimately, I

12. See Amartya Sen, *Democracy as a Universal Value*, J. DEMOCRACY, July 1999, at 3, 10-11 (vol. 10, No. 3).

13. My list overlaps somewhat with Professor Sen’s, but not entirely. Where I find four values worth emphasizing, Professor Sen finds three: “[F]irst, the *intrinsic* importance of political participation and freedom in human life; second, the *instrumental* importance of political incentives in keeping governments responsible and accountable; and third, the *constructive* role of democracy in the formation of values, and in the understanding of needs, rights, and duties.” *Id.* at 11.

14. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 52 (C. B. Macpherson ed., Hackett Publ’g Co. 1980) (1690).

15. Other states might find legitimacy along some other lines (economic growth, national security, stability, etc.). I make no claim here that democracy is the *only* legitimate form of government, though I suspect this is probably true.

must give consent to that rule.¹⁶ This flows from a more general idea of autonomy: no one can make me do something that I do not consent to. So too when it comes to collective rule: you can only do something to *us* if *we* agree to it. Democracy is just the formulation of this principle of legitimacy. If you do not get the agreement of the people to let you govern them, then you cannot govern them legitimately.

A lot is left unsettled by this broad principle. How many people need to be able to vote in order for there to be a genuinely collective will? How many people *actually need to vote* in order for there to be a legitimate democracy? We say, in America, that we live in a democracy, but if less than fifty percent vote in an election, is there a really a collective will?¹⁷ Or is this an example of minority tyranny—the few voters ruling over the many who have not (but who could have) voted? What if I am on the losing end of an election? Am I no longer being governed by my consent, because those for whom I voted are not actually ruling over me?

Let me abstract from these questions for the moment to stress two points about the intrinsic value of participation. The first is that I think it is compatible with a state being a democracy that not everybody votes, and even that not everybody is able to vote. America before the Nineteenth Amendment and the Civil Rights Movement was still a democracy, but it was an imperfect one—in many respects a badly imperfect one. So we need to make a distinction between some groups being prevented from participating and a state as a whole being democratic. A democracy can still be a democracy even if many groups are excluded *by law* from participation.¹⁸

The second point is that, of course, there is still a wrong when people are denied the franchise. Indeed, there is a problem when even *one person* is denied the right to vote.¹⁹ This relates back to consent. If you are going to rule over me, you at least have to ask me, and I need a reasonable chance of giving an answer. If you do not ask, then you have violated my autonomy and maybe my dignity as well. Or, as we might put it, participation is

16. Tom Christiano, *Democracy*, STAN. ENCYCLOPEDIA OF PHIL. (July 27, 2006), <http://plato.stanford.edu/entries/democracy> (discussing major justifications of democracy).

17. See Jonathan Levine, *The Case for Compulsory Voting*, NAT'L INT. (Nov. 2, 2012), <http://www.nationalinterest.org/commentary/the-case-compulsory-voting-7691> (noting recent low-turnout elections).

18. Of course, there may be a point when so many groups are excluded that the government ceases to be a democracy.

19. See Chad Flanders, *How to Think About Voter Fraud (And Why)*, 41 CREIGHTON L. REV. 93, 146 (2007).

necessary for a regime to legitimately rule over any given person. If he or she cannot participate, the legitimacy of government action over that person is put into question.

B. Participation as Expression

Another value of participation is its expressive role. Participation is a way we can show others what we think and believe. This does not just come across in for whom we choose to vote (although it does include that). There is the very act of voting itself that says something: it says that we are citizens,²⁰ or that we believe passionately about democracy, or that (at the least) we want to be seen as caring about American politics, or we just do not want to be told “if you don’t vote, you can’t complain.” Just going out to vote is expressive, even if you are not eligible to vote or if your ballot is spoiled. Indeed, standing in line to vote is also expressive (and the longer you stand, the more expressive it might be).

Of course, for *whom* you vote is also expressive, even if you vote for no one at all or if you vote for Donald Duck.²¹ The actual content of your vote is expressive—even if you “throw your vote away” on a third-party candidate who has no shot at winning. So both the act of voting and what you do with your vote (that is, for whom you vote) have expressive value. They say something about you—similar, perhaps, to the way in which the clothes you wear or (more relevantly) the bumper stickers you put on your car or the sign you put on your lawn has expressive value. You can also tell people of your vote, and then the content of your vote becomes more obviously expressive (more so than if you are just one vote tallied among others).

It is this “expressive” aspect of the value of participation that closely aligns it with the First Amendment idea of freedom of expression.²² You can march on a street corner with a sign, or you can stand in line to vote and then you can actually vote and have that vote recorded. Or you can refuse to vote because you do not think your vote matters or you do not care for the candidates. These are all ways of expressing yourself politically, some more

20. *Id.* at 147-48.

21. *See* *Burdick v. Takushi*, 504 U.S. 428, 438 (1992).

22. *See* *Burdick v. Takushi*, 737 F. Supp. 582, 587 (D. Haw. 1990) (“Being able to vote for the candidate of one’s choice, even when that candidate is not one of the listed candidates on the ballot, is the type of significant political expression which the First Amendment was designed to protect.”), *rev’d*, 937 F.2d 415 (9th Cir. 1991), *aff’d*, 504 U.S. 428 (1992).

important than others (and *which* ones are more important will be different at different times).

We should note that participation as expression goes both ways. Just as participating in an election can express what you believe, denying people the right to vote expresses something as well—something pretty important. If people cannot vote because they are denied it under the law, or because they face obstacles to voting, or because they are intimidated, *this* sends a message about what the government thinks about them—that they are not full citizens or that their opinions do not count. No amount of other means of additional expression can undo this harm to the fundamental value of participation.

C. Participation and Information

The above values associated with participation are more or less intrinsic to participation itself. They do not hold out participation as a means to some goal, but rather as simply valuable in its own right. Participation is valuable because it is necessary to legitimacy, and because by our participation we can express something about ourselves or about how we feel about our government.

