
OPTIMISM AND DESPAIR ABOUT A 2020 “ELECTION MELTDOWN” AND BEYOND

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INTRODUCTION

“It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way—in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only.”

—Charles Dickens, *A Tale of Two Cities*¹

It is easy to assume that the author of a book called *Election Meltdown*² thinks we are in a Dickensian “worst of times.” Adding to the feelings of despair is the condition of the United States since the book appeared in February 2020, with more than 200,000 Americans dead from COVID-19 and millions more affected,³ systemic racism brought to the forefront of the national consciousness by the killing of George Floyd and the Black Lives Matter protests,⁴ President Trump’s decision to use force against protestors in Washington D.C. and beyond,⁵ and the President’s continued insistence without evidence that

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¹ 1 CHARLES DICKENS, *A TALE OF TWO CITIES* 1 (1859).

² RICHARD L. HASEN, *ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY* (2020).

³ Erika Edwards & Denise Chow, *U.S. Covid-19 Death Toll Surpasses 200,000*, NBC NEWS (Sept. 19, 2020, 12:07 PM), <https://www.nbcnews.com/health/health-news/u-s-covid-19-death-toll-surpasses-200-000-n1240034> [<https://perma.cc/9GM8-AR6C>].

⁴ Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

⁵ Peter Baker, Zolan Kanno-Youngs & Monica Davey, *Trump Threatens to Send Federal Law Enforcement Forces to More Cities*, N.Y. TIMES (July 24, 2020), <https://www.nytimes.com/2020/07/20/us/politics/trump-chicago-portland-federal-agents.html>.

extended mail-in voting necessitated by the pandemic will lead to a stolen or rigged election.⁶

Four of the contributors to this fine and generous set of *Boston University Law Review* symposium essays on *Election Meltdown*—Atiba Ellis,⁷ Ellen Katz,⁸ Lisa Marshall Manheim,⁹ and Lorraine Minnite¹⁰—believe things are even worse than I described when my book first appeared in February, and particularly that systemic racism and voter suppression have contributed to a crisis not just of election administration but of American democratic legitimacy. Two symposium contributors, Anthony Gaughan¹¹ and Derek Muller,¹² believe that while we are not necessarily in the “best of times,” we can hope that forces such as free speech and a modern history of honest elections in the United States can save us from a November election meltdown.

My position falls somewhat between these two poles. A debacle is unlikely to happen in November, but thanks mostly to luck, not work. What is most likely to save us from a Twitterized *Bush v. Gore*¹³ 2.0 and post-election violence in November is neither an honest election system nor counterspeech to combat election misinformation. Instead, the odds, as measured by the “margin of litigation,”¹⁴ are against an election close enough to go into overtime in a state crucial for the Electoral College outcome.

But just as someone who runs a nuclear power plant would not ignore a small risk of a catastrophic meltdown of the reactor core, we cannot ignore that the four forces I described in my book—voter suppression, pockets of election administrator incompetence, dirty tricks such as Russian disinformation campaigns, and increasingly incendiary rhetoric about stolen or rigged elections—could lead to a catastrophic breakdown of the American electoral process in a close enough election, especially given the social stresses

⁶ Richard L. Hasen, Opinion, *Trump’s Relentless Attacks on Mail-In Ballots Are Part of a Larger Strategy*, N.Y. TIMES (Aug. 19, 2020), <https://www.nytimes.com/2020/08/19/opinion/trump-usps-mail-voting.html>.

⁷ Atiba R. Ellis, *Bug or Feature: The Long-Intertwined Legacy of Disinformation, Race, and Voting*, 100 B.U. L. REV. ONLINE 238 (2020).

⁸ Ellen D. Katz, *Eight Months Later*, 100 B.U. L. REV. ONLINE 243 (2020).

⁹ Lisa Marshall Manheim, *Cracks in the Foundation*, 100 B.U. L. REV. ONLINE 268 (2020).

¹⁰ Lorraine C. Minnite, *Putting a Band-Aid on a Gunshot Wound*, 100 B.U. L. REV. ONLINE 273 (2020).

¹¹ Anthony J. Gaughan, *American Democracy Is Healthier Than It Appears*, 100 B.U. L. REV. ONLINE 249 (2020).

¹² Derek T. Muller, *Governing Elections Without Law*, 100 B.U. L. REV. ONLINE 278 (2020).

