

---

**AMERICAN DEMOCRACY IS HEALTHIER THAN IT  
APPEARS**

**ANTHONY J. GAUGHAN\***

INTRODUCTION ..... 250  
    I. HONEST VOTE COUNTING ..... 252  
    II. THE ELECTORAL COLLEGE AS SAFEGUARD..... 256  
    III. HISTORY OF MUDDLING THROUGH..... 259  
    IV. THE TRUMP FACTOR ..... 264  
CONCLUSION: A HEALTHY DEMOCRACY ..... 266

---

\* Professor of Law and Kern Family Chair in Law, Drake University Law School. My gratitude to Rebecca Lutkenhaus for her extremely helpful research assistance and to Kevin Day, Tyler Creighton, and the editorial staff of the *Boston University Law Review Online* for the invitation to participate in the symposium.

## INTRODUCTION

No scholar has had a greater impact on the field of election law than Professor Richard Hasen.<sup>1</sup> Accordingly, when Professor Hasen warns that our democracy is in trouble, we should listen. In his superb new book *Election Meltdown*,<sup>2</sup> he puts the country on notice that the election law wars of the past decade pose a growing threat to American democracy itself.

The central argument of *Election Meltdown* is that our hyperpolarized political age has dangerously undermined the public's faith in the integrity of our election system. Consequently, as Professor Hasen explains, the United States risks a democratic breakdown in the event of a razor-thin presidential election.<sup>3</sup> The reason is because for the first time in over 150 years, America faces the prospect that a defeated party may not accept the election results.<sup>4</sup> As Hasen persuasively contends, "Few things are more important to democratic legitimacy than the losers' acceptance of the results of elections, yet this new rhetoric shows that the country's faith in elections, which we have long taken for granted, may be fraying."<sup>5</sup>

In *Election Meltdown*, Professor Hasen explains how four factors—voter suppression, pockets of electoral administrative incompetence, dirty tricks, and incendiary rhetoric—have combined to threaten our democracy in the event of an exceptionally close election. Since the book's publication earlier this year, the COVID-19 pandemic has compounded the threat by jeopardizing the health of voters who cast ballots in person, especially among high-risk groups like seniors.<sup>6</sup> The virus also endangers the health of poll workers, 58% of whom were

---

<sup>1</sup> Hasen has been cited in scholarly works over 2200 times and by courts over 30 times. See Hasen, Richard L., HEINONLINE, [https://heinonline.org/HOL/AuthorProfile?search\\_name=Hasen%2C+Richard+L.&collection=journals&base=js](https://heinonline.org/HOL/AuthorProfile?search_name=Hasen%2C+Richard+L.&collection=journals&base=js) [https://perma.cc/N64H-6QRE] (last visited Sept. 23, 2020)

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

<sup>3</sup> HASEN, *supra* note 2, at 13 ("Very close elections always put the electoral systems under stress. . . . *Bush v. Gore* happened before the rise of social media and Trumpism. Since then, stress on the system has increased dramatically.").

<sup>4</sup> *Id.* at 12 ("The central norm at stake in this book is the peaceful transition to power after hard-fought but fair elections").

<sup>5</sup> *Id.* at 10.

<sup>6</sup> Michelle Ye Hee Lee, *In New Guidance, CDC Recommends Alternatives in Addition to In-Person Voting to Avoid Spreading Coronavirus*, WASH. POST (July 7, 2020, 4:57 PM), [https://www.washingtonpost.com/politics/in-new-guidance-cdc-recommends-alternatives-to-in-person-voting-safety-precautions-for-in-person-voting/2020/07/07/5b62cbba-c078-11ea-b178-bb7b05b94af1\\_story.html](https://www.washingtonpost.com/politics/in-new-guidance-cdc-recommends-alternatives-to-in-person-voting-safety-precautions-for-in-person-voting/2020/07/07/5b62cbba-c078-11ea-b178-bb7b05b94af1_story.html); Alexander Burns & Katie Glueck, *Trump Faces Mounting Defections from a Once-Loyal Group: Older White Voters*, N.Y. TIMES (Aug. 11, 2020), <https://www.nytimes.com/2020/06/28/us/politics/trump-approval-older-voters-coronavirus.html> (observing that "the coronavirus pandemic continues to sweep the country, putting older Americans at particular risk").

over age 60 in the 2018 general election.<sup>7</sup> Voting by mail has thus become more important than ever before.<sup>8</sup> Yet, the underfunded U.S. Postal Service may not be able to deliver all the ballots in time if a late rush of ballots floods post offices on the eve of the November election.<sup>9</sup>

For all of these reasons, therefore, Professor Hasen's concerns about the health of American democracy are well-founded. Moreover, as he points out, there are "no miracle cures" to the challenges we face in administering elections.<sup>10</sup> As medium- and long-term solutions, he advocates improved election administration, uniform standards, federalized automatic voter registration, and a renewed national focus on civics education.<sup>11</sup> In the short term, however, he warns that there is "no easy way out should the election be extremely close or targeted for manipulation of the results."<sup>12</sup>

The threats to our democracy that Professor Hasen identifies should trouble every American. But the picture is not entirely bleak. American democracy in 2020 possesses underlying strengths that could help it successfully navigate a

---

<sup>7</sup> Michael Barthel & Galen Stocking, *Older People Account for Large Shares of Poll Workers and Voters in U.S. General Elections*, PEW RES. CTR. (April 6, 2020), <https://www.pewresearch.org/fact-tank/2020/04/06/older-people-account-for-large-shares-of-poll-workers-and-voters-in-u-s-general-elections/> [<https://perma.cc/DUK7-9JBV>].

<sup>8</sup> Kim Hyatt, *COVID-19 Sparks 'Tidal Wave' of Mail-in Ballots Across Minnesota*, STAR TRIB. (Aug. 5, 2020, 8:59 AM), <https://www.startribune.com/covid-19-sparks-tidal-wave-of-mail-in-ballots-across-minnesota/571982202/> [<https://perma.cc/EW5Z-RUHW>]; Vianney Gomez & Bradley Jones, *As COVID-19 Cases Increase, Most Americans Support 'No Excuse' Absentee Voting*, PEW RES. CTR.: FACTTANK (July 20, 2020), <https://www.pewresearch.org/fact-tank/2020/07/20/as-covid-19-cases-increase-most-americans-support-no-excuse-absentee-voting/> [<https://perma.cc/29BW-ZKN5>] ("The prospect of conducting the presidential election during a pandemic has prompted many states to reexamine their plans for how to conduct the election safely, including when it comes to access to early or absentee voting.").

<sup>9</sup> Adam Harris, *The Voting Disaster Ahead: Intentional Voter Suppression and Unintentional Suppression of the Vote Will Collide in November*, ATLANTIC (June 30, 2020), <https://www.theatlantic.com/politics/archive/2020/06/voter-suppression-novembers-looming-election-crisis/613408/> ("The widespread failures during the primary elections foreshadow a potentially disastrous November election. States such as New York have been racing to make accommodations for voting by mail. But other states are making voting more difficult for residents . . ."); Michael D. Shear, Hailey Fuchs & Kenneth P. Vogel, *Mail Delays Fuel Concern Trump Is Undercutting Postal System Ahead of Voting*, N.Y. TIMES (Aug. 22, 2020), <https://www.nytimes.com/2020/07/31/us/politics/trump-usps-mail-delays.html> (noting that "President Trump's yearslong assault on the Postal Service and his increasingly dire warnings about the dangers of voting by mail are colliding as the presidential campaign enters its final months" and generating "new concerns about how he could influence an election conducted during a pandemic in which greater-than-ever numbers of voters will submit their ballots by mail").

