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NORTH CAROLINA LAW REVIEW

Volume 100 | Number 5

Article 4

6-1-2022

Election Law Localism and Democracy

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ELECTION LAW LOCALISM AND DEMOCRACY*

RICHARD BRIFFAULT**

American federal and state elections are largely run by local officials. Although election law is almost entirely determined by the federal government and the states, elections are actually conducted by thousands of different county and city elections offices. This decentralization of election administration has often, and fairly, been criticized as resulting in undesirable interlocal variation in the application of election rules, inefficiency, and racial discrimination. Yet, in 2020, local election administration, particularly in large urban areas, was a source of strength. Local officials proved to be resilient, innovative, and attentive to local conditions. The record-high turnout in the face of a once-in-a-century pandemic was in considerable part due to their efforts to make voting easier and more accessible. These efforts, in turn, have triggered a reaction, with many states adopting new laws intended to curtail local authority.

This Article examines the local role in the 2020 election, together with the state pushback of 2021, as a study of both the surprising significance of local officials in promoting democracy and the place of local government in our intergovernmental system more generally. Local election offices are among the least formally empowered units of local government. They are charged solely with implementing state laws and policies. Yet, the 2020 election indicates they can exercise their authority to promote democracy in their communities. On the other hand, as with local governments generally, local power in election administration is fragile and can be stripped away by hostile state-level forces. By showcasing the importance of local elections officials, the 2020 election has made them a new site of conflict over the strength of American democracy.

INTRODUCTION	1422
I. THE LOCAL ROLE IN ELECTION ADMINISTRATION: AN OVERVIEW	1426

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II.	ELECTION ADMINISTRATION LOCALISM: IN ACTION AND IN COURT IN THE ELECTION OF 2020.....	1431
	A. <i>The Challenge</i>	1431
	B. <i>The Response</i>	1433
	1. In-Person Voting	1433
	2. Mail Voting.....	1435
	C. <i>LEOs in Court</i>	1437
	1. Arizona	1438
	2. Iowa	1441
	3. Ohio.....	1444
	4. Texas.....	1446
III.	BACKLASH: THE STATE LEGISLATIVE ATTACK ON ELECTION LAW LOCALISM	1452
IV.	LESSONS FROM ELECTION ADMINISTRATION LOCALISM: FOR ELECTIONS AND FOR LOCALISM.....	1461
	A. <i>The Local Role in Election Administration</i>	1461
	B. <i>Lessons for Localism from Local Election Administration</i>	1464

INTRODUCTION

The local role in the administration of federal and state elections would appear to be an unlikely topic for a conference on home rule. Some state constitutional provisions may grant home rule localities authority to adopt their own rules with respect to elections for *local* office.¹ But home rule does not give local election officials any policy-making autonomy with respect to the administration of elections for *state* and *federal* office. Quite the opposite. As the Texas Supreme Court explained in one of the many state-local election disputes in the Lone Star State in 2020, when county clerks administer elections they act as “subordinate and derivative branch[es] of state government,”² possessing, in classic Dillon’s Rule fashion, “only such powers and privileges as have been expressly or impliedly conferred” by state law.³

1. For a thoughtful treatment of the tension between home rule authority over local elections and potentially preemptive state election laws, see generally Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361 (2020). Professor Joshua Douglas has provided a detailed examination of the ability of local governments to expand the franchise, change the voting process, adopt campaign finance reforms, and otherwise regulate *local* elections (e.g., elections for local office and local ballot propositions). See generally Joshua A. Douglas, *The Right To Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039 (2017). My focus in this Article is on the impact of local administrative actions on *state and federal elections*.

2. *State v. Hollins*, 620 S.W.3d 400, 403–04 (Tex. 2020) (alteration in original) (quoting *Avery v. Midland County*, 406 S.W.2d 422, 426 (Tex. 1966), *vacated on other grounds*, 390 U.S. 474 (1968)).

3. *Id.* at 404 (quoting *Wasson Ints., Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 430 (Tex. 2016)).

Yet, the local role in running federal and state elections is crucial. As President Obama’s Commission on Election Administration noted at the outset of its 2014 report: “The United States runs its elections unlike any other country in the world. Responsibility for elections is entrusted to local officials in approximately 8,000 different jurisdictions.”⁴ This has been true throughout American history, and, although “[t]he power and discretion wielded by local staff has been trimmed by state and federal law since 2000, . . . local authority remains substantial.”⁵ The local role is greatest in matters classically considered “housekeeping”—registering voters; processing absentee ballot applications; locating and managing polling places and vote centers; selecting, operating, and maintaining voting machinery; designing ballots; hiring and training poll workers; checking names against registration lists and checking IDs. These actions shape the quality of the voting experience and are critical in determining whether, in practice, eligible electors will be able to cast ballots and have them counted.⁶ The local role in these matters is nominally limited simply to carrying out state commands locally. But local election officials wield considerable discretion and can directly affect the implementation of state rules.⁷ As the actions of local election officials in the 2020 election—and the backlash to those actions in many states in 2021—illustrate, local election offices play an essential role in making democracy work.

