ADVERSARIAL ELECTION ADMINISTRATION*

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As Americans, we are conditioned to believe that involving partisans in the administration of elections is inherently problematic. Understandably. The United States is a major outlier; virtually every other developed democracy mandates nonpartisan election administration. Whether on the left or right—especially since the 2020 election—we are barraged with headlines about actual or feared partisanship on the part of those who run our elections. What this narrative misses, however, is a crucial and underrecognized fact: by design, partisans have always played central roles at every level of U.S. election administration. What is more, partisans are baked into the U.S. election process for lofty reasons. Placing rival partisans in the election process increases transparency, enhances accountability, and (in theory) improves public trust in outcomes. Rival partisans populate election administration for the same reason we rely on the adversarial process in court: adversarialism leads to outcomes in which members of the public are more likely to abide. As with the justice system, adversarial election administration is not a perfect formula. But the better we understand the mechanisms of rival partisanship in election administration, the better our chances of improving them. This Article takes on this task, examining the history of adversarial election administration in the United States, describing how adversarial actors function in modern U.S. elections, and suggesting how states might better leverage adversarial election administration to bolster transparency, boost accountability, and secure election outcomes voters can trust.

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INTRODUCTION

> "Limited to their true sphere, and acting by open, honest methods, parties may, with great advantage, serve the people and the state."
>
> Dorman B. Eaton, 1887

The United States stands as an outlier in its approach to administering elections. Other advanced democracies rely on neutral bureaucrats to run them.[1]

1. *See* Daniel P. Tokaji, *Comparative Election Administration: A Legal Perspective on Electoral Institutions*, *in* COMPARATIVE ELECTION LAW 436, 439 (James A. Gardner, ed., 2022) [hereinafter Tokaji, *Comparative Election Administration*] (noting that sixty-three percent of countries follow a model in which the electoral management body is independent of the rest of government). U.S. election administration occupies a unique space when compared to other countries:

> Constitutionally independent bodies run elections in more than seventy countries, and many others rely on technocratic government agencies distanced in some manner from political influence. The U.S. is the only country that elects most of its election officials, and one of very few to allow high-ranking party members to lead election administration.

Grace Gordon, Matthew Weil, Al Vanderklipp & Kevin Johnson, *The Dangers of Partisan Incentives for Election Officials*, BIPARTISAN POL'Y CTR. (Apr. 6, 2022), https://bipartisanpolicy.org/report/the-dangers-of-partisan-incentives-for-election-officials/ [https://perma.cc/H9Y7-H9DL]. In international circles, a centralized, independent electoral management body is seen as a critical foundation for electoral legitimacy. *See, e.g.*, COUNCIL OF EUR., EUR. COMM'N FOR DEMOCRACY THROUGH LAW (VENICE COMM'N), CODE OF GOOD PRACTICE IN ELECTORAL MATTERS: GUIDELINES AND EXPLANATORY REPORT 10 (2002) (noting that "[a]n impartial body must be in

In contrast, U.S. states deliberately place partisans at all levels of the election process. The long-held consensus is that involving overt partisans in election administration undermines U.S. democracy.[2] Amidst a growing chorus of concern from both the political Right and Left about partisans running U.S. elections, this Article offers a counternarrative, pointing out that designers of state election systems purposefully populate elections with partisans at every level.[3] While high-profile examples of partisan behavior by election officials have tainted public perception of fairness in election administration, this Article argues that rival partisan involvement in election administration is underappreciated and underexplored.

As discussed more fully below, prominent election law scholars have danced around this idea. Heather Gerken concludes that when it comes to electoral reform bodies, removing partisans from the process bears risk.[4] Justin Levitt argues convincingly that we should think of partisanship in election administration on a spectrum, noting that while some forms of partisan behavior are worrisome, other forms are beneficial.[5] And even Daniel Tokaji—long a crusader against partisan election administration—has recently suggested that reformers should not strive for politically independent election administration, but rather *impartial* election administration.[6] This Article crystallizes these ideas

charge of applying electoral law" and that "where there is no longstanding tradition of administrative authorities' independence from those holding political power, independent, impartial electoral commissions must be set up at all levels, from the national level to polling station level"); *see also* Sarah Birch, *Electoral Institutions and Popular Confidence in Electoral Processes: A Cross-National Analysis*, 27 ELECTORAL STUD. 305, 308 (2008) (noting that "[a]mong practitioners in the fields of electoral assistance and observation, independent central electoral commissions have come to be regarded as the hallmark of accountable electoral administration"). Richard Pildes credits American exceptionalism in this respect to "widespread skepticism in American political culture, across the political spectrum, about whether it is actually possible to fashion sufficiently independent and nonpartisan institutions to deal with elections." *See* Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 80 (2004).

2. For an early example of this view, see JOSEPH P. HARRIS, ELECTION ADMINISTRATION IN THE UNITED STATES 9 (1934) ("The time has arrived to discard the whole theory of bipartisanship and elections, and to set up instead a responsible election organization in which the active partisan is debarred.").

3. Others have hinted at this reality:

> Whereas democratic best practices would insulate election mechanics from partisanship, the United States substitutes a nonprofessional administration that is bipartisan, not nonpartisan. Perhaps this is not the platonic ideal, but it has generally been good enough to muddle through. So long as each of the major parties could vigilate the other, a commitment to electoral competition, repeat play, and basic values of popular sovereignty kept temptations to cheat reasonably at bay.

Samuel Issacharoff, *Weaponizing the Electoral System*, 74 STAN. L. REV. ONLINE 28, 31–32 (2022).

4. *See* Heather K. Gerken, *The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics*, 6 ELECTION L.J. 184, 184 (2007).

5. *See* Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787, 1791 (2014).

6. Tokaji, *Comparative Election Administration*, *supra* note 1, at 454.

and offers a qualified defense of partisan election administration. It does so urgently: high levels of distrust in our election process post 2020 and fears that Republicans or Democrats (depending on the political foe) cannot be trusted to run a fair election have fueled threats and harassment of election officials of all political stripes. Experienced election officials are national treasures with invaluable institutional knowledge states cannot afford to lose. The way forward requires checking knee-jerk assumptions that election officials' partisan leanings automatically render them unfit (or worse, merit attack). This Article argues that partisan actors within our election system are underappreciated for the critical role they play *as partisans* in strengthening public faith in election outcomes.

To be sure, there are powerful arguments in favor of nonpartisan election administration.[7] Strong international consensus behind nonpartisan election administration exists for a reason: the long history of partisan mischief corrupting election outcomes in democracies around the world. While acknowledging that in a perfect world technocrats lacking a hint of partisan leaning would administer U.S. elections, this Article explores the system U.S. states have pursued in the alternative, to varying degrees of success: leveraging *rival* partisanship in a variety of ways to ensure transparency, buttress accountability, and secure partisan buy-in. Using examples from multiple states, this Article endeavors to supply a broad picture of the types of roles partisans play in U.S. election administration in different states. Given the current alarming lack of confidence in our system of elections, it has never been more important to shine a light on adversarial election administration and its contributions to buttressing confidence in electoral outcomes.

This Article proceeds in four parts. Part I reviews the history of partisan election administration to examine why states evolved election systems that routinely relied on overt partisan administrators, and where these mechanisms fell short over the course of U.S. history. Part II reviews modern-day placement of partisans in election roles and highlights the function of partisans in diffusing and fragmenting power, encouraging partisan buy-in, and increasing transparency in administrative decision-making. Part III examines the limits of the adversarial model. Finally, Part IV traces arguments in favor of partisan

7. "Nonpartisanship" is understood here as an "area of civic or patriotic interests where party or ideological difference never arises." WILLIAM SAFIRE, SAFIRE'S POLITICAL DICTIONARY 476 (5th ed. 2008). "Bipartisanship" takes place when "politicians set aside differences to work together on political matters." *Id.* at 54. Neither model imagines a role for partisans as partisans. In the *adversarial* model of election administration, as imagined here, individuals as explicit partisans perform roles acting on partisan motivations. As an example, imagine a recount room staffed by one Republican and one Democrat at each table examining contested ballots for voter intent. The two workers are not "setting partisanship aside." Rather, their rival partisan status functions as an explicit check so that process fairness is achieved and, as importantly, members of both parties and the public at large perceive process fairness.

election administration and suggests that intentionally staffing elections with partisans, when thoughtfully designed, can serve important goals.

I. THE HISTORY OF PARTISAN ELECTION ADMINISTRATION IN THE UNITED STATES

A. *Political Parties and Democratic Theory*

Early democratic theorists wrestled with how governments might best contend with competing interests. As political philosopher Jane Mansbridge describes in her book, *Beyond Adversary Democracy*,

> Over the generations the idea gradually gained acceptance that a democracy should weigh and come to terms with conflicting selfish interests rather than trying to reconcile them or make them subordinate to a larger common good. John Locke, in the treatise that would inspire the framers of the American Constitution . . . has men unite in political society chiefly in order to protect their property against others, and he defends majority rule on the grounds that it is required by the contrariety of interests, which unavoidably happen in all collections of men. By the next century, the framers of the American Constitution explicitly espoused a philosophy of adversary democracy built on self-interest.[8]

This idea—bringing adversarial interests together to forward the public good—forms the essence of democratic ordering. Even theorists widely credited with antiparty resoluteness acknowledged their role. For example, John Stuart Mill, often credited with a distaste for political parties, in fact recognized an important place for "fruitful political antagonism."[9]

Building on these foundations, the American system of government abounds with diffused and fragmented—and purposefully adversarial—power structures in nearly every facet, from its justice system[10] to its approach to

8. JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 16 (1983). Needless to say, this spirit of adversarialism also imbues the American judicial system, relying on adversarial processes to achieve justice. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089–90 (1984) ("Adjudication American-style is not a reflection of our combativeness but rather a tribute to our inventiveness and perhaps even more to our commitment [to justice]."). For a thoughtful critique of the adversarial justice system and problems with the adversarial model in general, see Carrie Menkel-Meadow, *The Trouble with the Adversarial System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 5–12 (1996).

9. *See* Bruce L. Kinzer, *J.S. Mill and the Problem of Party*, 21 J. BRIT. STUD. 106, 107 (1981) (noting that John Stuart Mill "did not envisage a political system free from party conflict; rather, he wanted the petty party warfare, empty of ideological content, of his own day to give way to fruitful political antagonism").

10. *See* Martin H. Redish, *The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953-1971*, 51 DEPAUL L. REV. 359, 364–67 (2001) (noting that the

environmental law.[11] In this sense, adversarial partisanship in election administration may be an outlier with respect to other countries, but it is deeply ordinary and familiar in the American context.

Despite the Framers' contempt for political parties[12] and continued public distaste for them thereafter,[13] some credit the rise of strong political parties for the vibrancy of U.S. democracy. Richard Hofstadter describes reliance on the adversarial model that took root in the Jacksonian era:

> It was foolish to expect free men to exist in politics without contention, and it was best that contending forces stand clear and apart. The existence of parties must be understood not merely in the old way as a sign that freedom existed but as a guarantee that it would continue to exist.[14]

Writing in 1942, E.E. Schattschneider argued that far from something to be sidelined or overcome, political parties "created democracy."[15] According to Schattschneider, "modern democracy is a byproduct of party competition."[16] Nancy Rosenblum likewise offers a full-throated defense of partisanship as a

adversarial justice system provides a lower-stakes ground for conflict resolution, which a multicultural democratic society needs to function); David Barnhizer, *The Virtue of Ordered Conflict: A Defense of the Adversary System*, 79 NEB. L. REV. 657, 658–63 (2000) (describing the virtue of the adversarial system as a stable method of conflict resolution); Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1389–90, 1389 n.83 (2008) (arguing that the adversarial system offers a way for heterogeneous societies to resolve tensions over seemingly settled public values); Gerald Walpin, *America's Adversarial and Jury Systems: More Likely To Do Justice*, 26 HARV. J.L. & PUB. POL'Y 175, 183 (2003) (noting the great strength of the adversarial system is that it allows the clash of two ideas of truth so that the better one may win out in a way acceptable to both sides).

11. *See* Kathryn Caballero, *Preventing Emissions from Slipping Through the Cracks: How Collaboration on New Technologies To Detect Violations and Minimize Emissions Can Efficiently Enforce Existing Clean Air Act Regulations*, 37 J. ENV'T L. & LITIG. 1, 10 (2022) (citing Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture and Citizen Suits*, 21 STAN. ENV'T L.J. 81, 96 (2002)) (contrasting the adversarial versus cooperative approach to environmental regulation).

12. *See generally* THE FEDERALIST NO. 10 (James Madison); *see* RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM, 1780-1840, at 54–73 (1969) (discussing the Framers' contempt for political parties). George Washington himself was no fan of political parties: "[They] serve[] always to distract the public councils and enfeeble the public administration." George Washington, Farewell Address (Sept. 17, 1796), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 40, 219 (James D. Richardson ed., Washington, Gov't Printing Off. 1896–99).

13. *See* NANCY L. ROSENBLUM, ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP 172 (2008) (describing how the historical (and present) distaste for political parties has "one constant . . . secure footing" where "politics is at the heart of the problem and parties are confidently cast as the agents of corruption . . . [t]hey are the principal objects in need of reform or, better, abolition").

14. HOFSTADTER, *supra* note 12, at 250–51. He continued, "Hardened partisans would expose the crimes, and even the failings, of competitors for the people's confidence." *Id.* at 251.

15. E.E. SCHATTSCHNEIDER, PARTY GOVERNMENT 1 (1942) ("It should be stated flatly at the outset that this volume is devoted to the thesis that the political parties created democracy and that modern democracy is unthinkable save in terms of the parties.").

16. *Id.* at 4.

pillar of democratic functioning.[17] She writes: "The justification for popular parties before parties were justified was to champion 'the democracy' against the encroachment of 'aristocrats' or 'monocrats,' 'the money power,' or a 'power elite' or 'establishment,' all exercising undue influence."[18] According to Rosenblum, partisans "do not withdraw, detach, and passively or cynically leave democracy to others . . . all this makes partisanship the political identity distinctive of representative democracy, and connects partisanship with the practice of democratic citizenship."[19]

B. *Political Parties and Early U.S. Elections*

Political party domination of the machinery of elections is a feature of early U.S. elections that persists in varying degrees to this day.[20] In Colonial Era elections, local officials would publicize elections, and eligible voters would then gather and cast their votes.[21] Who voted was severely constricted,[22] and many jurisdictions did not ballot (using *viva voce* (voice) voting instead).[23] By the 1800s, as the franchise expanded and paper balloting became the norm, political parties—or, more accurately, party agents—played an increasingly central role in distributing ballots to voters.[24] Political parties orchestrated who administered elections by placing temporary workers assembled to collect and tally the votes on Election Day (often referred to as "election judges").[25] State legislatures in the 1800s supported partisan control of the election process, but periodically issued mandates against one-party domination of the process. Pennsylvania's Act of 1839, for example, "aimed to put an end to the increasing struggle between the parties to secure control of the election boards by

17. *See* ROSENBLUM, *supra* note 13, at 172.

18. *Id.* at 211.

19. *Id.* at 457.

20. *See* Jay Goodliffe, Paul S. Hernson, Richard G. Niemi & Kelly D. Patterson, *The Enduring Effects of State Party Tradition on the Voting Experience*, 19 ELECTION L.J. 45, 46 (2020) (describing a "systematic relationship between a state's contemporary electoral practices and the historical strength of its party organizations").

21. KATHLEEN HALE, ROBERT MONTJOY & MITCHELL BROWN, ADMINISTERING ELECTIONS: HOW AMERICAN ELECTIONS WORK 30 (2015).

22. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 8–15 (2000) (discussing rationales for dramatically limiting the right to vote to propertied, white males upon the founding).

23. One account refers to a related method of increasing the accountability and reliability of elections, "supervision by publicity." In this method, election officials would speak aloud the names of voters, names would then be entered by clerks, and the voter's name would be checked as having voted on the "list of taxables." *See* EDWARD BATES LOGAN, SUPERVISION OF THE CONDUCT OF ELECTIONS AND RETURNS 6 (1927).

24. *See* RICHARD FRANKLIN BENSEL, THE AMERICAN BALLOT BOX IN THE MID-NINETEENTH CENTURY 30–35 (2004). Political parties printed ballots in bright colors enabling onlookers to see where each voter's loyalty lay. *See id.* at 30–31.

25. LOGAN, *supra* note 23, at 4–5.

providing a method of election to secure bipartisan representation among the election officers at the polling place."[26] Pennsylvania was the first state to push for the adversarial election model with other states like New Jersey and New York following its lead soon after.[27]

According to Richard Bensel, who compiled a comprehensive description of nineteenth-century American polling places, political parties played a central role in all aspects of election administration. Election judges, chosen as representatives of the major parties, assessed voters' eligibility in the absence of voter registration lists.[28] Eighteenth century election designers assumed *rival* partisans would keep each other in check. As Bensel describes, "Sometimes there were two, sometimes, three [election judges], but they were almost always drawn from opposing parties."[29]

Political parties also placed challengers at polling places, "chosen from the ranks of party professionals who had resided in the community for years [and thus] knew many of the voters on sight including their party allegiance, residency, status, and age."[30] Political parties relied on adversarial challengers both as a deterrent against the opposing side bringing ineligible voters to the polls and to prevent those voters from casting ballots if they did.[31] In this way, the administration of nineteenth-century U.S. elections was not partisan at the periphery. Rather, political parties—by distributing ballots, appointing judges, and placing challengers—put rival interests at the center of the election process.[32]

26. *Id.*

27. *Id.* at 5 ("Pennsylvania was foremost in making use of the bipartisan method of supervision. Such a method was not adopted in New Jersey until 1876 . . . . The bipartisan method of supervision was adopted in New York in cities, excepting New York City, in 1892.").