<sup>10</sup> HASEN, *supra* note 2, at 127.

<sup>11</sup> *Id.* at 127-38.

<sup>12</sup> *Id.* at 127.

disputed election, even one held amid a pandemic and during a time of intense political polarization.

### I. HONEST VOTE COUNTING

The first reason for cautious optimism stems from the fact that the honesty and accuracy of American electoral administration has improved dramatically in the last fifty years. Although Professor Hasen is absolutely right that pockets of administrative incompetence still exist, the overall quality of election administration in all fifty states and the District of Columbia is far superior to the vote counting systems of previous eras.

Although politicians often boast of America's democratic heritage, the truth is election fraud plagued our democracy in the nineteenth century and much of the twentieth century. In the mid-1800s, for example, the Tammany Hall Democratic machine dominated New York City politics through a combination of blatant corruption and stolen elections.<sup>13</sup> Tammany Hall became most notorious under the leadership of William "Boss" Tweed, a man whose name was synonymous with democratic dysfunction.<sup>14</sup> He made no attempt to hide his dishonest tactics. After his arrest on corruption charges, Tweed admitted that his machine had routinely changed tallies to manipulate election outcomes.<sup>15</sup> When investigators asked him about specific acts of fraud during the particularly notorious 1868 election, Tweed replied, "I don't think there was ever a fair and honest election in the City of New York."<sup>16</sup>

Tammany Hall captured the public's imagination as the preeminent example of corrupt urban politics, but chronic fraud extended far beyond the big cities of the industrial northeast. The 1876 presidential race, for example, saw voter suppression and election fraud on an appalling scale in the ex-Confederate states.<sup>17</sup> Across the South, white-supremacist Democrats engaged in terroristic acts of political violence to prevent Black people from voting for Republicans.<sup>18</sup> In Hamburg, South Carolina, for example, a paramilitary group of Democrats

---

<sup>13</sup> See generally TERRY GOLWAY, MACHINE MADE: TAMMANY HALL AND THE CREATION OF MODERN AMERICAN POLITICS (2014).

<sup>14</sup> LEO HERSHKOWITZ, TWEED'S NEW YORK: ANOTHER LOOK 159 (1977) (explaining how Tammany Hall's opponents charged that "Tweed led the most degraded and unprincipled local government in the United States").

<sup>15</sup> *Id.* at 325.

<sup>16</sup> *Id.*

<sup>17</sup> EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 148 (2016) (noting that "one can sympathize with the plight of the Republicans as they confronted the prospects of losing the presidency solely because of rampant disenfranchisement of freedmen in violation of the Fifteenth Amendment").

<sup>18</sup> WILLIAM J. COOPER, JR. & THOMAS E. TERRILL, THE AMERICAN SOUTH: A HISTORY 417 (1990) ("The commission heard testimony that revealed that fraud, violence, and intimidation were common. It was obvious that the Democrats had cast the most ballots in each of the states. Equally obviously, they had also prevented large numbers of blacks from voting.").

murdered six Black people.<sup>19</sup> The governor of South Carolina warned President Grant that the Hamburg murders represented the first volley in South Carolina Democrats' bloody campaign to achieve the "political subjugation and control of the State."<sup>20</sup> The governor was right. In September 1876 several hundred white-supremacist Democrats murdered at least thirty Black people in Ellenton, South Carolina.<sup>21</sup> An observer in Edgefield County declared that "Democrats are riding through the county striking terror in the hearts of Republicans."<sup>22</sup> When Black people did manage to vote in the 1876 election, southern election authorities often changed the votes cast by Black voters from Republican to Democratic in a massive campaign of election fraud.<sup>23</sup> The 1876 election reflected a systemic pattern of racist election corruption that poisoned southern politics for nearly one hundred years. By driving Black people out of the political sphere in violation of the Fifteenth Amendment, white-supremacist violence and fraud tainted virtually every election in the ex-Confederate South from the Reconstruction Era until the adoption of the Voting Rights Act in 1965.<sup>24</sup>

The twentieth century also saw significant cases of election fraud in the Midwest. The Pendergast political machine in Kansas City provided a case in point. It dominated western Missouri politics in the early twentieth century, encouraging its members to vote "early and often."<sup>25</sup> Under the leadership of Tom Pendergast, the Democratic machine stuffed ballot boxes with fraudulent votes, paid voters for their support, intimidated the machine's opponents, and started brawls at polling places.<sup>26</sup> In 1937 the U.S. Attorney's Office in Kansas City indicted 278 members of the Pendergast machine "for conspiring to interfere with the right of citizens to vote in Kansas City."<sup>27</sup> Ultimately, juries rendered guilty verdicts for 259 of the defendants.<sup>28</sup> The national uproar over

<sup>19</sup> RICHARD ZUCZEK, *STATE OF REBELLION: RECONSTRUCTION IN SOUTH CAROLINA* 164 (1996).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 176.

<sup>22</sup> *Id.* at 175.

<sup>23</sup> ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 575 (1988) (noting that "throughout the Deep South, black belt Democrats either barred freedmen from the polls (Yazoo County recorded only two votes for Hayes) or stuffed the ballot boxes" to make it appear that Black people voted for Democrats).

<sup>24</sup> FOLEY, *supra* note 17, at 233 (explaining how adoption of the "Voting Rights Act of 1965 finally provided the procedural mechanisms necessary to secure the franchise for US citizens of African ancestry").

<sup>25</sup> LAWRENCE H. LARSEN & NANCY J. HULSTON, *PENDERGAST!*, at xi (William E. Foley ed., 1997) ("Thomas J. Pendergast reigned as the undisputed political boss of Kansas City, Missouri, during the Roaring Twenties and the beginning of the Great Depression."); DAVID MCCULLOUGH, *TRUMAN* 156 (1992).

<sup>26</sup> LARSEN & HULSTON, *supra* note 25, at 6-7, 29, 58-60, 93; MCCULLOUGH, *supra* note 25, at 157.

<sup>27</sup> LARSEN & HULSTON, *supra* note 25, at 126.

<sup>28</sup> *Id.*

Pendergast's crimes eventually reached as far as the White House. President Harry Truman began his political career as an ally of the Pendergast machine.<sup>29</sup> Without Pendergast's support, Truman would probably not have won election to the U.S. Senate from Missouri in 1934.<sup>30</sup> Although he never participated in any of Pendergast's crimes, the connection created a stigma that pursued Truman for the rest of his career.<sup>31</sup> When Franklin Roosevelt selected the Missouri senator as his running mate in 1944, the *Chicago Tribune* blasted Truman as "the pliant tool of Boss Pendergast."<sup>32</sup> Truman, however, refused to repudiate Pendergast. As Vice President, Truman even attended Pendergast's funeral.<sup>33</sup>

The most momentous example of election fraud in the twentieth century came during the 1960 presidential election between Vice President Richard Nixon and Massachusetts Senator John F. Kennedy. In the official results, Kennedy finished ahead of Nixon by about 118,500 votes out of nearly 69 million cast, which enabled the Massachusetts senator to carry a majority in the Electoral College.<sup>34</sup> Kennedy's Electoral College victory depended on his narrow defeat of Nixon in Illinois and Texas.<sup>35</sup> But allegations arose almost immediately that the Democratic Party machines in those states had manufactured thousands of votes out of thin air, thus corruptly delivering the election to Kennedy.<sup>36</sup> Whether the ballot-box stuffing made the difference in Kennedy's election will never be definitively known.<sup>37</sup> But the historical evidence is compelling that

---

<sup>29</sup> MCCULLOUGH, *supra* note 25, at 158-59.