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.⁸ Local administrators

4. PRESIDENTIAL COMM’N ON ELECTION ADMIN., THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 1 (2014), <http://web.mit.edu/supportthevoter/www/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf> [<https://perma.cc/TNU2-PMHW>].

5. ALEC C. EWALD, THE WAY WE VOTE: THE LOCAL DIMENSION OF AMERICAN SUFFRAGE 2 (2009).

6. See, e.g., PRESIDENTIAL COMM’N ON ELECTION ADMIN., *supra* note 4, at 32; EWALD, *supra* note 5, at 98–101.

7. See, e.g., Peterson v. Dean, 777 F.3d 334, 346–47, 349 (6th Cir. 2015) (finding that Tennessee county administrators of elections, who can influence “precinct boundaries, polling stations, and early voting locations” and exercise discretion with respect to “policy matters . . . of political concern,” are subject to patronage removal); Soelter v. King County, 931 F. Supp. 741, 745 (W.D. Wash. 1996), *aff’d*, 132 F.3d 40 (9th Cir. 1997) (“The Elections Manager [in the State of Washington] possesses a substantial degree of responsibility and discretion The officeholder makes significant decisions concerning how elections are conducted, where polling places are located, how and in what form information is disseminated to voters and the public at large, and in certain cases whether precincts are combined, united, or divided [H]e or she conducts hearings and issues binding rulings on challenges to voter registration.”).

8. See, e.g., Nathaniel Persily & Charles Stewart III, *Introduction: The Miracle and Tragedy of the 2020 U.S. Election*, in STANFORD-MIT HEALTHY ELECTIONS PROJECT, THE VIRUS AND THE VOTE: ADMINISTERING THE 2020 ELECTION IN A PANDEMIC 2, 18 (Chelsey Davidson & Zahavah Levine

proved to be resilient, innovative, and attentive to local conditions. They quickly adapted to the extraordinary circumstances of 2020 by finding new ways and places to vote. They addressed the public health threats posed by voting in traditional cramped polling sites by finding more spacious places consistent with social-distancing goals,⁹ and they recruited tens of thousands of new and younger poll workers to replace the older workers most at risk from COVID-19.¹⁰ Local election officials around the country demonstrated a commitment—often challenged by state officials, political campaigns, or hostile advocacy groups—to make it easier for eligible voters to vote. These local efforts, in turn, triggered state responses that have curtailed local authority. Following the playbook of the new preemption,¹¹ some states even adopted punitive measures that could subject local election officials to civil or criminal penalties, or the loss of their jobs, for failure to comply with these new state restrictions.¹²

It would be a mistake to overly valorize the role of local election officials in promoting democracy. Local election administrators can be incompetent or antidemocratic, as illustrated by the New York City Board of Elections' disastrous initial miscounting of the ranked-choice votes in the city's 2021 mayoral primary¹³ and by the shenanigans of the Q-Anon-friendly Mesa Colorado County Clerk in 2020.¹⁴ And many state election officials also

eds., 2021) [hereinafter *THE VIRUS AND THE VOTE*], <https://fsi.stanford.edu/news/virus-and-vote-administering-2020-election-pandemic> [<https://perma.cc/FJR7-9X9S>] (describing the “historic and heroic administration of the 2020 election”).

9. See Maia Brockbank, Alexa Gold, Emily Kohn, Anastasiia Malenko & Alex Stout, *Polling Place Management in the 2020 General Election*, in *THE VIRUS AND THE VOTE*, *supra* note 8, at 292, 298–99.

10. See Evie Freeman, Jacob McCall, Maia Brockbank & Anastasiia Malenko, *Poll Worker Recruitment in the 2020 General Election*, in *THE VIRUS AND THE VOTE*, *supra* note 8, at 261, 263–67.

11. See, e.g., Richard Briffault, *The Challenge of the New Preemption*, 70 *STAN. L. REV.* 1995, 1995 (2018) (explaining that in recent years many state legislatures have engaged in a new and more aggressive form of preemption of local lawmaking that includes the adoption of punitive measures such as fines, civil or criminal liability, and removal from office for local officials who adopt or support local laws subject to state preemption).

12. See *id.* at 2002–07 (discussing the rise of punitive preemption).

13. See Eric Lach, *New York City's Needless Election Fiasco*, *NEW YORKER* (July 2, 2021), <https://www.newyorker.com/news/our-local-correspondents/new-york-citys-needless-election-fiasco> [<https://perma.cc/5E2Q-LDG8> (dark archive)]. Nor is New York City's Board of Elections the only local elections office that has recently made serious mistakes. See, e.g., Tom Magnarelli & Vaughn Golden, *After 2020 Election 'Failure,' Oneida County Elections Commissioners Resign*, *WSKG* (Feb. 17, 2021), <http://wskg.org/news/after-2020-election-failure-oneida-county-elections-commissioner-resign> [<https://perma.cc/LB5C-SUZY>].