But, of course, participation *does* further other ends besides itself; so it is also valuable as a means to those ends. Chief among these ends is information: voting does a good job, although perhaps not a perfect job, of telling rulers what the people think and want. Elections are in their own way a sort of “preference poll” of a certain set of the population.

The classic instance of voting having an informational role is Professor Amartya Sen’s work on democracies and famines.²³ Democracies, Professor Sen showed, were less susceptible to famines because the people would let their rulers know through democratic means that something in the machinery of the market or the government was breaking down, resulting in food shortages.²⁴ But this is, of course, an extreme example. There are other, smaller ways in which popular elections can inform those in government; sometimes this can be as minor as a shift in the national “mood” to which politicians nevertheless must respond. Other times, the vote can reveal that there is a serious mandate for change in the country.

23. See Sen, *supra* note 12, at 6-9. Professor Sen’s work has been controversial. See, e.g., Michael Massing, *Does Democracy Avert Famine?*, N.Y. TIMES (Mar. 1, 2003), <http://www.nytimes.com/2003/03/01/arts/does-democracy-avert-famine.html?pagewanted=all&src=pm>.

24. Sen, *supra* note 12, at 6-9.

Could a poll more simply do the same work as an election? Nate Silver's impressive work in predicting the 2008 and 2012 elections may make us think something like this.²⁵ So we can ask: Why not just have a much better (possibly more representative) poll serve the informational function of an election? There are, indeed, sound points to be made against the representativeness of popular opinion in elections, especially with low turnout (sometimes less than half of the electorate). Alternatively, this may be an argument not for replacing elections with polls, but for making voting mandatory.²⁶ And it still remains the case that even if a poll could do a better job of providing information, the other, non-instrumental values of participation would not be satisfied. Nor does it allow for the possibility that what people say with their votes may turn out to be different than what they tell a pollster.

D. Equal Participation

There remains one more value to consider in relationship to participation, and that is *equality*. Equality is not a value of participation per se; rather, it goes to how participation is (or is not) distributed. In modern democracies, it is thought that participation should be *equally* distributed, or at least as close to equally distributed as is legally and practically possible.

I do not think that the value of participation *requires* participation be equal. More specifically (and as I mentioned above), democracy *qua* democracy does not require equal participation by all groups. Certainly this is not entailed in the idea that democracy requires some participation to be considered a democracy. Democracy only requires that some of the people, in some capacity, have the ability to choose their leaders.

So if equal participation is a value, it is neither intrinsic to *democracy* nor even intrinsic to the individual's right to participate. One's right to

25. See NATE SILVER, *THE SIGNAL AND THE NOISE: WHY MOST PREDICTIONS FAIL—BUT SOME DON'T* (2012); see, e.g., Nate Silver, *Special Coverage: The 2012 Presidential Election*, N.Y. TIMES (Nov. 6, 2012, 10:10 AM), <http://fivethirtyeight.blogs.nytimes.com/2012/11/06/live-blog-the-2012-presidential-election>; Nate Silver, *Welcome (and Welcome Back) to FiveThirtyEight*, N.Y. TIMES (Aug. 25, 2010, 11:25 AM), <http://fivethirtyeight.blogs.nytimes.com/2010/08/25/welcome-and-welcome-back/>.

26. See Levine, *supra* note 17; see also THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 142 (2012) (offering a similar mandatory voting proposal).

participate is not necessarily diminished by the fact that others cannot participate.²⁷

To see how equality operates as a separate value, independent from the foundational value of democracy, note that equality among citizens can be realized just as much by abolishing the franchise altogether as by expanding the franchise. We could realize the value of equality by saying that *no one* can vote, just as much as we could by saying that everyone can vote. So we are dealing here with something that is not reducible, or translatable, into the foundational participatory value of democracy, but with something that instead is closer to respect. We show a lack of respect when we allow some groups of people to be part of some activity, whether it be voting or marriage or something else,²⁸ and others not part of the same activity on an arbitrary basis.

But what counts as an arbitrary basis? This indeed is the rub, and will be a main point of contention in the “voting wars.” When does excluding somebody mean a violation of equal treatment? And when does it not? Discrimination based on either race or gender is an absolute violation of equality when it comes to voting rights.²⁹ Age is also thought to be at some point a violation of equality,³⁰ but determining the exact age at which it becomes so is a matter of dispute.³¹ Why eighteen years of age, and not twenty-one? Why not sixteen? Finally, there is also class, which in the form of a poll tax is a violation of equality between rich and poor, but perhaps not in the form of requiring a photo identification which costs money.³²

27. By contrast, some argue that your right to vote can be diminished if too many people vote—for example, if some vote who are not registered to vote. See *Purcell v. Gonzales*, 549 U.S. 1, 4 (2006) (per curiam). The result is a “diluted vote.” See *id.* I return to this point in considering voter fraud.

28. See Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2097 (2005) (making the comparison between the right to vote and the right to marry). When a good is distributed unequally, we hurt those who do not receive the good *both* because they do not have the good (the intrinsic violation) *and* because others have it and they do not (the equality violation).

29. See U.S. CONST. amend. XV, § 1; *id.* amend. XIX, § 1.

30. See *id.* amend. XXVI, § 1.

31. Vivian Hamilton, *How Young Should Voters Be?: 16-Year-Olds’ Entitlement to the Most Basic Civil Right [Part V]*, CONCURRING OPINIONS (Jan. 22, 2013, 2:30 PM) <http://www.concurringopinions.com/archives/2013/01/how-young-should-voters-be-16-year-olds-entitlement-to-the-most-basic-civil-right-part-v.html>.

32. See Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 71-75, 138-44 (2009); see also U.S. CONST. amend. XXIV, § 1.