28. BENSEL, *supra* note 24, at 18.

29. *Id.*

30. *Id.* at 19. Rhode Island adopted the first challenger law as a colony in 1742; New York passed its first challenger law during the Revolutionary War. NICOLAS RILEY, BRENNAN CTR. FOR JUST., VOTER CHALLENGERS 7 & 25 n.33 (2012), https://www.brennancenter.org/sites/default/files/legacy/publications/Voter_Challengers.pdf [https://perma.cc/9NVY-TJ69].

31. *See* BENSEL, *supra* note 24, at 18 ("[C]hallengers could, as the law allowed, 'challenge' the right of a voter to cast his ticket if they doubted that the voter satisfied the suffrage qualifications of the state.").

32. As a caveat, describing "how elections were run" in early American history is to some extent folly. As Alec Ewald describes, "Even regional generalizations are hard to make, for the most striking features of the history of balloting in late colonial America—and later the young United States—are its variation and nonlinear development." ALEC EWALD, THE WAY WE VOTE: THE LOCAL DIMENSION OF AMERICAN SUFFRAGE 22 (2009).

Historians describing political party patronage of election administration in the 1800s noted that men who served as agents of political parties were likely motivated more by monetary gain than political belief.[33] As Bensel describes,

> Money and patronage motivated many of the party agents who distributed tickets, challenged opposition voters, and served as election officials behind the voting window. Although they tended to work only with candidates of a single party, many of these agents were otherwise more or less freelance operatives who offered their services for a fee.[34]

Corrupt incentives of party agents were hardly the only unseemly aspect of nineteenth-century U.S. elections. Accounts of voting during this period are full of drunken mayhem and violence. Bensel colorfully referred to the street or square outside the polling place as an "alcoholic festival" where "men were clearly and spectacularly drunk."[35] Referencing the violence that often took place, Edward Bates Logan described the voting scene in Philadelphia during that era:

> When the population of the ward was large and the election an important one there was often great struggling among the voters to reach the polling window, especially during the last hours of voting. Pushing and jostling led to angry recriminations and finally to blows, and the strife would soon spread out to the mass of the people in the street, during which excitement fists, canes, umbrellas, or whatever instruments of offense where handy, were used, while hats, coats, and apparel were torn to rags. And when the melee was over the combatants, bloody with blackened eyes and torn and disheveled hair, would manage to get out of the throng and sneak homeward.[36]

Legal mandates for adversarial election administration often failed to accomplish their purpose, in large part because dominant political machines—particularly in urban centers—captured total control of election administration. For example, by 1868, the Philadelphia Republican machine "had the majority

33. *See* FRANCES FOX PIVEN & RICHARD A. CLOWARD, WHY AMERICANS DON'T VOTE 36–41 (1988) (describing the vast expansion of political patronage in mid-nineteenth-century America and the rise of party "machines" particularly in urban areas).

34. BENSEL, *supra* note 24, at 63.

35. *Id.* at 20.

36. LOGAN, *supra* note 23, at 4; *see also* BENSEL, *supra* note 24, at 57–63. One of the principal arguments against women's suffrage had been that polling places were too raucous for tender feminine sensibilities. *See* HARRIS, *supra* note 2, at 20. In 1934, Joseph Harris wrote: "One of the leading arguments used against woman suffrage was that no woman of refinement or culture would care to venture near the polls on the day of election, for 'it was not a fit place for women.' Happily, this has practically passed." *Id.*

of the board and a minority of its own choice."[37] Partisan consolidation of power meant that even where law and custom required bipartisan representation in various aspects of election management, the dominant party called the shots. This reality, combined with widespread vote buying, "repeat voting," and other ills, led to an off-the-rails election system.[38]

Single-party domination of election administration also propelled racist exclusion of Black voters and other minorities from Reconstruction through (and well after) Jim Crow.[39] For most of this country's history, election administration laws and norms in the South diverged from the rest of the country.[40] Federal constitutional and statutory commands following the Civil War proved incapable of preventing discrimination in voting in southern states. In 1875, the U.S. Supreme Court explicitly blessed racial discrimination in election administration by refusing to uphold prosecution under the federal Enforcement Act of two local election administrators' denial of access to a Black voter in a municipal election in Kentucky.[41] With no effective federal check, state and local election workers in the South, dominated by a single party and coupled with rampant intimidation and terroristic violence, used their administrative whim to eviscerate Black access to the polls.[42]

37. LOGAN, *supra* note 23, at 12 (noting that at the time of his account in 1927 this state of affairs still held true). Detroit provides another example. One reporter, writing in 1916, "estimated that one hundred of the two hundred and three precincts in the city were controlled [by one party] more or less completely." *Id.* at 67.

38. L.E. FREDMAN, THE AUSTRALIAN BALLOT: THE STORY OF AMERICAN REFORM 20–30 (1968) (vividly describing abuses in the election system in the second half of the nineteenth century).

39. HALE ET AL., *supra* note 21, at 28–30 (describing how a lack of federal authority over "street level" election administration resulted in widespread discrimination against and disenfranchisement of Black voters). Such state and local discrimination persisted well beyond passage of the Voting Rights Act in 1965. *See, e.g.*, Harris v. Siegelman, 695 F. Supp. 517, 523 (M.D. Ala. 1988) (noting, after a successful challenge to state election administration discrimination under Section 2 of the Voting Rights Act, a racist election administration in Alabama in which "the state designed the office of poll officials, including its appointment process, to exclude blacks from service and to assure that those white poll officials appointed would act in whatever way necessary to prevent blacks from casting ballots for the candidates of their choice").

40. FREDMAN, *supra* note 38, at 64 ("The distinctiveness of southern politics including election laws and practice almost constitutes a system in itself . . . ."). Southern states in the late eighteenth century were all too happy to adopt the secret ballot as it "ensur[ed] an orderly vote and disenfranchised illiterates, who were mostly Negro." *Id.* at 73.

41. *See generally* United States v. Reese, 92 U.S. 214 (1875) (holding that the Fifteenth Amendment did not confer the right of suffrage). The U.S. Supreme Court continued to condone racial discrimination in election administration into the twentieth century. *See generally* Giles v. Harris, 189 U.S. 475 (1903) (refusing to compel local board of registrars in Alabama to register Black voters in compliance with the Fourteenth and Fifteenth Amendments).

42. ROBERT M. GOLDMAN, RECONSTRUCTION AND BLACK SUFFRAGE 65–67 (2001) (describing a court challenge to an 1873 "capitation tax" discriminatorily applied by local election officials). Goldman documents U.S. Supreme Court decisions like *United States v. Reese*, 92 U.S. 214 (1876), and *United States v. Cruikshank*, 92 U.S. 542 (1875), which perpetuated state and local

This brief overview reflects how early election designers in U.S. states left the work of administrating elections largely to political parties. State legislatures occasionally attempted to mandate rival participation to root out corruption and break single-party domination. Yet achieving truly adversarial oversight and engagement in the election process proved elusive. The next section reviews Progressive Era efforts to curb an election system run amok that opted against removing partisans from the mix.

C. *Progressive Era Reform: States Take Over*

Progressive Era reformers in the late 1800s and early 1900s sought to rout out corruption at all levels of government, reacting to all-powerful political machines that dominated state and local politics.[43] Progressive Era reformers attempted to transform state and local officialdom from the spoils of the politically connected to one based on merit and competence.[44] Reformers pushed for nonpartisan ballots for local offices (i.e., ballots absent candidates' party affiliation) as part of a general push to separate local government from the stain of machine politics.[45]

governments' racist denial of Black suffrage leading to Jim Crow. GOLDMAN, *supra,* at 66, 68; *see also* RICHARD ZUCZEK, STATE OF REBELLION: RECONSTRUCTION IN SOUTH CAROLINA 207–09 (1996); STEPHEN D. KANTROWITZ, BEN TILLMAN AND THE RECONSTRUCTION OF WHITE SUPREMACY 306–07 (2000); KEYSSAR, *supra* note 22, at 105–16 (describing the legal and extralegal tactics, including "paramilitary" force, by which Blacks were disenfranchised in the South); Michael Greenberger, *Undoing Reconstruction: Racial Threat and the Process of Redemption, 1870–1920*, 103 SOC. SCI. Q. 649, 653 (2018) ("As political elites sought to undermine elections as efficiently as possible, race provided the most useful cue for determining whether a voter would choose to vote for the correct (Democratic) candidate.").

43. *See* JAY M. SHAFRITZ, THE DORSEY DICTIONARY OF AMERICAN GOVERNMENT AND POLITICS 416–17 (1988) (defining "political machine" as "an informal organization that controlled the formal processes of a government through corruption, patronage, intimidation, and service to its constituents . . . usually centered on a single politician—a boss—who commanded loyalty through largess, fear, or affection"). Progressive Era reforms were complex and multifaceted. The current project seeks to draw out main themes relevant to election administration while acknowledging what is certainly a more nuanced story, as Mordecai Lee advises. MORDECAI LEE, BUREAUS OF EFFICIENCY: REFORMING LOCAL GOVERNMENT IN THE PROGRESSIVE ERA 15 (2008) ("[T]his was a complex period in American history, with a texture that does not lend itself to easy and one dimensional simplification.").

44. *See, e.g.*, KAREN PASTORELLO, THE PROGRESSIVES: ACTIVISM AND REFORM IN AMERICAN SOCIETY, 1893-1917, at 143 (2014) (describing the National Conference for Good City Government (delightfully called the "goo goos") which held its first conference in 1894 and demanded that career civic officials replace machine politics in city government).

45. LEE, *supra* note 43, at 17 ("Progressive reformers [] had nearly universal appeal: the goal of creating a permanent administrative branch of government that would be divorced from politics, [allowing] . . . [p]oliticians [to] continue to decide government policies, but an administrative cadre would implement them."). Historians have noted that the explicit reason for adopting state-run, nonpartisan ballots was to "break down party machines and 'sanitize' local government." Michael Alvarez, Thad E. Hall & Morgan Llewellyn, *Who Should Run Elections in the United States?*, 36 POL'Y STUD. J. 325, 327 (2008).

Yet progressives did not insist on purging partisans from all mechanisms of government. One prominent feature of reform during this era was partisan balancing requirements in numerous government bodies, including federal agencies,[46] judicial nominating commissions,[47] and other bodies within federal, state, and local government.[48] Progressive reformers embedded rival partisans to decrease the impacts of partisan monopolies, increase transparency, and break the political party spoils system.[49] Prominent thinkers from the era argued that parties "counterbalanced the anti-majoritarian features of the Constitution and centrifugal tendencies in American politics . . . essential in countering the dispersion of power and responsibility."[50] Progressives understood the futility of removing partisans from the mix. As colorfully put by historian Charles A. Beard, Progressives understood that eliminating political parties was "a vain flying in the face of the hard and unpleasant facts of life and a vain longing for the impossible."[51]

This approach permeated Progressive Era approaches to election administration, too. At the federal level, the Lodge Force Bill of 1890, though unsuccessful, is an early example of this impulse.[52] As one historian describes,

46. *See* Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9, 17 (2018) (noting that federal agencies and commissions have a long history of partisan balance requirements dating back to at least 1882). Partisan balance requirements are discussed further, *infra* Part IV.

47. *See* DOUGLAS KEITH, BRENNAN CTR. FOR JUST., JUDICIAL NOMINATING COMMISSIONS 1, 6 (2019), https://www.brennancenter.org/our-work/research-reports/judicial-nominating-commissions [https://perma.cc/VJY3-HRTP (staff-uploaded)] (click "Download Report").

48. As discussed further below, *infra* Part IV, modern scholars of partisan balance requirements at the federal level have noted several motivations for their existence including ensuring different viewpoints are expressed, raising costs of agencies acting in a partisan manner, and increasing the legitimacy of decision-making. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 799 (2013). Critics of partisan balance requirements suggest that they place more extreme partisans on such bodies causing dysfunction and that they result in long agency vacancies at the federal level. *Id.* at 799.

49. Feinstein & Hemel, *supra* note 46, at 17–18 (describing the history of partisan balance requirements at the federal level and noting that at least with respect to such provisions in federal laws, early partisan balance requirements "do not appear to have elicited much discussion in the House or in the Senate, and—speculation aside—the initial reason for their insertion remains obscure").

50. Victor Manuel Cázares Lira, *Charles A. Beard's Vision of Government: Rethinking American Democracy in the Machine Age*, 19 J. GILDED AGE & PROGRESSIVE ERA 122, 129 (2020).

51. *Id.* at 131; *see also* FRANK J. GOODNOW, POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT 207 (1900) (recognizing the contributions of political parties, noting that, "under our system of government, the affairs of the state are conducted through the medium of the representatives of political parties, and that of necessity such parties must, to a certain extent, provide for their conduct and management certain rules and regulations which are not inaptly termed 'Party Machinery'").

52. Richard E. Welch, Jr., *The Federal Elections Bill of 1890: Postscripts and Preludes*, 52 J. AM. HIST. 511, 512–13 (1965). For a general description of the history of the Lodge Force Bill, see KEYSSAR, *supra* note 22, at 108; Colin McConarty, *The Federal Elections Bill of 1890: The Continuation of Reconstruction in America*, 19 J. GILDED AGE & PROGRESSIVE ERA 390, 390 (2020); *Legislative Interests*, U.S. HOUSE REPRESENTATIVES, https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Temporary-Farewell/Legislative-Interests/ [https://perma.cc/Q53C-SCUP].

"The Republican platform of 1888 proclaimed the determination of the Republican party—if it regained the presidency—to promote the cause of 'honest elections' by passage of national legislation."[53] If enacted, the Lodge Force Bill of 1890 would have provided for "supervision of state registration and election procedures by federal court-appointed officers from both major parties."[54] While the Lodge Force Bill ultimately succumbed to political pressures of the day, its embrace of adversarialism as a mechanism to address corrupt voting practices is notable.[55]

At the state level, while some Progressive Era statutes required certain election officials to be chosen via nonpartisan elections,[56] states likewise embraced and perpetuated roles for rival partisans in the election process.[57]

Before discussing specific partisan roles in Progressive Era election mechanics, several structural reforms set the table. First, the widespread adoption of the secret ballot during this period constituted perhaps the most significant locus of reform.[58] The Australian (secret) ballot is widely credited for tamping down vote buying by making it impossible for political machines and candidates to verify their investment.[59] Moving from a system that relied on political parties to print and distribute ballots to a state-printed secret ballot

53. Welch, *supra* note 52, at 512.

54. *Id.* ("[T]he bill sought to deter the intimidation and corruption of voters in congressional elections by permitting the presence of national party officials and the arbitration of the federal circuit courts.") If passed, the law would have enabled one hundred citizens in a congressional district to petition the circuit court to appoint bipartisan federal supervisors to watch over election procedures. *Id.* As Welch describes, "Its central feature was to make federal circuit courts, rather than the state governors and state certifying boards, the arbiter of congressional election procedures and returns." *Id.*

55. A Democratic filibuster in the Senate doomed its passage. *Id.*

56. B.F. Schaffner, M. Streh & G. Wright, *Teams Without Uniforms: The Nonpartisan Ballot in State and Local Elections*, 54 POL. RSCH. Q. 7, 7–30 (2001); *see, e.g.*, LOGAN, *supra* note 23, at 51 ("[I]t seems that in election matters there is especial need for non-partisan administration."); *see also* HARRIS, *supra* note 2, at 116 ("The most needed improvement in election and registration administration is to secure more reputable, competent, and honest officers all along the line from top to bottom . . . . A single officer, independent of partisan control as far as possible, should be placed in charge of elections and registrations."). As described below, partisan involvement continues to this day. *See* Goodliffe et al., *supra* note 20, at 46 (describing a "systematic relationship between a state's contemporary electoral practices and the historical strength of its party organizations").

57. Piven and Cloward note that reformers "raised the twin banners of eliminating fraud and inefficiency in city government." PIVEN & CLOWARD, *supra* note 33, at 71. But the authors also attribute reform in the Progressive Era to business leaders and professionals being "unnerved by the hordes of immigrants concentrating in burgeoning city slums, confounded by the strength of the new city political bosses made audacious by their grip on immigrant and working-class voters . . . ." *Id.*

58. HARRIS, *supra* note 2, at 19 (noting widespread adoption of the secret ballot after 1890). The secret ballot sought to address illegal vote-buying. *See* FREDMAN, *supra* note 38, at 33 (describing the impetus behind secret ballot laws as preventing bribery and intimidation).

59. FREDMAN, *supra* note 38, at 39 (describing adoption of the secret ballot in Massachusetts in 1888 as an "undoubted success," noting that it was "generally agreed that the voting was fair and orderly," and that "careful drafting and successful application of [the Massachusetts secret ballot law] made it a model for many reformers elsewhere").

necessitated a dramatic expansion of state involvement in administering elections and a concomitant explosion of state statutes governing elections (how ballots appear, which candidates the state should place on ballots, and so forth).[60]

Second, local governments established voter registration processes. Especially as urban centers grew in population and voter eligibility expanded,[61] local governments instituted voter registration systems requiring would-be voters to present themselves at local government offices, sometimes at regular intervals, to request placement on the voter rolls.[62] Scholars disagree as to whether personal voter registration expansion sought principally to reduce fraud or to strategically (and effectively) reduce turnout among poor and minority voters.[63] Regardless, voter registration systems enmeshed local

60. HARRIS, *supra* note 2, at 19–21 (discussing expansion of state election codes following adoption of the secret ballot). This was done by incorporating many new provisions into the statutes.

> All of the provisions governing the ballot, as well as the nominating of candidates so that their names would be printed upon the ballot, came only when an official state ballot was provided. It is not at all by chance that the direct primary spread shortly after 1890. The adoption of the official ballot made it imperative for the statutes to recognize the existence of political parties, which had been done reluctantly before this . . . and the regulation of the party organization itself.

Id. at 19.

61. *See* LOGAN, *supra* note 23, at 13–15 (describing the problem of "repeaters" voting more than once).

62. PIVEN & CLOWARD, *supra* note 33, at 93 ("Delaware moved from permanent registration to biennial registration in 1899, and in 1986, Maryland required annual registration in Baltimore, where the police also purged the lists each year by means of a house-to-house canvass.").

