

Keynote Address of Prof. Richard L. Hasen Given to *The Voting Wars* Symposium, March 23, 2013

Richard L. Hasen<sup>♦</sup>

Before the election, I gave about thirty talks about my book, *The Voting Wars*. Since the election, I have given only two, including this one, which tells you how low the public's interest is in these issues after the election. Every four years, I get calls in October from the press saying "why haven't things gotten any better?" I say "because you guys haven't been paying attention for the past three years and ten months," and it's cyclical, with interest rising before each election and then falling quickly thereafter. But a lot happened in the 2012 election itself. So while I am going to talk about a part of my book, I'm going to update it and also talk about what has happened in the 2012 election.

Before beginning, I want to thank the *Journal of Law and Politics*, James Allred and the entire staff of the *Journal of Law and Politics* for putting this event together. I am honored to be the keynote speaker. I am especially honored to do it for the *Journal of Law and Politics* which, and I say this as the former co-editor of a competing journal, the *Election Law Journal*, the *Journal of Law and Politics* has been a consistent venue for very important and perceptive writing about election law, lobbying, and related topics. I always anxiously await the new issue. I'm really excited to be part of the *Journal* and of this event.

My book starts, and I'll start here, by asking you to imagine a close election. It is almost Election Day. The race between the Democratic candidate for President and the Republican candidate for President is close, and pundits predict that the election is going to come down to the battleground state of Wisconsin. Things are very bitter there; as you know Wisconsin was the scene of a series of recall elections, which became the focus of national attention when a bill to limit the power of public sector labor unions passed. The presidential election indeed comes down to the state of Wisconsin and the vote totals start coming in.

One of the things you learn about elections if you follow vote totals is that we don't have a single election for President, we actually have

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thousands of elections for President, taking place in different jurisdictions using different rules, different ways of casting the votes, and different methods for counting the votes. And so the vote totals start coming in, the lead is seesawing between the Democrat and the Republican all night, and at about two o'clock in the morning, when all the results from the beginning have come in, we're still waiting for absentee ballots and other votes to be counted, the Democrat is ahead by a two-hundred vote margin, out of millions of votes cast. At this point, conservatives take the airwaves and to the blogosphere, and start complaining about voter fraud. John Fund, noted conservative commentator, goes on *Opinion Journal* television and talks about what he calls "bizarre" voting anomalies in Dane County, home of the University of Wisconsin at Madison—a hotbed of liberalism that it is.<sup>1</sup> He talks about a history of voter fraud in what he calls "urban areas" of Milwaukee. Soon the Twitterverse and the Blogosphere light up with conservatives saying that Democrats are going to steal the election.

The next morning, a woman named Kathy Nickolaus holds a press conference. She is the chief election official in Waukesha County, Wisconsin. She holds this press conference and she says, "I was collecting vote totals from around the county on my laptop, and it turns out when I was transmitting the numbers I forgot the entire city of Brookfield, with its 15,000 voters. And when you add in those 15,000 voters to the vote totals, it turns out that the Democrat is not ahead in the state by 200, but the Republican is ahead by 7,000 votes."

Now it was Democrats' turn to complain. John Fund was quiet, but the Democrats were complaining. Kathy Nickolaus, who used to work for the Republican legislature, has now saved the day for the Republican candidate. The liberal blog ThinkProgress, writing about this event, says "critics are saying there are only two possible explanations for this bizarre development: foul play or incompetence. The URL is a little more blunt. It reads: "kathy-nickolaus-crook-or-idiot"

Nickolaus holds a press conference, where she defends herself, and standing behind her is a woman named Ramona Kitzinger. Her job is to be the Democrat who literally looks over the shoulder of the Republican to make sure that everything is okay, and she stands there like a fine piece of furniture at the press conference and nods her head and says everything's fine. But a day later, the Democratic Party of Wisconsin issues a statement

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<sup>1</sup> Video embedded in Evan McMorris-Santoro, *Conservative Pundit Sees Vote Fraud in Wisconsin Supreme Court Race*, TALKING POINTS MEMO (Apr. 6, 2011, 8:48 PM), <http://talkingpointsmemo.com/dc/conservative-pundit-sees-vote-fraud-in-wisconsin-supreme-court-race-video>.

for her. It's kind of interesting that the party is issuing a statement for an election official, and the statement reads "I am eighty years old, and I don't understand anything about computers. I don't know where the numbers Kathy was showing me ultimately came from, but they seem to add up. I'm still very, very confused."

Now the story I've just told you is true. Only the election has been changed. This was the election for state supreme court justice in 2011, and it was a race between the incumbent David Prosser, a Republican, a former Republican legislative leader (Kathy Nickolaus used to work for David Prosser), and a woman named JoAnne Kloppenburg, who was a Democrat. And the race seesawed back and forth; it was very bitter. It was a bitter race because everybody knew that control of the state supreme court turned on this race and whether that union law was going to be upheld or not depended on this race. Prosser was declared the winner. The state election board did an investigation of Kathy Nickolaus, and they determined something that I talk about in my book all the time: this was a case of Hanlon's Razor, a computer science principle. "Don't attribute to malfeasance that which can be explained by incompetence." That is, the problem here was that she didn't know what she was doing, not that she was trying to steal the election.

Kloppenburg eventually conceded. The state supreme court went on to uphold the union law against the challenge. Meanwhile, Prosser and other justices on the court got into continued altercations that have involved the state police, and we know that Prosser's hands ended up on the neck of another justice. And the investigation is trying to determine whether or not it was self-defense or an attack during deliberations over the union law. So things have gotten very bitter, in very friendly, happy, Midwestern Wisconsin.

And so the question I like to ask is, and I ask in this book, is twelve years after *Bush v. Gore*, could Florida 2000 happen again, and if it did, would it be worse?

One of the points I make in the book, which I won't go in to right now, is that the rise of social media would make the next election meltdown much worse. We didn't have social media in 2000 and thank God that we didn't.

So before I get into the details about what's wrong with how we run our elections I want to talk about why it matters. Why do we care about our elections and how well they are run? And so I want to point out some statistics about the 2005 presidential race in Egypt between Hosni Mubarak, the incumbent, and Ayman Nour, the challenger. You all

remember the Nour campaign, no? (Laughter.) He didn't do that well; Nour polled a scant 7.3 percent of the vote compared to 88.6 percent of the vote for Hosni Mubarak. Pretty good showing for Mubarak, but not quite as good as the next election where he got 100 percent of the vote, so he had room to improve.