In addition to equal *access*, there is also of course equal *impact*, a factor at issue in the great redistricting cases of the twentieth century.³³ The idea that some districts should have more heavily weighted votes than other districts was also thought to be a sin against equal treatment.³⁴ But, just as with the question of access, there are questions of how equal things must be. Must districts be precisely numerically equal? If there is variation, how great can that variation be? (This obviously has implications for Senate representation as well as the Electoral College, both of which we tolerate.) What we can say, now, is simply this: at some point, it is unfair if some peoples' votes weigh more than others, not because some cannot vote, but because some votes do not count for *as much* as other votes.

II. *The Voting Wars and The Voting Wars*

What is at stake in the voting wars? At least one thing at stake is the value of participation, in one or more of the four guises listed above. We care about voting because we care about the values of participation. But participation can be more or less valuable, more or less important. The denial of a group's right to vote is worse than the denial of an individual's right to vote, and not just because more people are affected by the former. Or take another example: A person who has to wait in line for several hours, or has to drive a half hour to get to her polling place, has the value of her participation degraded less than a person who has to pass a literacy test or pay a poll tax in order to vote.³⁵ Of course, participation is not the *only* thing at stake in the voting wars, but it is the main thing.

This Part first looks at extreme examples where the values of participation have been compromised almost totally. It then looks at mild examples, where the values of participation are affected in a minor way, and possibly not at all. In between these two extremes lie many of the cases that Professor Hasen focuses on in *The Voting Wars*.³⁶ Those examples are covered in detail in the final section of this Part; they are interesting because some seem to fall closer to the extreme violations, where others seem to be barely violations at all.

33. See *Karcher v. Daggett*, 462 U.S. 725, 727 (1983); *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 715 (1964); *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964).

34. *Karcher*, 462 U.S. at 744 (Stevens, J., concurring) (“[P]olitical gerrymandering is one species of ‘vote dilution’ that is proscribed by the Equal Protection Clause.”).

35. Though this may depend on the facts: if the polling places have deliberately been made to be hard to reach, then this may be worse (or the same as) a literacy test or a poll tax.

36. See HASEN, *supra* note 9.

A. Major Violations of the Value of Participation

If we think of the worst violations of participation, we see how they are bad, precisely because they diminish or destroy nearly *all* of the values of participation listed in Part I. To start with the obvious examples: male African Americans who were denied the right to vote prior to the passage of the Fifteenth Amendment; women who were excluded from the franchise prior to the passage of the Nineteenth Amendment; and African Americans (again) who were effectively blocked out of the vote by literacy tests and Jim Crow.³⁷ These are the classic and the most embarrassing and shameful instances of the near total exclusion from participation of groups we now rightly consider to be full citizens.

Their exclusion was obviously bad, but *why* was it so bad? To start with, it was bad because the foundational value of participation was violated. Certainly, the exclusion of many from the vote made the United States less of a democracy: it was exercising power (sometimes egregiously coercive power) over those who had no say in the direction of what was nominally their government. To this extent, the United States *as a whole* was a less-legitimate government than it might have otherwise been. In addition, there was a wrong at the individual level: all persons who were denied the right to vote, either because they were not granted the right (pre-amendment women and African Americans) or because the barriers to voting effectively deprived them of the vote, were individually being unjustly coerced.

After these, the other wrongs of denying participation may seem to pale in comparison. However, there was still a great wrong in the fact that the franchise was not just denied to everybody, but also allowed to some and denied to others. This is bad in two respects. First, it is a violation of the principle of equality, which, as we said, is not intrinsic to the value of participation, but is powerfully associated with it. When *groups* of people who share a particular characteristic are denied the right to vote, the wrong of denying them participation gets amplified. It is not just a denial of this person's or that person's right to vote, but is also a violation of equal treatment.³⁸ And the denial of equal treatment is not only a wrong against the value of equality; it also represents an expressive harm. Not only are certain groups unable to express their opinions, but that exclusion is a powerful expression of society's contempt or disregard for them.

37. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (rev. ed. 2009).

38. See *Karcher*, 462 U.S. at 744 (Stevens, J., concurring).

The informational value of participation may also seem relatively small in comparison to the fundamental denial of the right to vote and the violation of equal treatment. But we should not underestimate it. By preventing groups from being able to signal their needs and opinions, a further wrong was done. The needs of minorities and women went unmet, not only because politicians did not have an electoral incentive to heed them, but also because they did not have the information that letting those groups vote would have given them. Denying the vote is wrong, of course, but it begets further wrongs: a non-responsive—in part because it is *uninformed*—governing class.³⁹

B. Minor Violations of the Value of Participation

In a controversial decision on photo identification laws, Judge Richard Posner famously referred to those “who are eligible to vote [but] don’t bother to do so”—they said, “what the hell,” and stayed home rather than getting the necessary identification needed to vote.⁴⁰ Judge Posner obviously had little sympathy for such voters: if they were not able to vote, it was on them, not on the government.⁴¹ They only had themselves to blame.

Whether we think Judge Posner was right about the particular case of photo identification, there is a more general thing he does seem to get right. There is *some* point where the fault for not being able to vote rests more on the voter than on the government.⁴² For there must be some regulations that say who can vote and who cannot vote that are not based on invidious distinctions (race, gender, class), but are instead simply based on the necessity of having an ordered and orderly election. We have to be able to make sure that people will vote in the right places, that they will not vote twice, and that their votes will be counted in the right way. As the Supreme Court said in *Storer v. Brown*, “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if

39. In this way, initial violations of an equal right to vote can snowball: denial of an equal vote means less ability to influence future state action (including the removal of the conditions that created the inequality in the first place).

40. *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff’d*, 553 U.S. 181 (2008).