<sup>30</sup> *Id.* at 211-12.

<sup>31</sup> *Id.* at 240 ("In all that was revealed by the investigations there was nothing to suggest any involvement with illegal activities on the part of Harry Truman.").

<sup>32</sup> *Id.* at 330-31.

<sup>33</sup> *Id.* at 336 ("He was photographed coming and going and paying his respects to the family, all of which struck large numbers of people everywhere as outrageous behavior for a Vice President—to be seen honoring the memory of a convicted criminal.").

<sup>34</sup> ROBERT DALLEK, *AN UNFINISHED LIFE: JOHN F. KENNEDY, 1917-1963*, at 294 (2003).

<sup>35</sup> *See* STEPHEN E. AMBROSE, *NIXON: THE EDUCATION OF A POLITICIAN, 1913-1962*, at 606 (1987).

<sup>36</sup> *Id.* ("Charges of fraud in Texas and Illinois were too widespread, and too persistent, to be entirely without foundation"); ROBERT A. CARO, *THE PASSAGE OF POWER: THE YEARS OF LYNDON JOHNSON 151-55* (2012); DALLEK, *supra* note 34, at 295 ("Daley's machine probably stole Illinois from Nixon (before the final tally was in, he reported Illinois for Kennedy), but Jack would have won even without Illinois."); EDMUND F. KALLINA JR., *COURTHOUSE OVER WHITE HOUSE: CHICAGO AND THE PRESIDENTIAL ELECTION OF 1960*, at 152 (1988) [hereinafter KALLINA, *COURTHOUSE OVER WHITE HOUSE*]; EDMUND F. KALLINA, JR., *KENNEDY V. NIXON: THE PRESIDENTIAL ELECTION OF 1960*, at 257-58 n.13 (2010) [hereinafter KALLINA, *KENNEDY V. NIXON*]; W.J. RORABAUGH, *THE REAL MAKING OF THE PRESIDENT: KENNEDY, NIXON, AND THE 1960 ELECTION 186-90* (2009).

<sup>37</sup> AMBROSE, *supra* note 35, at 606 ("No one can know . . . which of the two candidates the American people chose in 1960."); FOLEY, *supra* note 17, at 218; KALLINA, *COURTHOUSE OVER WHITE HOUSE*, *supra* note 36, at 166 ("No final resolution of the controversy over the presidential contest is possible. . . . The fact is no one can say with certainty who 'really'

fraud on a significant scale did indeed occur in Texas and Illinois.<sup>38</sup> Historians' doubts about the integrity of the 1960 presidential election powerfully demonstrate the flawed nature of the American election system deep into the twentieth century.<sup>39</sup>

The election system of the 2020s, however, is vastly superior to that of 1960. As Professor Hasen has persuasively argued, evidence of election fraud is extremely rare in the twenty-first century.<sup>40</sup> Indeed, a study by Professor Justin Levitt found only thirty-one potential incidents of voting fraud out of one billion ballots cast between 2000 and 2014.<sup>41</sup> Likewise, a 2015 study by the Electoral Integrity Project gave American election administration high marks for preventing fraud and accurately counting votes, even as the report sharply criticized American redistricting and campaign finance policies.<sup>42</sup>

The progress the United States has made in driving corruption out of election administration is impressive, and Americans should be proud of it. Ironically, however, polls indicate that the American people harbor pervasive fears that fraud and chicanery taint the election system, even as the vote counting process has become far more honest and accurate than before. A 2016 poll found that only 43% of Americans had "a great deal of confidence that their vote would be counted correctly."<sup>43</sup> The disconnect between the perception of rigged elections and the reality of fair elections is disconcerting. The history of election fraud—

---

carried Illinois in 1960.”).

<sup>38</sup> FOLEY, *supra* note 17, at 224; RORABAUGH, *supra* note 36, at 187-90.

<sup>39</sup> FOLEY, *supra* note 17, at 206 (explaining that in the 1940s, 1950s, and 1960s American elections witnessed “the deliberate stuffing of the ballot box in an effort to subvert the electorate’s choice”).

<sup>40</sup> See, e.g., HASEN, *supra* note 2, at 21-24; RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* 41-73 (2012); Richard L. Hasen, *Trump’s Bogus Attacks on Mail-in Voting Could Hurt His Supporters, Too*, WASH. POST (May 20, 2020, 1:40 PM), <https://www.washingtonpost.com/outlook/2020/05/20/trump-mail-vote-fraud/> (“[A]bsentee ballot fraud is very rare—there were 491 prosecutions related to absentee ballots in all elections nationwide between 2000 and 2012, out of literally billions of ballots cast.”).

<sup>41</sup> Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014, 6:00 AM), <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/>.

<sup>42</sup> Pippa Norris, *American Elections Ranked Worst Among Western Democracies. Here’s Why.*, CONVERSATION (Mar. 22, 2016, 5:57 AM) <https://theconversation.com/american-elections-ranked-worst-among-western-democracies-heres-why-56485> [<https://perma.cc/5L4X-S68T>] (“[V]oting processes were rated more favorably. Factors here included whether any fraudulent votes were cast, whether the voting process was easy, whether voters were offered a genuine choice at the ballot box, along with the vote count and post-election results.”).

<sup>43</sup> Giovanni Russonello, *Poll Shows Wide Fears that Ballots Won’t Count*, N.Y. TIMES, Oct. 25, 2016, at A22.

and the successful reforms adopted in recent decades to improve the quality and integrity of election administration—is a story that Americans need to know.<sup>44</sup>

While it is far from perfect, election administration in the United States today is far superior to what it was in the past. Accordingly, in the event of a razor-thin election, we can at least take solace from the fact that the votes will be counted far more honestly and accurately than in previous eras.

## II. THE ELECTORAL COLLEGE AS SAFEGUARD

The second reason for cautious optimism about our democracy's ability to weather a close election is the Electoral College. To be sure, the list of arguments against the Electoral College is long.<sup>45</sup> I share them. There are many reasons to abolish the Electoral College—an institution undemocratic by design. Foremost among them is the fact that five times in history it has produced a different winner than the nationwide popular vote, including in 2016.<sup>46</sup> Even more concerning, population distribution trends in future elections could increase the frequency of splits between the popular vote and the Electoral College.<sup>47</sup>

But the Electoral College has one redeeming quality: it dramatically reduces the size of the recount battlefield. Accordingly, deeply flawed though it is, the Electoral College provides a constitutional safeguard that reduces the likelihood of election meltdowns.<sup>48</sup>

The reason is because of the Electoral College's winner-take-all nature. In forty-eight of the fifty states (as well as the District of Columbia), electoral votes are awarded on a winner-take-all basis.<sup>49</sup> The only exceptions are Maine and

---

<sup>44</sup> HASEN, *supra* note 2, at 137 (proposing civics education that “includes discussions about the specific danger of loose talk about ‘stolen’ or ‘rigged’ elections without any proof or even basis in reality”).

<sup>45</sup> For the debate over the Electoral College, see generally EDWARD B. FOLEY, *PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE* (2020); ALEXANDER KEYSSAR, *WHY DO WE STILL HAVE THE ELECTORAL COLLEGE?* (2020); TARA ROSS, *WHY WE NEED THE ELECTORAL COLLEGE* (2019); JESSE WEGMAN, *LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE* (2020).