14. See Matt Shuham, *Judge Bars Conspiratorial Colorado Clerk from Election Administration After Suspicious Leak*, *TALKING POINTS MEMO* (Oct. 14, 2021, 2:46 PM), <https://talkingpointsmemo.com/news/judge-bars-conspiratorial-colorado-clerk-from-election-administration-after-suspicious-leak> [<https://perma.cc/GJX7-8J3C>]; Matt Shuham, *A QAnoner Posted One County's Election Passwords. The County Clerk Allegedly Helped.*, *TALKING POINTS MEMO* (Aug. 31, 2021, 2:44 PM), <https://talkingpointsmemo.com/news/a-qanoner-posted-one-countys-election-passwords-the-county-clerk-allegedly-helped> [<https://perma.cc/4Q3C-GLSL>].

undertook major and successful efforts to help voters in 2020.¹⁵ But what is particularly striking is the degree to which local election officials—including, but not limited to, those in major urban centers like Maricopa County, Arizona (Phoenix); Fulton County, Georgia (Atlanta); and Harris County, Texas (Houston)¹⁶—were willing to push and even push beyond the limits of state-granted local authority to make it possible for their constituents to vote.

This Article treats the local role in conducting the 2020 election together with the state pushback of 2021 as a valuable case study of both the surprising significance of local election administration in promoting democracy and the place of local government in our federal-state-local system more generally. It proceeds in four parts. Part I provides a brief overview of the role of local election officials (“LEOs”) in administering federal and state elections. Part II focuses on how LEOs responded to the COVID-19 pandemic in 2020, paying particular attention to some of the key litigation provoked by aggressive local efforts to facilitate voting. Part III turns to the 2021 state legislative response, with several Republican-dominated legislatures, driven by the Trumpian challenge to the legitimacy of the 2020 election, moving to strip LEOs of their powers to expand access to the franchise and imposing new administrative burdens and penalties on them. Part IV concludes with some observations about the local role in running elections and the significance of local election administration for thinking about local government and state-local relations more broadly. On the one hand, the 2020 election indicates that even the least formally empowered local units, lacking any claim of home rule and charged solely with implementing state laws and policies, can be attentive to local needs and concerns. Their actions reveal both the will and the ability to promote democracy in their communities. On the other hand, as with local government generally, local power in election administration is fragile and can be stripped away by hostile state-level forces. Moreover, the importance of the local role in elections, as revealed in 2020, has triggered new and troubling ideological campaigns to intimidate LEOs and enable antidemocratic forces to take over local election administration.

15. See, e.g., Dominique Erney, Anne Glatz, Eliza Sweren-Becker & Wendy R. Weiser, *Mail Voting: What Has Changed in 2020*, BRENNAN CTR. FOR JUST. (Sept. 17, 2020), <https://www.brennancenter.org/our-work/research-reports/mail-voting-what-has-changed-2020> [<https://perma.cc/GGV6-YL3D>].

16. Although few in number, the populous metropolitan voting districts have an outsized importance to the American electorate. See David C. Kimball & Brady Baybeck, *Are All Jurisdictions Equal? Size Disparity in Election Administration*, 12 ELECTION L.J. 130, 130–31 (2013) (“[L]ess than six percent of the local election officials in the United States serve more than two-thirds of the voters in a national election.”).

I. THE LOCAL ROLE IN ELECTION ADMINISTRATION: AN OVERVIEW

“The question of who runs elections is critical because elections are the ultimate accountability mechanism in a democracy.”¹⁷ It says something about the United States that administration of our elections—including elections for federal office—has long been and continues to be highly decentralized, with local governments playing the leading operational role.¹⁸ Fundamental election law decisions—such as registration and voter identification requirements, or authorization of early in-person voting or vote-by-mail—are made by the states, but the actual conduct of elections is handled almost entirely by local governments.¹⁹ Local officials register voters, process absentee ballot applications, and distribute and collect absentee ballots.²⁰ They also design ballots; recruit and train poll workers; manage early voting and Election Day operations; select and prepare vote centers and polling places; acquire, operate, maintain, test, and secure voting equipment; and count, canvass, and report the results.²¹ In short, they “are responsible for every aspect of the process in the electoral cycle.”²²

The local government that usually conducts elections is the county, although in some states both counties and municipalities run elections, and states in New England use their cities and towns.²³ Regardless of the type of jurisdiction, the structure of local election administration typically takes one of three forms. First, and most common, a single official may be in charge of administering elections. This is the practice for all or most elections in twenty-two states.²⁴ The local elections office goes by a variety of names—clerk, auditor, registrar, or supervisor of elections.²⁵ As these titles suggest, in many places, particularly small- and medium-sized jurisdictions, running elections is just one of a number of functions for which the office is responsible. The heads of most single-person election offices are elected, but in at least eight states some are appointed by the county governing body or manager.²⁶

17. KATHLEEN HALE, ROBERT MONTJOY & MITCHELL BROWN, ADMINISTERING ELECTIONS: HOW AMERICAN ELECTIONS WORK 27 (2015).

18. KAREN L. SHANTON, CONG. RSCH. SERV., R45549, THE STATE AND LOCAL ROLE IN ELECTION ADMINISTRATION: DUTIES AND STRUCTURES 1 (2019).