¹³ 531 U.S. 98 (2000).

¹⁴ On the concept, see Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 946-47 (2005) (“The closeness of election results in a state whose electoral votes matter to the outcome of the Electoral College tally is the biggest single factor that predicts the possibility of a post-election controversy over presidential election results spilling into court.”).

exacerbated by the pandemic, injustice, and social unrest. If we dodge a bullet now, it is only because election administrators' prayers are answered.¹⁵

In this very short essay I first explain why the optimism of Gaughan and Muller is unwarranted and that the American election system requires fundamental repair. I then explain that although the deeper pathologies in American democracy diagnosed by Ellis, Katz, Manheim, and Minnite (and some contributors to an earlier *Balkinization* symposium on *Election Meltdown*)¹⁶ are correct, that does not mean we will fail to have a decisive presidential outcome in November. Instead, their critiques point to the need for broader, more systemic change not just in American elections but American democracy. We should channel our despair into resolution to begin urgent work after we make it through this tumultuous election period.

UNWARRANTED OPTIMISM

The months since the publication of *Election Meltdown* have been momentous and bracing. My response to an earlier *Balkinization* symposium¹⁷ on the book published on March 7, 2020, contained neither mention of the COVID-19 pandemic nor the George Floyd protests, both of which unfolded soon thereafter. These events further put pressure on an election taking place under conditions of extreme American polarization and when many Americans view November's outcome in existential, even apocalyptic, terms.

Briefly put, the virus has put pressure on election officials trying to conduct a safe election in a pandemic, which caused many more voters to wish to vote by mail. Congress, mired in partisan bickering over elections and fanned by a President making repeated, unsubstantiated claims of a "rigged" election with mail-in ballots, failed to provide adequate funding for the increased costs of both mail-in balloting and hygienic in-person balloting.¹⁸ Resource starvation raises the risks of mistakes in an election that has been marked by likely record-setting litigation over when, where, and how people can vote safely in a pandemic.

¹⁵ See *Election Administrator's Prayer*, TAEGAN GODDARD'S POL. DICTIONARY, <https://politicaldictionary.com/words/election-administrators-prayer> [<https://perma.cc/NAN2-J97W>] (last visited Oct. 1, 2020) ("The Election Administrator's Prayer is 'Please, please, please let the winners win big.' or 'Lord, let this election not be close.'").

¹⁶ Jack Balkin, *Symposium on Richard L. Hasen, Election Meltdown: Collected Posts*, BALKINIZATION (Mar. 9, 2020, 9:30 AM), <https://balkin.blogspot.com/2020/03/symposium-on-richard-l-hasen-election.html> [<https://perma.cc/WT9D-FW7M>].

¹⁷ Rick Hasen, *The Election Meltdown Paradox, and Broader Questions About the Health, Stability, and Future of American Elections and Democracy*, BALKINIZATION (Mar. 7, 2020, 9:30 AM), <https://balkin.blogspot.com/2020/03/the-election-meltdown-paradox-and.html> [<https://perma.cc/YF6N-55PH>].

¹⁸ Alexa Corse & Lindsay Wise, *Senate GOP Coronavirus Package Omits Additional Election Funding*, WALL STREET J. (July 29, 2020, 11:34 AM), <https://www.wsj.com/articles/senate-gop-coronavirus-package-omits-additional-elections-funding-11596036853>.

The social protests over George Floyd's death and American anti-blackness provoked violent responses from both federal government forces in Portland as well as vigilantes.¹⁹ Provocateurs and more serious analysts suggest that we could have violence in the streets whether Trump wins reelection or loses. The concerns are heightened as the President exhorts his followers to "watch" polling places²⁰ and the Attorney General makes unsubstantiated and unsupported claims of voter fraud.²¹

In these circumstances, I cannot share Anthony Gaughan's optimism or describe the American election system as "healthier" than it appears to be.²² Our partisan, decentralized, and underresourced election system leads to quadrennial angst over whether *this* will be the year when we have another razor-thin election. On top of that, the pandemic has illuminated the weak protection for voting rights caused by fragmentation of authority for running elections, polarization over voting rules and their judicialization by an increasingly polarized judiciary, and weak constitutional voting guarantees.²³ It is undoubtedly true, as Gaughan argues, that it is harder to cheat in American elections than it was fifty years ago; but that comparative advantage is hardly a reason to characterize the system as being close to healthy. The Electoral College does not serve as a bulwark against election meltdown; if we used a national popular vote rather than voting by state, a meltdown risk would actually be smaller. The odds are low that popular election totals would be within one million votes between candidates, meaning a successful recount to overturn the results of a presidential election would be much less likely. Finally, I agree with Gaughan that we might well "muddle through" the upcoming election, but that is no way to run a rational election system.

