EIGHT MONTHS LATER

ELLEN D. KATZ*

INTRODUCTION

Rick Hasen's *Election Meltdown*[1] provides a concise and scathing analysis of what ails the American electoral process. Rick identifies four "principal dangers"—namely, voter suppression, "pockets of incompetence" in election administration, "dirty tricks," and "incendiary rhetoric" about stolen or rigged elections. He argues that these dangers have contributed to past dysfunctional elections and are sure to infect future ones. *Election Meltdown* closes with some proposals to temper the identified dangers so as to make voting less difficult and restore confidence in the electoral process.

Rick published *Election Meltdown* on February 4, 2020. It was the start of an election year, and, no doubt, he anticipated that disputes would soon emerge that would test, and in many cases, confirm his analysis. Eight eventful months have since passed. The COVID-19 pandemic has touched and altered every aspect of life with millions infected, millions more unemployed, and its radiating impacts expanding daily. Amid this evolving crisis came a second one as tens of millions of people worldwide joined Black Lives Matters ("BLM") demonstrations to protest the killing of George Floyd by Minneapolis police officers and other cases of police violence. The BLM protests initiated a host of proposals to reform the criminal justice system, and, more broadly, public and private institutions long shaped by entrenched systemic racism.

Rick is a savvy observer of American political life, but I suspect that even he did not anticipate that events of such magnitude would follow publication of *Election Meltdown*. Understandably, the book does not discuss the ramifications of either a global pandemic or a mass protest movement for election law and administration. Still, one cannot read *Election Meltdown* today without considering its claims in light of these developments.

I. COVID-19 AS AN ELECTION MELTDOWN CASE STUDY

The pandemic has generated a host of election-related disputes that show *Election Meltdown*'s analysis to be spot on. Indeed, it would be difficult to conjure up a better case study for the book's claims.

Ongoing COVID-related voting disputes display each of the "principal dangers" that *Election Meltdown* identifies as threats to American elections. For

* Ralph W. Aigler Professor of Law, University of Michigan Law School.

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

instance, *Election Meltdown* uses the label voter suppression to describe a host of practices that are defended as necessary to prevent voter fraud but which, in design and effect, lower participation by voters in particular communities. This label is easily attached to recent efforts that limit access to absentee ballots and make casting them more difficult. So too, recent disputes reveal notable "pockets of incompetence" in election administration, including, inter alia, the failure to process absentee ballot applications in a timely fashion and the egregiously long lines to vote at thinly staffed polling stations.[2] Indeed, incompetence seems like a mild charge to lodge against those empowered to address the now well-documented ways in which the pandemic has complicated voting. The pandemic has also revealed a host of electoral "dirty tricks," including the misleading charge that voting by mail is unsafe and the calculated effort to make it so by sabotaging the U.S. Postal Service.[3] Finally, "incendiary" rhetoric has become rampant as charges of "rigged" elections and "massive disenfranchisement" have become commonplace.[4]

In short, Rick did not predict the pandemic, but his analysis of what afflicts the American electoral process astutely anticipated how the election infrastructure would respond to one. As COVID-related election disputes proliferate, examples of the dangers *Election Meltdown* described multiply. The result is a case study that confirms the book's framework.

This case study, curiously, also offers a lens through which to consider a competing framework that *Election Meltdown* might have adopted. Mounting evidence from the COVID-related election disputes shows that the dangers that *Election Meltdown* identified are not so much independent threats but instead connected phenomena that bolster one another. Stringent absentee ballot requirements not only suppress the vote but also increase pressure on polling stations in ways that make pockets of incompetence more consequential. Pandemic-related dirty tricks and incendiary rhetoric undermine confidence in and the reality of a reliable vote and thus might fittingly be labeled forms of voter suppression themselves. Put differently, these threats are so closely tied together that *Election Meltdown* might have presented them as varied responses

[2] *See, e.g.*, Jesse McKinley & Luis Ferré-Sadurní, *In Heated New York Races, 3 Weeks and Still Counting*, N.Y. TIMES, July 18, 2020, at A12; John Whitesides & Jarrett Renshaw, *Confusion, Long Lines at Some Poll Sites as Eight U.S. States Vote During Coronavirus Pandemic*, REUTERS (June 2, 2020, 6:15 AM), https://www.reuters.com/article/us-usa-election/confusion-long-lines-at-some-poll-sites-as-eight-u-s-states-vote-during-coronavirus-pandemic-idUSKBN2391B5 [https://perma.cc/STS7-R6QH].