63. LEE, *supra* note 43, at 17 (describing one branch of Progressive Era reformers as "[a] different cluster of ideas was essentially anti-democratic or at least elitist"). This group of reformers sought to

> minimize the supposed harm of mass democracy through a "demobilization of American citizens." These reformers viewed with particular alarm the mass of new immigrants who congregated in the major metropolises and were, reformers felt, subject to the temptations of machine politics and ethnic-oriented candidates. They had a "frenzied, almost hysterical tone" regarding the democratic threats the masses posed to American government.

Id. Voter turnout decreased significantly from nearly eighty percent of the eligible voting age population in 1888 to sixty-five percent in 1905, just shy of forty-nine percent in 1924, and continuing in the low fifties to low sixties in the years since. Instituting personal voter registration as a tactic to reduce turnout was not new to the Progressive Era. *See* PIVEN & CLOWARD, *supra* note 33, at 89–90. Piven and Cloward note that voter registration laws existed in New York and Pennsylvania in 1821 and 1836 respectively, requiring state assessors to make up lists of men eligible to vote. But these early registration systems met with heated opposition. *Id.* Scholarly debate rages regarding whether reduced turnout after 1896 can be attributed to successful fraud prevention versus exerted effort on the part of the political class to stymie poor and minority voters. For an overview of this scholarly debate, see PIVEN & CLOWARD, *supra* note 33, at 97–104.

governments in new administrative processes in which officials had not previously engaged on a widespread scale.[64]

As states wrested election administration from partisan control, rather than remove partisans entirely, state election codes retained explicit roles for rival partisan actors. As Joseph Harris described, the rapid expansion of state election codes in the Progressive Era included "more frequent provision for representation of the two leading political parties in election administration."[65] Some attribute this to party capture and political parties' insistence on maintaining involvement and control. As Richard McCormick described,

> Election machinery always has been something more than an instrument through which the will of the voters could be made known. It has been the means of influencing the verdict of the electorate. Any change in the machinery affected the fortunes of the major factions contending for political power . . . . No factor is more constant in explaining the development of election machinery than this one.[66]

Reformers nevertheless believed that for elections to be legitimate in the eyes of the people, party representatives—from both sides—must be strategically placed. This premise imbues election statutes from the Progressive Era that created state and local election boards purposefully populated with adversarial partisans.[67] States also created explicit roles for party-appointed poll watchers to keep an eye on the fairness of elections.[68] In this way, "reliance, which is placed throughout the system upon the parties to secure the proper

64. Notably, voter registration today is not solely the province of the state. Countless private organizations, from the League of Women Voters to Unions to the NAACP, engage in substantial voter registration efforts, seeking to alleviate the confusion and burden personal registration can comprise. This public-private voter registration system is unique to the United States. PIVEN & CLOWARD, *supra* note 33, at 208 ("The very notion of relying on private resources to reach potential voters is unique to the United States . . . . Other major democracies, government assumes the affirmative obligation to register voters. This is the only way to guarantee that all citizens will be registered.").

65. HARRIS, *supra* note 2, at 19.

66. RICHARD P. MCCORMICK, THE HISTORY OF VOTING IN NEW JERSEY: A STUDY OF THE DEVELOPMENT OF ELECTION MACHINERY, 1664–1911, at 215–17 (1953).

67. HARRIS, *supra* note 2, at 110–11 (noting that election boards, "as a rule, have three or four members, the number depending upon whether the legislature wished the board to be evenly divided between the two political parties or to be dominated by the party in power"). Harris cites one example of a three-member board with appointees from three political parties (Democrat, Republican, and Socialist), noting that "this tri-party representation, extending down to precinct officers, has a significant effect upon the conduct of elections. It makes collusion between the precinct officers practically impossible." *Id.* at 111.

68. LOGAN, *supra* note 23, at 21 (describing the Act of 1891 in Pennsylvania that established "a method of supervision by means of watchers" that gave each party the power to appoint electors from the precinct to act as watchers). Logan observed that in providing for a party-appointed system of watchers, the legislature is again placing its "[r]eliance upon party spirit to maintain the proper supervision of elections." *Id.* at 22.

administration of the law, [remained] the outstanding feature of the election system."[69]

Yet reliance on adversarial partisan participation to secure fair elections met its limit. As Progressive Era reforms handed greater power to state governments to administer elections, single-party domination of elections persisted. Accounts from the 1920s and 1930s suggest that single-party political machines were able to maintain firm control over elections and thwart visions of adversarial checks.[70] Summarizing concerns, Joseph Harris, writing in 1934, complained that the dominant political party very often ran the show: "Spoils politics is the rule . . . . In many places the subservience of the election commissioners to the party machine is so complete that no appointment, removal, or promotion is made without 'orders.'"[71]

In addition, Harris pointed out that even in jurisdictions with bipartisan boards,

> there is a single dominant political machine which controls *both* party organizations . . . . The assumption that one side will watch the other and thus prevent frauds ignores the fact that political crooks can make bargains. The whole election machinery, from the election commissioner to the precinct clerk, becomes a perquisite of the political spoilsmen.[72]

A decade later, Lewis Abrahams chronicled single-party machine elections. In a chapter titled, "Election Warfare," Abrahams described how violence (threatened and real) prevented election deputies in Hudson County, New Jersey, from showing up on Election Day in the early 1940s:

> Election deputies are nonexistent; although they are paid, they rarely show up to perform their duties. These deputies are the ones arrested, not the law violators. They are generally assaulted, blackjacked, and railroaded on Election Day. On the dawn of the following day, they are released; all is forgotten until the next election . . . . Counting votes . . . is a farce. The man who reads the ballots is surrounded by [the party boss's] gangsters; he can hardly be heard when he announces the vote. The doors of the counting houses are locked, while the ballots are counted in semidarkness.[73]

69. LOGAN, *supra* note 23, at 32.

70. *Id.* at 33 ("[I]n several states (notably New Jersey, Missouri, Ohio, New York, and Michigan) . . . some attempts have been made to bring about greater supervision [of election administration] by state authorities, usually by giving the state authorities appointing power over the county or city boards of election, but in most cases such supervision is nominal.").

71. HARRIS, *supra* note 2, at 123.

72. *Id.* at 115.

73. LEWIS ABRAHAMS, IT'S ALL POLITICS 97–98 (1944) (describing political domination of Democrat Frank R. Hague, mayor of Jersey City from 1917 to 1947, over the election process in Hudson County, New Jersey).

Progressive Era reformers believed that purposefully embedding rival partisan actors into election processes would enhance election legitimacy, transparency, and accountability.[74] But the stranglehold of party machines and the scourge of Jim Crow in the South thwarted this vision.[75]

Nevertheless, reliance on adversarial election administration endured. A narrative from Evanston, Illinois, from the 1964 presidential election illustrates the persistence of adversarial election administration as the favored tactic to secure public trust. The account describes an Election Day infused with partisan actors: "Five [election judges were] required for each polling place, three from one party, two from the other, with the numerical advantage alternated among precincts. In addition, each party is permitted two poll-watchers in every precinct."[76] As voters arrived at the polls, one judge issued an "Application for Ballot," which required the voter to sign his or her name and address.[77] "Next, two judges, one representing each political party, compare the voter's signature with that on his registration card in the precinct binder."[78]

While just one account in one state in one year, this description reflects the approach that stuck despite obstacles: strategically placed rival partisans serving as checks at all stages of the election process. The next part turns to examining the role of rival partisans in U.S. election administration today.

74. BENSEL, *supra* note 24.

75. For a vivid description of where U.S. Supreme Court deference to local election officials led in the South, see BERNARD TAPER, GOMILLION VERSUS LIGHTFOOT (1963), which documents in detail the racist denial of Black voter registration in Macon County, Alabama. Taper writes,

> Now that Negroes had become purposeful about trying to register . . . local and state officials had shown themselves to be equally purposeful—and infinitely resourceful—about finding ways to thwart them. Boards of Registrars had set up tedious application procedures, had disqualified Negroes on technicalities without telling them why they failed, had met irregularly, or for long periods not met at all. Some boards have resigned rather than registered Negroes, and despite petitions . . . governors have been dilatory in appointing new boards, giving as a reason that they couldn't find anybody willing to serve.

Id. at 17–20; *see also* KEYSSAR, *supra* note 22, at 259 ("Registrars in many towns and cities thwarted black aspirants by not showing up at the office or by simply refusing to register blacks when they did. Those who were adamant about registering could lose their jobs, have loans called do, or face physical harm more than a few were killed."); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Pathological Racism, Chronic Racism Targeted Universalism*, 109 CALIF. L. REV. 1107, 1136–37 (2021) (describing second-generation voting barriers and the difficulty in addressing them via federal law).

76. ROBERT J. DINKIN, ELECTION DAY: A DOCUMENTARY HISTORY 178 (2002).

77. *Id.* at 179.

78. *Id.* The account catalogs further adversarial checks up until the count is finalized, such as requiring opposing political party monitoring during the vote tabulation process. *Id.* at 181.

II. PARTISAN PARTICIPANTS IN MODERN U.S. ELECTION ADMINISTRATION

The present effort does not attempt an exhaustive review of election staffing in all fifty states; others have ably tackled the difficult task of describing the enormous variation among states in how elections are administered.[79] Instead, this part provides snapshots of ways rival partisans take part as state-level election administrators, on state-level boards, as local election officials, on local-level boards, on canvassing boards, as temporary poll workers, and as observers and challengers. As the discussion below reveals, marked variation in state approaches to election administration has persisted, between states and within states.[80] Yet the involvement of adversarial partisan actors at every level of election administration remains the norm.[81]

At the outset, it is important to stress the transformation of state-run elections in the modern era into a highly professionalized, committed workforce.[82] While human error and a multitude of technical and process glitches remain issues at the margins, experienced and knowledgeable election officials run elections in every state.[83]

79. *See* HALE ET AL., *supra* note 21, at 30–38.

80. As Hale, Montjoy, and Brown aptly note, "[E]lection officials comment frequently that the idea of one, unified election system is neither accurate nor useful as a way to understand US election administration. Indeed, there are 50 election systems that perform essentially the same functions but in very different ways." *Id.* at 25.

81. Wisconsin experimented with an ambitious attempt at nonpartisan election administration with its erstwhile Government Accountability Board ("WGAB") (in operation from 2008 to 2016). *See* Daniel P. Tokaji, *America's Top Model: The Wisconsin Government Accountability Board*, 3 U.C. IRVINE L. REV. 575, 577 (2013) (describing the creation of the WGAB and how it functioned); Shawn Johnson, *Once a Symbol of Bipartisanship, Government Accountability Board Targeted for Overhaul*, WISC. PUB. RADIO (Oct. 13, 2015, 9:20 AM), https://www.wpr.org/once-symbol-bipartisanship-government-accountability-board-targeted-overhaul [https://perma.cc/C4TT-VH6R] (describing the causes of the WGAB's demise).

82. *See* HALE ET AL., *supra* note 21, at 46 (describing the increase in professionalism among modern-day election administrators due to the increased complexities of the job).

83. As an international observer delegation described in the opening of its preliminary report evaluating the 2022 U.S. midterms, the "November 8 mid-term congressional elections were competitive and professionally managed, with active voter participation." OFF. FOR DEMOCRATIC INSTS. & HUM. RTS. & ORG. FOR SEC. & CO-OPERATION IN EUR. PARLIAMENTARY ASSEMBLY, UNITED STATES OF AMERICA – MID-TERM CONGRESSIONAL ELECTIONS, 8 NOVEMBER 2022: STATEMENT OF PRELIMINARY FINDINGS AND CONCLUSIONS 1 (2022), https://www.oscepa.org/en/documents/election-observation/election-observation-statements/united-states-of-america/statements-27/4577-2022-mid-term-1/file [https://perma.cc/5BHU-7U77].

A. *State-Level Election Administrators*

Figure 1. CEO Methods of Appointment[84]

Voters Elect Chief Election Official	Governor Appoints Chief Election Official	Legislature Appoints Chief Election Official	Board of Elections Appoints Chief Election Official
AL, AK, AR, AZ, CA, CO, CT, GA, IA, ID, IN, KS, KY, LA, MA, MI, MN, MO, MS, MT, ND, NE, NM, NV, OH, OR, RI, SD, UT, VT, WA, WV, WY	DE, FL, NJ, PA, TX, VA	ME, NH, OK, TN	HI, IL, MD, NY, NC, SC, WI

Voters in thirty-three states directly elect a single chief election official ("CEO") responsible for managing the state's election (usually the Secretary of State).[85] In the remaining states, the CEO is appointed either by the Governor (six states), the legislature (four states), or the state's board of elections (seven states).[86]

Although power is concentrated unilaterally in CEOs in a majority of states, several important constraints limit the ability of CEOs to exert partisan bias. First and foremost, CEOs are constrained by state law. The U.S. Constitution delegates the power to set the time, place, and manner of elections

84. *Election Administration at State and Local Levels*, NAT'L CONF. STATE LEGISLATURES (Nov. 1, 2022), https://www.ncsl.org/elections-and-campaigns/election-administration-at-state-and-local-levels [https://perma.cc/S4DA-8F27] [hereinafter *Election Administration*].

85. *Id.* In Utah and Alaska, voters elect a lieutenant governor who serves as the chief election official. *Id.* Sometimes, the CEO shares authority over the state's election administration with a board. *See infra* note 94.

86. *Election Administration*, *supra* note 84. For all practical purposes, the difference between appointing statewide election officials versus electing them is negligible. Alvarez et al., *supra* note 45, at 328 ("[A] conflict of interest may arise regardless of appointment or election since the election official's job may be contingent upon her own successful reelection or the reelection of a particular government official.").

to the state legislatures.[87] CEOs are constitutionally bound to follow election rules dictated by state legislatures.[88] To be sure, state legislatures often delegate authority to state CEOs to implement the state's election laws and give CEOs rulemaking authority to fill in inevitable statutory gaps. A Nevada statute, for example, gives the Nevada Secretary of State broad authority to "adopt such regulations as are necessary to carry out the provisions of [Nevada's election code]."[89] Likewise, an Ohio statute delegates to its elected Secretary of State authority to regulate the conduct of elections consistent with Ohio's election law.[90] The Ohio statute further gives its Secretary of State authority to create rules governing specified aspects of the election process, such as the forms of ballots and the registration records,[91] and gives its Secretary of State authority to issue final approval of ballot language.[92]

States with partisan CEOs also diffuse and fragment CEO power in a variety of ways. Nine states split state-level authority between a CEO and a bipartisan board.[93] Additionally, some state statutes constrain the ability of CEOs to act unilaterally by requiring consultation within the state's election administration at the state and local levels.[94] State CEOs also have limited powers over local elections. In a majority of states, for example, CEOs do not

87. U.S. CONST. art. I., § 4. This authority extends to federal elections only, but since states typically hold state and federal elections concurrently, the rules are virtually the same in most cases.

88. Instances of court recognition of legislative delegation of authority to CEOs are too numerous to detail. As one example, in recent litigation challenging implementation of Georgia's new voting equipment, the court acknowledged the Georgia CEO's discretion. *See* Curling v. Raffensperger, 493 F. Supp. 3d 1264, 1296 (N.D. Ga. 2020), *appeal dismissed*, 50 F.4th 1114 (11th Cir. 2022) ("The Court respects that the Secretary of State and Georgia State Election Board are vested with considerable discretion in implementing the mandate of O.C.G.A. § 21-2-379.25(c) . . . ."). Litigation pending at the U.S. Supreme Court could considerably upset such long-held assumptions. *See* Harper v. Hall, 380 N.C. 317, 403–04, 868 S.E.2d 499, 559–60 (2022), *cert. granted sub nom.* Moore v. Harper, 142 S. Ct. 2901 (2022) (forwarding the theory—in its most radical form—that the U.S. Constitution delegates state legislatures exclusive authority to create rules in federal elections).

89. NEV. REV. STAT. ANN. § 293.124 (2022). Nevada statute makes clear that the state's election law is to be interpreted "liberally," such that the "real will" of electors trumps failure to comply with mere formalities. *See* § 293.127.

90. OHIO REV. CODE ANN. § 3501.05 (LEXIS through File 1 of the 135th Gen. Assemb. (2023–2024)).

91. *Id.* (LEXIS).

92. *Id.* (LEXIS).

93. Al Vanderklipp, *Which States Have Election Boards or Commissions?*, ELECTION REFORMERS NETWORK (Apr. 29, 2021), https://electionreformers.org/guide-to-state-election-boards-and-commissions/ [https://perma.cc/U2QN-PZ3H] (explaining that Arkansas, Georgia, Indiana, Kentucky, Ohio, Rhode Island, South Dakota, Tennessee, and West Virginia split leadership duties between both an election board and individual official).

94. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-452 (Westlaw through the Second Reg. Sess. of the Fifty-Fifth Leg. (2022), and includes Election Results from the Nov. 8, 2022 Gen. Elec.) (providing that the Secretary of State, in consultation with each county, "shall prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots").

appoint and cannot remove local election officials.[95] Even in instances in which CEOs can appoint local officials, some states nevertheless employ adversarial principles. Ohio law, for example, requires its Secretary of State to appoint county boards of election,[96] but board members must be drawn from members of the two major political parties.[97] In many states, CEOs lack discretion to direct local election spending.[98] Decentralization has long been a central descriptor of U.S. elections—and purposefully so. As Hale, Montjoy, and Brown note, "In typical US fashion, we try to control power by dividing it."[99]

Courts also constrain state CEOs.[100] When CEOs enact rules or implement statutes in ways that are inconsistent with state and/or federal law, institutional actors, like the U.S. Department of Justice (when federal law is in play), political parties, nonprofits, and individual voters can and do challenge CEO action in court.[101] Especially amidst the skyrocketing volume of election litigation since *Bush v. Gore*,[102] challenging CEOs for violating state and/or federal law has become commonplace.[103] While lawsuits are an arguably inefficient way to reign in alleged partisan CEO abuses of power, courts nevertheless provide a crucial guardrail.