Professor Muller focuses his symposium contribution not on the election system as a whole but on the threat of foreign interference and misinformation and the difficulty of finding legal solutions to the problem.²⁴ While not quite as upbeat as Gaughan, Muller believes the threat from foreign hacking into voter registration databases as we saw in the 2016 elections has been met with a strong government response and that the First Amendment bars most attempts at

¹⁹ Joan Donovan, Opinion, *How an Overload of Riot Porn is Driving Conflict in the Streets*, MIT TECH. REV. (Sept. 3, 2020), <https://www.technologyreview.com/2020/09/03/1007931/riot-porn-right-wing-vigilante-propaganda-social-media>.

²⁰ Fredreka Schouten, *Trump Pledges to Send 'Sheriffs' and 'Law Enforcement' to Polling Places on Election Day, but It's Not Clear He Can*, CNN (Aug. 21, 2020, 12:40 PM), <https://www.cnn.com/2020/08/20/politics/trump-election-day-sheriffs/index.html> [<https://perma.cc/NH5T-7KXE>].

²¹ Tara Subramaniam, *Fact-Checking William Barr: Is Your Vote No Longer Secret with Mail-in Ballots?*, CNN (Sept. 12, 2020, 3:41 PM), <https://www.cnn.com/2020/09/11/politics/barr-secret-vote-fact-check/index.html> [<https://perma.cc/K92E-AX3R>].

²² Gaughan, *supra* note 11.

²³ Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION L.J. 263 (2020).

²⁴ Muller, *supra* note 12.

government regulation of foreign or domestic misinformation. Muller recognizes that it might take a generational shift to build more trust in American institutions, but in the meantime, “[a] free people must exercise critical judgment and correct for cognitive biases. And a free people must be willing to engage in good faith with one another.”²⁵

To begin with, we cannot discount foreign hacking in the 2020 elections. While our voter registration databases may be stronger, other critical infrastructure such as our electrical grid remains vulnerable to an Election Day hack.²⁶ And as I research a new book project on cheap speech,²⁷ I find myself troubled by the idea that law can do nothing, particularly as the information environment continues to deteriorate for American voters. If voters cannot trust all the information to which they are exposed (increasingly online), they will have a harder time trusting even reliable information to make voting choices consistent with their interests. Muller may just expect too much critical judgment from the average American voter bombarded with false information and increasingly deprived of true information.

TOO MUCH DESPAIR?

The contributions from Professors Ellis, Katz, Manheim, and Minnite take a different tack, and they do not directly address the question whether we will be able to conduct a fair and legitimate election in November. Instead, like many of the symposium participants in the earlier *Balkinization* symposium,²⁸ they believe that problems with election administration are markers of a deeper problem with systemic racism and voter suppression permeating the American political system.

As Professor Ellis puts it, “We often understand race and disinformation as ‘bugs’ or viruses that interfere with the otherwise sensible electoral machine, and we tend to blame bad actors . . . for their bad acts. But I cannot help but

²⁵ *Id.* at 281.

²⁶ HASEN, *supra* note 2, at 93-95.

²⁷ For my earlier writing on this topic, see Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 200-02 (2018).

²⁸ See, e.g., Tabatha Abu El-Haj, *Too Little Hope, Not Enough Gloom*, BALKINIZATION (Mar. 3, 2020, 9:30 AM), <https://balkin.blogspot.com/2020/03/too-little-hope-not-enough-gloom.html> [<https://perma.cc/442D-QXR2>]; Guy Charles, *Meltdown? On Rhetoric and Causation*, BALKINIZATION (Mar. 5, 2020, 9:30 AM), <https://balkin.blogspot.com/2020/03/meltdown-on-rhetoric-and-causation.html> [<https://perma.cc/5WXP-PFT5>]; Stephen Griffin, *Hasen's Timely Warning*, BALKINIZATION (Feb. 29, 2020, 9:30 AM), <https://balkin.blogspot.com/2020/02/hasens-timely-warning.html> [<https://perma.cc/DT7H-YXNY>]; 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/VLG9-W7CN>]; Franita Tolson, *The Default of American Politics: The Perpetual and Never-Ending Prospect of an Election Meltdown*, BALKINIZATION (Mar. 2, 2020, 9:30 AM), <https://balkin.blogspot.com/2020/03/the-default-of-american-politics.html> [<https://perma.cc/K95E-VJQL>].