19. *Id.* at 3. The principal exceptions are Alaska, where the state conducts elections above the borough level, and Delaware, where all elections are conducted by the state. *Id.* at 7.

20. *Id.*

21. *Id.*

22. Marian K. Schneider, *Election Security: Increasing Election Integrity by Improving Cybersecurity*, in THE FUTURE OF ELECTION ADMINISTRATION: CASES AND CONVERSATIONS 243, 245 (Mitchell Brown, Kathleen Hale & Bridgett A. King eds., 2019) [hereinafter THE FUTURE OF ELECTION ADMINISTRATION].

23. HALE ET AL., *supra* note 17, at 38.

24. *Id.* at 39–40.

25. *Id.* at 40.

26. *Id.* at 40–41.

Second, elections may be managed by multimember boards or commissions. This is the practice in about ten states.²⁷ These bodies are typically bipartisan in nature, with appointments made either at the state level—with input from local officials or party leaders, by local elected officials, or by a mix of state and local appointing officers.²⁸ These boards usually employ professional staff and are headed by an appointed director.²⁹

Third, in eighteen states, the responsibility for election administration is split across a number of offices—some consisting of individuals, others multimember boards—with different offices handling different functions, such as voter registration, Election Day operations, or the canvass of the results.³⁰ These LEOs may be elected or appointed.³¹

With respect to all these features—single officer or multimember body, elected or appointed, election functions in a single office or split up—there may very well be variation within a single state as well as across states. In most states, the state government or state officials do not appoint and cannot remove LEOs.³² Women account for more than 75% of LEOs, a number that reflects the relatively high level of representation of women in municipal and county clerk offices compared to other levels of government.³³

Local governments typically bear most of the costs of elections, including elections for federal and state offices.³⁴ Before 2020, the only significant federal funding for state and local election administration was the \$3.65 billion made available to the states pursuant to the Help America Vote Act (“HAVA”) of 2002 to upgrade voting machinery and improve voter registration systems, with the states committed to providing matching funds as a condition for the HAVA grants.³⁵ The federal funds were all appropriated more than a decade ago, except for an additional \$380 million provided in March 2018 for election security.³⁶

27. *Id.*

28. *Id.* at 40–42.

29. *Id.* at 41–42.

30. *Id.*

31. *See id.* at 42.

32. *Id.* at 33.

33. NATALIE ADONA, PAUL GRONKE, PAUL MANSON & SARAH COLE, DEMOCRACY FUND, STEWARDS OF DEMOCRACY: THE VIEWS OF AMERICAN LOCAL ELECTION OFFICIALS 14 (2019), https://democracyfund.org/wp-content/uploads/2020/06/2019_DemocracyFund_StewardsOfDemocracy.pdf [<https://perma.cc/FQ3V-WUY6>].

34. *See* SHANTON, *supra* note 18, at 9; GRACE GORDON, CAL. VOTER FOUND., DOCUMENTING AND ADDRESSING HARASSMENT OF ELECTION OFFICIALS 10 (2021), https://www.calvoter.org/sites/default/files/cvf_addressing_harassment_of_election_officials_report.pdf [<https://perma.cc/W9KK-SDZ7>].

35. *See* HALE ET AL., *supra* note 17, at 85; SHANTON, *supra* note 18, at 18–19; *see also* Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended in scattered sections of 5, 10, 36, 42 and 52 U.S.C.).

36. SHANTON, *supra* note 18, at 9.

Beyond the HAVA funds, “[l]ocalities typically assume primary responsibility” for most of the costs of conducting federal and state elections, “with states contributing to varying degrees.”³⁷ The most common form of state support is to cover all or part of the costs of acquiring voting equipment, but twenty-four states provide no financial assistance even for acquiring voting equipment.³⁸ Twenty states contribute to the costs of operating and maintaining voting equipment, and a few states cover or contribute to the costs of training local officials or share some election-specific costs, like printing ballots and transporting voting equipment.³⁹ Local governments incur significant election-related costs, often with little or no state support, for maintaining, updating, and securing voting equipment and registered voter databases, as well as for obtaining supplies long before balloting begins.⁴⁰ The costs of continuing software updates “are usually absorbed by cash-strapped local election jurisdictions.”⁴¹ So, too, in most states, personnel costs are borne by local governments.⁴² As one federal district court explained in rejecting a private group’s effort to bar Minneapolis from accepting a nonprofit donation to help fund the many extra expenses it incurred to conduct the 2020 election, the city had received no federal or state funds to defray the cost of the 2016 election and “the City’s responsibility to self-fund federal elections within its boundaries is typical.”⁴³

Since the eighteenth century, American elections have largely been locally managed. For much of that time “[e]lection administration was an intermittent chore for various local officials whose primary responsibilities were in other functions of government.”⁴⁴ As elections became more administratively complex in the nineteenth and twentieth centuries, local offices expanded and in the larger urban centers came to specialize exclusively on elections.⁴⁵

Local election administration has been far from unproblematic. LEOs in the South played a key role in enforcing racial exclusion during the Jim Crow era, and many big-city election offices have been staffed through patronage and operated to support the interests of local party machines. Nor are these concerns

37. *Id.*

38. *Id.* at 10.