I point this out because we see these numbers and we know they're not real, and we know that in order to have a democracy with legitimacy, we need to have confidence in the fairness of the process, and confidence that the way the votes are being cast and counted is being done fairly and accurately, without fraud, without incompetence.

And we know what happens when it doesn't work out that way. So here's a picture of the street protests at Tahrir Square. At some point the Egyptian people had enough of a dictator, and this can't always happen in places where there are dictators. So here's Tahrir Square and this is what happened and what we continue to see happening in Egypt when people are not convinced that the democratic process is working. And here's a picture of street protests in Russia, December 2011, when it was widely seen that Putin had cooked the results to pad his parliamentary majority. And then here are two pictures from the United States in 2011. Pictured at the top is a Tea Party rally, An older white woman is holding a sign. It says "No Chicago style politics in Texas – voter ID works for me." At the bottom of this slide is a union rally in Philadelphia with an older African-American male holding a sign reading "Voter ID = Poll Tax." These are the voting wars that have hit the United States.

And it all goes back to Florida 2000. Some of you may not recognize this next picture, but this was once a very recognizable individual – this is Katherine Harris. She was the chief election officer of Florida at the time of the 2000 election, called the "Secretary of State" but one of her jobs was to run the election. Not only was she elected as a Republican in a partisan election, the way we do it in thirty-three states in the United States, she was also the honorary co-chair of the Bush for President election committee in Florida. In fact, she was not the only chief election officer to serve in such a role. A later investigation showed that a phone call was made from her cell phone to Governor Bush—George Bush's brother was governor of the state, you couldn't make these facts up, no one would believe this if it were a movie—a phone call was made from her cell phone to Governor Bush from Republican party headquarters on the night of the election. Why are you calling the governor if you are supposed to be counting the votes? And her answer was, well, I was at the Republican Party victory party and Al Cardenas, who was chair of the party, borrowed

my phone and made the call; I didn't make the call. A great explanation except for this question: why is the person supposed to be counting the votes instead attending one of the parties' victory parties on the night of the election? And we learn that partisanship in Florida went all the way down, so when they had to count those votes, it turns out that the standards they adopted for recounting those votes in democratic counties were very generous for Gore. Whether you were a Democrat or a Republican counting those votes, you were much more likely to find votes for Gore if you were a Democrat than if you were a Republican.

We also learned a lot about problems with our voting technology. This is a picture the famous Butterfly Ballot, adopted by a woman named Theresa LePore who was running the election in Palm Beach County, a woman who was a Democrat. She saw that there were so many candidates on the ballot for President in Florida that she needed to do something about the font size. I've got a lot of elderly voters, she said, I need to make the font bigger so people can see it. I'm going to put the names of the candidates on both sides of the ballot. So you can see the different holes you are supposed to punch out with a little pin or stylus. You punch out into the punch card, and you can see it says "George Bush, President; Dick Cheney, Vice President," there's a hole. Number three, it says "Al Gore, President; Joe Lieberman, Vice President, Democrat" up here. You see right here, five, and there's this hole, four, so maybe you vote "four" for Democrat, maybe you vote one for Gore one for Lieberman. It turns out that if you were voting hole four, you were voting for Pat Buchanan, the Reform Party candidate. This led to the famous "Jews for Buchanan" vote in Palm Beach County. (Laughter.) Even Pat Buchanan said "these people were not voting for me." Thousands of people. And even more people who voted twice. Punched hole four and five—one for Gore, one for Lieberman. That ballot didn't count.

So what do we learn about Florida? We learn that partisanship infected the process. You had a Democratic attorney general, for example, Bob Butterworth, issuing opinions on what he thought election law meant, opinions which helped the Democrats, which were going against what Katherine Harris said. Never mind that Butterworth's job did not include issuing opinions in this area. You had the problem of "localism": different rules in different places, rules changing, and people lobbying to change the rules. You had technology problems. And it ended with an out of control court subverting American democracy. Everybody agrees on this point. They just disagree as to which court. The Republicans think it was the

Florida Supreme Court, and the Democrats think it was the U.S. Supreme Court.

What has this led to? One thing it has led to is armies of lawyers. The amount of election litigation has more than doubled from the period before 2000 to the period after 2000. We are litigating much more frequently. For good or for bad, that is a fact. This churn about elections has affected people's confidence in the fairness of our election process. The American National Election Study, the gold standard of public opinion around elections, asked people "how fairly do you think the presidential election was run?" We have a great baseline because they asked it in 1996, before all these problems started. You can see in 1996, about ten percent of the people thought the way the election was run was somewhat or very unfair. Look what happens in 2000: it jumps up. Of course it jumps up, 2000 was this contested election. But look at 2004: that's when Bush runs for election against Kerry. 21.5 percent of Democrats compared to only 3 percent of Republicans think that the way the election was run was unfair.

Now let's contrast that with what happened in Washington state, where they had a contested governor's race in 2004. First, a Republican was declared the winner. Then there was a recount, and the Republican was declared the winner again. It went to court, and the Democrat was ultimately declared the winner. How unfair was the election according to public opinion? 68 percent of Republicans thought it was unfair compared to only 27 percent of Democrats. The lesson is clear: If my guy won, the election was done fair and square. If your guy won, there must have been some fraud or mismanagement.

This even has affected the public's confidence in the fairness of the election process by race. Look at this 2004 Pew study:<sup>2</sup> 63 percent of whites compared to 30 percent of African Americans are very confident that their votes are going to be accurately counted. 8 percent of whites compared to 29 percent of African Americans are not at all confident their votes are going to be accurately counted.

After Florida, we've seen allegations of voter fraud, allegations of voter suppression, problems with partisanship in localized election administration, and technology issues. We also see the rise of social media. My book talks about all of these; I'm going to focus on the first two of the issues we heard a little bit about this morning: fraud versus suppression and the fight over voter I.D.