[3] Ian Millhiser, *Trump Admits He's Stalling Pandemic Relief to Make It Harder to Vote*, VOX (Aug. 13, 2020, 12:00 PM), https://www.vox.com/2020/8/13/21366319/trump-post-office-vote-by-mail-fox-sabotage-pandemic-covid-19-coronavirus.

[4] *See, e.g.*, David Siders, *'Rigged Election' Goes from Trump Complaint to Campaign Strategy*, POLITICO (July 31, 2020, 4:30 AM), https://www.politico.com/news/2020/07/31/trump-rigged-election-campaign-strategy-388884 [https://perma.cc/CHN6-LDDF].

to a broader threat (or threats) observed from different angles rather than as discrete dangers.

This view, in turn, invites consideration of the causal forces that propel these connected dangers. There are, without doubt, multiple, compatible ones. Dan Tokaji, for instance, has suggested partisan polarization and economic inequality as two very sound candidates.[5] The BLM protests offer a third.

II. #BLACKLIVESMATTERS IN ELECTION LAW

The 2020 BLM demonstrations offer a different lens through which to consider *Election Meltdown*. These demonstrations target race-based police violence and propel a broad reckoning with the ways entrenched racism shapes opportunities in a host of public and private institutions. The BLM protests underscore the importance of the vote as a necessary condition for reform and accordingly demand a critical examination of ways systemic racism continues to shape the electoral process.

Notably, *Election Meltdown* does not include systemic racism among the "principal" dangers it identifies as presently threatening American elections. Nor do the reforms it promotes target the distinct ways racial discrimination infuses and shapes voting opportunities. Instead, *Election Meltdown* attempts to combat the threats it identifies with race-neutral tactics that are best characterized as universalist in perspective. That is, they seek to improve the electoral process for all voters with the unstated expectation that doing so will adequately remedy the distinct ways systemic racism limits the ability of specific groups of voters to participate.[6]

This is no oversight. Rick is well aware of the role systemic racism plays in the electoral process and has written powerfully and eloquently about it in the past.[7] Race and racism, moreover, are hardly absent from the narrative he presents. *Election Meltdown* cites various ways the four dangers it identifies find racialized expression. It observes, for instance, that voter suppression efforts and dirty tricks often target communities of color, that pockets of incompetence are criticized in a racially selective manner, and that incendiary rhetoric employs racial tropes and stereotypes. *Election Meltdown* nevertheless declines to treat systemic racism as even one of the "great" or "primary" dangers it sees as presently threatening American elections, and it promotes reforms that are not facially responsive to it.

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[5] *See* Dan Tokaji, *The Centrifugal Forces of Democracy*, BALKINIZATION (Feb. 28, 2020, 9:30 AM), https://balkin.blogspot.com/2020/02/the-centrifugal-forces-of-democracy.html [https://perma.cc/LGR2-HK9J].

[6] *See* Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After* Shelby), 123 YALE L.J. 2838, 2842-47 (2014).

[7] *See, e.g.*, Richard L. Hasen, Civil Right No. 1*: Dr. King's Unfinished Voting Rights Revolution*, 49 U. MEM. L. REV. 137 (2018); Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58 (2014) [hereinafter Hasen, *Race or Party?*].

It is possible that *Election Meltdown* adopts this stance based on the belief that forces other than racism pose greater danger to the electoral process. That prospect strikes me as unlikely. The BLM protests and the assessments they are generating have brought renewed focus to the broad impact of entrenched racism, but racism's role in the electoral process has long been in plain view. It certainly was eight months ago when Rick published *Election Meltdown*. More likely, the relegation of systemic racism in *Election Meltdown*'s narrative reflects Rick's skepticism about the present viability of traditional remedies to address contemporary racial discrimination in voting. *Election Meltdown* explicitly voices this doubt, noting that using the Voting Rights Act (VRA) and related federal statutes to challenge voter suppression represents an "increasingly uphill climb[]" and that "judicial recourse [is] likely to be partially effective at best."[8]

This assessment is difficult to dispute. Part of the problem, of course, is the diminished power of the VRA to combat racial discrimination in voting.[9] Much of the difficulty, however, stems from the fact that restoring and strengthening the VRA's provisions, as the proposed Voting Rights Advancement Act would do,[10] would change less than its supporters expect. Many federal judges, including a majority of the Justices on the Supreme Court, are likely to read provisions of a fortified VRA narrowly and unsympathetically. This prospect no doubt shaped both the framework *Election Meltdown* offers and the reforms it proposes.