39. *Id.* at 10–11; see also NAT’L CONF. OF STATE LEGISLATURES, THE PRICE OF DEMOCRACY: SPLITTING THE BILL FOR ELECTIONS 9–13, 20–23 (2018), https://www.ncsl.org/Portals/1/Documents/Elections/Final_Costs_Report-Splitting_the_Bill_for_Elections_32084.pdf [<https://perma.cc/V98M-ZGF6>].

40. See, e.g., Martha Kropf & JoEllen V. Pope, *Election Costs: A Study of North Carolina*, in THE FUTURE OF ELECTION ADMINISTRATION, *supra* note 22, at 185, 188–91.

41. HALE ET AL., *supra* note 17, at 147.

42. NAT’L CONF. OF STATE LEGISLATURES, *supra* note 39, at 21.

43. *Minn. Voters All. v. City of Minneapolis*, No. 20-2049, 2020 WL 6119937, at *1 (D. Minn. Oct. 16, 2020).

44. HALE ET AL., *supra* note 17, at 30.

45. *Id.* at 31.

purely historic, as some local governments have continued to try to dilute minority votes through the drawing of precinct lines,⁴⁶ siting polling places in inconvenient locations, not hiring poll workers of color,⁴⁷ or burdening the enforcement of federal voting law protections.⁴⁸ Before the Supreme Court in *Shelby County v. Holder*⁴⁹ eliminated the requirement that changes in voting laws, practices, and procedures for certain “covered jurisdictions” be precleared by the Department of Justice, “the bulk of the Department of Justice’s section 5 objections were against counties and local governments, not states.”⁵⁰ The lengthy wrangle over counting Florida’s votes in the 2000 presidential election—with the LEO-designed “butterfly ballot”⁵¹ and the inconsistent intercounty and intracounty treatment of the “intent of the voter” standard for assessing disputed ballots⁵²—dramatically made the entire country aware of some of the shortcomings of local election administration. That election, in turn, contributed to the enactment of HAVA, which strengthened the role of the states in election administration, particularly voter registration and the selection and acquisition of voting machinery.⁵³

“The power and discretion wielded by local staff has been trimmed by state and federal law since 2000, but local authority remains substantial.”⁵⁴ The increased sophistication of voting technology; changes in voter registration practices; requirements concerning the maintenance of voter databases; the spread of new means of voting such as early in-person voting and all-mail elections; the development of new forms of voting, like ranked-choice voting; and the steady stream of new election laws in both red and blue states have all further heightened the importance of election administrators, particularly at the local level, in making the system work.

Although local election administration has, appropriately, been subject to considerable criticism, political scientist Alec Ewald has shown that “[l]ocal administration of U.S. elections has sometimes been a vector of inclusion in

46. See, e.g., Sydnee Fielkow, *Shelby County and Local Governments: A Case Study of Local Texas Governments Diluting Minority Votes*, 14 NW. J.L. & SOC. POL’Y 348, 373–74 (2019).

47. See, e.g., *Harris v. Siegelman*, 700 F. Supp. 1083, 1085 (M.D. Ala. 1988).

48. See, e.g., Justin Weinstein-Tull, *A Localist Critique of Shelby County v. Holder*, 11 STAN. J.C.R. & C.L. 291, 311 (2015) [hereinafter Weinstein-Tull, *A Localist Critique*].

49. 570 U.S. 529 (2013).

50. Weinstein-Tull, *A Localist Critique*, *supra* note 48, at 294, 294 n.15.

51. For a sympathetic treatment of the state election law changes and administrative restrictions that led Palm Beach County Supervisor of Elections Theresa LePore to design the butterfly ballot, see HALE ET AL., *supra* note 17, at xxiv–xxv.

52. *Bush v. Gore*, 531 U.S. 98, 105–06 (2000).

53. See, e.g., HALE ET AL., *supra* note 17, at 83–90.

54. EWALD, *supra* note 5, at 2. For a trenchant examination of how the continued state decentralization of most aspects of election administration to local elections offices can be an obstacle to the enforcement of federal election laws, see generally Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747 (2016) [hereinafter Weinstein-Tull, *Election Law Federalism*].