41. *See id.*

42. *See* Chad Flanders, *Spelling Murkowski: The Next Act: A Reply to Fishkin and Levitt*, 28 ALASKA L. REV. 49, 54 (2011).

some sort of order, rather than chaos, is to accompany the democratic processes.”⁴³

So, in order to vote, people will have to register in some manner, they may have to wait in line before they vote, and they may have to show some proof that they are who they say that they are. Each of these may discourage some from participation. People may not want to go to the trouble of registering, or they may not want to wait in line, or they may not bring the right form of identification. As a result, these people will not be able to vote.⁴⁴

Do such requirements for participation *as such* represent a degradation of the value of participation? They do, but they are relatively minor in the whole scheme of things. Someone who is subject to inconvenience or delay is not being denied his right to vote; he still has the ability to participate. So there is no violation of the fundamental value of participation: the person still has the right to consent or not to consent to the government—at some point, he or she is just choosing not to. There may even be an *expressive* value in not participating when you have the right to participate; and non-participation can perform an informational function. An apathetic electorate can, in its own way, send a message; and sometimes it may even be *intending* to send a message by not voting.

In other words, there is a difference between being denied the right to vote, either legally or by obstacle after (deliberate) obstacle, and being constrained or limited in trying to vote by reasonable requirements or practical impediments. A democracy is imperfect if many of its citizens do not vote, but much less imperfect than a democracy that denies many of its citizens the right to vote. A voting system that has a 0.03% error-rate is bad, but not nearly as bad as one that has a 10% error rate. Some errors are unavoidable, and some voters (as Judge Posner said) simply will not be bothered to vote, no matter how easy it becomes to do so.⁴⁵

There is, of course, a persuasive case that the government *should* do more to encourage voting and to make it easier to vote—that there are many

43. 415 U.S. 724, 730 (1974).

44. Senator Rand Paul recently seemed to suggest that it should be difficult to vote. Josh Douglas, “*People Should Get Off Their Butts” to Register and Vote*, PRAWFSBLAWG (Feb. 21, 2013, 1:41 PM), <http://prawfsblawg.blogspot.com/prawfsblawg/2013/02/people-should-get-off-their-butts-to-register-and-vote.html>. I disagree: it should be relatively easy to vote. But at the same time, that it is sometimes difficult to vote is not per se a diminishment of a person’s right to vote. We have to see how difficult it is and if others face the same difficulty, and also (obviously) whether the proposed obstacle is a reasonable restriction.

45. *Crawford*, 472 F.3d at 951.

positive obligations the government has that it is not meeting.⁴⁶ I agree. But the government cannot do everything, and there will inevitably be difficulties for some to get out to vote (work, children, or other obligations) and mistakes in tabulation (simply by human error). These diminish some of the values of participation, but not to such a degree that the values are not realized at all. Indeed, it is an open question whether *any* voting regime can fully realize all the values of participation: it would require one hundred percent turnout, perfect tabulation, and an immense amount of resources. This is not only impossible—to some extent, it is not desirable. As the conclusion to this essay indicates, participation is less an all-or-nothing thing, and more a *more-or-less* thing.⁴⁷ More is better, but a little less is not the same as nothing.

C. *The Voting Wars*

Professor Hasen's new book, *The Voting Wars*, is a brilliant report from the frontlines of election law. He shows how, as Professor Josh Douglas recently put it,⁴⁸ election law has become a year-round affair, rather than a once in every four years phenomena.⁴⁹ Election battles are being fought well before elections, in an aim to game the system in favor of one candidate or another. They are also becoming increasingly bitter and (in what seems to be Professor Hasen's major take-away point) partisan.⁵⁰ But some of these battles seem worth worrying about and some seem relatively minor, as Professor Hasen would probably admit.

1. *Stupidity*

A common theme throughout Professor Hasen's book is that we should not mistake stupidity on the part of those who run elections for intentional maliciousness.⁵¹ There are plenty of instances of stupidity in Professor Hasen's book: from the design of ballots to keeping election results on one's laptop and then misplacing them.⁵² These accidents, or blunders, have

46. Joseph Fishkin, *Voting as a Positive Right: A Reply to Flanders*, 28 ALASKA L. REV. 29, 33 (2011).

47. *See infra* Part IV.

48. Josh Douglas, *Election Law as an Everyday Activity*, PRAWFSBLAWG (Feb. 1, 2013, 06:04 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2013/02/election-law-as-an-everyday-activity.html>.

49. *See, e.g.*, HASEN, *supra* note 9, at 5, 131-57.

50. *See, e.g., id.* at 4-6, 88-97, 193-97.

51. *See, e.g., id.* at 7, 45-47, 116-20, 149-55, 159-75.

52. *Id.* at 2-4, 119, 159-81.

serious consequences, but they are, by and large in Professor Hasen's telling, innocent (even if stupid and relatively avoidable) mistakes.⁵³

Professor Hasen is right that we should not put too much stock in these mistakes *qua* mistakes because they do not fundamentally damage any of the values of participation. They do not threaten democracy, they do not express contempt or disregard for voters individually or as a group, and they do not deprive us of any real information about voters (although they do tell us about the need for institutional safeguards against stupid mistakes). Of course, this all changes when there are massive mistakes, but Professor Hasen does not give any examples of these.

So, these sorts of instances should be put at the minor end of the voting wars. We should not, Professor Hasen urges, read too much into them,⁵⁴ and he is right. They show the need for reform, but not much more than this. They also show that some toleration for error is almost built into the value of participation, as long as the error does not become too large or systematic.⁵⁵

2. The "Fraudulent Fraud Squad"

The issue of voter fraud is certainly one of the major issues, if not *the* major issue, that constitutes the voting wars in Professor Hasen's telling.⁵⁶ The interest in fraud revealingly lines up along partisan lines. Those on the right point to the dangers of fraud; those on the left focus on the dangers of enforcing measures against fraud too aggressively, especially given the limited number of cases of actual fraud. Professor Hasen clearly favors those on the left, and makes a compelling case that the true evidence of in-person voter fraud is really quite thin⁵⁷—and I mostly agree with him.

But it is important to note (abstracting from the empirical questions temporarily) that the value of participation seems to be on both sides of the debate.⁵⁸ Those who worry about fraud worry about how individual votes might be canceled out by fraudulent ones; they worry that those who are not registered to vote might corrupt the process, both in terms of results (who should win) and in terms of information (for example, what the actual margin of victory is). Those who worry about overreacting to fraud worry about people who should be allowed to vote being excluded from voting;

53. *See id.*

54. *Id.*

55. Flanders, *supra* note 19, at 133.

56. *See* HASEN, *supra* note 9, at 41-73.