<sup>46</sup> Drew DeSilver, *Trump's Victory Another Example of How Electoral College Wins Are Bigger than Popular Vote Ones*, PEW RES. CTR.: FACTTANK (Dec. 20, 2016), <https://www.pewresearch.org/fact-tank/2016/12/20/why-electoral-college-landslides-are-easier-to-win-than-popular-vote-ones/> [<https://perma.cc/VY5G-9YAL>].

<sup>47</sup> Dan Balz, *More Popular Vote-Electoral College Splits May Be in Our Future*, WASH. POST (Apr. 14, 2018, 11:38 AM), [https://www.washingtonpost.com/politics/more-popular-vote-electoral-college-splits-may-be-in-our-future/2018/04/14/0d961dce-3f1a-11e8-8d53-eba0ed2371cc\\_story.html](https://www.washingtonpost.com/politics/more-popular-vote-electoral-college-splits-may-be-in-our-future/2018/04/14/0d961dce-3f1a-11e8-8d53-eba0ed2371cc_story.html).

<sup>48</sup> See generally Anthony J. Gaughan, *The Small Margins Problem: How Abolishing the Electoral College Could Create a Future Election Crisis*, 56 IDAHO L. REV. (forthcoming 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3585943](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3585943).

<sup>49</sup> *The Electoral College*, NAT'L CONF. ST. LEGISLATURES (July 6, 2020), <https://www.ncsl.org/research/elections-and-campaigns/the-electoral-college.aspx>



Nebraska, which award their electoral votes based on a combination of the statewide and congressional district results.<sup>50</sup> Thus, in the vast majority of states, a candidate receives all of a state's electoral votes regardless of whether the candidate wins by 1% of the vote or by 51% of the vote.

The winner-take-all nature of the Electoral College makes it unnecessary to confirm the precise vote totals in states where the candidates finish outside the recount margin. The trigger margin for automatic recounts in most states is less than 1%, and in some states it is as low as 0.1% or 0.25%.<sup>51</sup> In this highly polarized era, presidential race results in most states rarely come down to a margin of less than 1%.

In the 2016 presidential election, for example, only three states had a vote margin of 1% or less between Donald Trump and Hillary Clinton: Michigan (0.1%), New Hampshire (0.4%), and Wisconsin (1.0%).<sup>52</sup> In only three other states was the margin between Trump and Clinton less than 2%: Florida (1.2%), Pennsylvania (1.2%), and Minnesota (1.5%).<sup>53</sup> The other forty-four states (plus the District of Columbia) saw much larger margins separate the candidates.<sup>54</sup>

Indeed, in this age of red versus blue, most states see lopsided results in presidential elections. In California, for example, Clinton defeated Trump by more than 4.2 million votes.<sup>55</sup> In Oklahoma, Trump won with 65% of the vote.<sup>56</sup> In Massachusetts, Clinton beat Trump by over twenty-seven percentage points, 60% to 32.8%.<sup>57</sup> In Louisiana, Trump won by almost twenty percentage points, 58.1% to 38.4%,<sup>58</sup> and in North Dakota, he won by over thirty-five percentage points, 63% to 27.2%.<sup>59</sup> The point is clear: the Electoral College's focus on

---

[<https://perma.cc/76BW-BN74>].

<sup>50</sup> *Id.*

<sup>51</sup> *Automatic Recounts*, NAT'L CONF. ST. LEGISLATURES (Jan. 30, 2020), <https://www.ncsl.org/research/elections-and-campaigns/automatic-recount-thresholds.aspx> [<https://perma.cc/8EGY-GEZQ>].

<sup>52</sup> David Catanese, *The 10 Closest States in the 2016 Election*, U.S. NEWS (Nov. 14, 2016, 4:39 PM), <https://www.usnews.com/news/the-run-2016/articles/2016-11-14/the-10-closest-states-in-the-2016-election>.

<sup>53</sup> *Id.*

<sup>54</sup> *Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES (Aug. 9, 2017, 9:00 AM), <https://www.nytimes.com/elections/2016/results/president> [<https://perma.cc/Y62T-438Z>].

<sup>55</sup> *California Results*, N.Y. TIMES (Aug. 1, 2017, 11:22 AM), <https://www.nytimes.com/elections/2016/results/california> [<https://perma.cc/2A5K-PJ4K>].

<sup>56</sup> *Oklahoma Results*, N.Y. TIMES (Aug. 1, 2017, 11:22 AM), <https://www.nytimes.com/elections/2016/results/oklahoma> [<https://perma.cc/C6JT-P3DG>].

<sup>57</sup> *Massachusetts Results*, N.Y. TIMES (Aug. 1, 2017, 11:22 AM), <https://www.nytimes.com/elections/2016/results/massachusetts> [<https://perma.cc/5JTF-4XE8>].

<sup>58</sup> *Louisiana Results*, N.Y. TIMES (Aug. 1, 2017, 11:22 AM), <https://www.nytimes.com/elections/2016/results/louisiana> [<https://perma.cc/2WLV-HRCQ>].

<sup>59</sup> *North Dakota Results*, N.Y. TIMES (Aug. 1, 2017, 11:22 AM),

individual states has the effect of rendering the vast majority of state results uncontestable in presidential elections. We should welcome that fact, at least so far as we seek to avoid an election meltdown.

Take Iowa as an example. In 2016 Trump won Iowa by 800,983 votes to 653,669 votes for Clinton.<sup>60</sup> However, three months after Iowa certified its results, the auditor in Dallas County discovered that the county had inadvertently failed to report 5842 votes.<sup>61</sup> In the event of a nationwide popular vote for president decided by a razor-thin margin, the belated revelation of Iowa's missing votes could have caused a constitutional crisis. County election authorities did not discover the error until February 2017, two weeks after the presidential inauguration. But under the Electoral College system, Iowa's winner-take-all approach rendered the 5842 missing votes nothing more than a historical footnote. Trump would have carried Iowa even if all 5842 votes had gone to Clinton.

Even when the Electoral College system has experienced weeks-long, high-stakes recounts, the universe of battle has been relatively modest. For example, the 1876 election controversy concerned the results in Florida, Mississippi, Oregon, and South Carolina, and the 2000 election controversy only concerned the results in Florida. In the grand scheme of things, both election controversies remained manageable because the Electoral College contained the size of the partisan battlefield.

In contrast, under a nationwide popular vote, a close election would require a fifty-state recount as well as a recount in the District of Columbia. The spectacle of fifty-one recounts would be chaotic and potentially destabilizing. If the Florida example in 2000 is any guide, litigation would likely ensue in all fifty-one jurisdictions.<sup>62</sup> Indeed, with the precise vote total in every jurisdiction becoming crucially important, the campaigns would be incentivized to engage in scorched-earth legal tactics in each and every state. The cacophony of cases, motions, injunctions, and hearings could potentially drag on for months. And, unlike the 2000 election, when the Supreme Court only dealt with an election dispute under Florida state law and federal constitutional law, the justices in a nationwide recount would be confronted with fifty different and often conflicting bodies of state law. A nationwide train wreck could easily materialize as a result.

---

<https://www.nytimes.com/elections/2016/results/north-dakota> [https://perma.cc/NMT7-W32M].

<sup>60</sup> *Iowa Results*, N.Y. TIMES (Aug. 1, 2017, 11:22 AM), <https://www.nytimes.com/elections/2016/results/iowa> [https://perma.cc/LQ8M-KQQJ].