American voting, a pathway along which the franchise expanded.”⁵⁵ Historically, some local governments reduced or eliminated property ownership or tax payment requirements for voting before their states did, and some local governments extended the suffrage to women before either their state governments or the ratification of the Nineteenth Amendment.⁵⁶ Although their power to determine the qualifications for the vote was limited to local elections, local administrative actions often had the effect of extending the franchise more broadly. With property assessed and compliance with property ownership requirements determined at the local level in late eighteenth and early nineteenth-century America, local officials often enfranchised residents ineligible under state law. “Inclusionary local practices acted as a kind of solvent, working hand in hand with changing ideological views to undercut the property qualification.”⁵⁷ Then, as now, much of the pressure to loosen state requirements came in urban areas.⁵⁸ Some local governments continue to take the lead by extending the vote to noncitizens or people under eighteen and by implementing new methods of aggregating votes, such as ranked-choice voting, although these innovations are necessarily limited to elections for local office.⁵⁹

In recent years, although formally subservient to their states, some county election officials resisted state purge laws⁶⁰ and state-directed cutbacks in early voting⁶¹ and took a relatively lenient approach to the enforcement of state-enacted voter ID requirements.⁶² Sometimes LEO efforts to extend the opportunity to vote early put effective pressure on state officials to extend early voting statewide.⁶³ Even before the pandemic, populous metropolitan-area counties, facing the greatest stress at their Election Day polling places,

55. EWALD, *supra* note 5, at 129.

56. HALE ET AL., *supra* note 17, at 129–35.

57. EWALD, *supra* note 5, at 131.

58. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 17 (rev. ed. 2009).

59. See, e.g., Douglas, *supra* note 1, at 1054–66.

60. “Purge” laws are state laws that remove voters from voter registration lists on the theory that the voter has become ineligible to vote. Most commonly, this involves a determination that the voter no longer resides at the address at which she or he is registered. Nonresidence, in turn, is most commonly presumed from the voter’s failure to vote in recent elections, followed by the voter’s failure to respond to a postcard from the local elections office seeking to determine whether the voter still resides at the address. Aggressive purge laws disenfranchise relatively inactive voters. See EWALD, *supra* note 5, at 7. In *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018), the Supreme Court sustained an Ohio purge law that removed from the voter registration list a voter who had failed to vote for two years and then failed to return to the local elections office a preaddressed, postage-paid return card, asking the voter to verify the voter still lived at that address. *Id.* at 1835–37.

61. Weinstein-Tull, *A Localist Critique*, *supra* note 48, at 301–03.

62. *Id.*; see also Louis Cholden-Brown, *Local Poll Site, National Implications*, 13 ELON L. REV. 109, 131–32 (2020) (“Localities have also filed amicus briefs seeking to preserve the VRA, through delineation of their experiences . . .”).

63. See Richard L. Hasen, *When Is Uniformity of People, Not Counties, Appropriate in Election Administration? The Cases of Early and Sunday Voting*, 2015 U. CHI. LEGAL F. 193, 201.

supported the availability of early voting and other alternatives to Election Day voting. But the potential for LEOs to contribute to the advancement of democracy was most clearly demonstrated by their administration of the pandemic election of 2020, which is the focus of the next part.

II. ELECTION ADMINISTRATION LOCALISM: IN ACTION AND IN COURT IN THE ELECTION OF 2020

A. *The Challenge*

The COVID-19 pandemic presented an extraordinary challenge for running an election, especially one as freighted and tumultuous as the 2020 presidential election. The first and most salient public health responses to the pandemic were “social distancing” and “stay-at-home” directives—measures that were in strong tension with Election Day voting, particularly in often-crowded urban polling places. Election Day voting requires an army of poll workers—over 900,000 worked at 116,000 polling sites in 2016.⁶⁴ Even in that pre-pandemic election, nearly 65% of local election officials surveyed reported that it was “very difficult” or “somewhat difficult” to obtain poll workers. In 2016, a majority of poll workers were over the age of sixty, and 24% were seventy-one years or older. With older people most subject to the ravages of the pandemic, the usual problem of recruiting a sufficient number of poll workers was magnified severalfold in 2020. Indeed, in the Wisconsin primary—held in early April just as the pandemic was taking hold—the number of polling places in Milwaukee was cut from 180 to 5, and in Green Bay from 31 to 2, due to the absence of poll workers.⁶⁵ Finding and setting up polling sites for the November election that met COVID-19 standards of cleanliness and social distancing, recruiting tens of thousands of new poll workers, and acquiring personal protective equipment presented “an onslaught of new administrative challenges.”⁶⁶

Consequently, crucial to the election administration response to COVID-19 was the switch from Election Day polling place voting to the expanded use of early in-person and mail voting. The percentage of ballots cast on Election Day dropped from 54.5% in 2016 to just 30.5% in 2020, while the percentage of ballots cast by mail rose from 24.5% to 43.1%.⁶⁷ This rapid and unprecedented

64. U.S. ELECTION ASSISTANCE COMM’N, EAVS DEEP DIVE: POLL WORKERS AND POLLING PLACES 1 (2017), http://www.eac.gov/sites/default/files/document_library/files/EAVSDeepDive_poll_workers_pollingplaces_nov17.pdf [<https://perma.cc/EDK7-GAZV>].