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<sup>2</sup> See Andrew Kohut, *The Issue of the Count*, NY TIMES MIDTERM MADNESS BLOG (Nov. 6, 2006, 12:45 PM), <http://midtermmadness.blogs.nytimes.com/2006/11/06/the-issue-of-the-count/>.

Here's a picture of a guy named Mario Gallegos. Mario Gallegos was a state senator in Texas, a Democrat, and he was in Houston recovering from a liver transplant. He was having some complications, and the doctor said stay in the hospital. But he had to be brought up to Austin and was kept in a hospital bed in the capitol rotunda, and wheeled in to essentially filibuster the Republican voter I.D. law. That's how bitter this had become. They needed every vote of the Democrats to block the ID law. For years, the Democrats used all kinds of procedural tricks to block the voter I.D. law and Gallegos, who actually just passed away from his liver disease this past year, was an outspoken opponent of voter I.D. laws. He said: "the old Karl Rove [trick is] back again. . . . The Republican Party is seeing census numbers and the Latino community is voting in record numbers . . . it's a last gasp to try and suppress the vote."<sup>3</sup>

After a while, the Democrats' luck ran out. Their procedural tricks to try to stop voter I.D. from being enacted failed, and Governor Perry signed the voter I.D. law. He declared: "Today, with the signing of this bill, we take a major step forward in securing the integrity of the ballot box and protecting the most cherished right we enjoy as citizens."<sup>4</sup> The Republican side: voter I.D. is necessary for integrity.

Not so fast though, says Eric Holder, the Attorney General of the United States. Because Texas has a history of discrimination and voting on the basis of race, it has to submit all of its changes to the Department of Justice or to a three-judge court for approval to make sure that the law is not going to make minority voters worse off. Holder issued a statement. He said there is not really a problem with voter fraud, Texas's law is going to suppress the vote, and therefore we are blocking the law. Texas challenged the law. It went to a three-judge court in D.C. The three-judge court blocked the law. Texas said okay, we'll go to the Supreme Court, and one of the arguments that is being made is that the Voting Rights Act is no longer constitutional. That's an argument that's at issue in the *Shelby County* case.<sup>5</sup> You can see the headline (in the slide) from the *New York Times*: "Conservative Justices Voice Skepticism on Voting Law." So by the time the Supreme Court gets to the Texas case, which it has been holding, it could well be that the court will say: we don't need to address

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<sup>3</sup> See "Gschwartz," *Texas Republicans Still Carrying Torch for Contrived Vote Fraud Issue*, QUEBLOG (Jan. 30, 2009, 4:40 PM), <http://www2.sacurrent.com/blog/queblog.asp?perm=69438>.

<sup>4</sup> Robert Wilonsky, *As Rick Perry "Secures the Integrity of the Ballot Box," He Says, Sure, He Might Run for Prez*, DALLAS OBSERVER (May 27, 2011, 11:21 AM), [http://blogs.dallasobserver.com/unfairpark/2011/05/as\\_rick\\_perry\\_secures\\_the\\_inte.php](http://blogs.dallasobserver.com/unfairpark/2011/05/as_rick_perry_secures_the_inte.php).

<sup>5</sup> *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013). This case was decided months after this keynote address.

whether or not this violates Section 5 of the Voting Rights Act because Section 5 is unconstitutional. And then Texas' voter I.D. law, which allows you to use a concealed weapons permit, but not a college ID, to vote, will go into effect, subject to additional court challenge.<sup>6</sup>

So how did we get there? How did we get to the point where we have, as John Fortier has pointed out, red state election law and blue state election law? Republican states passing voter I.D., Democratic states like my state of California passing same-day voter registration. How did we get that way? Voter fraud was not a big national issue before 2000, but it became one after 2000. Two days before Republican House Administration Committee Chair Bob Ney went to jail for Abramoff-related improprieties, he was holding a hearing about what became the Help America Vote Act. A group was formed to testify at that hearing that no one had ever heard of, a group called The American Center for Voting Rights. The American Center for Voting Rights popped up two days before this hearing. Two years later, it disappeared. I mean, they took down everything. This is a screenshot from the Internet Wayback Machine—you know, nothing ever dies on the internet—they wiped everything out. Thor Hearne, who was the head of this organization for two years— go look him up he's at Arent Fox, a very prominent D.C. firm—you will see he scrubbed his résumé of having worked at this organization. No mention. He'll mention that he testified before the Carter-Baker commission but not that he testified for this American Center for Voting Rights.

The American Center for Voting Rights was formed primarily to make the case that voter fraud was a big problem and therefore restrictive voting laws need to be put in place to curb it. Here's a screenshot from their now-defunct website. I don't know if you can see this smiling bald African-American guy with the earring—I tried to track him down. This is a stock photo from Getty photos. I tried to see if he was happy that he was smiling on this page.

Here's an excerpt from that page about ACVR's report on Ohio voting irregularities. "The Ohio report states 'Third party organizations, especially ACT, ACORN, the NAACP, engaged in a coordinated 'Get Out the Vote' effort. A significant component of this effort appears to be registering

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<sup>6</sup> In fact, now months after this keynote address and after the Supreme Court decided *Shelby County*, the Supreme Court remanded the Texas voter I.D. case to the lower court, *Texas v. Holder*, 133 S. Ct. 2886, 2886 (2013), which dismissed it, Order, *Texas v. Holder*, No. 1:12-CV-00128 (D.D.C. Aug. 27, 2013) (No. 382). New challenges to the Texas voter I.D. law under section 2 of the Voting Rights Act are pending, *Veasey v. Perry*, No. 2:13-CV-00193 (S.D. Tex. Filed June 26, 2013); *United States v. Texas*, No. 2:13-CV-00263 (S.D. Tex. Filed Aug. 22, 2013).

individuals who would cast ballots for the candidate supported by these organizations. This voter registration effort was not limited to the registration of legal voters but, criminal investigations and news reports suggest, that this voter registration effort also involved the registration of thousands of fictional voters such as the now infamous Jive F. Turkey, Sr., Dick Tracy and Mary Poppins. Those individuals registering these fictional voters were reportedly paid not just money to do so but were, in at least one instance, paid in crack cocaine.”