<sup>61</sup> Jason Noble, *Dallas County Failed to Report 5,842 Votes Cast in 2016 Election*, DES MOINES REG. (Feb. 8, 2017, 5:40 PM), <https://www.desmoinesregister.com/story/news/politics/2017/02/08/dallas-county-failed-report-5842-votes-cast-2016-election/97665238/>.

<sup>62</sup> On the Florida recount in 2000, see FOLEY, *supra* note 18, at 279-305.

Thus, although replacing the Electoral College with a national popular vote would be a victory for democratic principles, it would risk precisely the type of election meltdown Professor Hasen warns about. If we adopted a national popular vote without also adopting the reforms—such as uniform standards, updated election procedures, and transparent laws and regulations—that Hasen advocates, a nationwide popular vote recount would sow the seeds for a full-blown constitutional crisis. Accordingly, for the time being at least, we have reason to be grateful for the Electoral College.

### III. HISTORY OF MUDDLING THROUGH

A third reason for cautious optimism is the fact that the United States has had bitterly contested elections in the past and yet, each time, has found a way to muddle through to a solution. On three occasions in American history the losing candidate has had at least some cause to feel cheated by the result of the presidential race: the elections of 1876, 1960, and 2000.<sup>63</sup> Yet, none of them resulted in a democratic breakdown. In each case practical and legal realities compelled the aggrieved candidate to accept defeat.

The gravest election crisis in American history came in the 1870s, when sectional and partisan bitterness over the Civil War still ran deep. The 1876 election dispute concerned which candidate—New York Governor Samuel Tilden, the Democratic nominee, or Ohio Governor Rutherford B. Hayes, the Republican nominee—had carried four states: Florida, Louisiana, Oregon, and South Carolina.<sup>64</sup> The 1876 election dispute was decided when a congressionally appointed Electoral Commission voted eight-seven along partisan lines to award the disputed electoral votes to Hayes.<sup>65</sup> When House Democrats mounted a filibuster on March 1, 1877, to prevent Hayes from being inaugurated on March 4, the Democratic Speaker of the House Samuel Randall defied his own party and ruled the delaying tactics out of order.<sup>66</sup> The matter was definitively resolved on March 2 when Tilden conceded the race in a telegram to Randall.<sup>67</sup> Despite fears that the dispute might erupt into another Civil War, partisan tempers cooled quickly. After having survived the devastating conflict of the 1860s, Americans had little appetite for a resumption of hostilities in the 1870s.

Cooler heads also prevailed in 1960. Although Richard Nixon is remembered today as a lawbreaking President who resigned from the White House in disgrace in 1974, during the 1960 election controversy, he accepted his fate with

<sup>63</sup> *Id.* at 117-49 (discussing 1876 election dispute); *id.* at 217-28 (discussing evidence of fraud in 1960 election); *id.* 279-305 (discussing 2000 election dispute).

<sup>64</sup> *Id.* at 123-25.

<sup>65</sup> FONER, *supra* note 23, at 579-80.

<sup>66</sup> FOLEY, *supra* note 17, at 145 (“Randall’s role in averting a potential disaster has been significantly underappreciated . . .”); FONER, *supra* note 23, at 581 (“No one played a more critical part in resolving the crisis than Speaker Randall.”).

<sup>67</sup> FOLEY, *supra* note 17, at 117, 146 (“Randall received a telegram from Tilden saying that the candidate acquiesced in the completion of the count.”).

surprising grace. In the days after the election, the suspicion that the Democratic Party machines in Illinois and Texas had manufactured fraudulent votes put a cloud over John Kennedy's narrow election victory.<sup>68</sup> Many Republicans urged President Nixon to bring public attention to the alleged fraud by demanding recounts.<sup>69</sup> But President Nixon ultimately chose to bow to legal and practical realities. As he explained in his autobiography, "[W]hat if I demanded a recount and it turned out that despite the vote fraud Kennedy had still won? Charges of 'sore loser' would follow me through history and remove any possibility of a further political career. After considering these and many other factors, I made my decision and sent Kennedy a telegram conceding the election."<sup>70</sup> In fact, the most compelling reason for President Nixon to accept defeat was the lack of a recount procedure in Texas, a state dominated by the Democratic Party.<sup>71</sup> As Professor Edward Foley has observed, "Even if there had been a formal procedure available for Nixon to invoke, it would have been biased against him by the Texas Democrats, loyal to Johnson, who thoroughly controlled its operation."<sup>72</sup> Thus, Nixon had quite valid grounds for feeling robbed of a fair chance to reexamine the 1960 results. But he felt compelled by political and legal realities to abandon the idea of challenging the legitimacy of the election's outcome. Consequently, on January 20, 1961, the Republican Eisenhower Administration transferred power without incident to the Democratic Kennedy Administration.<sup>73</sup>

The 2000 election controversy lasted far longer—thirty-six days in all—but it also ended with a pragmatic concession of defeat.<sup>74</sup> The dispute arose from Texas Governor George W. Bush's extraordinarily narrow victory over Vice President Al Gore in Florida, a crucial state that gave the Texas governor a 271-267 victory in the Electoral College.<sup>75</sup> It initially appeared as though Bush had won a clear victory on election night. At 2:30 a.m. Eastern time, with Bush seemingly ahead in Florida by 60,000 votes, Gore called the governor to congratulate him on his victory.<sup>76</sup> But one hour later, with Bush's margin of

---

<sup>68</sup> AMBROSE, *supra* note 35, at 606; CARO, *supra* note 36, at 151-55; DALLEK, *supra* note 34, at 295; KALLINA, COURTHOUSE OVER WHITE HOUSE, *supra* note 36, at 152; KALLINA, KENNEDY V. NIXON, *supra* note 36, at 257 n.13; RORABAUGH, *supra* note 36, at 186-90.

<sup>69</sup> FOLEY, *supra* note 17, at 225-26.

<sup>70</sup> RICHARD NIXON, RN: THE MEMOIRS OF RICHARD NIXON 224 (1978).

<sup>71</sup> AMBROSE, *supra* note 35, at 606 ("A recount was never a possibility. It would have taken at least a year and a half in Cook County, Illinois, where Mayor Richard Daley had turned in an overwhelming Kennedy vote, and there were no provisions whatever for a recount in Texas."); NIXON, *supra* note 71, at 224.

<sup>72</sup> FOLEY, *supra* note 17, at 226.

<sup>73</sup> AMBROSE, *supra* note 35, at 608.

<sup>74</sup> See CORRESPONDENTS OF THE N.Y. TIMES, 36 DAYS: THE COMPLETE CHRONICLE OF THE 2000 PRESIDENTIAL ELECTION CRISIS (2001).

<sup>75</sup> See FOLEY, *supra* note 17, at 280.