wonder if those tied problems are—and continue to be—features of American democracy.”²⁹ Professor Manheim concurs, seeing the implications of “intentional voter suppression” as “widespread and profoundly corrosive.”³⁰ And both Professors Katz and Minnite believe I acted strategically in structuring my *Election Meltdown* narrative to focus on nonpartisan solutions for fixing elections: Professor Katz suggests that “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.”³¹ Professor Minnite, in a title suggesting I am offering a band-aid for a gunshot wound,³² concurs with some of the earlier *Balkanization* symposium participants that the problems I diagnose in the book “are but symptoms of much deeper systemic and structural flaws in our constitutional order.”³³

There is no question that there are books to be written on *why* the Republican Party settled on a strategy of seeking to further bogus voter fraud narratives to combat the problem of a shrinking older, white, more rural electorate that currently serves as the Party’s base. Telling that story is important, and systemic racism is a key part of that story. But I was telling a different story about why American elections can no longer be run in ways that instill widespread voter confidence, and systemic racism is only a part of *that* story.

Recent empirical research by Professors Sellers and Michalski show that underresourced election administration does not follow racial, financial, or partisan patterns.³⁴ Russian interference attempts in 2016 were not limited to racial appeals, though they were a part of it; and other dirty tricks, like the attempt to tie Roy Moore to fundamentalist teetotalers in Alabama did not rely on race. And incendiary rhetoric about stolen elections comes from both Democrats and Republicans. In short, some of the symposium participants wish I had written a book about a somewhat different subject than the one I actually tackled.

And this brings me to my final point. Looking at the history of systemic racism in the United States, it is easy to despair. Despite the Voting Rights Act, the Civil Rights Act, and many other efforts, racism, especially anti-Black racism, remains one of the very top political problems in the United States.

I wrote *Election Meltdown* not trying to solve that problem but instead to present a more manageable one that could marginally improve the lives of Black people and make it more likely that voting produces winners supported by a majority of the people. I consider how best to assure that we can run a fair

²⁹ Ellis, *supra* note 7, at 238.

³⁰ Manheim, *supra* note 9, at 269.

³¹ Katz, *supra* note 8, at 246.

³² The quote comes from *Election Meltdown*. HASEN, *supra* note 2, at 125.

³³ Minnite, *supra* note 10, at 275.

³⁴ See generally Joshua S. Sellers & Roger Michalski, *Democracy on a Shoestring*, 74 VAND. L. REV. (forthcoming 2021), <https://ssrn.com/abstract=3685493>.

electoral system that most would accept as producing legitimate outcomes. As I wrote in the *Balkanization* symposium,

There *are* steps that may be taken to shore up the security of our voting machines, educate the public about vote counts, and insure that eligible voters will be able to cast a ballot that will be meaningfully counted. These kinds of steps are much easier to imagine than reforming the electoral college or coming up with ways of restoring civil society and achieving greater economic equality. So while I do not believe that issues of election administration are isolated from these larger societal trends, a piecemeal approach focused on fixing elections seems both prudent and a priority.³⁵

We are certainly not living in the best of times. In many ways it does feel like the worst of times. It is easy under conditions of a pandemic, social unrest, increasing economic and political inequality, and rising political violence to despair of the potential for broad or even narrow positive social change. Perhaps, as Professor Abu el-Haj put it, we are living in a paradoxical period of “too little hope” and “not enough gloom.”³⁶

But a laser-like focus on what we can do to assure election legitimacy and a peaceful transition of power in 2020 (should one be necessitated if Biden beats Trump) remains an urgent matter in the short period before the election. And if we can get beyond the 2020 election season relatively unscathed, there is much work to be done. Neither our election system nor our broader body politic is particularly healthy right now, and broader change is both urgent and necessary going forward.

³⁵ Hasen, *supra* note 17.

³⁶ Abu el-Haj, *supra* note 28.