That story is actually true and I tracked this down. It turns out that the woman who paid the crack cocaine herself died of a drug overdose so we never got to the bottom of the story, but there was a guilty plea in that single case. But ACVR portrays an “epidemic” of voter fraud committed by minorities. This is the reason the report says “Jive F. Turkey, Sr.” There’s a subtle, or not so subtle, racism in a lot of this literature.

But all of the sudden the idea that there’s a lot of voter fraud that’s being committed by Democrats became a part of the mainstream Republican orthodoxy. Here’s Michelle Malkin, a conservative commentator, writing in 2010: “Denial is not just a river in Egypt. It’s the Democrats’ coping mechanism for midterm election voter fraud. Faced with multiple reports of early voting irregularities and election shenanigans across the country, left-wing groups are playing dumb, deaf and blind. *Voter fraud? What voter fraud?*”<sup>7</sup> Now if you remember the 2010 midterm election, that’s when Democrats took what President Obama called a “shellacking.”<sup>8</sup> Republicans made great gains in that election. What did Michelle Malkin have to say about the voter fraud effect in that election once the Republicans won? Nothing. “Voter fraud? What voter fraud?” When voter fraud happens, it must be done by Democrats.

Just before the same election Dick Armey, former Congressional leader, speaking at the Lincoln Club in Orange County said three percent of ballots cast in elections were fraudulent Democratic ballots. Just a number apparently made up from thin air. “I’m tired of people being Republican all their lives and then changing parties when they die.”<sup>9</sup> That was the joke. Got a big laugh there.

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<sup>7</sup> Michelle Malkin, *The Left’s Voter Fraud Whitewash*, TOWNHALL.COM, Oct. 27, 2010, [http://townhall.com/columnists/michellemalkin/2010/10/27/the\\_lefts\\_voter\\_fraud\\_whitewash/](http://townhall.com/columnists/michellemalkin/2010/10/27/the_lefts_voter_fraud_whitewash/).

<sup>8</sup> Kara Rowland, *Obama Concedes “Shellacking,”* WASH. TIMES, Nov. 3, 2010, <http://www.washingtontimes.com/news/2010/nov/3/obama-concedes-shellacking/>.

<sup>9</sup> Martin Wisckol, *Armey Wants to Transform Congressional GOP*, ORANGE COUNTY REGISTER, Sept. 2, 2010, <http://www.ocregister.com/news/armey-264883-gop-party.html>.

So where did this come from? How much voter fraud is there, and do we need things like ID to combat it? There's a person named Hans von Spakovsky. He has worked at the Justice Department, he has worked at the Federal Election Commission, he is now at the Heritage Foundation. He's one of the people who I call a member of the "Fraudulent Fraud Squad." He is out there pushing the idea that voter fraud is a major problem, which means we need voter I.D.

So how extensive is impersonation fraud? I've been looking for cases of impersonation fraud—for example, I go to polls and I say "I'm John Fortier," and I try to vote in John's place. How often does this happen? I couldn't find a lot of cases of this happening at all. I couldn't find any cases where it has been affecting election outcomes. When I started looking I went all the way back to 1980 and I couldn't find a single election.

Hans von Spakovsky wrote a report for the Heritage Foundation, put up a related op-ed on Fox News, saying that "one doesn't have to look far to find instances of fraudulent ballots cast in actual elections by 'voters' who are figments of active imaginations. In 1984 a district attorney in Brooklyn, New York, a Democrat, released the findings of a grand jury report that reported extensive registration and impersonation fraud between 1968 and '82."<sup>10</sup>

First of all, 1984? Not exactly recent. But okay, between '68 and '82, extensive impersonation fraud. Grand jury report. I look for the grand jury report and I can't find it, so I write to Professor Justin Levitt, who collects all this stuff, and he doesn't have it. I write to Professor Lorraine Minnite, who wrote a great book called *The Myth of Voter Fraud*, and she doesn't have it. Nobody has it. So I wrote to von Spakovsky, who had written to me before to plug stuff to plug on my Election Law Blog. (By the way, he wrote to me yesterday to complain about something I wrote about him.)

I said "I'd like to see the grand jury report." Silence. I wrote to him again and I said "I'd like to see the grand jury report." Silence. So I wrote to the head of the Heritage Foundation and I said "you know, one of the things about social science is that you need to be able to replicate your data. You make a claim, you have to back it up." Silence. So I went to the website *Talking Points Memo* and they did a little story about it. He's blocking this report, it's a great story because von Spakovsky is one of the favorite targets of the left, they love to attack him, and I was all set to go

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<sup>10</sup> Hans von Spakovsky, *Smoke of Election Fraud Leads to Election Fires*, FOXNEWS.COM, Oct. 31, 2008, <http://www.foxnews.com/story/2008/10/31/smoke-registration-fraud-leads-to-election-fires/>.

on *The Rachel Maddow Show* with a very exciting talk about him, but then the grand jury report appeared. Joy Shoemaker, the law librarian at the excellent new UC Irvine law school, found someone at the Brooklyn DA's office who found the report. That person faxed it to the law library, within an hour we had it up on the Election Law Blog.<sup>11</sup>

What did it show? Extensive impersonation fraud? No. There was some impersonation fraud where election officials were involved but nothing where people were showing up at the polls in some kind of conspiracy, claimed to be someone else, and tricking election officials. Didn't happen.

What did happen? There was a lot of bad stuff that happened, especially at the Brooklyn Board of Elections. My favorite story in the report is how there was a reformist candidate running against the Brooklyn machine, and the machine was worried that this reformist guy was going to get the nomination. If you got the nomination for the Democratic party, you were going to win the election in Brooklyn, a very heavy Democratic population. So they went into the bathroom of the Brooklyn Board of Elections and they hid in the ceiling panels above the bathroom until the lights were turned out for the night. Then they climbed down out of the bathroom and they went and changed voter registration cards so the people they thought would have voted for the reformist candidate—and they hoped that it was a close election—they could point to the cards and show that it was a mismatch of the signatures. Yeah, that happened; it happened in the 1970s I believe. It has nothing to do with impersonation fraud, it has nothing to do with voter I.D., but it did happen. But that's what the report showed and that must be why von Spakovsky didn't want to share the report with me. But remember, this is his evidence of a recent problem with impersonation fraud.