<sup>76</sup> JEAN EDWARD SMITH, BUSH 124 (2016).

victory down to less than 2,000 votes and shrinking fast (Bush eventually ended up with only a 537-vote margin in Florida), Gore retracted his concession.<sup>77</sup> A five-week legal battle immediately ensued over recount procedures.<sup>78</sup> When the Supreme Court finally ended the Florida recount on December 12—effectively freezing in place Bush’s narrow lead in the state<sup>79</sup>—Gore accepted defeat and urged his supporters to do the same. In his concession speech, he eloquently explained why a defeated candidate must concede defeat: “I accept the finality of this outcome, which will be ratified next Monday in the Electoral College. And tonight, for the sake of our unity as a people and the strength of our democracy, I offer my concession.”<sup>80</sup> Although the Supreme Court’s decision in *Bush v. Gore*<sup>81</sup> elicited sharp condemnation by many observers,<sup>82</sup> the controversy did not disrupt the peaceful transfer of power from the Democratic Clinton Administration to the Republican Bush Administration on January 20, 2001.<sup>83</sup>

Thus, the United States has successfully weathered three major presidential election crises, two that involved serious allegations of cheating (1876 and 1960) and two that required weeks to resolve (1876 and 2000). Yet, in none of the cases did the election controversy cause lasting damage to the nation’s political stability. To be sure, the United States in the 2020s is a more divided—and thus more vulnerable—nation than it has been in decades. The reason is because political polarization in the United States has skyrocketed in the twenty years since the 2000 election.<sup>84</sup> For example, a 2017 report by the Pew Research Center revealed that partisan divisions over fundamental political values have reached record levels during Donald Trump’s presidency.<sup>85</sup> In addition, surveys

<sup>77</sup> FOLEY, *supra* note 17, at 280; SMITH, *supra* note 76, at 125.

<sup>78</sup> For the definitive account of the *Bush v. Gore* legal battle, see FOLEY, *supra* note 17, at 279-305.

<sup>79</sup> *Bush v. Gore*, 531 U.S. 98, 110-11 (2000).

<sup>80</sup> *Text of Gore’s Concession Speech*, N.Y. TIMES (Dec. 13, 2000), <https://www.nytimes.com/2000/12/13/politics/text-of-goreacutes-concession-speech.html> [<https://perma.cc/L3R7-TTW7>].

<sup>81</sup> 531 U.S. 98 (2000).

<sup>82</sup> See David Cole, *The Liberal Legacy of Bush v. Gore*, 94 GEO. L.J. 1427, 1429-30 (2006).

<sup>83</sup> Katharine Q. Seelye, *The Inauguration: The Departure*, N.Y. TIMES, Jan. 21, 2001, at 19.

<sup>84</sup> Jeffrey M. Jones, *Trump Job Approval Sets New Record for Polarization*, GALLUP (Jan. 16, 2019), <https://news.gallup.com/poll/245996/trump-job-approval-sets-new-record-polarization.aspx> [<https://perma.cc/B836-DZUE>].

<sup>85</sup> *The Partisan Divide on Political Values Grows Even Wider*, PEW RES. CTR. (Oct. 5, 2017), <https://www.pewresearch.org/politics/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider/> [<https://perma.cc/6LA6-NN3L>] (“The divisions between Republicans and Democrats on fundamental political values – on government, race, immigration, national security, environmental protection and other areas – reached record levels during Barack Obama’s presidency. In Donald Trump’s first year as president, these

in recent years have consistently found a disturbing increase in the level of personal animosity expressed by Democrats and Republicans for members of the opposing party.<sup>86</sup>

Yet, despite this era of toxic partisanship, bitterly disputed election results have not triggered a democratic breakdown in any state. For example, in 2008, Minnesota witnessed one of the closest and most acrimonious elections in its history.<sup>87</sup> In the days immediately following the November 2008 election, it appeared that the incumbent Republican U.S. Senator Norm Coleman had defeated the Democratic candidate Al Franken by 215 votes out of 2.9 million votes cast.<sup>88</sup> The close margin triggered an automatic recount.<sup>89</sup> In January 2009 the State Canvassing Board certified Franken as the winner by 225 votes.<sup>90</sup> The election dispute ended up before a three-judge court, which ultimately confirmed Franken's victory.<sup>91</sup> And, on June 30—almost eight months after the election—the Minnesota Supreme Court affirmed the three-judge court's findings.<sup>92</sup> In response, Coleman conceded defeat in dignified fashion, declaring: “The Supreme Court of Minnesota has spoken, and I respect its decision and will abide by the result . . . . It's time for Minnesota to come together under the leaders it has chosen and move forward. I join all Minnesotans in congratulating our newest United States senator: Al Franken.”<sup>93</sup>

The nation's democratic foundations have proved remarkably resilient even in two recent, high-profile elections marred by incendiary rhetoric and wild

---

gaps have grown even larger.” (citation omitted)).

<sup>86</sup> 8. *Partisan Animosity, Personal Politics, View of Trump*, PEW RES. CTR. (Oct. 5, 2017) (“Last month, a separate Pew Research Center study found that most Republicans and Democrats also had negative views of the *members* of the opposing party. Majorities in both parties rated each other ‘coldly’ on a 0-100 thermometer scale. Republicans and Democrats rated each other more coldly than they did in December 2016.” (citation omitted)), <https://www.pewresearch.org/politics/2017/10/05/8-partisan-animosity-personal-politics-views-of-trump/> [<https://perma.cc/U6B5-QWA8>]; *Political Polarization in the American Public*, PEW RES. CTR. (June 12, 2014) (“Republicans and Democrats are more divided along ideological lines – and partisan antipathy is deeper and more extensive – than at any point in the last two decades.”), <https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/> [<https://perma.cc/4MXQ-B54N>].

<sup>87</sup> See Patricia Lopez, *Tense Faceoff: Bitter to the Very End*, STAR TRIBUNE (Nov. 3, 2008, 11:34 AM) (“[T]he elbows-out, rough-edged nature of a Senate race that has been the longest, costliest and most brutally fought in state history.”), <https://www.startribune.com/final-u-s-senate-debate-a-punishing-verbal-slugfest/33731749/> [<https://perma.cc/R8DF-LN3F>].

<sup>88</sup> FOLEY, *supra* note 17, at 319.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 324.

<sup>91</sup> *Id.* at 330.

<sup>92</sup> *Id.*

<sup>93</sup> Josh Kraushaar & Manu Raju, *Coleman Concedes Race to Franken*, POLITICO (July 1, 2009, 11:02 AM), <https://www.politico.com/story/2009/06/coleman-concedes-race-to-franken-024383> [<https://perma.cc/56YF-4YBD>].

allegations. In 2018 Republican Brian Kemp narrowly defeated Democrat Stacey Abrams in the Georgia governor's race.<sup>94</sup> The Abrams campaign rightfully complained that Kemp, as the incumbent secretary of state, had implemented strict voter registration rules in a self-interested fashion.<sup>95</sup> But Abrams went beyond the evidence and clearly implied that the election had been stolen.<sup>96</sup> A similar episode unfolded in Kentucky one year later. In the 2019 Kentucky governor's race, Democrat Andy Beshear defeated the Republican incumbent, Matt Bevin.<sup>97</sup> After the election, Bevin claimed without evidence that "we know there have been thousands of absentee ballots that were illegally counted."<sup>98</sup> Bevin's baseless allegations elicited a storm of criticism. As Professor Joshua Douglas of the University of Kentucky warned, "[T]o throw around allegations of election irregularities without any proof at all is just really dangerous."<sup>99</sup>

But what is striking about the bitterly contested Georgia and Kentucky elections is that in both cases the controversies ended with a whimper. Bevin ultimately conceded defeat a few days after the election, acknowledging: "We're gonna have a change in the governorship based on the vote of the people, and what I want is to see the absolute best for Kentucky. I am not going to contest these numbers that have come in."<sup>100</sup> Abrams was less conciliatory. As late as April 2019—five months after the election—she still claimed that Republicans had "stole it [the 2018 election] from the voters of Georgia."<sup>101</sup> But in neither case did civil disorder result. The stability of the state governments in Georgia and Kentucky continued unabated. This history suggests that even in this intensely polarized era, America's democratic institutions continue to exhibit great resilience.