57. *See id.*

58. *See* Flanders, *supra* note 19, at 133.

they worry about barriers to voting being artificially high, to the point where some people are not just burdened in their exercise of the franchise, but actually *deprived* of the franchise.

How severe these diminishments of the value of participation are depends on the facts. If voter fraud is massive and barriers to registration and voting are minor, then those on the pro-photo identification side may be correct that there is a major violation of the value of participation by fraud. Those who are properly registered have the values of their votes diluted,⁵⁹ and the results of the election might (again, if fraud is truly widespread), at the limit, mean that American politics is only quasi-legitimate: those whose votes should count are not exercising their proportionate influence over the process.

However, if voter fraud is comparatively limited and barriers to registration are in some cases quite large and not merely an inconvenience, then the anti-photo identification side might be correct that requiring photo identification *also* would represent a major violation of the value of participation—and, interestingly, in a similar way as those who are *pro*-identification. Those who cannot vote because they do not have and cannot obtain the proper identification are having their individual participation denied, and if *many* people are similarly situated then American politics loses some of its legitimacy.

Only knowing the facts will tell us who, in fact, is correct in this debate. I suspect that the facts show very little evidence of in-person voter fraud, so the risk (as Professor Hasen persuasively shows) does seem to be exaggerated.⁶⁰ But this does not settle the debate because if the barriers to getting the right kind of identification are more of an inconvenience than an *obstacle*, then the failure to realize the value of participation in any given instance might be simply on the voter who (paraphrasing Judge Posner) just could not be bothered.⁶¹ If the voter did not want to vote (or is under-motivated to vote), the value of participation is not too corrupted in his case because he at least had the chance to vote, but chose for whatever reason not to exercise it. Whether this is true may be only decidable on a case-by-case basis: how easy it is to get photo identification in a state, what

59. See *Purcell v. Gonzales*, 549 U.S. 1, 4 (2006) (per curiam).

60. See HASEN, *supra* note 9, at 41-73; Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 644-50 (2007).

61. *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008).

allowance is made for provisional voting, and the limitations of the individual voter.⁶²

But there is a further wrinkle to this debate, for we have not yet covered the equality aspect of the right to participation, which seems to play a serious role here. The impact of most photo identification laws seems to fall disproportionately on some groups, most notably the poor, but also African Americans and the elderly.⁶³ And *here* we may face the difficulty that goes beyond the denial of an individual's right to vote in a particular case: the demand for greater identification (even types of identification that are many times easily available) that creates a greater burden for some *groups* and not for other groups goes against the value of equal participation.⁶⁴ The fact that the "fraud squad" seems to target *some* voters and not others⁶⁵ may be what is most problematic about their actions, and not merely their demand for greater requirements per se.

3. Intimidation and Deception

If someone is deceived about where he can vote, whether he can vote, or when he can vote, or if someone is scared away from voting by a threat, then there are obviously violations of the value of participation in the individual instance. A person who does not vote because she is given bad information or she is told that bad consequences will follow from her vote does not have a chance to give consent to those who would govern her. But this gets us to the question: What counts as deception or intimidation?

This is a surprisingly complex question. For if a poll worker mistakenly puts up bad information, a voter may be misled into going to the wrong polling place, but she is not deceived. So deception requires a *deliberate* attempt to mislead voters: when this happens, this violates the individual's value in participating, and (if it is targeted at a group, as it sometimes is) it could represent a violation of the value of equal participation.

Intimidation is another concept that is hard to define, partly because of its unquestionably subjective cast: different people might be afraid of different things, and so be deterred from voting for more or less compelling reasons. In his book, Professor Hasen investigates the case of the Black Panthers in front of a Pennsylvania polling place (a notorious obsession of

62. See *Weinschenk v. State*, 203 S.W.3d 201, 209-13 (Mo. 2006) (en banc) (per curiam).

63. *Crawford*, 472 F.3d at 955-57 (Evans, J., dissenting).

64. Moreover, this denial of equal protection has a further impact on the expressive and informational values of voting. I thank James Boyer for pointing this out to me.

65. See, e.g., HASEN, *supra* note 9, at 41-43, 50-51.

Fox News for many weeks).⁶⁶ It seems wrong to call *that* a case of intimidation and by so doing imply that some might have been legitimately deterred from voting (this is so even if some might have been scared off from voting by the sight of the Panthers). But one might imagine worse cases. If the intimidation is targeted, effective, *and* represents a threat that some might legitimately take seriously (as opposed to some vague fear), then these cases of intimidation might represent a denial of the value of individual participation. If the threat is targeted at a group, then equality values again come into play.

4. *Early Voting*

A major source of contention in the 2012 election was *early voting*—when it was available, whether it was available, and to whom it was available.⁶⁷ The lack of opportunities for early voting was suspected to have led, in some cases, to greater delays on the actual day of voting.⁶⁸ In a few states, there was a back and forth on the part of officials about whether and when early voting would take place, leading to confusion and uncertainty among voters.⁶⁹ But was this confusion, uncertainty, and delay a mere inconvenience, or was it something more?

There are at least two issues here. First, is early voting required in order to realize the value of participation? I doubt it; although in many cases early voting makes it easier for people to vote, the limited number of days to vote (at the limit, only having one day to vote) does not per se degrade the value of participation. Again, the state does not have an obligation to make it maximally easy for people to vote; it has pragmatic and administrative concerns to tend to. The state just (and this is a big “just”) has to remove unreasonable obstacles to voting. Nor does delay on the day of voting per se represent a denial or even a degradation of the value of participation. People need only a reasonable opportunity to participate, not a guarantee of participation (should such a thing even be possible).

66. *Id.* at 97-104.