Jane Mayer did an interview with von Spakovsky.<sup>12</sup> First of all, she asked him “why didn't you turn over the report?” and von Spakovsky's response was “what am I, Hasen's research assistant?” I thought this was an interesting response. But then she said to von Spakovsky: “tell me the names of any credible election experts who think that impersonation fraud is a major problem.” He said sure: Bob Pastor, who's at American University, and Larry Sabato, who's right here at the University Virginia. When she reached Pastor, because Pastor had indicated that he had a problem voting once, he said, “I think they just mistakenly checked my

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<sup>11</sup> Rick Hasen, *1984 Grand Jury Report on Voter Fraud Now Available*, ELEC. L. BLOG (June 23, 2011, 6:52 PM), <http://electionlawblog.org/?p=19560>.

<sup>12</sup> Jane Mayer, *The Voter Fraud Myth*, NEW YORKER, Oct. 29, 2012, [http://www.newyorker.com/reporting/2012/10/29/121029fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2012/10/29/121029fa_fact_mayer).

name when my son voted—it was just a mistake.” He added, “I don’t think that voter-impersonation fraud is a serious problem.” Sabato, who supports the use of voter I.D.s under some basic conditions—that is, where the ID is provided free and the government makes everybody have to get it—says of the voter-impersonation question, “One fraudulent vote is too many, but my sense is that it’s relatively rare today.” So these are the people that von Spakovsky pointed to in order to show that impersonation is a major problem. As I said, for my book, I looked to find a single case where an election has been affected—an outcome by impersonation fraud—and couldn’t find one.

Let me talk about a real case that just happened in Texas this past year involving impersonation fraud. It’s Election Day. Dad is out of town. Mom takes her teenage son, who is a Junior—same name as Dad, but “Junior”—takes him to the polling place to vote for Dad, in Dad’s place, because Dad is out of town. He votes, pretends he’s Dad. Same day, Dad comes home early from the business trip. On the way home from the business trip, he goes and stops at the polling place and tries to vote; it turns out, someone has already voted. Mom is indicted. That case is still pending, as far as I can tell. A coordinated effort to swing an election? No. Fortunately for us, most criminals are idiots, and they don’t know how to commit fraud. This kind of fraud can be very hard to do.

How do we know how much this is a problem? Here’s some evidence: for five years the Department of Justice made pursuing voter fraud a major focus. This was during the Bush years. How much voter fraud did they find? They found maybe 100-something cases. How many involved an impersonation fraud? Zero. Texas: major investigation for two years. How much involving impersonation fraud? Zero. There was a great study by a group called News21. They asked every DA in the country, every DA’s office, send us all of your election crimes since 2000. We want to hear about all of them. Not a random sample, all of them. Here’s what they found: 491 absentee ballot cases, which made up 23.7 percent of all accusations. Where was voter impersonation fraud? At the bottom of the categories: 0.5 percent. These are allegations, these are not even convictions.

Why is that? Well, here’s the reason. If I want to steal an election, there are two ways I’m going to do it. One way is, I’m an election official, I’m going to count the votes. So in Cudahy, California, a small city in Southern California, the ballots are coming in to city hall to be counted. City workers, election officials, would open up those ballots secretly; they would carefully open the ballots. If they were votes for incumbents, they

would re-seal the envelopes. If they were votes for challengers, they would throw away the ballots. That's a good way to steal an election. It's pretty efficient. If you're counting the votes, you change who is voting. And that's a major problem. That's serious. We have to have checks on election officials. That's one thing that happens.

The other thing is absentee ballot fraud. This was mentioned this morning by John Fortier. Here's an example, one of my favorite examples, of the race for county commissioner in Dodge County, Georgia. The two candidates were McCranie and Mullis. Incredibly, each of the two camps, McCranie and Mullis, actually set up tables inside the courthouse at opposite ends of the hall, where supporters on both sides openly bid against each other to buy absentee ballots.

At trial, a Dodge County magistrate described the rowdy courthouse atmosphere during the absentee voting period as “a successful flea market.” One of the vote buyers in the Mullis camp also testified that open bidding for votes was “[l]ike an auction.” Vote buyers for both sides paid the voter \$20 to \$40 after the voter cast his or her absentee ballot. Sometimes, the cash payment occurred in the courthouse bathroom. More frequently, the voters received their payment while the “haulers” drove them home after they voted.<sup>13</sup>

Why would this be? Why would absentee ballot fraud be more prevalent than impersonation fraud? Well a major reason we have the secret ballot is to prevent people from being able to engage in this kind of transaction. Because if I want to pay you \$20 to vote for Smith, if I have the absentee ballot I can either write “Smith” in myself or I can look to make sure you did it. If you go to the polling place, how do I know that you voted? How do I know you don't go in there every time, pretend to vote, and collect \$20 from a bunch of people? I can't verify who you voted for if you actually did vote. And so, it's not as though if you were trying to commit this kind of fraud, it would be easier to do than with an absentee ballot. It would be hard to do, and it would be easier to detect—you would need a lot of people going to the polling place to do this. It's just not the kind of thing that people would do if they want to steal an election, which is why the statistics are so lopsided when you look at what happens. No

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<sup>13</sup> *United States v. McCranie*, 169 F.3d 723 (11th Cir. 1999).

reason to think absentee ballot fraud would be easier to find than impersonation fraud.

We have absentee ballot fraud prosecutions every year, and they do swing elections. In fact the 1997 Miami mayor's race had so much absentee ballot fraud that the judge dropped the results of the election. 25,000 absentee ballots affected by fraud. So voter fraud, or election crimes, do happen. But not impersonation fraud, and that's what a voter I.D. law is meant to affect.

Why this focus on voter I.D.? Some claim that the intent is to suppress the Democratic vote. Professor Daniel Ortiz talked about this a little bit. I think that's part of the story, but I don't think that's the big part of the story. I think a bigger part of the story is that it's meant to excite the Republican base that the votes are going to be stolen. Here's an email that came out during the 2006 investigation of the U.S. attorneys scandal where a number of U.S. attorneys during the Bush administration were fired for no apparent reason. And it turned out that there was a guy named David Iglesias, lifelong Republican, a very well respected lawyer, who was the U.S. Attorney in New Mexico, and he was being pressured by Republican activists to indict someone from ACORN, a group that engaged in voter registration activities. We'll talk about them in a minute. He was under pressure to indict someone from that group for election fraud. Here's an email that went to a bunch of Republicans and to the U.S. Attorney: "I believe the [voter] ID issue should be used (now) at all levels –federal, state legislative races and Heather [Wilson]'s race . . . . You are not going to find a better wedge issue."<sup>14</sup> Indict that woman now, this is going to help us win our election. A big part of the push for voter I.D. to claim that Democrats are trying to steal the election is to get Republicans to turn out to vote and to fundraise.