95. HALE ET AL., *supra* note 21, at 33 ("[I]n the great majority of states, CEOs do not appoint and cannot remove LEOs . . . .").

96. OHIO REV. CODE ANN. § 3501.06 (LEXIS).

97. *Id.* (LEXIS) ("[T]he secretary of state shall appoint two . . . such board members for a term of four years. One of those board members shall be from the political party which cast the highest number of votes for the office of governor at the most recent regular state election, and the other shall be from the political party which cast the next highest number of votes for the office of governor at such election.").

98. HALE ET AL., *supra* note 21, at 33.

99. *Id.* The authors additionally stress that "[d]ivision of responsibilities prevents any one office from exercising all . . . election powers . . . ." *Id.* at 42.

100. Justin Levitt notes that "judicial review may be seen as another structural protection against the most extreme forms of partisanship. The very fact that a court is watching and prepared to enforce substantive rules helps to confine partisan effect and partisan intent . . . ." Levitt, *supra* note 5, at 1828.

101. HALE ET AL., *supra* note 21, at 33 (noting that "the influence of CEOs is not unfettered" citing courts as backstops).

102. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration To Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 956 (2005) [hereinafter Hasen, *Beyond the Margin*] (describing likely reasons why *Bush v. Gore* increased the volume of election litigation); *see also* Richard L. Hasen, *Research Note: Record Election Litigation Rates in the 2020 Election: An Aberration or a Sign of Things To Come?*, 21 ELECTION L.J. 150, 150 (2022) ("[T]here is reason to believe that the rates have not peaked, given what Justin Riemer, chief counsel of the Republican National Committee, called the parties' current state of 'permanent litigation.'").

103. Ohio law's broad delegation of authority to its state CEO to implement its election laws has led to frequent challenges in court. *See, e.g.*, Ohio Republican Party v. Brunner, 582 F. Supp. 2d 957, 957 (S.D. Ohio 2008) (challenging process to verify voter registration information and granting TRO), *vacated by* Brunner v. Ohio Republican Party, 555 U.S. 5 (2008); Ne. Ohio Coal. for the Homeless v. Blackwell, No. C2-06-896, 2006 WL 8424056, at *1 (S.D. Ohio, Oct. 26, 2006) (granting TRO regarding voter ID policies); State *ex rel.* Skaggs v. Brunner, 120 Ohio St. 3d 506, 2008-Ohio-6333, 900 N.E.2d 982, at ¶ 1 (granting writ of mandamus compelling Ohio Secretary of State to correct interpretation of statute governing determination of validity of provisional ballots).

Constraints on the powers of CEOs should not be overstated. Particularly, since passage of the Help America Vote Act in 2002 that centralized aspects of state election administration, CEOs in some states have attained greater power to make decisions regarding how elections are administered.[104] Since 2020, some states have removed power from local administrators fostering even more centralized control.[105] As discussed in greater detail in Section III.B below, partisan state CEOs represent a weak link in the system of adversarial checks.

B. *State-Level Election Boards*

In nine states plus the District of Columbia, a board or commission is in charge of elections statewide.[106] As noted above, nine states split authority between the CEO and a board.[107] Such boards are typically appointed (e.g., by the Governor) and contain provisions requiring membership from the two largest political parties.[108]

104. HALE ET AL., *supra* note 21, at 33 (citing the Help America Vote Act ("HAVA") for increased state centralization and noting that "CEOs have gained a good bit of discretionary power," including the ability to make decisions relating to removal of voters from voter lists and making decisions about voting equipment). *See generally* Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended in scattered sections of 36 and 52 U.S.C.). Note that the power to remove voters from voter lists is heavily constrained by federal law through the National Voter Registration Act of 1993, Pub. L. No. 103-31, § 8, 107 Stat. 77, 82–87 (codified as amended at 52 U.S.C. § 20507(a)(3), (c) (2002)).

105. *See* Richard Briffault, *Election Law Localism and Democracy*, 100 N.C. L. REV. 1421, 1462 (2022) (describing the backlash against local election authority post-2020 and highlighting legislative acts in Georgia and Texas that particularly limit LEO authority).

106. Namely, Delaware, Hawaii, Illinois, Maryland, New York, North Carolina, Oklahoma, South Carolina, Virginia, and Wisconsin. *See Election Administration*, *supra* note 84.

107. *See Election Administration*, *supra* note 84.

108. *See, e.g.*, ME. REV. STAT. tit. 1, § 1002(1-A)(C) (Westlaw through emergency legislation through Ch. 51 of the 2023 First Reg. Sess. and First Spec. Sesss. of the 131st Leg.) ("No more than [two] commission members may be enrolled in the same party."); WASH. REV. CODE § 42.17A.100(1) (2022) ("No more than three commissioners shall have an identification with the same political party."); N.Y. ELEC. LAW § 3-100(1) (McKinney 2023) (explaining that New York's state board of elections is "composed of four commissioners appointed by the governor," two from recommendations from each state committee of the major political parties and two drawn from recommendations from the majority and minority parties in the state houses); N.C. GEN. STAT. § 163-19(b) (LEXIS through Sess. Laws 2023-12 of the 2023 Reg. Sess. of the Gen. Assemb.) (explaining that North Carolina's election board consists of five members from two political parties having the highest number of registered affiliates and no more than three members can be from the same party); N.H. REV. STAT. ANN. § 658:2 (Westlaw through Ch. 1 of the 2023 Reg. Sess.) (providing that "[e]ach state political committee of the [two] political parties which received the largest number of votes cast for governor" in the previous election appoints two inspectors of election).

Figure 2. State-Level Bipartisan Board Structures[109]

Bipartisan boards structured for partisan balance (even number of members)	**Bipartisan boards with odd number of members**	**Bipartisan board with nonpartisan chair/tiebreaker**
Illinois, Indiana,* New York, Wisconsin	Arkansas,* Delaware, Georgia,* Kentucky,* Maryland, North Carolina, Oklahoma, Rhode Island,* South Carolina, South Dakota,* Tennessee,* Virginia, West Virginia*	Hawaii, Ohio*

*authority split between state CEO and board

State-level election boards embed rival partisans by law. For example, Virginia's three-member state board of elections must contain two members from the party winning the most votes in the last gubernatorial election.[110] As another example, Oklahoma's statute provides that its Governor must choose board members from the lists of names submitted by each party, appointing two members from one political party and one member from the other political party.[111]

As to the scope of state boards' authority, it should come as no surprise that no two state boards function exactly alike. Georgia's statute diffuses authority over elections, dividing power over elections between its state board and its CEO.[112] It additionally requires the board to "promulgate rules and

109. Vanderklipp, *supra* note 93.

110. VA. CODE ANN. § 24.2-102 (LEXIS through Acts of the 2023 Sess. Effective Mar. 15, 2023) ("The State Board of Elections . . . shall consist of five members appointed by the Governor . . . subject to confirmation by the General Assembly. In the appointment of the Board, representation shall be given to each of the political parties having the highest and next highest number of votes in the Commonwealth for Governor at the last preceding gubernatorial election. Three Board members shall be of the political party that cast the highest number of votes for Governor at that election.").

111. OKLA. STAT. ANN. tit. 26, § 2-101.1 (Westlaw through emergency effective legislation through Ch. 1 of the First Reg. Sess. of the 59th Leg. (2023)). In addition to requiring adversarial party membership, some state statutes explicitly forbid board members from engaging in political activity. An Illinois statute prohibits members of its state board of election from running for office or contributing to political campaigns or committees. 10 ILL. COMP. STAT. ANN. 5/1A-14(a) (Westlaw through P.A. 103-1 of the 2023 Reg. Sess.).

112. GA. CODE ANN. § 21-2-31 (LEXIS through Acts 2023, No. 23-20 of the 2023 Sess.). Georgia law instructs its State Board of Elections to "promulgate rules and regulations so as to obtain uniformity

regulations to define uniform and nondiscriminatory standards concerning what constitutes a vote and what will be counted as a vote for each category of voting system used in this state,"[113] and to "adopt rules and regulations setting forth criteria governing the selection of voter registration places."[114]

South Dakota's statute carefully delineates a process by which both Democrats and Republicans will have seats on its seven-member board, while the (elected) Secretary of State serves as the board's chair.[115] The Speaker of the state House of Representatives appoints two members who must be registered to two different political parties. The remaining four members are appointed, in carefully delineated staggered terms, by Democratic and Republican leaders of the state Senate and House.[116]

Not all state election boards rely as religiously on adversarial partisans. Rhode Island is an example of a state that affirmatively limits partisanship on its state-level board. Its seven-member state board of election is appointed by the Governor and confirmed by the state Senate.[117] Rhode Island law does not require the board be comprised of members of both parties, instead it stipulates that the Governor and Senate "shall strive to select a board whose membership shall be representative of all citizens of the state and of their diverse points of view."[118] The statute attempts to ensure the impartiality of its state board by requiring its members to take an oath "impartially to administer the duties of his or her office without regard to partisan or political considerations."[119]

The use of election boards as opposed (or in addition) to single administrators serves a number of functions. State boards encourage coalition building, serve as a buffer for the professional staff, and, perhaps most importantly, provide a check on individual malfeasance or overzealous partisan allegiance.[120]

in the practices and proceedings of superintendents, registrars, deputy registrars, poll officers, and other officials, as well as the legality and purity in all primaries and elections." § 21-2-31(1) (LEXIS).

113. *Id.* § 21-2-31(7) (LEXIS).

114. *Id.* § 21-2-215(f) (LEXIS).

115. S.D. CODIFIED LAWS § 12-1-5 (Westlaw through the 2023 Reg. Sess. and Sup. Ct. R. 23-15).

116. *Id.* (Westlaw).

117. 17 R.I. GEN. LAWS § 17-7-1 (LEXIS through Ch. 14 of the 2023 Sess., not including all corrections and changes by the Director of Law Revision).

118. *Id.* (LEXIS).

119. 17 R.I. GEN. LAWS § 17-7-4 (LEXIS).

120. Alvarez et al., *supra* note 45, at 329. Specifically, survey respondents favored boards as opposed to single election officials because

> [t]he public is most likely aware it is more difficult for a board to commit election malfeasance—a board requires that some or all members coordinate their actions. Similarly, most Americans are familiar with the necessity of checks and balances upon the actions of government officials. Although it may be viewed as superfluous to create another

C. *Local Election Officials*

The meat of administration of U.S. elections takes place at the local level.[121] While it is impossible to generalize about local level election official staffing,[122] scholars estimate that almost two-thirds of local election officials ("LEOs") are elected.[123] In a minority of jurisdictions, LEOs are either directly appointed, or local boards made up of appointed members elect them (as discussed below).[124] Partisan election officials represent "almost half of the local jurisdictions and about half of the voters in the United States."[125] This contrasts with other local government officials; for example seventy-seven percent of city council members are elected using ballots that do not list party affiliation.[126]

As to the degree of authority LEOs possess, different states allot LEO discretion differently. In some instances, LEOs have authority to make rules regarding distinct processes but generally must clear decisions with state-level officials. For example, in Nevada, county clerks establish the locations and

> administration level to oversee the election official(s), Americans may see a board as a check upon the undesirable actions of a single election official.

Id. at 333.

121. *See* Jeanne Richman & Robert R. Outis, *State Control of Election Administration*, *in* ISSUES OF ELECTORAL REFORM 117–18 (Richard J. Carlson ed., 1974) ("[E]very state exercises some responsibility for the conduct of elections, but the method and degree of control vary widely."). Increased complexity, as well as the statewide, and sometimes national, spotlight on local elections has transformed what was once a sleepy, mostly clerical job into a more professionalized, statewide and even nationally, interconnected occupation. *See* Ernest Hawkins, *Practitioner Commentary: Observations on the Changing Job of the Local Election Official*, 68 PUB. ADMIN. REV. 850, 850 (2008) (describing the professionalization and increased cooperation among local election officials as administering elections became increasingly complex from the 1970s to 2000s); KAREN L. SHANTON, CONG. RSCH. SERV., R45549, THE STATE AND LOCAL ROLE IN ELECTION ADMINISTRATION: DUTIES AND STRUCTURES 11–15 (2019). States use different terms for local election officials, for example clerk, registrar, and supervisor of election. *Id.*

122. Quirks of history, state institutional structures, home rule provisions, and other local anomalies contribute to a high level of variation.

123. David C. Kimball, Martha Kropf, Donald Moynihan, Carol L. Silva & Brady Baybeck, *The Policy Views of Partisan Election Officials*, 3 U.C. IRVINE L. REV. 551, 552 (2013) (noting that for half of LEOs, political affiliation "is a critical feature of the selection process").

124. David C. Kimball & Martha Kropf, *The Street-Level Bureaucrats of Elections: Selection Methods for Local Election Officials*, 23 REV. POL'Y RSCH. 1257, 1261 (2006) [hereinafter Kimball et al., *Street-Level Bureaucrats*]. Mississippi is the only state that uses a system of elected local election boards. *Id.* For an interesting discussion of potential impacts of elected versus appointed local election officials, see Barry C. Burden, David T. Canon, Stéphane Lavertu, Kenneth R. Mayer & Donald P. Moynihan, *Selection Method, Partisanship, and the Administration of Elections*, 41 AM. POLS. RSCH. 903, 928 (2013) ("Our results indicate that elected officials are more in favor of policies that are thought to promote [voter] turnout than appointed officials and that their jurisdictions are associated with higher voter turnout."). Also of interest, Kimball and Kropf note that "[i]t is more common to find appointed election authorities in heavily populated urban and suburban jurisdictions [and that] elected clerks are more frequently found administering elections in rural, less populated counties and towns." MARTHA KROPF & DAVID C. KIMBALL, HELPING AMERICA VOTE 99 (2012).

125. Kimball et al., *Street-Level Bureaucrats*, *supra* note 124, at 1261.

126. *Id.* at 100.

boundaries of election precincts.[127] Yet, maps must be submitted to the CEO, who can order revisions.[128] Like CEOs, LEOs are also constrained by statute; they must ensure that all local rules conform with state law and state-level rules.[129] New Hampshire law gives city clerks the power to "establish uniform practices and procedures that conform to state and federal law for the conduct of elections at all polling places within the city," but requires that the Secretary of State resolve any conflicting interpretations of state and federal laws arising between the city clerk and other election officials.[130] Colorado requires LEOs to consult with state-level officials in interpreting state election laws; the county clerk and recorder and deputy have discretion to "interpret" the state's election code, but they must follow the rules promulgated by the CEO and consult with the CEO on these interpretations.[131]

Following the 2020 election, when the powers of LEOs to administer elections in pandemic conditions came under intense scrutiny, some state legislatures responded by explicitly removing power from LEOs.[132] Iowa's 2021 election reform bill, for example, included a provision underscoring that the county Commissioner of Elections (an elected position)[133] "does not possess home rule powers with respect to the exercise of powers or duties related to the conduct of elections prescribed by statute or rule, or guidance issued [by the Secretary of State]."[134]

Courts also constrain LEOs. Plaintiffs regularly sue local election officials for failure to comply with state and federal law.[135] This phenomenon appeared front and center during the 2020 election.[136] In 2020, state and federal courts

127. NEV. REV. STAT. § 293.205 (2022).

128. *Id.* § 293.206.

129. Georgia provides an example. In Georgia, county or municipal superintendents administer elections at the local level. As long as rules are consistent with state law and state board rules, the superintendent can issue local rules for the conduct of elections. GA. CODE ANN. § 21-2-70 (LEXIS through Acts 2023, No. 23-20 of the 2023 Sess.).

130. *See* N.H. REV. STAT. ANN. § 659:9-a (Westlaw through Ch. 1 of the 2023 Reg. Sess.). The city clerk is appointed by election of the city council. § 48:2 (Westlaw).

131. COLO. REV. STAT. § 1-1-110(1) (LEXIS through Ch. 18 from the 2023 Reg. Sess. and effective as of Mar. 10, 2023) ("The county clerk and recorder, in rendering decisions and interpretations under this code, shall consult with the Secretary of State and follow the rules and orders promulgated by the Secretary of State pursuant to this code.").

132. *See* Briffault, *supra* note 105, at 1452 ("A particularly striking feature of the 2021 legislative reaction to the expansion of access to the ballot in 2020 was the rash of laws undermining LEOs.").

133. IOWA CODE § 331.501(1) (2023).

134. *Id.* § 47.2(1).

135. *See* COLL. OF WM. & MARY SCH. OF L. & NAT'L CTR. FOR STATE CTS., ELECTION LAW MANUAL 115–41 (2d ed. 2022), https://www.electionlawprogram.org/__data/assets/pdf_file/0025/83833/ELM_Fall_22.pdf [https://perma.cc/RR39-ETCM] (describing the nature of legal challenges brought to ensure compliance with state statutes governing election administration).

136. Briffault, *supra* note 105, at 1437–51 (detailing such litigation in Arizona, Iowa, Ohio, and Texas during the 2020 election).

routinely quashed attempts by LEOs to make voting easier during the pandemic by exercising authority not explicitly granted via statute.[137]

An additional constraint on local election officials is citizen oversight on the ground. Voters, advocates, and nonprofit groups have long played a role in ensuring local elections are administered according to the law before, during, and after Election Day.[138] Since the 2020 election, public oversight of LEOs has taken a more nefarious turn as those who disbelieve the 2020 election results seek to (in their mind) expose election administration wrongdoing.[139] Some election officials have responded by opening the doors, hoping that when skeptical members of the public see what is behind the curtain, they will be satisfied that elections are run conscientiously and fairly, with multiple checks and balances to ensure accuracy.[140] Other election officials, particularly those who are targets of death threats and other horrific tactics, are leaving their posts

137. *Id.* (describing examples, such as loosening various aspects of mail-in voting requirements and installing drop boxes for absentee ballots, not explicitly authorized by state law). For example, an election official in Dane County, Wisconsin, interpreted Wisconsin election law to allow voters who were "indefinitely confined" due to COVID-19 to obtain absentee ballots without photo identification. Jefferson v. Dane County, 2020 WI 90, ¶¶ 23–27, 394 Wisc. 2d 602, 951 N.W.2d 556. The Wisconsin Supreme Court issued an injunction to prevent this accommodation as contrary to Wisconsin law because the governor's emergency order did not authorize all Wisconsin voters to obtain absentee ballots without photo identification. *Id.* ¶¶ 30–32; *see also* Ariz. Pub. Integrity All. v. Fontes, 475 P.3d 303, 305–06 (Ariz. 2020) (involving an attempt to change voting instructions in Maricopa County, Arizona, for mailed ballots during the 2020 election); Democratic Senatorial Campaign Comm. v. Pate, 950 N.W.2d 1, 3–4 (Iowa 2020) (involving decision by officials in three Iowa counties to mail registered voters absentee ballots with prefilled information).