67. See Lizette Alvarez, *Democrats Sue to Extend Florida's Early Voting*, N.Y. TIMES (Nov. 4, 2012, 2:42 PM), <http://thecaucus.blogs.nytimes.com/2012/11/04/democrats-sue-to-extend-floridas-early-voting/>.

68. See Alvarez, *supra* note 1.

69. See Tonya Alanez, *Florida's 2012 Election Mess: Heavy Turnout, Wordy Ballot, Fewer Early Voting Days*, SUN SENTINEL (Nov. 10, 2012), http://articles.sun-sentinel.com/2012-11-10/news/fl-florida-voting-problems-20121110_1_absentee-ballots-election-day-long-ballot; David Lauter & Joseph Tanfani, *Confusion Arises in Florida's Early Voting*, L.A. TIMES (Nov. 4, 2012), <http://articles.latimes.com/2012/nov/04/news/la-pn-early-voting-confusion-florida-20121104>.

A second issue is *why* early voting was in some cases limited. If it is a question of resources, this seems to me one thing. Lack of money can explain why some polling places could not be open on days other than Election Day.⁷⁰ Not having enough money as the reason for not having early voting seems to me not on its face objectionable; it is more like a fact of the world than an invidious force preventing people from voting.

But there could be other, less benign motivations for limiting early voting—namely, to create additional obstacles for *certain groups of voters*: poorer voters, say, or voters of a particular party. If early voting is taken away (or promised to some and not to others), then we *do* have a serious violation of the value of participation because now participation is no longer equal. It becomes tiered.

This point, in fact, can be generalized. Mere economic motives, if they are the cause of delays at the polling places (because of no early voting, lack of polling machines, or some other reason), are in general relatively minor degradations of the values of participation. To some degree, there will always be limitations on one's ability to vote under the United States system, where voting is not mandatory and the voter accepts some of the responsibility in actually going out to vote.⁷¹ So long as we broadly accept this system (something considered in the next section), limitations on one's ability to vote without delay will be inevitable and more or less acceptable. They may make us upset but, generally, we should put up with them.

But something else happens when a lack of economic resources is not just a fact, but something that becomes *used* as a pretext to deprive some voters of their opportunities to vote. In this case, it is not the individual value of participation that matters, but the equality value. Now, it is not merely a question of some barriers being put up in front of voting (for there will always be barriers), but some voters having to meet those barriers and others not. As a result, we have the same problem that we faced with photo identification and voter intimidation and deception. All of these things are problems, and they can diminish the value of participation, but they seem to me only serious problems when they involve not just additional barriers, but

70. A lack of money could explain other problems as well, such as an inadequate number of polling booths or outdated or poorly working polling machines.

71. See Flanders, *supra* note 42, at 54. There is also the reality that voting administration is largely a state-based phenomenon, which opens the door to wide disparities between states and how they run elections.

barriers that affect people unequally. The voting wars get serious when they implicate not only participation, but *equal* participation.⁷²

5. *Partisanship*

I have so far almost entirely omitted discussion of a theme that pervades Professor Hasen's book, and that is *partisanship*.⁷³ The voting wars are, in Professor Hasen's telling, a party-oriented affair: battles over voting are in fact proxy fights between Republicans and Democrats (and to a lesser extent, by Republicans and Democrats against third parties).⁷⁴ The people deciding how elections in America should be run and how they should be *won* are mostly partisan officials. Partisanship, as Hasen's book instructs us, is pretty much why we have the voting wars in the first place. In other words, partisanship is not *a* problem; it is *the* problem.

Consider how partisanship can pop up and infect every stage of voting and participation. Partisans may draw district lines in ways that favor one party over the other, then they may restrict early voting or institute voter ID because it means fewer members of the other party can vote, and then they may fight to have the rules for counting ballots be one way rather than another because that means they win (or have the process run by a partisan official). Indeed it is very rare to see an election rule that will *not* skew in favor of one party rather than another, and indeed deliberately so.⁷⁵ Even election season stupidity might be because of partisanship when we choose election officials based on party loyalty rather than competence. In short, all of the problems listed in this section may, in the end, be problems about partisanship.

Indeed, the election problems we have might be more manageable and less intractable if we didn't have partisans deciding election battles. It is pretty easy to see why. When we put party into the mix, election law rules look zero-sum: what helps one party will hurt the other party. So a problem isn't something *both parties* can solve together, but something which *each party* tries to manipulate to its advantage. Moreover, once one party has the

72. In addition, when the burden is spread more or less equally there will be a greater chance that something will be done about it. When the burden is put on a subset of the population, they may lack the ability to spur any meaningful change of that burden.

73. See HASEN, *supra* note 9, at 75-104.

74. See *id.* at 75-81.

75. I discuss some instances where (amazingly) partisanship is not an issue in designing rules for elections in a recent article. See Chad Flanders, *Election Law Behind a Veil of Ignorance*, 64 FLA. L. REV. 1369 (2012).

rules in its favor, it can build on that edge—compounding its advantage—in election after election.

So long as one party sees an advantage in limiting the participation of some people or groups of people, the voting wars will go on and on.⁷⁶ This leads naturally to the question: Could the voting wars ever end absent some wholesale change in the system? If not, are the voting wars something we should learn to live with?

III. Will the Voting Wars Be Resolved? Can They?

Professor Hasen vividly presents the battles and fights of the voting wars. He is an expert at showing where the problems are located and how they happen. He is, however, less sanguine about “solving” them. President Obama’s proposal of a non-partisan election commission in his State of the Union address can be viewed as a step in the right direction,⁷⁷ but commissions have a sad history of being ignored or simply kicking the can down the road.⁷⁸ We will have to wait and see. But if we cannot hope for quick fixes or immediate solutions—especially given the present political climate—we can think about how to *approach* the problems, and here I have some suggestions based on the above analysis. What follows makes three points: first, that we should consider participation mostly as a value and less so as a right; second, that we should be especially attentive to violations of the value of equal participation; and finally, (echoing Professor Hasen) that we should be humble in attempting to fix the problem of political polarization by fixing our electoral machinery.