The reforms themselves are a common-sense mix of what Rick labels "medium and longer term" strategies that he suggests would help prevent the looming election meltdown. The proposals—including state-level electoral reforms, increased federal funding and guidance, specific actions by social media corporations, and expanded civics education—all seem sensible, even if they are not, as Rick readily acknowledges, "miracle cures." Universalist in character, these proposals seek to counter the identified threats to the electoral process in order to protect participatory opportunities for all voters. That is, they do not seek to protect particular voters from discrimination or to address the distinct harms that follow from targeted racial discrimination.

Rick has promoted this universalist stance before and remains in good company in viewing it as the most promising means to achieve meaningful electoral reform.[11] It may well be. Still, this approach involves significant cost. The BLM protests and the inquiries they initiated have laid bare what has long

[8] HASEN, *supra* note 1, at 129.

[9] *See, e.g.*, Shelby County v. Holder, 570 U.S. 529 (2013).

[10] Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. (2019).

[11] *See, e.g.*, Hasen, *Race or Party?*, *supra* note 7; *see also* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389 (2015); Samuel Issacharoff, Comment, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013); Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOWARD L.J. 741 (2006).

been clear to many—namely that systemic racism is real, entrenched, and the source of lasting and distinct harm. The BLM demonstrations stand as a warning that institutions ignore this racism at their peril and that nominally neutral policies allow it not only to fester but to expand. It is an indictment that finds application in varied arenas, including, unsurprisingly, election law and administration.

Consider, for instance, the difficult questions raised by the practice known as "ballot harvesting." *Election Meltdown* recounts the sordid attempt to use this practice to sway a 2018 North Carolina congressional race. To prevent tampering of this sort going forward, the book recommends tightening state rules governing ballot harvesting and urges that the practice be limited to the collection of ballots from those who face "difficulties turning in ballots themselves."[12] The unstated assumption appears to have been that relatively few voters would encounter such difficulties and thus that harvesting would (and should) remain a limited practice.

Eight months later that assumption no longer holds. *Election Meltdown* understandably did not envision these radically changed circumstances and no doubt would have altered or supplemented its proposed ballot harvesting reforms had it known that many more voters than it expected would need assistance casting absentee ballots. Rick has since offered some thoughts on this issue,[13] and we should look forward to hearing more from him as election officials seek to balance genuine concerns about fraud and exploitation with the assistance many voters now need to cast absentee ballots.

Achieving that balance requires consideration not only of the way the pandemic has complicated the mechanics of voting but also of the insights the BLM demonstrations have brought to the fore. In particular, meaningful reform to ballot harvesting procedures must address the way racial discrimination has infected the practice and the distinct damage that discrimination has done. As *Election Meltdown* itself notes, perpetrators of the North Carolina scheme targeted older Black voters in the district, collecting ballots from some that were incomplete and failing to turn in completed ones. This race-based criminal conduct likely swayed the election's outcome and undoubtedly denied the targeted voters the ability to cast their ballots on equal terms. Voiding the election provided some redress, but a complete remedy requires more structural reform. Tightening ballot harvesting rules, as *Election Meltdown* suggests, might inhibit future schemes of this sort, but it might also deny the voters targeted by the fraud the ability to cast absentee ballots during a pandemic that has already devastated their community. *Election Meltdown* specifies that it would allow harvesting of ballots from voters who sign a declaration stating

[12] HASEN, *supra* note 1, at 134.

[13] *See* Richard L. Hasen, *California's Ballot Harvesting Law: A Crop of Trouble?*, L.A. LAW., July-Aug. 2020, at 14, 14 ("[N]ow may be the time for California to impose reasonable limits on the third-party absentee ballot collection while taking care not to place additional burdens on minority voters and voters meeting special assistance along the way.").

their need for assistance, but, as the North Carolina scheme suggests, such declarations might themselves be vulnerable to racially infused manipulation. At the same time, voters most in need of the assistance that harvesting provides may now be justifiably reluctant to rely on it. How best to accommodate the conflicting concerns that ballot harvesting presents is no simple task. What is clear, however, is that any meaningful reform must acknowledge, examine, and reflect the racialized nature of the fraud and the resulting injury it seeks to address.

None of this is to suggest that universalist reforms are necessarily ill-advised or that seeking to reduce the threats *Election Meltdown* identifies is anything other than sound policy. Without doubt, universalist reforms can provide meaningful relief, offering the proverbial rising tide that bestows benefits on all voters. They are, however, blunt tools. Too often, they are inadequately calibrated to the varied contexts in which they apply and are insufficiently responsive both to the distinct ways racial discrimination finds expression and the damage it does.