138. *See* Rebecca Green, *Election Surveillance*, 57 WAKE FOREST L. REV. 289, 291–92 (2022) (describing efforts by nonprofit voter protection and good government groups to observe elections and resolve/report issues).

139. Bob Bauer & Benjamin L. Ginsberg, *Election Officials Need Our Legal Help Against Repressive Laws and Personal Threats*, WASH. POST (Sept. 7, 2021, 6:04 PM), https://www.washingtonpost.com/opinions/2021/09/07/bauer-ginsberg-election-official-legal-defense-network/ [https://perma.cc/3EMC-7PXK (dark archive)] (describing threats against election workers post-2020).

140. *See, e.g.*, Bente Berkeland, *Clerks Battle False Claims as They Prepare To Administer Elections*, NPR (Oct. 25, 2022, 5:00 AM), https://www.npr.org/2022/10/25/1131253864/colorado-election-officials-voting-misinformation [https://perma.cc/5NDE-9BDK] (describing efforts of local election officials to bend over backwards to ensure transparency); Chuck Goudie, Barb Markoff, Christine Tressel & Ross Weidner, *Election Authorities Stress Transparency in Lead-Up to 2022 Midterm Elections*, ABC7 CHI. (Nov. 3, 2022), https://abc7chicago.com/midterm-election-2022-transparency-concerns/12414347/ [https://perma.cc/MS4A-62UY] (describing public equipment tests in Illinois as "just one of these kinds of transparent displays of election equipment taking place all across the state in the run up to the [2022] midterms").

in alarming numbers.[141] These events, discussed further *infra*, represent a threat to adversarial functioning.[142]

E. *Local Election Boards*

Bipartisan boards supervise elections in roughly fifteen percent of local jurisdictions.[143] Local election boards generally require bipartisan membership by statute. For example, in Pennsylvania,[144] Ohio, and Oklahoma,[145] minority party representation on county election boards is required by law. New York statute requires an equal number of commissioners from each of the major political parties on each local board of elections.[146] Louisiana statute establishes local boards consisting of the Registrar of Voters, the Clerk of the Court, the chairman of the parish executive committee of each recognized political party, and one member appointed by the Governor.[147] In Ohio, county board members

141. Michael Wines, *After a Nightmare Year, Election Officials Are Quitting*, N.Y. TIMES (July 2, 2021), https://www.nytimes.com/2021/07/02/us/politics/2020-election-voting-officials.html [https://perma.cc/HDX5-QPQG (staff-uploaded, dark archive)].

142. Fact checking by the independent press and opposition party refutation typically act to constrain conspiracy theories. However, this becomes challenging in a truth-free environment. As Scott Radnitz writes,

> Whereas democracy is premised on agreement about the facts but disagreement over policy, we may be entering a period in which political actors do not agree on basic realities—or more precisely, in which some actors deliberately disregard established facts. Depending on the institutional rules, this form of politics can persist as long as the contending parties perceive that their tactics are effective.

Scott Radnitz, *Why Democracy Fuels Conspiracy Theories*, J. DEMOCRACY, Apr. 2022, at 147, 159.

143. Kimball et al., *Street-Level Bureaucrats*, *supra* note 124, at 1261–62.

144. Pennsylvania's requirement is found in 25 PA. CONS. STAT. § 1203(b)(3) (2022) ("In either case, there shall be minority representation on the commission."); Ohio's requirement can be found in in OHIO REV. CODE ANN. § 3501.06(B)(1) (LEXIS through File 1 of the 135th Gen. Assemb. (2023-2024)). The statute outlines in specific detail that

> the Secretary of State shall appoint two . . . board members for a term of three years. One of those board members shall be from the political party which cast the highest number of votes for the office of governor at the most recent regular state election, and the other shall be from the political party which cast the next highest number of votes for the office of governor at such election.

Id. (LEXIS).

145. OKLA. STAT. ANN. tit. 26, § 2-111 (Westlaw through emergency effective legislation through Ch. 1 of the First Reg. Sess. of the 59th Leg. (2023)) ("[T]he county central committees of the two political parties with the largest number of registered voters in the state . . . shall each submit to the State Election Board a nominee for membership on the county election board and a nominee to serve as the alternate.").

146. N.Y. ELEC. LAW § 3-200(2) (McKinney 2023).

147. LA. STAT. ANN. § 18:423(C)(1) (Westlaw through the 2023 First Extra. Sess.).

are drawn from the two major political parties.[148] In Minnesota, each precinct's election board is composed of election judges,[149] who are appointed by municipal authorities who must draw from lists of individuals nominated by the political parties.[150]

In other states, local boards are elected with no requirement for adversarial party membership. This does not necessarily translate, however, to one-party control over local elections. New Mexico provides an illustrative example, where the local elected government body called the Board of County Commissioners ("BOCC") has numerous duties with respect to elections.[151] The BOCC, which consists of either three or five members,[152] holds a variety of election-related powers, including designating polling places, consolidating precincts, and appointing Boards of Registration.[153] Even though the New Mexico statute contains no requirement of adversarial partisan membership on the BOCC, in its duties overseeing elections, the BOCC is nevertheless required to prevent single-party domination by statutory mandate. For example, when it appoints Boards of Registration, the BOCC must ensure that no more than two of the three persons are members of the same party at the time of their appointment.[154] New Mexico's statute also requires that each County Clerk appoint a "precinct board" for each polling precinct for a term of

148. OHIO REV. CODE ANN. § 3501.06(B)(1) (LEXIS). Ohio's county boards are responsible for establishing precincts and have local rulemaking authority. *Id.* § 3501.11 (LEXIS) (providing that rules be consistent with state election law and regulations put forward by the Secretary of State).

149. MINN. STAT. § 204B.20 (2022).

150. *Id.* § 204B.21.

151. Elections are only a part of the BOCC's function. The BOCC serves numerous roles, including adopting the annual budget, approving tax levies, and enacting ordinances to provide for the health, safety, welfare, prosperity, and morals of the community. The BOCC also has "significant appointive, administrative, and regulatory powers. . . . [T]hey must also cooperatively share their power with other elected county officials . . . [such as] the Assessor, Clerk, Sheriff, Treasurer, and Probate Judge." *See* N.M. EDGE CNTY. COLL., THE NEW MEXICO COUNTY COMMISSIONER HANDBOOK 5 (2022), https://nmedge.nmsu.edu/documents/consolidated_commissioner_2022_handbook_final_november_18.pdf [https://perma.cc/6C8G-2RHA]. Another role of local BOCCs in New Mexico is serving *ex officio* as the county canvassing board. New Mexico law allows the BOCC to designate the Board of Registration to serve as the county canvassing board for the county. *Id.* at 136. The New Mexico County Commissioner's Handbook notes that in practice, the BOCC delegates much of the work of examining the returns to the county clerk's staff. *Id.*

152. County Commissioner terms are staggered. N.M. STAT. ANN. § 4-38-6 (Westlaw through Ch. 3 of the 2023 First Reg. Sess. of the 56th Leg. (2023)). In counties with three County Commissioners, the terms of no more than two commissioners may expire in the same year. In counties with five County Commissioners, the terms of no more than three commissioners may expire in the same year. N.M. CONST. art. X, § 2. A commissioner holds office until their successor is qualified and enters upon the duties of the office. N.M. STAT. ANN. § 4-38-7 (Westlaw).

153. N.M. STAT. ANN. §§ 1-3-2, 1-4-34 (Westlaw).

154. *Id.* § 1-4-34 (Westlaw). Appointments to the Board of Registration are made from the lists of county party chairpersons. The BOCC must give preference to the names in the order indicated on the lists. *Id.* (Westlaw).

two years.[155] Each precinct board must consist of a presiding judge and two election judges representing each major party.[156] In this way, adversarial partisanship remains at the core of local election administration in New Mexico.

Similar to their role on state-level boards, adversarial partisan actors on local boards serve to legitimize elections, ensure transparent decision-making, and diffuse power.

E. *State and Local Canvassing Boards*

Another example of the purposeful injection of partisans in election administration is the use of canvassing boards for certifying vote totals. State canvassing boards exist at the local and statewide level in different configurations from state to state. Some states impose canvassing duties *ex officio* on state and local officials or bodies.[157] Other states convene canvassing boards specifically for the purpose of certifying vote totals.[158] Such boards commonly feature purposeful partisan checks,[159] although some state canvassing boards lack provisions to ensure rival partisan makeup. For example, Idaho's state board of canvassers consists of its Secretary of State, state Controller, and state Treasurer, all of whom are elected state officials who may belong to the

155. *Id.* §§ 1-2-6, 1-2-10 (Westlaw).

156. *Id.* § 1-2-12 (Westlaw).

157. *See, e.g.*, IDAHO CODE § 34-1211 (LEXIS through Ch. 20 from the 2023 Reg. Sess. and effective as of Mar. 8, 2023); MONT. CODE ANN. § 13-15-502 (LEXIS through Ch. 20 from the 2023 Reg. Sess. and effective as of Mar. 8, 2023); UTAH CODE ANN. § 20A-4-306 (LEXIS through 2022 Third Spec. Sess. of the 64th Leg.).

158. *See, e.g.*, MICH. CONST. art. II., § 7; NEB. REV. STAT. § 32-1028 (2022); 17 R.I. GEN. LAWS § 17-8-1 (LEXIS through Ch. 14 of the 2023 Sess., not including all corrections and changes by the Director of Law Revision); WYO. STAT. ANN. § 22-16-101 (LEXIS through 2022 Budget Sess.).

159. *See* MD. CODE ANN. ELEC. LAW § 11-301(g) (LEXIS through Ch. 8 of the 2023 Reg. Sess. of the Gen. Assemb.; and including legislative changes ratified by the voters at the Nov. 2022 election) ("At least one member of the board of canvassers present shall be a registered voter of the principal minority party."); VA. CODE ANN. § 24.2-106(A) (LEXIS through Acts of the 2023 Sess. Effective Mar. 15, 2023) ("There shall be in each county and city an electoral board composed of three members who shall be qualified voters of such county or city[,] . . . [t]wo electoral board members shall be of the political party that cast the highest number of votes for Governor at that election."). North Carolina's statute states that

> there shall be a county board of elections, to consist of five persons . . . . Four members of county boards of elections shall be appointed by the State Board . . . . One member of the county boards of elections shall be appointed by the Governor to be the chair of the county board . . . . Of the appointments to each county board of elections by the State Board, two members each shall belong to the two political parties . . . .

N.C. GEN. STAT. § 163-30(a) (LEXIS through Sess. Laws 2023-12 of the 2023 Reg. Sess. of the Gen. Assemb.). Most states key the partisan makeup of canvassing boards to the top two parties receiving the most votes in a designated election: for example, the most recent governor's race. *See, e.g.*, NEB. REV. STAT. § 32-1028; VA. CODE ANN. § 24.2-106(A) (LEXIS).

same party.[160] At the other extreme is Vermont, which seats rival party officials from the two major parties on its local canvass committees.[161]

In general, the authority of state canvassing boards is restricted.[162] State canvass boards seldom feature avenues for dissent or refusal (meaning they are ministerial only). For example, Nebraska's canvass statute explicitly spells out the ministerial nature of its state canvass board.[163]

When partisan checks on canvassing boards fail, courts provide a backstop. Events in Michigan in 2020 and New Mexico and Arizona in 2022 bear this out. In Michigan, canvassing boards consist of four people balanced between the two largest political parties.[164] In the 2020 election, Trump and others exerted considerable pressure on Republican members of canvassing boards in Michigan not to certify the election.[165] Republican members of the board of

160. *See* IDAHO CODE § 34-1211 (LEXIS) ("The secretary of state, state controller and state treasurer shall constitute the state board of canvassers.").

161. VT. STAT. ANN. tit. 17, § 2592(a)–(b) (LEXIS through Act No. 10 and Municipal Act No. M-1 of the 2023 Sess.) ("For all county offices and countywide public questions, the county clerk and the chair of the county committee of each major political party (or designee) shall constitute a canvassing committee to receive and tally returns and issue certificates.").

162. State canvassing boards do not typically possess powers of investigation. *See, e.g.*, IDAHO CODE § 34-1203A(1), (2) (LEXIS); N.J. STAT. ANN. § 19:20-1 (Westlaw through L.2023, c. 9 and J.R. No. 1); WYO. STAT. ANN. § 22-16-103 (LEXIS). Rhode Island is an example of a state that gives unusually broad investigative powers to its canvass boards, including the power to subpoena similar to a court. *See* 17 R.I. GEN. LAWS § 17-8-7 (LEXIS) (enabling the board to "summon witnesses by subpoena signed by the clerk of those boards, and to compel these witnesses to attend and testify in the same manner as witnesses are compelled to appear and testify in any court").

163. NEB. REV. STAT. § 32-1037 ("The duty of the board of state canvassers to canvass the votes is ministerial in nature."). Some canvassing boards provide for mechanisms of dissent, for example, Maryland's, which features a dissent mechanism requiring a written statement be submitted to the State Board of Elections. MD. CODE ANN. ELEC. LAW § 11-503(b)(1) (LEXIS). According to this statute,

> If a member of the Board of State Canvassers dissents from a determination of an election result or reasonably believes that the conduct of a Board member or Board proceeding was not in compliance with applicable law or regulation or was otherwise illegal or irregular, the member shall prepare and transmit a distinct written statement of the reasons for the dissent or concern to the State Board of Elections.

Id. (LEXIS). State courts have confirmed the ministerial nature of canvassing boards. *See, e.g.*, Coleman v. Ritchie, 762 N.W.2d 218, 228 (Minn. 2009) (reaffirming the board's ministerial nature while discussing the error correction powers of the board); Reed v. Bd. of Cnty. Canvassers, 194 A. 280, 282–83 (N.J. 1937) (discussing the narrow power of the board in its ministerial role); James v. Bartlett, 359 N.C. 260, 269–71, 607 S.E.2d 638, 644–45 (2005) (striking down a board attempt to expand its authority as outside the law).

164. MICH. CONST. art. II, § 7.

165. *See* Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 17th, 2020, 9:11 PM), https://twitter.com/realDonaldTrump/status/1328883405837258753?s=20&t=BtsKeFiNUv43K9baV31kKw [https://perma.cc/TYL4-Y8TE]; Jonathan Oosting, *Michigan GOP Leaders Meet Trump, Promise 'We Will Follow Law' on Election*, BRIDGE MICH. (Nov. 20, 2020), https://www.bridgemi.com/michigan-government/michigan-gop-leaders-meet-trump-promise-we-will-follow-law-election [https://perma.cc/D4AR-MV7W].

canvassers for Wayne County, Michigan's largest county (which includes Detroit), resisted certification.[166] After sustained public pressure and threat of legal action, both Republican members voted to certify.[167]

Partisan pressures likewise played heavily during a 2022 New Mexico primary election certification. Members of the Otero County Commission, which serves as the county canvass board,[168] refused to certify election results.[169] Notably, New Mexico law does not provide for adversarial partisan checks on its canvassing board.[170] Ultimately, the Secretary of State filed a lawsuit for a

166. *See* Colin Dwyer, *Michigan's Wayne County Certifies Election Results After Brief GOP Refusal*, NPR (Nov. 18, 2020, 9:39 AM), https://www.npr.org/sections/live-updates-2020-election-results/2020/11/18/936120411/michigans-wayne-county-certifies-election-results-after-brief-gop-refusal [https://perma.cc/6JQQ-NYTS].

167. *See id.* Michigan law is clear that its canvassing boards lack discretion, leaving other processes avenues for challenging results. *See* MICH. BUREAU OF ELECTIONS, PROCEDURES AND DUTIES OF THE BOARDS OF COUNTY CANVASSERS 18–19 (2022), https://www.michigan.gov/sos/-/media/Project/Websites/sos/02lehman/BCC_Manual.pdf?rev=509a71cc4f264c258ba7645f9a8e67b9&hash=4246C7D3419DF0491586ACFA3F0B5AE7 [https://perma.cc/3D6X-B9A5] (stating that "duties of the Boards of County Canvassers are ministerial and clerical" in nature and "exclude the power to . . . in any way 'go behind' the *Statements of Votes* or poll books delivered to the Board 'for the purpose of determining frauds in the election.'" (quoting McLeod v. State Bd. of Canvassers, 7 N.W. 2d 240, 243 (Mich. 1942))). Since the 2020 election, some have suggested making more explicit the ministerial role of canvassing boards, thus reducing reliance on the adversarial partisan model. *See, e.g.*, Kevin Johnson, *Why We Need To Take the Partisanship Out of Certifying Elections*, GOVERNING (Oct. 27, 2022), https://www.governing.com/now/why-we-need-to-take-the-partisanship-out-of-certifying-elections [https://perma.cc/R5FK-EWUB] ("Just as our system of partisan chief election officials has opened the door this year to election deniers, giving partisans a key role in certification likewise invites danger [and because] elections today fac[e] so many overlapping threats, states should act to cross this one off the list."). On November 8, 2022, Michigan voters approved a ballot initiative that clarified the ministerial duty of its canvassing boards; the text of Michigan's new constitutional amendment retains the adversarial model. *See* MICH. CONST. art. II, § 7. The amendment states that

> [a] majority of any board of canvassers shall not be composed of members of the same political party. . . . It shall be the ministerial, clerical, nondiscretionary duty of a board of canvassers, and of each individual member thereof, to certify election results based solely on: (1) certified statements of votes from counties; or (2) in the case of boards of county canvassers, statements of returns from the precincts and absent voter counting boards in the county and any corrected returns. The board of state canvassers is the only body or entity in this state authorized to certify the results of an election for statewide or federal office and to determine which person is elected in such election.