What about ACORN? ACORN was a voter registration group—they're still attacked even though they haven't been in existence for four years. They're still attacked as trying to steal the election. ACORN had what I consider a broken business model. They hired very poor people who were desperate for jobs and they said go out and register people to vote, and if you don't turn in enough registration forms you're going to be fired. There's not a strict quota, but you've got to perform. So here's a voter registration form for "Mr. Mickey Mouse." Lots of these forms—Tony Romo, the Dallas Cowboys quarterback, turns out to register a lot in Texas.

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<sup>14</sup> Email from Patrick Rogers to David Iglesias, U.S. Attorney for New Mexico, *available at* <http://www.justice.gov/oig/special/s0809a/chapter6.htm>.

But we can't find a single case where one of these fraudulently registered voters has actually been registered and successfully voted. The fraud here is to try to get money from ACORN, as opposed to trying to steal the election. So this stuff happens, but what you see is, and this goes back to the American Center for Voting Rights, a kind of bait and switch. There's a lot of registration fraud, the potential for elections to be stolen, equals the election is going to be stolen. And by the way, if you register as Jive F. Turkey, Sr., and you show up to vote, don't you think people are going to be suspicious? So it just doesn't happen very much. That's what happened there, and in part because of this, ACORN ended up being attacked, vilified, and is now out of the voter registration business.

Which brings me to the question of voter suppression. If the intent here is at least in part to make it harder for Democrats to vote, how prevalent is this? Democrats love to tell voter suppression stories. They love to say that it is a big problem. There was a great story that appeared after Indiana passed a voter I.D. law. It's the first election that is held under the voter I.D. law, and there's this great story that AP runs about these nuns. The nuns are holding this election at the convent and one of the nuns is the poll worker, she's working at the polls. Two nuns come in, one in her eighties the other in her nineties, and they're not allowed to vote because they don't have ID.<sup>15</sup> They don't drive, they live on the convent, they have no need for the kind of ID that would be good enough for Indiana's law. And so, these poor nuns have been disenfranchised. Nuns would never commit fraud, right? (Now it turns out, in this last election, we had a nun that is just about to plead guilty to committing fraud; she voted for a dead sister, voted her absentee ballot—again absentee ballots used fraudulently.) But a great story from the AP about poor nuns who were being disenfranchised.

What the story didn't mention is that if you were over 65, as both of these nuns were, in Indiana you could vote absentee without an ID. Were they disenfranchised? No. They may not like voting absentee, they may prefer to vote in person, but to call them literally "disenfranchised?" I don't think that's the case. In fact, there's a reason the plaintiffs in all of these cases, the institutional plaintiffs, the public interest law firms who bring these suits, have a really hard time finding real people who 1) lack an ID, 2) can't easily get the ID, and 3) want to vote. The concern here is not mostly with those people. There aren't that many of them. We know from the Pennsylvania voter I.D. trial, there aren't that many of those people.

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<sup>15</sup> Deborah Hastings, *Indiana Nuns Lacking ID Denied at Poll by Fellow Sister*, ASSOC. PRESS, available at <http://www.foxnews.com/wires/2008May06/0,4670,IndianaPrimaryPhotoID,00.html>.

Now in Pennsylvania there was going to be a problem because they were rolling it out too quickly, but generally speaking, the number of people who lack ID, can't get ID, and want to vote seems to be pretty small.

So what do we know? Michael Pitts did a study appearing in the *Journal of Law and Politics*<sup>16</sup> of the 2008 Indiana election, the first with the new ID requirement. The election saw 2.8 million voters cast ballots. 1,039 people showed up without ID and cast provisional ballots. A lot of those people were people who left the ID in the kitchen and didn't bring it with them. Not many people lacked ID, because if you lack ID, and you know you don't have it, you're probably not going to bother showing up. 137 of them got their votes counted. So what does this tell us? We don't know how many people are deterred, who never showed up, didn't have the ID, and couldn't vote. We don't know how many those are, but we have no reason to believe that it's a very large number. And there's a huge discrepancy between what some of the polling shows about people who lack ID, and the people who, if you actually try and find them, who don't have IDs. So maybe we're talking one percent. We don't know what the number is. But it seems to be low; not as was claimed by an advocacy group in the election, ten million Latino voters without ID. That's almost all the Latino voters in the country. The numbers just don't add up.

Now here's what the Brennan Center said about voter identification and similar requirements making it harder for people to vote. The Brennan Center issued a study where they said new voting restrictions "may affect" more than five million people. *May* affect. The Brennan Center is very careful. Now, of those five million, about two million were people who voted early in the weekend before the election in Florida and Ohio, who were maybe not going to get that opportunity to vote the last weekend. They would still be able to vote on other days' early voting, or absentee, or in person on election day, but "*may* affect." Look at what the left does with this study. This is a *Huffington Post* headline: "Brennan Center: Millions of Voters Impacted by New Photo I.D., Citizenship and Registration Laws."<sup>17</sup> *Impacted*, a little stronger. *Daily Kos*: "5 Million Voters have been Targeted by the GOP School of Election Engineering."<sup>18</sup> And *Rolling*

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<sup>16</sup> Michael J. Pitts & Matthew D. Neumann, *Documenting Disfranchisement: Voter Identification During Indiana's 2008 General Election*, 25 J. L. & POL. 329 (2009).

<sup>17</sup> John Celock, *Brennan Center: Millions of Voters Impacted by New Photo I.D., Citizenship and Registration Laws*, HUFFINGTON POST (Oct. 3, 2011, 2:27 PM), [http://www.huffingtonpost.com/2011/10/03/report-5-million-voters-i\\_n\\_992530.html](http://www.huffingtonpost.com/2011/10/03/report-5-million-voters-i_n_992530.html).