<sup>94</sup> Alan Blinder & Richard Fausset, *Democrat Ends Bid in Georgia for Governor*, N.Y. TIMES, Nov. 17, 2018, at A1.

<sup>95</sup> HASEN, *supra* note 2, at 116.

<sup>96</sup> *Id.*

<sup>97</sup> Campbell Robertson, *Bevin, Kentucky's Sharp-Elbowed Republican Governor, Concedes Race*, N.Y. TIMES, Nov. 15, 2019, at A14.

<sup>98</sup> Miles Parks, *Skeptics Urge Bevin to Show Proof of Fraud Claims, Warning of Corrosive Effects*, NPR (Nov. 10, 2019, 7:01 AM), <https://www.npr.org/2019/11/10/777300611/skeptics-urge-bevin-to-show-proof-of-fraud-claims-warning-of-corrosive-effects> [<https://perma.cc/RKY9-VJF9>]; see also Ben Tobin & Billy Kobin, *'Absurd' and 'Ridiculous': What Officials, Experts Say About Bevin's Voter Fraud Claims*, LOUISVILLE COURIER J. (Nov. 7, 2019, 6:40 PM), <https://www.courier-journal.com/story/news/politics/elections/kentucky/2019/11/07/kentucky-governor-election-fact-check-matt-bevins-voter-fraud-claims/2516391001/> [<https://perma.cc/ZRN6-KF2F>].

<sup>99</sup> Tobin & Kobin, *supra* note 98.

<sup>100</sup> Tim Craig, *Kentucky Gov. Matt Bevin, a Trump Ally, Concedes Reelection Bid*, WASH. POST (Nov. 14, 2019, 2:45 PM), [https://www.washingtonpost.com/national/kentucky-gov-matt-bevin-a-trump-ally-concedes-reelection-bid/2019/11/14/5dfed6d8-0715-11ea-ac12-3325d49eacaa\\_story.html](https://www.washingtonpost.com/national/kentucky-gov-matt-bevin-a-trump-ally-concedes-reelection-bid/2019/11/14/5dfed6d8-0715-11ea-ac12-3325d49eacaa_story.html).

<sup>101</sup> HASEN, *supra* note 2, at 116.

## IV. THE TRUMP FACTOR

But there is a powerful counterargument that can be summarized in two words: Donald Trump. America's history of successfully muddling through disputed elections may have no predictive value when it comes to the current occupant of the Oval Office. President Trump has consistently defied democratic norms and engaged in irresponsible rhetoric of the most reprehensible kind.<sup>102</sup> As just one example of many, Trump questioned the fairness and legitimacy of the upcoming November 2020 elections on at least ninety-one occasions during the first seven months of 2020.<sup>103</sup> In July 2020, Trump went so far as to suggest that he may not accept the results of the presidential election.<sup>104</sup> Two weeks later the president even floated the idea of postponing the November election because of his completely false allegations of voter fraud.<sup>105</sup>

There is simply no precedent for Trump. He is so far outside the historical mainstream that one can make no safe predictions about how he would respond to defeat. Trump's track record certainly gives no reason to assume he would show the same patriotic dignity as Tilden, Nixon, or Gore. After all, Trump has claimed that he was a victim of fraud even in an election that he *won*. After his Electoral College victory in 2016, he alleged without a shred of evidence that three to five million fraudulent ballots had been cast for his opponent, Hillary Clinton.<sup>106</sup> A member of Trump's own voter fraud commission later admitted that Trump's claims of widespread fraud during the 2016 election were

---

<sup>102</sup> See, e.g., *In His Own Words: The President's Attacks on the Courts*, BRENNAN CTR. FOR JUST. (Feb. 14, 2020), <https://www.brennancenter.org/our-work/research-reports/his-own-words-presidents-attacks-courts> [<https://perma.cc/X5VG-EYYP>].

<sup>103</sup> Susan B. Glasser, *Trump Is the Election Crisis He Is Warning About*, NEW YORKER (July 31, 2020), <https://www.newyorker.com/news/letter-from-trumps-washington/trump-is-the-election-crisis-he-is-warning-about>.

<sup>104</sup> Aamer Madhani, Colleen Long & Will Weissert, *Trump Not Ready to Commit to Election Results if He Loses*, WASH. POST (July 19, 2020, 10:34 AM), [https://www.washingtonpost.com/politics/trump-not-ready-to-commit-to-election-results-if-he-loses/2020/07/19/efbda26e-c9cc-11ea-99b0-8426e26d203b\\_story.html](https://www.washingtonpost.com/politics/trump-not-ready-to-commit-to-election-results-if-he-loses/2020/07/19/efbda26e-c9cc-11ea-99b0-8426e26d203b_story.html) (“President Donald Trump is refusing to publicly commit to accepting the results of the upcoming White House election . . . It is remarkable that a sitting president would express less than complete confidence in the American democracy's electoral process. But for Trump, it comes from his insurgent playbook of four years ago, when in the closing stages of his race against Hillary Clinton, he said he would not commit to honoring the election results if the Democrat won.”).

<sup>105</sup> Amy Gardner, John Dawsey & John Wagner, *Trump Encounters Broad Pushback to His Suggestion to Delay the Nov. 3 Election*, (July 30, 2020, 8:35 PM), [https://www.washingtonpost.com/politics/trump-floats-idea-of-delaying-the-november-election-as-he-ramps-up-attacks-on-voting-by-mail/2020/07/30/15fe7ac6-d264-11ea-9038-af089b63ac21\\_story.html](https://www.washingtonpost.com/politics/trump-floats-idea-of-delaying-the-november-election-as-he-ramps-up-attacks-on-voting-by-mail/2020/07/30/15fe7ac6-d264-11ea-9038-af089b63ac21_story.html).

<sup>106</sup> Abby Phillip & Mike DeBonis, *Without Evidence, Trump Tells Lawmakers 3 Million to 5 Million Illegal Ballots Cost Him the Popular Vote*, WASH. POST (Jan. 23, 2017, 8:05 PM), <https://www.washingtonpost.com/news/post-politics/wp/2017/01/23/at-white-house-trump-tells-congressional-leaders-3-5-million-illegal-ballots-cost-him-the-popular-vote/>.



“baseless.”<sup>107</sup> If Trump will falsely claim to be a victim of election fraud when he wins, we have every reason to assume that he will immediately claim fraud if he loses in November.

Nevertheless, notwithstanding the President’s history of irresponsible rhetoric, there is heartening evidence that the worst-case scenario can be avoided. In an uncharacteristically strong response, Republican elected officials overwhelmingly rejected Trump’s proposal to postpone the 2020 elections.<sup>108</sup> As Senate Majority Leader Mitch McConnell made clear in no uncertain terms: “Never in the history of this country, through wars, depressions and the Civil War, have we ever not had a federally scheduled election on time. We will find a way to do that again this November third.”<sup>109</sup>

House Republican Leader Kevin McCarthy was similarly emphatic, declaring: “Never in the history of federal elections have we ever not held an election and we should go forward with our election . . . .No way should we ever not hold our election on the day that we have it.”<sup>110</sup> Congressional Republican after congressional Republican likewise rejected the president’s suggestion. As Senator Charles Grassley of Iowa put it, “All I can say is that, it doesn’t matter what one individual in this country says. We still are a country based on the rule of law. And we must follow the law until either the Constitution is changed or until the law is changed.”<sup>111</sup>

The vigorously hostile Republican response to Trump’s reckless idea provides at least cautious grounds for hope. With the sole exception of Trump himself, the evidence suggests that our elected officials will—in the end—seek to maintain political stability in the event of a razor-thin 2020 presidential election. A full-fledged democratic collapse would serve no reasonable American’s interest.