Id.

168. N.M. STAT. ANN. § 1-13-1(A) (Westlaw through Ch. 3 of the 2023 First Reg. Sess. of the 56th Leg. (2023)) ("The board of county commissioners is ex officio the county canvassing board in each county.").

169. Christina A. Cassidy, *County's Refusal To Certify the Vote Hints at Election Chaos*, ASSOCIATED PRESS (June 15, 2022), https://apnews.com/article/2022-midterm-elections-biden-new-mexico-voting-machines-7b91e326d2f378898046ec7df779ba20 [https://perma.cc/XH3V-4S4C].

170. *See* N.M. STAT. ANN. § 4-38-6(A) (Westlaw) (providing that county commissioners are elected).

writ of mandamus to compel certification of the results.[171] Concurrently, mounting political pressure, including threats of prosecution by the state Attorney General, helped force the board to certify the results.[172] The same basic chain of events played out in Arizona's Cochise County during the 2022 midterm election.[173] As these examples demonstrate, partisan actors in the certification process are tempered by law and constrained by courts.[174]

F. *Temporary Workers (Poll Workers)*

Localities in every state rely on temporary election workers, often referred to as poll workers, to staff elections. In presidential election years, nearly one million Americans step forward to work the polls.[175] Typically, poll workers engage in a range of tasks before, during, and after elections from setting up polling places and checking in voters to tabulating voted ballots, processing absentee ballots, and staffing recounts.[176] Forty-eight states mandate that poll

171. Press Release, N.M. Sec'y of State, Sec'y of State Files Lawsuit Against Otero Cnty. Comm'n for Illegal Actions To Disenfranchise 2022 Primary Election Voters and Harm Primary Candidates (June 14, 2022), https://www.sos.state.nm.us/2022/06/14/secretary-of-state-files-lawsuit-against-otero-county-commission-for-illegal-actions-to-disenfranchise-2022-primary-election-voters-and-harm-primary-candidates/ [https://perma.cc/3GR4-MYJN]. New Mexico election law also includes a provision that if a county canvass board is not fulfilling its duties, any voter may petition the court for a writ of mandamus to compel the board to do its job. N.M. STAT. ANN. § 1-13-12 (Westlaw) ("The district court, upon petition of any voter, may issue a writ of mandamus to the county canvassing board to compel it to approve the report of the county canvass and certify the election returns.").

172. Susan Montoya Bryan & Morgan Lee, *Screams, Threats as New Mexico Counties Certify Vote*, ASSOCIATED PRESS (June 17, 2022), https://apnews.com/article/2022-midterm-elections-new-mexico-government-and-politics-donald-trump-fa26178d77b421ff7317d1a6ae83e0c4 [https://perma.cc/Y7SM-RCK5].

173. Jonathan J. Cooper, *Arizona County Certifies Election After Judge's Order*, ASSOCIATED PRESS (Dec. 2, 2022), https://apnews.com/article/2022-midterm-elections-arizona-phoenix-government-and-politics-938a920c848d28ca23435a6d2cb61f98 [https://perma.cc/SR7K-AEQM].

174. For an analysis of the role of courts in policing partisan malfeasance in canvassing and other postelection processes, see Derek Muller, *Election Subversion and Writs of Mandamus*, ELECTION L. BLOG (Feb. 2, 2022, 7:08 AM), https://electionlawblog.org/?p=127340 [https://perma.cc/XMZ7-N9RP] ("By the end of the canvass, recount, audit, and contest, however, the results are in. There is a fixed set of results for a winning candidate and a losing candidate. The decision to 'certify' an election is a ministerial act. And if an election official opted to refuse to certify, or certify some other result, the remedy is to file in state court (not federal court) for mandamus."); *cf.* Johnson, *supra* note 167 (proposing to eliminate certification boards altogether).

175. ELECTION ASSISTANCE COMM'N, EAVS DEEP DIVE: POLL WORKERS AND POLLING PLACES 1 (2017), https://www.eac.gov/sites/default/files/document_library/files/EAVSDeepDive_pollworkers_pollingplaces_nov17.pdf [https://perma.cc/TX8N-BS6R] (estimating that 917,694 poll workers worked the polls in 2016, perhaps a more representative figure given pandemic conditions in 2020).

176. *See Research & Policy*, NAT'L CONF. STATE LEGISLATURES (June 17, 2020), https://www.ncsl.org/research/elections-and-campaigns/election-poll-workers637018267.aspx [https://perma.cc/N4E7-3UF4].

workers hail from different political parties.[177] Arizona's statute is typical, requiring local boards of elections to ensure that appointed poll workers do not share the same political affiliation. Specifically, Arizona requires that "[i]n each precinct where the inspector is a member of one of the two largest political parties, the marshal in that same precinct shall be a member of the other two largest political parties."[178] North Carolina's poll worker statute requires that rules governing who works elections must "emphasize the need for the appearance as well as the reality of security, accuracy, participation by representatives of more than one political party, openness of the process to public inspection, and honesty."[179]

Illinois is another example of a state that relies heavily on rival partisan poll workers at multiple stages. Illinois, which uses the term "election judges" to refer to its poll workers, requires a careful scheme for their appointment to ensure major party representation in their ranks. Illinois law states that "[n]o more than 3 persons of the same political party shall be appointed judges of the same election precinct or election judge panel."[180] The Illinois statute also spells out particular roles for rival major party election workers to guard against fraud. For example, Illinois law requires that voters with disabilities who require assistance must be accompanied and assisted by election workers from two

177. *Id.* ("48 states mandate a specific political party makeup of poll workers. A worker's party affiliation is sometimes taken from voter registration records or based on the party he or she voted for in the last primary election. In many states, poll workers must be nominated by the local chapter of their political party to serve in affiliation with that party."). Challenges to partisan affiliation requirements for local election official appointments have been unsuccessful. *See, e.g.*, Werme v. Merrill, 84 F.3d 479, 487 (1st Cir. 1996) (denying under a rational basis review third-party challenge to state statute requiring appointment of election inspectors and ballot clerks based on major party affiliation).

178. ARIZ. REV. STAT. ANN. § 16-531(A) (Westlaw through the Second Reg. Sess. of the Fifty-Fifth Leg. (2022), and includes Election Results from the Nov. 8, 2022 Gen. Elec.). Arizona law further provides that

> [t]he inspector, marshal, and judges shall not have changed their political party affiliation . . . since the last preceding general election, and if they are comprised of only members of the two political parties that cast the highest number of votes in the state at the last preceding general election, they shall be divided equally between these two parties.

Id. (Westlaw). In 2022, Republicans filed suit in several jurisdictions to secure compliance with adversarial partisan mandates. *See* Patrick Marley & Yvonne Wingett Sanchez, *RNC Seizes on Political Affiliations of Poll Workers in Swing States*, WASH. POST (October 7, 2022), https://www.washingtonpost.com/politics/2022/10/07/rnc-poll-workers/ [https://perma.cc/WJ43-44BN (dark archive)]. In Arizona, where Republican workers trailed Democrat workers by eighteen percent prior to the 2022 midterm election, the Republican National Committee filed suit to force the county to release data about poll worker recruitment and to shorten the hours of poll worker shifts (presumably to make recruitment easier). *See id.*

179. N.C. GEN. STAT. § 163-166.10 (LEXIS through Sess. Laws 2023-12 of the 2023 Reg. Sess. of the Gen. Assemb.).

180. 10 ILL. COMP. STAT. 5/13-1 (Westlaw through P.A. 103-1 of the 2023 Reg. Sess.).

different parties.[181] If curbside voting occurs, two election judges from different parties will be present to allow electors to vote.[182] If an elector asks for further instructions once they have been given a ballot and have entered the voting booth, two judges of opposite political parties will give them instructions.[183] If a voting device has been enabled for voting but the voter leaves the polling place without casting a ballot, two judges of election, one from each of the two major political parties, shall spoil the ballot.[184] The Illinois statute has explicit roles for adversarial partisans in the counting process as well.[185]

Important caveats to the adversarial poll worker model include the dual problems of public participation and political geography. Not only is poll worker recruitment a perennial problem,[186] but local election officials routinely report an inability to comply with the adversarial partisanship model due to a lack of qualifying candidates.[187] As a matter of practicality, LEOs must make do with whoever steps forward to fulfill this important civic duty. This problem is particularly acute in jurisdictions that lack political diversity, rendering the pool of eligible people belonging to the minor party scarce.[188]

Despite these hurdles, the use of strategically placed partisans intentionally permeating the ranks of temporary election workers is intended to ensure reliability, fairness, and transparency of election processes.[189]

181. *See id.* at 5/17-13(b) (Westlaw).

182. *See id.* at 5/17-13.5 (Westlaw).

183. *See id.* at 5/24-10 (Westlaw).

184. *See id.* at 5/24C-12 (Westlaw).

185. *See id.* at 5/17-18 (Westlaw) (requiring that to count the votes, three judges, at least one from each political party, will carefully mark three separate tally sheets for each vote a candidate receives); *id.* at 5/24-10A(b) (Westlaw) (requiring that in the event of an overvote, a group of judges of election, consisting of at least one judge from each of the two major political parties, will make a duplicate ballot of all votes, except for the office that is overvoted using the ballot label booklet of the precinct).

186. Poll worker recruitment is a problem that predated the 2020 pandemic election. *See, e.g.*, Matt Vasilogambros, *Few People Want To Be Poll Workers, and That's a Problem*, PEW CHARITABLE TRS. (Oct. 22, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/22/few-people-want-to-be-poll-workers-and-thats-a-problem [https://perma.cc/37E8-BVKN].

187. *See* Rebecca Green, *Partisan Parity in U.S. Election Administration*, *in* OXFORD HANDBOOK ON ELECTIONS (Eugene Mazo, ed., Oxford U. Press, forthcoming 2023) (describing the challenges of recruiting rival partisans to work the polls). *See generally* BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART (2009) (describing the ills of political segregation).

188. *See* HALE ET AL., *supra* note 21, at 158 ("[I]n most locations, party activities have not produced a sufficient volume of poll workers and shortfalls have occurred."). During the 2020 midterms, the Republican National Committee sued to enforce poll worker partisan parity requirements. *See* Marley & Sanchez, *supra* note 178 (describing suits in Arizona, Nevada, and Michigan).

189. Requirements for multiple parties to be represented in election processes are not confined to Election Day. *See supra* Part II. For example, there are strict rules for bipartisan representation at recount tables and during the certification stage. *See supra* Part II.

G. *Partisan Poll Watchers and Challengers*

Explicitly partisan poll watchers are a key feature in securing public trust in U.S. elections. While not technically election "staff," poll watchers nevertheless play a central role in election system design. As states expanded election administration in the Progressive Era,[190] reformers understood that partisan-appointed poll watchers would provide critical buy-in from political parties and members of the public. As Joseph Harris described in 1934, "It is generally believed that the honesty of elections is safeguarded by having at the polls representatives of the several political parties as official watchers . . . and, in primary or nonpartisan elections, representatives of the individual candidates as well."[191]

Today, a majority of states rely on a system of oversight in which political parties or candidates appoint observers to watch over election processes. Just like "the justice system relies on the adversarial process to ensure fair judicial outcomes, . . . candidate- and party-appointed election observers seek to achieve much the same effect: to ensure that the voters of each candidate or party are protected and that elections are administered according to the law."[192] Election system designers have relied on poll watchers to ensure the perception and reality of fairness in election administration.[193] Partisan poll watchers provide

190. *See supra* Section I.C; LOGAN, *supra* note 23, at 21 (discussing a reform in Philadelphia in 1891 requiring a system of partisan poll watchers in which "[t]he persons acting as watchers were required to have a certificate from the County Commissioners showing the party [they] represented").

191. HARRIS, *supra* note 2, at 232–33. Harris acknowledged that where party organizations were strong (e.g., in big cities) party-appointed poll watchers were "regularly placed," whereas in smaller communities without organized party infrastructures, poll watchers were "rarely used." *Id.* at 233. Harris also suggested that partisan representatives routinely stood watch over the counting processes, whether credentialed as poll watchers or not: "Of course, it is common everywhere for the precinct captain and other political workers, if there are any at the election, to be present at the account, whether with credentials as watchers or not." *Id.* Furthermore, Harris makes a special point to note the mischief partisan-appointed poll watchers can unleash:

> A number of prominent election officers have complained to the writer [Harris] of the poor class of watchers appointed by the parties in many precincts of the city, and have related incidents of where the watchers were drunk or raised such a disturbance that they had to be forcibly ejected from the polls.

Id. at 235.

192. Rebecca Green, *Election Observation Post-2020*, 90 FORDHAM L. REV. 467, 472–73 (2021) [hereinafter Green, *Election Observation*].

193. Thirty-three states allow nonpartisan observers (i.e., members of the public not appointed by political parties or candidates) in addition to, or sometimes instead of, partisan observers. *Id.* at 473. In some instances, a state's statute may not explicitly provide for nonpartisan observers, but in practice, election officials allow nonpartisan observers to watch. *See Policies for Election Observers*, NAT'L CONF. STATE LEGISLATURES (Nov. 7, 2022), https://www.ncsl.org/research/elections-and-campaigns/policies-for-election-observers.aspx [https://perma.cc/XMT9-E69M]. The source notes that

another example of the conscious injection of overtly partisan actors aimed at achieving fairness and transparency goals.

Many state statutes also provide for partisan "challengers" as a distinct role.[194] Although the terminology may differ state to state and is often conflated with the role of observer, a challenger is generally understood as a person who may contest the eligibility of individual voters. New Jersey's challenge statute is typical:

> [C]hallengers shall be the authorized challengers for their respective political parties and candidates . . . . They shall have the power to challenge the right to vote therein of any person claiming such right and shall have power to ask all necessary questions to determine this right . . . ."[195]

State statutes typically require that challengers hail from opposing political parties and constrain their activities to avoid voter intimidation and disruption of the voting process.[196]

* * *

> [f]ourteen state [sic] don't explicitly authorize nonpartisan citizen observers in statu[t]e but have allowed them in practice in the past. This may be left up to the discretion of the state or local election officials and evaluated on a case by case basis: Colorado, Delaware, Idaho, Kansas, Kentucky, Louisiana, Maine, Minnesota, Montana, Nebraska (will explicitly allow them in statute beginning Nov. 14, 2020), New Jersey, New York, North Carolina and Oregon.

Id.

194. The history of challenger provisions is discussed *supra* Section I.B. *See also* Gilda R. Daniels, *Outsourcing Democracy: Redefining Public-Private Partnerships in Election Administration*, 88 DENV. L. REV. 237, 250–51 (2010) (describing state statutory challenger provisions).

195. N.J. STAT. ANN. § 19:7-5 (Westlaw through L.2023, c. 9 and J.R. No. 1).

196. Some states, for example, require that any challenges be undertaken in good faith, based on "substantial evidence" and/or identifies "specific source of the information or personal knowledge." RILEY, *supra* note 30, at 18; *see also Poll Watchers and Challengers*, NAT'L CONF. STATE LEGISLATURES (Nov. 1, 2022), https://www.ncsl.org/research/elections-and-campaigns/poll-watcher-qualifications.aspx [https://perma.cc/252S-6R8A] (detailing state challenger laws). As methods of voting have moved beyond the polling place, several states have expanded challenge provisions to include challenges to absentee voter eligibility. *See, e.g.*, KY. REV. STAT. ANN. § 117.087(1) (Westlaw through laws effective Apr. 4, 2023 and the Nov. 8, 2022 election) ("The challenge of a mail-in absentee ballot shall be in writing and in the hands of the county clerk before 8 a.m. on the day preceding any primary, regular election, or special election day."). The role of challenger is among the most controversial among adversarial partisan players as the practice has often been linked to voter intimidation and suppression. *See* Kate Uyeda, *Challenging the Challengers: How Partisan Citizen Observers Contribute to Disenfranchisement and Undermine Election Integrity*, 75 VAND. L. REV. 657, 677–78 (2022) (describing legal challenges that may be brought against disruptive challenger actions); Jason Belmont Conn, *Of Challengers and Challenges*, 37 UNIV. TOL. L. REV. 1021, 1022 (2006) (arguing that the presence of challengers is often unlawful and detrimental to the electoral process); Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173, 201–02 (2015) (describing legal redress against those engaging in groundless challenges of voters).

Observers of U.S. elections have routinely highlighted decentralization as a central feature.[197] Less often discussed is the purposeful placement of rival partisan actors at various stages and levels of state administration. When the role of partisans in election administration is addressed, comments are generally disparaging.[198] Yet, even in states with a single partisan election administrator at the helm, election staffing features explicitly rival partisans at all levels to ensure that one party is unable to unilaterally control how elections are run and to ensure public buy-in of election outcomes.[199]

III. THE LIMITS OF ADVERSARIAL ELECTION ADMINISTRATION

In numerous ways, adversarial election administration as practiced in the United States falls short. Historically, single-party domination thwarted effective checks.[200] Today, the weak links are state election systems that place significant unilateral power in the hands of partisan CEOs. This configuration has caused considerable damage to public confidence. A textbook example is Florida Secretary of State Katherine Harris during the 2000 *Bush v. Gore*

197. Congress underscored the value of decentralization in election administration when passing the Help America Vote Act. *See* H.R. Rep. No. 107-329, 107th Cong. (2001) (citing three rationales for decentralized election administration: making it difficult for one party to seize control and dictate outcomes, allowing flexibility to take into account local conditions, and providing greater accountability); *Toward a Greater State Role in Election Administration*, 118 HARV. L. REV. 2314, 2317 (2005).