<sup>18</sup> "Jamess," *5 Million Voters Have Been Targeted by the GOP School of Election Engineering*, DAILY KOS (Oct. 27, 2011, 4:40 AM), <http://www.dailykos.com/story/2011/10/27/1030459/-5-Million-Voters-have-been-targeted-by-the-GOP-school-of-Election-Engineering>.

*Stone*: “GOP War on Voting: New Laws Could Block Five Million from Polls.”<sup>19</sup> Now they’re disenfranchised. All five million of them, including the millions who will have twenty-three days to vote in Ohio, they will have absentee ballot applications sent to them, and who will be able to vote upon election day. Disenfranchised? A little bit of exaggeration.

So what is this about? I claim that Democrats do the same thing as Republicans in terms of using this issue to get the base excited, and to turn out to vote, and to fundraise. Here is Donna Brazile, noted Democratic activist and official writing in a blasted email message: “When my sister tried to vote in Florida, in the 2000 election, she was a victim of voter suppression. . . . In Florida, Pennsylvania, Ohio, Wisconsin, and Texas, extremist governors or legislatures are willing to violate people’s civil rights in order to win elections.”<sup>20</sup> Send money now. So that’s a big part of what this is about, too.

But it’s not the only story with what’s wrong with our elections. I wish that the only story were about these fights between the parties, but the bigger problem is one of partisanship in how elections are run. And incompetence. Here’s Ken Blackwell, who was the Secretary of State and also co-chair of the Bush Re-election Committee in 2004 in Ohio. He issued a number of controversial rulings, all of which tended to favor Republicans, including a ruling that said if you turned in your voter registration form and it wasn’t on the right weight of paper, that it would not be counted. He was replaced by a Democrat, Jennifer Brunner. Jennifer Brunner said, I’m going to run this election so fairly that no one is going to know my name. I’m going to be anonymous. It’s going to be great. The Republicans had sent out an absentee ballot form for people to turn in to get their absentee ballots in Ohio. The McCain campaign sends this out. There’s this little box that you could check on the form that says “Yes, I’m a citizen and I’m ready to vote.” And that box was not required by Ohio law. But Brunner took the position that if you didn’t check that box then I’m not counting your vote. So people knew her name because of what she did. In fact, here’s John Gibson on Fox News: “Somebody’s trying to steal your election,” Jennifer Brunner.<sup>21</sup>

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<sup>19</sup> Julian Brookes, *GOP War on Voting: New Laws Could Block Five Million from Polls*, ROLLING STONE (Oct. 3, 2011, 11:50 AM), <http://www.rollingstone.com/politics/blogs/national-affairs/gop-war-on-voting-new-laws-could-block-five-million-from-polls-20111003>.

<sup>20</sup> Email from Donna Brazile (June 28, 2011) (on file with author).

<sup>21</sup> John Gibson, *Heads Up, Ohio. Someone Is Trying to Steal Your Election*, FOXNEWS.COM, Oct. 8, 2008, <http://www.foxnews.com/story/2008/10/01/heads-up-ohio-someone-is-trying-to-steal-your-election/>.

We have partisans running our elections. In no other civilized, advanced democracy do we have this kind of situation. And then we had Jon Husted, who came in after Blackwell and Brunner as Ohio Secretary of State, a Republican; he had a mixed record. He did some things like fighting voter I.D. which was not seen as in line with Republicans. He did other things such as his votes on the hours for early voting. He appeared to be casting votes to benefit Republicans. The problem is not the people. It's the fact that we've got a swing state, highly polarized state, and we're letting partisans run our elections.

But even worse than that is the problem of localism, the problem that we have people with different resources and levels of competence running our elections. So in Ohio, if you go to vote, you might go to a gymnasium or some place and there are multiple places where you can vote within the gymnasium. You have to vote at the right table, at the right precinct. Otherwise, in Ohio, your vote won't count. You walk in, you ask for a ballot, and you're told what table to go to. Part of what tells you what table to go to is your address. So here's the deposition of a poll worker, who was explaining why, house number 798, whether it was even or odd, to decide which table to go to. When asked whether the house number 798 was even or odd, the poll worker responded:

A. Odd.

Q. And why do you think that's odd? I'm sorry. Why do you think her address is an odd address?

A. Because it begins with an odd number.

Q. It starts with an odd number?

A. Yes. Nine is an odd number. Eight's even.

...

Q. . . . So on Election Day, if somebody came in with an address 798 and you had two ranges to choose from, you would choose the odd for them?

A. Yes.

Q. Okay. And is that how you did it for all the ballots that you looked up on Election Day?

A. To determine if they were even – yes

Q. To determine if they were even or odd, you looked at the first digit of the address?

A. No. I looked at the whole address.

Q. And you chose however many – if there were more odds than even numbers, it would be an odd address?

A. Yes.<sup>22</sup>

Everybody knows that. 798: two odds, one even. It's an odd number, right? Second grade math, we all know that. (Laughter.) Funny, except people were being disenfranchised, and the Ohio Supreme Court said that's just fine. It took a ruling from the Sixth Circuit Court of Appeals, the federal court. Actually, three very conservative judges on that court who said you can't disenfranchise someone, someone can't lose their franchise, because the poll worker doesn't know that 798 is an even number.

So, we said, let's try and fix this. Congress set up the U.S. Election Assistance Commission (EAC) in 2002. The U.S. Election Assistance Commission, and here's a screenshot of their website: there are four commissioners, two Democrats and two Republicans. Vacant, vacant, resigned, resigned. We went an entire election season with no commissioners on the U.S. Election Assistance Commission. Republicans blocking any appointments to the U.S. Election Assistance Commission. The National Association of Secretaries of State, which is the body of all these chief election officers, said the EAC was too powerful. Since the day the EAC was formed, its only job was to give out money for voting machines and to provide information on best practices. So the other thing that's going on, there's a turf war between federal, state, and local government, as to who is going to run our elections. That's part of what's at issue in this other voting case before the Supreme Court, involving Arizona's citizenship requirement for voting.

This brings us to 2012. Who are the faces of 2012? Here's one of them: Desiline Victor. She was at the State of the Union, 102-year-old woman, waited in line for hours to vote in Florida because the lines were so long. "We have to fix that," said President Obama, and people cheered. This is the Democrats' face of the 2012 election.