65. See, e.g., Persily & Stewart, *supra* note 8, at 4–5, 17–18 (detailing “[the] historic and heroic administration of the 2020 election”).

66. *Introduction to Chapter 3: In-Person Voting*, in *THE VIRUS AND THE VOTE*, *supra* note 8, at 231, 231.

67. U.S. ELECTION ASSISTANCE COMM’N, ELECTION ADMINISTRATION AND VOTING SURVEY 2020 COMPREHENSIVE REPORT 8–10 (2021), <https://www.eac.gov/sites/default/files/docu>

shift presented a host of new challenges. Both early and mail voting had been on the rise in previous election cycles, but their use had been concentrated in a limited number of states. Prior to the pandemic, nineteen states—home to more than 43% of American voters—required an excuse or otherwise limited mail voting to certain groups.⁶⁸ By contrast, in 2020, only five states required an excuse to vote by mail.⁶⁹ Suddenly, millions of voters who had never before voted by mail were eligible to do so. Even in those states that had previously made mail voting broadly available, millions more voters took advantage of that option in 2020 than had done so before.

The unprecedented surge of tens of millions of voters to a system they had not previously used placed new burdens on both voters and LEOs. Voting by mail is more complicated than polling place voting. It entails many more steps. The voter must apply for a mail ballot; an election office has to verify that the applicant is eligible for a mail ballot; the election office has to send a ballot to the voter; the voter has to return the ballot in a timely fashion; and the elections office has to “process” and verify the ballot.⁷⁰

Unlike the traditional experience of voting at a physical polling place under the supervision of election officials or volunteer election workers, marking an absentee/mailed ballot occurs in an unsupervised environment, usually at the voter’s home. The ballot is then sent through the mail or delivered in person to the election office. Because the voter does not appear in person, election officials use other ways of verifying that the absentee/mailed ballot they are receiving comes from the intended eligible voter.⁷¹

Typically, this involves signature verification, or requiring the voter to sign an affidavit on the ballot’s return envelope, which is then checked against the voter’s signature on file in the elections office. This can cause problems if the voter fails to sign the ballot or there is a discrepancy between the ballot signature and the one on file. Some states require mail voters to include photocopies of their identification documents or have the mailed ballot envelope signed by witnesses or notarized.⁷² The voter’s failure to do this, or to take other steps required to assure that the ballot has been properly completed

ment_library/files/2020_EAVS_Report_Final_508c.pdf [https://perma.cc/7G9A-68VV]. Early in-person voting also rose, albeit less dramatically than mail-in voting, from 25.3% to 30.6%. *Id.*

68. See, e.g., *How Common Was By-Mail Voting Before COVID-19 and Which States Will Allow It in 2020?*, USAFACTS, <https://usafacts.org/articles/voting-by-mail-and-covid-19/> [https://perma.cc/LKM5-JB55] (Sept. 29, 2020, 1:24 PM).

69. *Id.*

70. See *Voting Outside the Polling Place: Absentee, All-Mail, and Other Voting at Home Options*, NAT’L CONF. ST. LEGISLATURES (Sept. 24, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> [https://perma.cc/ZPR8-S73G].

71. *Id.*

72. *Id.*

and returned, can cause problems for both the voter and voting officials. There is generally a higher voter error rate for mail-in ballots than polling place ballots, with new mail-in voters especially prone to error.⁷³ For the LEOs there is the expense of new supplies and equipment to print, fold, mail, unfold, and tabulate the ballots. The whole system depends on a postal service whose reliability many voters came to doubt.

B. *The Response*

In 2020, many local election administrators, particularly in major urban centers, proved to be resilient, innovative, and attentive to local circumstances and concerns. They addressed the problems of both pandemic in-person voting and the transition to an unprecedented volume of mail-in voting.

1. In-Person Voting

For in-person voting, this involved massive investment in hygiene and safety in traditional polling places and the expansion of voting hours and voting centers to address social distancing concerns. City and county election offices gave voters greater choices as to where to vote and found new types of voting locations, like outdoor tents, sports arenas, parks, fairgrounds, and convention centers.⁷⁴ LEOs also enjoyed extraordinary success in recruiting tens of thousands of new and younger poll workers to replace the older workers most at risk from COVID-19.⁷⁵ LEOs engaged in extensive outreach to local

73. See Nathaniel Rakich, *Why Rejected Ballots Could Be a Big Problem in 2020*, FIVETHIRTYEIGHT (Oct. 13, 2020, 7:00 AM), <https://fivethirtyeight.com/features/why-rejected-ballots-could-be-a-big-problem-in-2020/> [<https://perma.cc/W6K6-K5EQ>].