198. *See* HARRIS, *supra* note 2, at 32–33 (suggesting in 1934 that "[t]here should preferably be no requirement that each of the two dominant parties should be represented"); CTR. FOR DEMOCRACY & ELECTION MGMT., AM. UNIV., BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 1 (2005), https://ucdenver.instructure.com/courses/3034/files/378056/download?download_frd=1 [https://perma.cc/Y6S7-EZ9X (staff-uploaded archive)] (listing nonpartisan election administration as a central recommendation); Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL'Y REV. 125, 144 (2009) (arguing that the most important institutional reform in election administration should be the development of state election management bodies insulated from partisan politics); Hasen, *Beyond the Margin*, *supra* note 102, at 974 ("[T]he people running our election should not have a vested interest in their outcome."); KEVIN JOHNSON, THE CARTER CTR. & ELECTION REFORMERS NETWORK, NEW MODELS FOR KEEPING PARTISANS OUT OF ELECTION ADMINISTRATION 4, https://electionreformers.org/wp-content/uploads/2022/01/REV6_with-links.pdf [https://perma.cc/N6NK-WGT4] (advocating for nonpartisan CEOs appointed via "broadly representative election official nominating commissions" modeled after judicial nominating commissions); ELECTION REFORMERS NETWORK, NONPARTISANSHIP WORKS: HOW LESSONS FROM CANADA CAN RE-ESTABLISH TRUST IN U.S. ELECTION ADMINISTRATION 13 (2021), https://electionreformers.org/wp-content/uploads/2021/12/Nonpartisanship-Works.pdf [https://perma.cc/GQ5M-H2BV] (proposing the U.S. model nonpartisan election administration after Canada); Gordon et al., *supra* note 1 (recommending alternatives to partisan election administration and ways to reduce political parties' direct involvement in election administration).

199. *See supra* Section II.A.

200. *See* Green, *Election Observation*, *supra* note 192, at 472 (describing single-party domination in election administration historically).

debacle.[201] The partisan taint of her actions reverberates to this day.[202] The lack of conflict of interest rules constraining partisan CEO political activity during elections—including the egregious instances in which partisan CEOs have themselves run for office in elections they are charged with overseeing—demonstrates that states are far from perfecting the adversarial partisanship model.[203] Concentrated, unilateral authority at the state and local level are problematic; the fix involves adding partisan checks and/or reducing or limiting discretion of partisan actors as explored *infra* Part IV.

But unilateralism is only one way in which the adversarial system falls short. Another, which has come into greater relief in the last several years, involves actors deliberately flouting the adversarial system. To analogize again with the justice system: rather than arguing your side zealously in court, you instead ambush the courthouse. In what has been dubbed "election subversion," partisan actors reject the basic premise of democratic functioning. They seek not to work within the election system, but to actively undermine it. Election laws are respected and followed only when doing so suits the end goal of placing your candidate in power.

Several election scholars are documenting this trend.[204] In his important article on this subject following the 2020 election, Professor Richard L. Hasen details numerous threats to fair elections that swirl today.[205] Most relevant here, Hasen outlines election subversion actions taken by election administrators who

201. Harris notoriously served as the Florida Secretary of State while simultaneously cochairing Florida's Bush for President campaign. *See* Christian M. Sande, *Where Perception Meets Reality: The Elusive Goal of Impartial Election Oversight*, 34 WM. MITCHELL L. REV. 729, 733 (2008) (describing the lasting taint of Florida Secretary of State Katherine Harris's partisan role during the 2000 election). Before and after Election Day in 2000, Harris made numerous decisions that appeared egregiously partisan, from purging voter lists to declining to extend certification deadlines despite ongoing recounts, to name just a few. *Id.*

202. *See id.*

203. Molly Greathead convincingly argues for curbs on the inherent conflict of interest present when CEOs run for office in their state. *See* Molly C. Greathead, *"No Man Can Be the Judge of His Own Cause": Applying the Principles of Due Process to Our Elections*, 18 ELECTION L.J. 360, 361 (2019) ("[T]he same due process requirement of a fair and impartial decision maker in a trial should apply to officials in charge of overseeing elections and that a conflict of interest exists when a chief election official is also in charge of overseeing her own election."). A 2020 study found 138 instances where a CEO oversaw an election they were also running in over the past twenty years. *See* ROPES & GRAY, EXECUTIVE SUMMARY: CHIEF ELECTION OFFICERS AND CONFLICTS OF INTEREST REPORT 7 (2020), https://electionreformers.org/wp-content/uploads/2020/09/01.27.20-RG-Executive-Summary-Reformatted.pdf [https://perma.cc/JET8-59FF].

204. Lisa M. Manheim offers a helpful survey of election subversion literature post-2020. *See* Lisa Manheim, *Election Law and Election Subversion*, 132 YALE L.J. F. 312, 312–13 (2022).

205. Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265, 265 (2022) [hereinafter Hasen, *Identifying and Minimizing Risk*] (identifying the main threats as (1) state legislatures usurping voter choice; (2) fraudulent or suppressive election administration; and (3) violent and disruptive private actions to disrupt the election process).

flout laws and norms the system counts on them to abide. A poster child for this phenomenon is Tina Peters of Mesa County, Colorado. Peters, an avowed 2020 election denier, allegedly compromised the source code of voting machines in her jurisdiction in an (unsuccessful) effort to expose (nonexistent) wrongdoing.[206] Peters's actions, which involved forging credentials to enable unauthorized individuals to access county election equipment, exposed Mesa County's election system to heightened risk of hacking and violated Colorado law leading to her criminal prosecution.[207] In the Peters example, the problem is not a failure of adversarialism but acute and illegal subversion of the system entirely.

To address this and other forms of subversion in election administration, Hasen proposes a set of sensible legal reforms involving improved transparency, ballot chain of custody rules, and auditing.[208] Yet Hasen understands that changes to the law can only go so far when subversion tactics exploit or flout it.[209] For this reason, he seeks to address what he fears is the "overpoliticization" of election administration.[210] He targets election officials who embrace the false claim of a stolen election in 2020 (often termed "election deniers"), concerned that they may "manipulate election results in a misguided effort to 'even the score.'"[211]

The idea that partisans might exploit or flout the rules of the game is not new. Writing in 2008, political scientist Nancy Rosenblum recognized the dangers of adversarial breakdown.[212] According to Rosenblum, political parties only forward democratic principles if certain key conditions are present:

> Political parties are congruent with democracy if they are committed to operating within the electoral system by appealing publicly to voters for a chance to enter and control government; if they do not aim at

206. Jeremy Harlan, *Colorado Clerk Tina Peters Pleads Not Guilty in Election Security Breach Case*, CNN (Sept. 7, 2022, 10:00 PM), https://www.cnn.com/2022/09/07/politics/tina-peters-pleads-not-guilty-colorado/index.html [https://perma.cc/D9ZV-E8XR] (describing Peters's criminal prosecution).

207. *Id.*

208. Hasen, *Identifying and Minimizing Risk*, *supra* note 205, at 266.

209. Surveying election subversion literature post-2020, Manheim frames election subversion "as the exploitation of a breakdown in the rule of law to install a candidate into elected office." Manheim, *supra* note 204, at 313.

210. Hasen, *Identifying and Minimizing* Risk, *supra* note 205, at 266 ("The solutions to these problems are both legal and political. Legal changes should include: . . . rules limiting the overpoliticization of election administration . . . .").

211. *Id.* at 291. Ultimately Hasen's fix leaves room for doubling down on the adversarial guardrails suggested here. *Id.* at 298 (arguing that election rules must ensure "actual administration of elections will be done on a fair bipartisan or nonpartisan basis").

212. NANCY L. ROSENBLUM, ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES 456–59 (Princeton Univ. Press ed., 2008).

> destroying opposition parties as enemies; and if, on losing an election, they give up office without a fight.[213]

Rosenblum theorizes that political parties pose the greatest threat to democracy when they "threaten civil war or violent hostilities, [or] do not accept their status as parts but pretend to be the sole representative of the nation."[214] Rosenblum thus challenges the assumption that partisanship is the enemy.

Indeed, it does not necessarily follow that partisans who earnestly believe the 2020 election was stolen will seek to subvert elections. If elected to or placed in office, skeptics may well be sticklers for following the letter of the law. Consistent with this idea, some election officials have concluded that one way to address concerns about the reliability of elections is to recruit skeptics as election workers in an effort to help them see firsthand the many safeguards and guardrails the U.S. system of elections contain.[215]

An obvious retort is that even well-intentioned election skeptics may cause harm to the election system. Calls for hand counting ballots during the 2022 midterm, born of misguided distrust of voting machines, provide an example.[216] Though advocates for hand counting may believe it achieves more trustworthy outcomes, hand counting is far less reliable than machine counting and is likely to cause enormous delay in reaching a final result.[217] In addition, hand counts may violate state law.[218] Thus, well-intentioned though misguided assumptions

213. *Id.* at 414.

214. *Id.*

215. *See, e.g.*, Greg Jaffe & Patrick Marley, *In a County Rife with Conspiracy Theories, a GOP Clerk Fights To Win Voters' Trust*, WASH. POST (Nov. 4, 2022, 6:00 AM), https://www.washingtonpost.com/politics/2022/11/04/election-official-fights-misinformation/ [https://perma.cc/4EPH-9PU8 (dark archive)] ("'What I always tell people who have questions or who are cynical or concerned with the process: sign up' [Justin Roebuck, an election official from Ottawa County, Michigan,] said. 'It's great . . . . It's God's work in my opinion.'").

216. Rosalind S. Helderman, Amy Gardner & Emma Brown, *How Trump Allies Are Pushing To Hand-Count Ballots Around the U.S.*, WASH. POST (Apr. 4, 2022, 6:00 AM), https://www.washingtonpost.com/politics/2022/04/04/trump-hand-counted-ballots-dominion-machines/ [https://perma.cc/3XLS-SUBN (dark archive)].

217. *See* Karena Phan & Ali Swenson, *Why Do Election Experts Oppose Hand-Counting Ballots?*, ASSOCIATED PRESS (Nov. 3, 2022), https://apnews.com/article/2022-midterm-elections-nevada-83f8f680cfaf96adce39bcbdd8e4610a [https://perma.cc/G5YA-VYBX] (noting that machine counts are twice as accurate as hand counts, which can take weeks or months depending on the size of the jurisdiction); Roman Battaglia, *A California County Has Dumped Dominion, Leaving Its Election Operations Up in the Air*, NPR (Mar. 10, 2023, 5:00 AM), https://www.npr.org/2023/03/10/1162352172/shasta-county-dominion-voting-lindell-hand-count [https://perma.cc/Y2X8-UUT3] (describing the Shasta County Board of Supervisor's decision, based on conspiracy theories about Dominion voting machines, to hand count ballots despite increased cost and decreased efficiency and accuracy).

218. *See, e.g.*, Jen Fifield, *Judge Blocks Cochise County Plan for Full Hand Count of Ballots*, ARIZ. MIRROR (Nov. 8, 2022, 10:41 PM), https://www.azmirror.com/2022/11/07/judge-blocks-cochise-county-plan-for-full-hand-count-of-ballots/ [https://perma.cc/RVZ9-SZTA] (describing court ruling that hand counts violate Arizona law).

about election administration are nevertheless dangerous to democratic functioning. Yet the fix is to address misinformation about the reliability of U.S. elections and to improve public education about how elections are run and the many safeguards in place. Removing partisans from election administration is unlikely to address these harms and may ultimately stoke conspiracies if skeptical partisans are locked out.

To function as designed, adversarial election administration assumes partisan actors will play inside the adversarial paradigm.[219] Addressing these problems—and related issues surrounding—are central to ensuring democratic functioning.[220] As the next part explores, tagging partisan election administration as the source of the danger misses the mark, and even, in its most aggressive forms, risks exacerbating both the threats and harassment election administrators around the country face and further eroding public confidence in elections. While a breakdown in the adversarial system threatens harm to its functioning, so too does the refrain that "unless [Democrats or Republicans] run our elections, democracy is doomed." The next part traces scholarship recognizing a role for rival partisan actors within election administration and, building on these ideas, suggests paths forward.

IV. ADVERSARIAL ELECTION ADMINISTRATION AND THE PATH FORWARD

Election law scholars have hinted at the idea that partisanship might be part of the solution in reforming how elections are run. In 2007, Heather Gerken wrote an article addressing the general problem of trusting elected officials to enact electoral reforms: the fox-guarding-the-henhouse problem.[221] Those in power will write election rules (such as drawing district lines) that maintain their power, putting incumbent interests ahead of the public good. Gerken characterized the problem of politics in election rulemaking this way:

> When academics and policymakers talk about what ails American politics, many offer a similar diagnosis: the problem is that we leave the regulation of politics *to* politics; elected officials set the rules by which

219. A related set of concerns involve legislative powershifting that actively undermines distributed democratic power within the states (to borrow Jessica Bulman-Pozen and Miriam Seifter's phrasing). For an excellent overview of this class of harms and an argument that state courts are in the best position to address it, see Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WISC. L. REV. 1337, 1339 (explaining the class of harms and arguing that state courts are in the best position to address threats to elections).

220. Lisa Manheim, Jessica Bulman-Pozen, and Miriam Seifter settle on state courts as the preferred mechanisms for addressing these threats. *See* Manheim, *supra* note 204, at 349 ("[C]ourts . . . display important strengths in response to election subversion."); Bulman-Pozen & Seifter, *supra* note 219, at 1399 (arguing that state courts are well-situated to counter election subversion).

221. *See* Heather K. Gerken, *The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics*, 6 ELECTION L.J. 184, 184 (2007).

> they are elected. Unsurprisingly the proposed cure to this problem is often to create an independent body to set the rules insulating its members from the distorting effects of special interest politics.[222]

But Gerken found fault in an approach that stressed political "independence." She pointed to risks in attempting to isolate politics from politics, suggesting there can be too much of a good thing. According to Gerken, "too much independence from politics may, ironically, undermine the success of reform efforts in the long run."[223] Why? Because "[i]ndependence, counterintuitively enough, can sometimes insulate decision makers from political pressures to such an extent that they lose sight of what type of reform is politically realistic."[224] The solution, Gerken offered, was to move away from "quarantine"—that is, attempting to isolate reform bodies from politics entirely—towards *inoculation*.[225] Particularly apt given recent pandemic times, Gerken suggested "the introduction of some politicking into the decision making process itself"[226] as a way to inoculate reforms against political winds that would undermine them.[227]

While Gerken addresses an adjacent problem, her inoculation idea is equally persuasive in the realm of administrating elections. Applying Gerken's idea here, purposefully inoculating election administration with rival partisan actors at all stages, while no panacea, can ward off partisan mischief and ensure partisan buy-in of election outcomes.

Justin Levitt also danced around this idea in *The Partisanship Spectrum* in 2014.[228] Levitt argued that the problem of partisanship in election administration is not partisanship writ large, but certain *kinds* of partisanship.[229] By disaggregating partisanship into a range of behaviors and motivations, Levitt credited some forms of partisanship as beneficial; they may improve, for example, democratic responsiveness and accountability.[230] Other forms have worrisome impacts, such as what he termed "tribal partisanship" where public

222. *Id.*

223. *Id.* at 185.

224. *Id.*

225. *Id.*

226. *Id.* at 190.

227. More recently, Josh Douglas has echoed the idea that partisan involvement in election rulemaking leads to more sturdy election rules. *See* Joshua A. Douglas, "*How the Sausage Gets Made": Voter ID and Deliberative Democracy*, 100 NEB. L. REV. 376, 378 (2021) (advocating that "laws are more legitimate when the legislative process is open to all stakeholders and when opponents can have a meaningful influence on the final outcome").

228. *See* Levitt, *supra* note 5, at 1792.

229. *See id.* at 1790–91. This is similar to an earlier argument of Daniel Tokaji's. *See* Daniel P. Tokaji, *Lowenstein Contra Lowenstein: Conflicts of Interest in Election Administration*, 9 ELECTION L.J. 421, 437 (2010) (distinguishing partisan election administrative actions who act on partisan versus ideological bases).

230. Levitt, *supra* note 5, at 1803.

officials act solely to benefit those with shared partisan leanings and harm political opponents "wholly divorced from—or stronger yet, contrary to—the policymaker's conception of [a] policy's other merits."[231]

By viewing partisanship on a spectrum, Levitt does important work in unpacking why partisanship is harmful without dismissing the idea that partisanship can be leveraged to serve laudable goals.[232] Writing about California's independent redistricting commission, which first drew California's legislative lines in 2011, he noted

> it was not designed to eliminate all partisan effects nor all partisan influences; indeed, commissioners were, by design, selected in part based on their partisan affiliation. And it did not actually end up eliminating all partisan effects or influences. What it did do, notably, is deploy multiple tools designed to constrain specific forms of partisanship.[233]

Like Gerken, Levitt recognizes an important role for partisans in the election process.

Most recently, in a book chapter on comparative election administration, Daniel Tokaji argued that the goal for structuring election administration should not be political independence, but instead *impartiality*.[234] Tokaji used the example of Mexico's Electoral Institute (Instituto Nacional Electoral ("INE")), which features representation from Mexico's major parties.[235] As Tokaji described,

> [F]unctional impartiality is advanced not so much by *independence* from political actors, but through structured *interaction* among them. Such consultative mechanisms allow party pressures to be channeled through the [INE], at once reducing the risk of capture by any one political faction while also helping all major political factions feel that they have a seat at the table.[236]

231. *Id.* at 1798. Tribal partisanship, Levitt argues, is undesirable no matter how modest or intense its manifestation. *Id.* at 1810. Levitt notes that norms often constrain the worst forms of tribal partisanship: "[P]ublic officials with recognizable partisan affiliations can leave behind private tribal partisan impulses when acting in a public capacity, even when their self-interest is implicated. Indeed, our lived experience is that they not only can but repeatedly do, in daily official acts large and small, even when there are opportunities to behave otherwise." *Id.* at 1853.