A. Rights and Values

I have deliberately phrased points in this paper in terms of the *value* of participation. It is, however, more common to hear people discuss the right to vote, a right that cannot be infringed or even burdened unless the state

76. Of course, it is possible for partisan officials to run elections in fair, unbiased ways, and many have done so. But to have election officials be members of one party, and chosen because of that fact, obviously increases incentives to bend the rules in the party’s favor.

77. See *supra* note 6 and accompanying text.

78. As one editorial put it, “When politicians want to be seen as doing something, they create a task force, convene a panel or if they really want it to sound important, appoint ‘a blue-ribbon commission.’” Editorial, *Obama’s Unneeded Election Commission*, SUN SENTINEL (Feb. 22, 2013), <http://www.sun-sentinel.com/news/opinion/editorials/fl-editorial-election-law-reform-dv-20130222,0,1801369.story>.

has a very strong countervailing interest.⁷⁹ Of course, it is not a matter of either protecting the right to vote or recognizing the value of participation. Part of the value of participation can be explained by saying that we have a right to participate. But this has to be explicated further. What does the right of participation mean, and why is it valuable? One way of looking at why participation is intrinsically valuable is that we usually need to *consent* to have somebody (or something) do something to us. Voting is one way we can give our consent to the government to push us around.

I am wary about putting too much emphasis on the *right* to vote, as opposed to the multiple *values* that participation promotes or embodies. For one, it is too easy to fall into the idea that rights are “trumps” and should outweigh any and all pragmatic considerations. But the right to vote costs money to implement, and, more saliently, to have organized voting and regulated voting means putting all sorts of incidental burdens on the right to vote. This is not just about fraud or efficiency: this is about having an orderly process through which we can legitimately say a democratic will is formed. We have registration and identification checks, as well as other processes, to make sure people are voting in the right place and at the right time, and (yes) to make sure that no one votes who should not vote. All of these burdens end up putting some limitations on the right to vote, but all can be justified.

Beyond this, there are a number of line-drawing problems. We can say that no one should have to wait five or six hours to vote. I agree; it is an outrage. But what kind of wrong is it? Is it the violation of a *right*? Or is it more like an unfortunate burden on a person’s participation—one that we should fix, but that there is no constitutional obligation to fix? Or what about the case of a ballot that is confusing and hard to read? Is it a rights violation, or simply a misfortune—one that we just have to let lie for the time being?⁸⁰

This gets us to another problem: that of remedy. What is the correct remedy for a long line, and how should it be implemented? Election remedies are notoriously tricky. If someone makes a mistake in casting her ballot, or if a ballot is hard to read, can she have a revote? This creates all sorts of problems, even in these cases where the value of participation has been lost and so too, arguably, the right to vote. If we allowed a

79. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190-91 (2008); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964).

80. The problem should be fixed as soon as possible, however, and with deference to the idea that we should not change the rules of the election game right before an election (or right after).

constitutional challenge in all of these cases, we would be hard pressed to find a way to fix all of them. Sometimes, of course, the fault lies with the voter and nothing should be done; but sometimes the fault really is in the election system. But even in those cases, it may be better to say that we have lost a good thing than that a right has been violated.

B. Equality

If the previous section in some way disparaged the value of the right to vote, this section needs to partially take that back. Even though there may be some violations of the right to vote which are trivial when taken as an individual matter, things change when a group is targeted. A minor barrier which some group has to face taken as a group is something much more serious than a minor barrier that you or I happen to face as a contingent matter (for example, if I get a flawed ballot which neither I nor any poll worker notices and as a result my vote gets thrown out). If African Americans have to work harder to get to vote than other people, then this is wrong quite independently of how much harder they have to work.

What goes wrong here is not a violation of the value of participation *per se*, but rather the problem of a violation of political equality: we say that one group is less than another, expressively, and we may disproportionately exclude those people from the political process in a way that only shows up because *they face a barrier that other people do not face*. If everybody faced the same obstacle, no expressive disrespect would be shown, and no selective exclusion would be present. It might be a bad thing, but it would not be bad from the perspective of equality; and if it is not *that* bad, it might not even be bad from the perspective of participation. It might just be one of those things that we need to fix, eventually.

At the end of the day, equal participation probably ends up as the main issue in the voting wars. We should make changes because it should be easier for people to vote, but what is most pressing is if the status quo of some existing arrangements makes being able to vote unequal for certain groups of people, for people in different districts, or for people in different states. But we should not confuse *not having it as good as other people* with *the denial of the value of participation*. The former aims for equality; the latter aims for “good enough.” The fact that we all have to stand in line is bad, but if voters in poor and black districts have to stand in line while voters in rich and white districts do not, this is very bad, and possibly a rights violation—not a violation of the right to vote, but a violation of the right to equal protection.

C. Fixing Elections and Fixing American Politics

If more people participated, would this be good? I do not mean in asking this to imply that some people should not vote, or not be able to vote, because they believe the wrong things or do not know the right things. This seems to me a wrongheaded and mostly silly view. But we can ask if more of the values of participation would be realized by more people voting. This is not as easy of a question to answer. Certainly, it is better for the individual intrinsic good of participation. More people voting means more people consenting and having a role in choosing how their government should run. This seems undeniable. But what about the other values?

If more people participated, then America would be more democratic—not only in the sense that we give people a *de jure* right to vote, but also when this right is actually used. We would be a more active democracy, not merely a passive one, and each additional person voting makes us incrementally more democratic. But, of course, not participating can be one way of expressing one's views of politics, and there are other ways of participating (writing, speaking out, or protesting) that may be as effective and expressive as the right to vote. Voting is expressive as well, and more people voting means that more of a certain type of expression is occurring.