<sup>107</sup> Ledyard King, *Trump’s Claims of Massive Voter Fraud Are Baseless, Election Integrity Panel Member Says*, USA TODAY (Aug. 5, 2018, 7:22 PM), <https://www.usatoday.com/story/news/politics/2018/08/04/donald-trumps-widespread-voter-fraud-claim-untrue-election-official/905262002/> [<https://perma.cc/284D-RWX8>].

<sup>108</sup> Andrew Desiderio, *Republicans Flat-Out Reject Trump’s Suggestion to Delay Election*, POLITICO (July 30, 2020, 4:51 PM), <https://www.politico.com/news/2020/07/30/trump-delay-election-gop-388290> [<https://perma.cc/R2N7-SUHZ>].

<sup>109</sup> *Republicans to Trump: You Can’t Delay 2020 Election*, BBC (July 31, 2020), <https://www.bbc.com/news/world-us-canada-53599363> [<https://perma.cc/4DNL-4BHD>].

<sup>110</sup> Clare Foran & Manu Raju, *Republicans Openly Challenge Trump’s Tweet on Delaying Election*, CNN POL. (July 30, 2020, 2:53 PM), <https://www.cnn.com/2020/07/30/politics/trump-election-tweet-republican-reaction/index.html> [<https://perma.cc/YG7A-PYC7>].

<sup>111</sup> *Id.*

## CONCLUSION: A HEALTHY DEMOCRACY

The United States has experienced a democratic breakdown only once in its history: the Civil War.<sup>112</sup> Approximately 750,000 Americans died in the Civil War in fighting that raged from Pennsylvania to Texas.<sup>113</sup> Nevertheless, despite the chaos, the northern and border states administered free and fair federal and state elections throughout the war. The parties hotly contested the elections and many Democrats engaged in rhetoric that undermined the war effort.<sup>114</sup> Ohio Congressman Clement Vallandigham even called on foreign powers to intervene in the war on the side of the Confederacy.<sup>115</sup> Yet, American democracy carried on. Lincoln won reelection in 1864 in one of the most momentous elections in history.<sup>116</sup> The key point is American democracy—in all its messiness—worked in the 1860s under the most extreme pressures imaginable.<sup>117</sup> As Lincoln himself put it, the 1864 election “demonstrated that a people’s government can sustain a national election, in the midst of a great civil war.”<sup>118</sup>

The same was true of the 1918 elections, conducted during the deadliest pandemic in modern history.<sup>119</sup> In 1918 an H1N1 virus (described inaccurately at the time as “Spanish Influenza”) killed 675,000 Americans and cost the lives of over 50 million people worldwide.<sup>120</sup> Amid the pandemic crisis, the country held the 1918 midterm elections. Although the midterms saw a decline in voter turnout and some states struggled with administrative problems, a study by Jason Marisam concluded that “surprisingly, in most places the election was held with relatively few complications.”<sup>121</sup> Indeed, to a remarkable degree, the 1918

---

<sup>112</sup> DEP’T VETERANS AFF., AMERICA’S WARS (2019), [https://www.va.gov/opa/publications/factsheets/fs\\_americas\\_wars.pdf](https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf) [<https://perma.cc/F77M-R4PL>].

<sup>113</sup> Guy Gugliotta, *New Estimate Raises Civil War Death Toll*, N.Y. TIMES, April 3, 2012, at D1.

<sup>114</sup> DAVID HERBERT DONALD, LINCOLN 416 (1995); JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 592 (1988).

<sup>115</sup> DONALD, *supra* note 114, at 416.

<sup>116</sup> MCPHERSON, *supra* note 114, at 805.

<sup>117</sup> DONALD, *supra* note 114, at 544 (“The election went off smoothly.”).

<sup>118</sup> ABRAHAM LINCOLN, *Response to a Serenade*, in 8 COLLECTED WORKS OF ABRAHAM LINCOLN 100, 100-01 (Roy Basler ed., 1953).

<sup>119</sup> See *History of 1918 Flu Pandemic*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 21, 2018), <https://www.cdc.gov/flu/pandemic-resources/1918-commemoration/1918-pandemic-history.htm> [<https://perma.cc/8PR5-EDB6>].

<sup>120</sup> *1918 Pandemic (H1N1 Virus)*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 20, 2019), <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html> [<https://perma.cc/4E8S-HQVS>]; see also Richard Gunderman, *10 Misconceptions About the 1918 Flu, the ‘Greatest Pandemic in History,’* CONVERSATION (Mar. 17, 2020, 3:27 PM), <https://theconversation.com/10-misconceptions-about-the-1918-flu-the-greatest-pandemic-in-history-133994> [<https://perma.cc/B9WL-8Z2M>].

<sup>121</sup> Jason Marisam, *Judging the 1918 Election*, 9 ELECTION L.J. 141, 141 (2010).

election results looked like a normal midterm.<sup>122</sup> Accordingly, Marisam notes, “There was no national debate about the legitimacy of the election results.”<sup>123</sup> The election produced a peaceful transfer of power from the incumbent Democrats—who lost control of both houses of Congress—to the Republicans.<sup>124</sup>

When viewed in historical context, therefore, America’s democratic foundations look much stronger and more robust than the overheated partisan rhetoric of the 2020 campaign would otherwise suggest. Most important of all, American democracy is far more inclusive today than it was for much of the nation’s history. Women did not possess full suffrage rights in all states until the adoption of the Nineteenth Amendment in 1920. Black people in the South only truly realized the Fifteenth Amendment right to vote with the adoption of the Voting Rights Act in 1965. And prior to the 1970s, Presidents could send eighteen-, nineteen-, and twenty-year-old Americans to fight and die on battlefields around the globe even though those same young adults could not vote in most elections.<sup>125</sup> By virtually every measure, therefore, the quality of American democracy is vastly superior to what it was 50 or 100 or 200 years ago.

Accordingly, the history of American democracy should be a central part of the civics education that Professor Hasen proposes.<sup>126</sup> As he puts it so well in *Election Meltdown*:

In the end, this form of civics education aims to convince the American public that what unites us and helps us thrive is our multi-faceted plural democracy, in which losers respect fair election outcomes and vow to fight another day, and that our democracy’s value is much greater than the issues dividing us.<sup>127</sup>

To be sure, the partisan rancor of this acrimonious era is deeply troubling and profoundly disheartening. But we should not overlook the abiding strength of American democracy. Although the dangers we face as a nation in the 2020s are all too real, there is nevertheless reason for cautious optimism that American democracy will continue to display resilience and a robust capacity for growth and improvement.

---

<sup>122</sup> JOHN MILTON COOPER, JR., *PIVOTAL DECADES: THE UNITED STATES, 1900–1920*, at 313 (1990) (“[N]ormal midterm attrition accounted for most of the shifts, while sectional issues played a role again in many contests.”).

<sup>123</sup> Marisam, *supra* note 121, at 141.

<sup>124</sup> COOPER, *supra* note 122, at 313.

<sup>125</sup> *Oregon v. Mitchell*, 400 U.S. 112, 117-19 (1970); *cf.* U.S. CONST. AMEND. XXVI (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”).

<sup>126</sup> The foremost work on this subject is ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000).

<sup>127</sup> HASEN, *supra* note 2, at 138.