232. *Id.* at 1820–21 ("Under the right conditions, individuals and entities can and do forego extremes of tribal partisanship and practice all the time, it is not pollyannaish to consciously seek those conditions in institutional design.").

233. *Id.* at 1865–66.

234. Tokaji, *Comparative Election Administration*, *supra* note 1, at 454.

235. *Id.* at 443.

236. *Id.* Bruce Cain also explored structured partisan competition in redistricting, noting a role for partisans in producing more durable outcomes. *See* Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1838 (2012) (arguing for a model that "induces competition between the party factions").

As Tokaji observed, "Giving various factions a seat at the table, rather than trying to hermetically seal administrators from party politics, is more likely to advance functional impartiality."[237]

We know from important work in the administrative law field that inoculation is no panacea. Praise is hardly deafening, for example, for partisan-balancing requirements ("PBRs") at the federal level.[238] Administrative law scholars criticize PBRs for numerous reasons, ranging from concerns that PBRs generate nominations of more extreme partisans[239] to their production of dysfunctional gridlock.[240] In the elections realm at the federal level, one need look no further than the Federal Election Commission to see such impacts.[241]

In state election administration, partisan balance can lead to dysfunction as well.[242] Take, for example, the implosion of Virginia's 2021 Redistricting Commission, purposefully populated with equal numbers of Democratic and Republican legislators and citizens.[243] The Commission's inability to achieve consensus threw map drawing to the Virginia Supreme Court.[244] Yet what was seen by many as a categorical failure had its bright side. As a leader of Virginia's redistricting reform effort pointed out after one particularly contentious Commission meeting, "Redistricting is always a messy process. Now we get to

237. Tokaji, *Comparative Election Administration*, *supra* note 1, at 437.

238. PBRs are generally understood as statutory mandates governing federal regulatory entities that feature mandatory bipartisan agency heads. *See* Ronald J. Krotoszynski, Jr., Johnjerica Hodge & Wesley W. Wintermyer, *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941, 945 (2015).

239. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 798–99 (2013).

240. Krotoszynski et al., *supra* note 238, at 983–84 (arguing that PBRs unconstitutionally interfere with executive authority); Feinstein & Hemel, *supra* note 46, at 74 ("Minority party members might be excluded from access to information about agency decisionmaking, or they might be reluctant to blow the whistle on their majority party colleagues . . . ."); Neal Devins & David E. Lewis, *Not-So-Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 460 (2008) (examining the impacts of party polarization on presidential control of independent agencies).

241. Krotoszynski et al., *supra* note 238, at 985 ("The Federal Elections Commission (FEC) provides a telling example of the potential difficulties that can arise from a statutory partisan balance requirement that mandates an exactly even partisan balance. The FEC's enabling statute mandates that the President appoint no more than three of the six commissioners from the same political party."); *see also* Feinstein & Hemel, *supra* note 46, at 81 (discussing critiques of partisan balance requirements).

242. *See supra* Section II.F (discussing litigation surrounding dysfunctional canvassing boards).

243. VA. CONST. art. II., § 6-A(b) (establishing Virginia's redistricting commission consisting of sixteen members, eight legislators and eight citizens, equally divided between the two major political parties); Graham Moomaw, *Va. Redistricting Commission Implodes as Republicans Reject Compromise and Democrats Walk Out*, VA. MERCURY (Oct. 8, 2021, 3:39 PM), https://www.virginiamercury.com/2021/10/08/va-redistricting-commission-implodes-as-republicans-reject-compromise-and-democrats-walk-out/ [https://perma.cc/VTF4-TEAB].

244. *See* Laura Vozzella, *Virginia Supreme Court Approves Redrawn Congressional, General Assembly Maps*, WASH. POST (Dec. 28, 2021, 7:44 PM), https://www.washingtonpost.com/dc-md-va/2021/12/28/virginia-redistricting-final-maps-supreme-court/ [https://perma.cc/T3SM-K928 (dark archive)].

see it."[245] Although the outcome was unsatisfying to many, the process was (by far) the most accountable and transparent in Virginia history.[246]

Administrative law scholars have documented the benefits to PBRs that presage this observation. Particularly relevant here, scholars have recognized that in the federal agency context, PBRs provide several transparency-enhancing benefits.[247] One is a "fire alarm" function. As Rachel Barkow describes,

> [W]hen an agency is composed of members of different parties, it has a built-in monitoring system for interests on both sides because that type of body is more likely to produce a dissent if the agency goes too far in one direction. That dissent, in turn, serves as a "fire alarm" that alerts Congress and the public at large that the agency's decision might merit closer scrutiny.[248]

In election administration, rival partisans likewise serve this "fire alarm" role, alerting lawmakers, members of the public, advocates, and courts when rival partisan action is unfair or unlawful.

Another transparency-enhancing benefit of PBRs in federal agencies is the "deliberation function." Cass Sunstein mined social psychology literature to argue that when members of rival parties are in a group setting, it productively exposes partisans to competing views.[249] The effect, according to Sunstein, is that the group settles on a middle—as opposed to an extreme—path. Sunstein describes the "depolarizing" effects of PBRs like this:

> Depolarization, rather than polarization, . . . occurs when a group consists of individuals drawn equally from two extremes. If people who initially favor caution are put together with people who initially favor risk-taking, the group judgment will move toward the middle.[250]

245. Mel Leonor, *Incumbent Protection Takes Center Stage at Virginia Redistricting Commission*, RICHMOND TIMES-DISPATCH (Sept. 10, 2021), https://richmond.com/article_e22c7268-1f39-5056-926e-709668ce3ff8.html [https://perma.cc/4PGA-L7PS (staff-uploaded, dark archive)] (quoting Brian Canon, then Executive Director of the redistricting reform group OneVirginia2021, commenting on the striking spectacle of a legislator on the commission, state Senator George Barker, a legislator on the commission, requesting that his home not be drawn out of the district he represented).

246. *See* Rebecca Green, *Redistricting Transparency*, 59 WM. & MARY L. REV. 1787, 1802 (2018) (describing how legislative privilege shrouded Virginia's 2010 redistricting process).

247. Brian Feinstein and Daniel Hemel describe these features as the "monitoring" and "deliberation" accounts. *See* Feinstein & Hemel, *supra* note 46, at 73, 75.

248. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 41 (2010); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984) (describing the congressional approach of designing a "fire-alarm" system that "enable[s] individual citizens and organized interest groups to examine administrative decisions" among others).

249. Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 92–94 (2000).

250. *Id.*

This "exposure" inherently enhances transparency. Deliberations and decisions made without exposure to opposing viewpoints are, as a matter of common sense, more likely to be extreme (or at least not reflect, be tested by, or take into account opposing views). Administrative law scholars argue that injecting politics into administrative decision-making can thus be productive, so long as it is open and transparent.[251] Leveraging this phenomenon at all levels of election administration is wise policy. Involving partisans from opposing parties at every level on this theory promotes fairness in elections.[252]

As this discussion suggests, solutions to the current breakdown in trust may lie not in attempting to remove partisanship from administrative ranks. Instead, policymakers might consider tools to leverage adversarial election administration—and mitigate its downsides.[253] What might such a reform path look like? The discussion below sketches some ideas and their limits.

A. *Leverage Adversarialism*

Whether urban political machines of yore or the Jim Crow South, history signals the dangers of single-party domination of our election process. States and localities can and should enhance adversarial mechanisms to ensure that representatives of both major political parties are positioned to influence the rules governing elections (consistent, of course, with federal and state statutory mandates) and are present and engaged at each stage of the election process itself. Adversarialism operates as an important form of transparency. Injecting rival partisans adds sunlight and ensures skeptics that their interests are represented through the presence of like-minded people.

Adversaries keep each other on their toes and work to ensure the other side follows the law. Adversaries bear witness, even in instances where they lack power to determine rules or change policy or practice. Even a local election

251. *See, e.g.*, Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 32–45 (2009) (describing the benefits of "giving politics a place" in administrative rulemaking).

252. Critics of this account are quick to point out that especially in hyperpolarized environments, this assumption does not necessarily play out. *See, e.g.*, Ganesh Sitaraman & Ariel Dobkin, *The Choice Between Single Director Agencies and Multimember Commissions*, 71 ADMIN. L. REV. 719, 749 (2019) ("[I]t is not clear that deliberation leading to compromise is likely to occur in a fiercely partisan environment. On the question of compromise solutions, there is social psychology literature that suggests that when ideological homogeneous groups deliberate, their members move toward an ideologically extreme position.").

253. In the best-case scenario, any statutory, regulatory, and policy fixes should not be pursued by the party in power in a smoky backroom. Josh Douglas describes an admirable process in Kansas in developing a new voter ID law in which a wide variety of stakeholders, including partisans from both sides, contributed to designing the rule. *See* Douglas, *supra* note 227, at 379. Likewise, on this point, Daniel Tokaji cites the work of Luis Alejandro Trelles, who highlights the importance of "interaction among institutional and external political actors . . . ." Tokaji, *Comparative Election Administration*, *supra* note 1, at 443.

board with a majority of Democrats or Republicans nevertheless secures the benefits of adversarialism; the majority party cannot conduct its business in secret—it is forced to reckon with and explain itself to the other side or risk the consequences of exposure, opposition, and complaint. Adversarialism fosters accountability. At its best, adversarialism forces moderation and fairness.

As noted above, adversarialism is hardly a perfect tool. Major parties can collude,[254] majority parties can discount or ignore the interests of nonmajority party actors,[255] and the interests of third parties may be wholly ignored. Another risk is deadlock when adversarial mechanisms require even numbers.[256] Still, embedding rival partisans throughout the election process may be the best hope states have to signal to voters across the political spectrum that elections are being scrupulously administered according to the law.

B. *Limit the Power of Unitary CEOs*

Of all the varied structures within state election systems, those headed by a lone partisan CEO are arguably the most precarious shepherds of public faith. The vast majority behave ethically and responsibly with zealous adherence to the law. Yet tribal partisans, as Justin Levitt warns,[257] may jump at opportunities to use their office to harm political opponents and/or forward the interests of copartisans.

States should harness the power of adversarialism to limit the power of unitary CEOs. States should learn from the lessons of our long history in administering elections that centralized power is the enemy of fairness and public confidence in election administration.

States with unitary CEOs should consider installing state-level bipartisan election boards to work with state CEOs to administer elections, and limiting the delegated powers of CEOs are advisable steps forward. States should also

254. An example from the redistricting context of bipartisan collusion is the phenomenon of bipartisan gerrymandering. *See* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 595 (2002). E.E. Schattschneider also points to this problem. SCHATTSCHNEIDER, *supra* note 15, at 183 ("As a matter of fact, the rivalry of the local machines of the competing major parties is by no means always genuine. Professional politicians as a class develop a remarkable solidarity when their privileges are attacked by the public. The bosses of the rival parties in the locality can often lend each other a helping hand.").

255. Entrenchment is a perennial problem in election administration. *See* David Schleicher, *The Boundary Problem and the Changing Case Against Deference in Election Law Cases: Lessons from Local Government Law*, 15 ELECTION L.J. 247, 249 (2016) ("[M]odern election law problems are largely about entrenchment of the policy preferences of today's majorities against change. That is, most election law disputes arise because legislators represent their supporters too well and seek to ensure their continued domination of politics.").

256. *See* Lisa Marshall Manheim, *Presidential Control of Elections*, 74 VAND. L. REV. 385, 429 (2021) (noting that gridlock at the "FEC does not translate into a power-sharing agreement; it translates into nonenforcement [and] prevents the FEC from clarifying the law").

257. *See* Levitt, *supra* note 5, at 1806.

enhance requirements that CEOs regularly consult with stakeholders from both parties as they engage in rulemaking and setting policy well in advance of Election Day. Finally, state CEOs should be barred from running for office or campaigning for others while in office. Such reforms would do much to quell public concern that overtly partisan CEOs cannot be trusted to run fair elections.

C. *Reduce LEO Discretion*

A third and related suggestion is for states to examine statutory delegation of authority over election processes for instances in which discretion is allotted to an LEO absent adversarial check. As scholars of election administration readily point out, too much unilateral discretion may lead to problems.[258] Ensuring adversarialism provides a check on LEO discretion through, for example, adversarial local election board oversight and the presence of adversarial observers), which can make these decisions less fraught and enhance voter buy-in.

That said, reducing discretion of local actors within system of elections has its downsides. Local officials are best situated to respond to local conditions, so vesting them with authority often makes practical sense.[259] Unilateral discretion is undoubtedly more efficient and, in many respects, more practical. Requiring more cooks in the kitchen may be overly cumbersome or lead to unnecessary quibbling over what might otherwise be commonsense paths forward in situations where statutes or CEO guidance fails to provide clear direction.[260] Still, any hit to efficiency might be an acceptable price to pay for reduced post hoc challenges, criticism, and resultant hits to public faith in outcomes.

D. *Address Vagaries and Statutory Gaps in State Election Codes*

A fourth reform path goes beyond structural balance of power issues to address the rules of the road. When election rules, whether statutes, regulations, or policies, are unclear or contain gaps, partisan mischief is most likely to rear

258. Burden et al., *supra* note 124, at 90 (noting that discretion leads to "mischief, incompetence, or selective effort by a LEO [that] could alter the likelihood that individuals turn out to vote, voters' perception that their vote will be counted, and ultimately, the electoral fates of candidates").

259. Richard Briffault makes the point that LEOs proved crucial during the 2020 pandemic election due to their ability to respond flexibly to local conditions. Briffault, *supra* note 105, at 1423 ("Much of the surprising success of the 2020 election—record high turnout facilitated by a massive, unprecedented shift to early and mail-in voting undertaken in the midst of a once-in-a-century pandemic, with few Election Day problems and no security breakdowns or proven fraud—is attributable in large measure to the work of local election officials.").

260. *Id.* (spotlighting the positive role local election officials played in the 2020 election).

its head.[261] In addition, elections are also most vulnerable when rules fail to contemplate unexpected circumstances.[262] Working to identify and fix vagaries in state statutes, regulations, and policies and to fill any gaps should be a central goal of policymakers in every state. The more definitively and comprehensively rules can be set before elections take place, behind the veil of ignorance when it is unclear which rules will benefit which side, the better.

E. *Promote Election Official Code of Ethics*

Finally, states should work to strengthen norms and professionalism among state and local election administrators.[263] In 1996, the International Institute for Democracy and Electoral Assistance published its Code of Conduct for Ethical and Professional Administration of Elections.[264] In 1997, the Election Center (also known as the National Association of Election Officials) developed the first Code of Ethics for voter registrars and elections administrators.[265] Many state and local jurisdictions have formally adopted election administration codes of conduct to reinforce norms of professionalism and impartiality.[266] More recently, election reformers looking to bolster public trust in elections have redoubled calls for the adoption of election administrator codes of conduct.[267] In a system where partisans actively participate, measures to buttress professional norms should be pursued.

261. Richard H. Pildes, *Election Law in an Age of Distrust*, 74 STAN. L. REV. 100, 104 (2022) (advocating for clear and consistent policies and procedures statewide for running elections and noting that distrust thrives on legal uncertainty).

262. Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545, 551 (2018) (arguing that clear rules addressing election emergencies "would minimize both the appearance that election officials may be manipulating or exploiting a tragedy for political advantage, and their opportunity to do so").

263. For an excellent discussion of the rise of professionalism in election administration, see HALE ET AL., *supra* note 21, at 45–48.

264. For a good explanation of the purpose of election worker codes of conduct and samples, see *Standards of Conduct for Election Workers*, ELECTIONS GRP. https://www.electionsgroup.com/standards-of-conduct-for-election-workers [https://perma.cc/QWD4-PS9N] (referencing several codes of conduct, including one employed in Weld County, Colorado).

265. *See About Us*, ELECTION CTR., https://www.electioncenter.org/about-us.html [https://perma.cc/6EB9-PYYQ] (noting that through the Election Center, the "nation's elections administrators developed the first Code of Ethics for voter registrars and elections administrators in 1997").

266. Virginia provides examples of election official codes of conduct at both the state and local levels. The Virginia Department of Elections posts its Employee Code of Ethics on its website. *See Employee Code of Ethics*, VA. DEP'T ELECTIONS, https://www.elections.virginia.gov/contact-us/about-us/employee-code-of-ethics/ [https://perma.cc/8KZG-J8KA]. Likewise, Fairfax County, Virginia posts its Standards and Conduct for Election Officials. *See Standards and Conduct for Election Officials*, FAIRFAX CNTY. VA., https://www.fairfaxcounty.gov/elections/standards [https://perma.cc/W5AZ-N6RJ].

267. *See, e.g.*, GRACE GORDON & RACHEL OREY, FORTIFYING ELECTION SECURITY THROUGH POLL WORKER POLICY 3 (2022), https://bipartisanpolicy.org/download/?file=/wp-

CONCLUSION

The long and troubled history of single-party, machine-dominated, racist election administration in the United States demonstrates that injecting partisan actors into the conduct of elections is dangerous business. The present level of partisan hyperpolarization and the fact-free-for-all that has damaged trust in U.S. elections create a natural impulse to pursue nonpartisan election administration.[268] Nonpartisan election administration is a noble goal and would place the United States more in line with international norms. Yet, at least in the short term, partisans will continue to administer U.S. elections. Partisanship in election administration should not be unquestioningly dreaded or villainized; it should be acknowledged and harnessed. Marshalling fruitful political antagonisms may, at least for now, be our best way forward.

content/uploads/2022/10/BPC_Poll-Worker-Policy_RV4.pdf [https://perma.cc/9E6X-L25R] (calling for state legislatures to "universalize[e] codes of conduct [for temporary election workers] that affirm professionalism and ethics").

268. As columnist Ezra Klein warns, "Our political system is not designed for political parties this different, and this antagonistic . . . ." Ezra Klein, *Dobbs Is Not the Only Reason To Question the Legitimacy of the Supreme Court*, N.Y. TIMES (June 30, 2022), https://www.nytimes.com/2022/06/30/opinion/dobbs-mcconnell-supreme-court.html [https://perma.cc/W59U-A7UM (staff-uploaded, dark archive)].