More participation would probably also give more information about what people are feeling and what they think ought to be done. Although it is also possible that more people voting may simply give a muddier signal: new voters may cancel other new voters out.⁸¹ Do countries where voting is mandatory have more information about what their voters want than countries where voting is voluntary? It is hard to say, partly because part of knowing what voters are saying is interpreting election results, and these can be pretty noisy. Did they vote for the new candidate or against the incumbent? Did they give the winner a mandate or not? So more participation may mean more information; however, it is an open question about whether it gives better information.

Nor does greater participation necessarily mean better government. More voters may mean more ignorant voters (though current voters are already ignorant). But just as the ignorance of voters does not itself make their participation valueless or worthless, the fact that more voters will not help matters does not hurt the cause of greater participation, and will in many

81. On the other hand, more voters may just give the same signal, in which case the informational value of more voters also would not be that great. It depends on whether a representative sample of the United States population is voting or whether that sample is skewed in one way or the other.

ways obviously help it. Ignorant voters (however we define this phrase) still have the right to vote, their voting is an expressive act, and it has an informational function, and the more voters there are, the more these values will get realized.

Finally, more participation will not necessarily mean less polarized politics.⁸² The section on polarization above indicated that the hope was that if we got politics out of election administration, this would make a lot of the problems with voting—long lines, bad ballots, etc.—at least seem more manageable. We would not be using electoral machinery as a means to push a party ahead.⁸³ We would come together to see a common problem, rather than a chit to fight over.

But what would we gain? Voting would be easier for some, and perhaps our elections would be more reflective of the democratic will. But this is unclear. Moreover, it is not clear that, even if everyone voted, our *actual* politics would be any less polarized, any less gridlocked, or any less acrimonious.⁸⁴ We should avoid seeing the problems manifested in our contemporary politics as really problems of not enough people voting, because they probably are not. The causes go much deeper than this, and, in fact, fights over election administration are probably as much *symptoms* of polarization as they are the *cause* of polarization.⁸⁵

Professor Hasen ends his book on a mostly pessimistic note.⁸⁶ He thinks that the problems of polarization run too deep to make realistic electoral reform possible.⁸⁷ The problem is that one party (usually the Republicans) sometimes stands to benefit from electoral dysfunction.⁸⁸ More generally, offices of electoral administration are seen as themselves political positions,

82. This is noted by Professor Hasen in his recent review of Professor Larry Lessig's new book. See Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 550, 583-84 (2012) (reviewing LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011) and JACK ABRAMOFF, *CAPITOL PUNISHMENT: THE HARD TRUTH ABOUT WASHINGTON CORRUPTION FROM AMERICA'S MOST NOTORIOUS LOBBYIST* (2011)).

83. At the same time, it may just be that part of our system is that control of the electoral machinery is one of the spoils of political triumph. There may be good things about this along with the bad.

84. See Hasen, *supra* note 82, at 583-84.

85. See *id.*

86. See HASEN, *supra* note 9, at 199 (admitting that “none” of his proposals for election reform will happen).

87. *Id.* at 199-201.

88. See *id.* at 198.

so that it is the official's *role* to act in the interests of her party, rather than in the interests of the voter or the government.⁸⁹

Still, we might be able to take solace in the fact that even if the voting wars ended in a truce, it is not certain that we would gain all that much. The problems with elections can seem pervasive and all-encompassing, but they are not. For, in fact, and this is something for which we can take considerable pride in, not every election district is embattled, not every election ends in a recount, officials sometimes rise above partisanship, and, for the most part, those who want to vote, do. We are not China; we are not Russia. Things could be better: they almost *always* could. And we should incrementally try to make them better. But they could be much, much worse. The introduction of lawyers full of sound and fury into elections has obscured the reality a bit (for it is in their interest to portray election crises as apocalyptic), but it is still there.

IV. Conclusion

It is tempting to think of “participation” as solely an individual value. It is more tempting still to see the value of participation as exhausted in an analysis of the *right to vote*. But sometimes this perspective can obscure more than it illuminates. Voting is a collective good as well as an individual right, and so it sometimes makes sense to look at voting in the aggregate and not merely in terms of each individual voter. Here, whether the good of voting is realized is not a yes-or-no question, but more of a question of “how much” or a question of what is “good enough.” Not everyone can or will vote in an election, even when barriers to participation are relatively low. But can *most people* who want to vote do so? And is this *enough* of the people to make it plausible to speak of America as a democracy? If we can answer “yes” to both of these questions, many of the values of participation will have been realized, even though there will be individual cases in which the value will be realized in a diminished way, or not at all.

The individual perspective on voting obscures in another way too. Voting is only one way of participating in a democracy. It may be the best way, though I am not sure about this. We can run for office, we can run someone's campaign, or we can simply run our mouth about the important issues of the day. All of these are vital to democracy, and some are arguably *more* vital than the simple, boring, and many times meaningless act of pulling a lever or pushing a button on a touch screen. My list of the values

89. *See id.*

of participation describes values that are not only realized in voting. Apathy about politics is not necessarily solved by getting more people to vote.

In this respect, too much focus on the voting wars may limit our understanding of the possible solutions to the wars—solutions which may have more to do with reducing polarization or political apathy, limiting the role money can play in politics, or even changing rules about Senate debates.⁹⁰ So it may be misleading to talk voting wars, as if there was one big, relatively well-defined thing (called “voting”) we were fighting over and two sides and the possibility of an ending. What we have are a number of *democratic* battles, some at the state level and some at the local level, some within election law and some outside of it, some more important than others, some of which we are winning, some of which we will never win, but all of which are worth fighting. If it sometimes seems we have a long way to go, we only have to remind ourselves how far it is we have come.

90. This point is emphasized by James Gardner in his recent book. See JAMES A. GARDNER, *WHAT ARE CAMPAIGNS FOR?: THE ROLE OF PERSUASION IN ELECTORAL LAW AND POLITICS*, at x (2009) (“In a democracy, the electoral compromises but a small fraction of the political, and if we are concerned to assure the health of our democracy, it is to the political, in the broadest sense, that we must attend.”).