And here's Melowese Richardson, you may not recognize her. She was a poll worker in Cincinnati. She was interviewed by the local TV station. She said, yeah, I voted twice. I wanted Obama to win. I voted an absentee ballot, and I voted in person. And it turned out she voted for her granddaughter too, twice, once in person and once in absentee ballot. That's the other face of the 2012 election. An election overrun by fraud, an election where we're suppressing the vote of people who should not have to endure this.

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<sup>22</sup> Hunter v. Hamilton Cnty. Bd. of Elections, 850 F. Supp. 2d 795, 819-20 (S.D. Ohio 2012).

The voting wars continued in 2012, but things also changed in 2012. First, we saw a Republican legislative overreach between 2008 and 2012. We saw an interesting public response, a court response, and then I want to talk about post-election reactions and the future. But here's a map from the Brennan Center: no question about it, it was only in Republican states where restrictive voter laws were passed. Voter I.D., cutbacks in early voting, making it harder to register people to vote. That happened. It wasn't the secretaries of state who were manipulating the election rules, it was the legislatures. In states with one-party legislatures they were doing this.

Democratic states were doing other things. They were making it easier for people to vote. I'm talking about proposals to let sixteen-year-olds vote to let felons vote. Democrats claim the high road by saying we're going to increase the franchise, but what they don't tell you is that increasing the franchise is going to help Democrats. There's a self-interest here too.

What was different about this cycle compared to last cycle is that many of these laws were blocked by courts, at least temporarily. Wisconsin's voter I.D. law and Pennsylvania's voter I.D. law were put on hold. South Carolina's voter I.D. law was approved, but put on hold for 2012. Texas's law was blocked. Early voting restrictions were changed. One thing that's different about 2012: the courts woke up. The courts, unlike in the last elections, were not dividing on party lines, so that was interesting.

And then we saw public action. This is comedian Sarah Silverman in her video called "Get Nana a Gun."<sup>23</sup> The idea is to get the grandmother a gun, and she can get a concealed weapons permit, and she can be able to register to vote. Voter I.D. and these issues broke through the public consciousness. My mother, I was talking to her on the phone in October, she said, "What's this with the voter I.D. laws? Are they trying to make it harder for people to vote?" I said "Mom, I've been doing this for five years. I just wrote a book about this. Read the book!" But it broke through in a way that was different than before.

The judiciary's actions were really interesting. So in the Ohio early voting case—remember, Ohio gave twenty-three days of early voting—everybody got an absentee ballot application. You could go vote on Election Day. But on the last weekend, the Republican legislature said, we're cutting back on early voting for everybody. Except that they're so

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<sup>23</sup> Sarah Silverman, *Let My People Vote 2012 – Get Nana A Gun*, FUNNY OR DIE, <http://www.funnyordie.com/videos/1564f7a7e2/let-my-people-vote-2012-get-nana-a-gun-with-sarah-silverman>.

incompetent in Ohio that they messed up and didn't withdraw early voting for everybody; they let military overseas voters continue to be able to vote in person on those days. Democrats went to court. I called their claim "impossible." Professor Ned Foley called it a "Hail Mary pass," but the Democrats won. The legal theory was very weak—the theory advanced by the court as to why this was an equal protection violation. But one of the judges, Judge White, in her concurrence said that she did not think that taking away the last weekend of early voting is a big burden on voters, but she did not trust Ohio to be able to run its election competently. We know in 2004 there were long lines, we know there were big problems, so let's put early voting, which worked in 2008, back in place.

Then even the conservative judges on the Sixth Circuit, in the case involving the wrong precinct voting, said, we're relying on *Bush v. Gore*, the case from 2000 that handed the election to George Bush. We're going to say it's an equal protection violation to not count someone's vote, when all they did was show up at the polling place and lack a competent poll worker to tell them where to vote. *Bush v. Gore*—finally, this is the Sixth Circuit making some lemonade from that case.

But there were still problems. Here's a picture from Miami of long voting lines. One study, which I'm not sure that I buy, says up to 200,000 Florida voters were deterred by the long lines. That strikes me as a very large number, but we'll see. But there's no question that there were long lines in some places. I remember when President Obama was giving his acceptance speech, I was watching on Twitter, there were still people on line in Miami voting. That's ridiculous. President Obama: "we have to fix that." He said it three times. He said it in the inauguration speech, he said it in the State of the Union, he said it in his acceptance speech. He said it three times: fix the long lines.

What should we do? One proposal I have is that we make the federal government register all voters—proactively go out and register voters. Give you a national ID card, and if you want you could use your thumbprint, if you want, because you may forget your card but you're never going to forget your thumb. I like to say that this is a proposal that has united Democrats and Republicans. It has united them against the idea. Democrats hate voter I.D., Republicans hate universal voter registration. So there are lots of things we could do.

Now we're going to have a commission headed by Bob Bauer and Ben Ginsberg, the top Obama election lawyer and the top Romney election lawyer. They're going to issue a report. They're going to issue best practices. I thought that's what the United States Election Assistance

Commission was supposed to do. So our faith in fixing the process rests on a report that's going to issue recommendations, which the states may or may not pay attention to. In an era of red election law and blue election law, that doesn't seem like it's going to get very far.

What are the chances that we're going to have another election meltdown like Florida? Let's say the odds of it happening in any one election are low, because you have to have a state be really, really close, and it would have to be a state that affects the outcome of a presidential election. But if we do have a meltdown, it's going to be much worse, because people are aware of all these rules, we now have social media, people are more partisan polarized than they were in 2000.

So what's the answer? I want to suggest that the answer is to be found in religion. It's the election administrator's prayer, which is "Lord, let this election not be close." Because what's going to save us is not that we fix the system. We have to fix that but we're not fixing that. I don't see that we're going to fix it before 2016. Despite the efforts of Pew and others to make things better, I see a continuing churn. So, we have to just hope for a landslide. If we get a landslide, then we'll be okay. If not, I really worry about our democracy. I look at the pictures of Tahrir Square and I worry about what this country would be like if the election results came down to what they came down to in Wisconsin in that summer of 2011. Two hundred votes apart, and a partisan election official with the key votes stored on her laptop. That's no way to run a democracy.

Thanks very much.