74. See Lisa Keen, *The 2020 Primary Elections*, in *THE VIRUS AND THE VOTE*, *supra* note 8, at 28, 44 (discussing how Fulton County, Georgia, partnered with the Atlanta Hawks to use Atlanta's State Farm Arena); Mathew Simkovits, *Michigan 2020: Election Administration in the Coronavirus Pandemic*, in *THE VIRUS AND THE VOTE*, *supra* note 8, at 80, 93–94 (discussing how Michigan used the Henry Ford Detroit Pistons Performance Center as a satellite voting center and the Detroit Lions' Ford Field as a place to receive ballots); Craig Mauger, *Detroit, Michigan Secretary of State Partner To Ensure Integrity of November Election*, DETROIT NEWS, <https://www.detroitnews.com/story/news/politics/2020/09/02/detroit-sos-jocelyn-benson-partner-november-election/5689364002/> [<https://perma.cc/Z4F5-PRWV>] (Sept. 2, 2020, 10:07 AM) (explaining that the Detroit Red Wings, Tigers, Pistons, and Lions will work with Detroit officials to use their arenas to support election administration); Audrey Conklin, *Drive-Thru Voting, Ballot Drop-Offs Pop Up in Minnesota, Texas, Other States*, FOX NEWS (Oct. 4, 2020), <https://www.foxnews.com/politics/drive-thru-voting-ballot-drop-offs> [<https://perma.cc/7RXY-MVGH>] (discussing the use of the Oakland-Alameda County, California, Coliseum for in-person voting); Carrie Levine & Matt Vasilogambros, *Running an Election in a Pandemic, in 10 Steps*, CTR. FOR PUB. INTEGRITY (Sept. 9, 2020), <https://publicintegrity.org/politics/elections/ballotboxbarriers/running-election-lessons-pandemic-10-steps/> [<https://perma.cc/9952-F7XE>] (explaining that St. Louis County told voters they could go to any polling place in the county, not just the one to which they were assigned; poll workers would print the correct ballot on demand; this was expected to cut polling locations by one-third; and “voters who face lines can change locations”).

75. Evie Freeman, Jacob McCall, Maia Brockbank & Anastasiia Malenko, *Poll Worker Recruitment in the 2020 General Election*, in *THE VIRUS AND THE VOTE*, *supra* note 8, at 261, 261–77; Barbara

businesses, nonprofits, civic groups, schools, and universities. In some instances, they persuaded local organizations to sponsor a polling place by providing workers or collaborated with their local government to have local public servants assigned to the polls.⁷⁶ Some increased compensation or offered other incentives.⁷⁷

This extensive array of in-person voting measures largely involved the exercise of preexisting local discretionary authority. These actions underscore the local capacity for taking the initiative, as well as the advantage decentralized administration offers in terms of easier connections and ability to work with local businesses, civil society organizations, and community groups in locating and obtaining access to voting sites, securing the donation of supplies, recruiting volunteer workers, and successfully seeking additional funding. As one close study of the 2020 election in Michigan concluded, “Michigan’s decentralized election system itself may have contributed to the efficiency of in-person voting in the 2020 general election, as the system allowed town clerks to tailor the location and procedures of polling places to the unique needs of their own counties.”⁷⁸

This herculean effort to obtain new polling places, furnish them with equipment and supplies, make them safe and secure, hire new workers, and provide staff with personal protective equipment imposed major financial burdens on many traditionally underfunded election offices. The federal Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) provided states with \$400 million to address the consequences of the pandemic for the election—a sum many elections officials concluded was not nearly enough to meet the need.⁷⁹ Much of the gap was closed by an additional \$400 million in

Sprunt, *Poll Worker Numbers Have Many Election Officials Breathing Sigh of Relief*, WABE (Oct. 29, 2020), <https://www.wabe.org/on-poll-workers-many-election-officials-breathe-sigh-of-relief/> [<https://perma.cc/JH44-4RYX>].

76. See Amanda Zerbe, *Florida 2020: Election Administration in the Coronavirus Pandemic*, in *THE VIRUS AND THE VOTE*, *supra* note 8, at 56, 70; Simkovits, *supra* note 74, at 91; Mikaela Pyatt, Alexa Gold & Krithika Iyer, *Nevada 2020: Election Administration in the Coronavirus Pandemic*, in *THE VIRUS AND THE VOTE*, *supra* note 8, at 103, 111; Haley Schwab & Joven Hundal, *Arizona 2020: Election Administration in the Coronavirus Pandemic*, in *THE VIRUS AND THE VOTE*, *supra* note 8, at 176, 181.

77. See Zerbe, *supra* note 76, at 70 (mentioning supplemental financial incentives offered poll workers in Palm Beach County, Florida); Simkovits, *supra* note 74, at 91 (discussing how Detroit, Michigan, increased poll worker pay from \$175 to \$500 per day); Pyatt et al., *supra* note 76, at 111 (detailing that some counties in Nevada increased hourly pay to attract poll workers); Bree Baccaglioni, *Georgia 2020: Election Administration in the Coronavirus Pandemic*, in *THE VIRUS AND THE VOTE*, *supra* note 8, at 201, 207 (discussing how some counties in Georgia experimented with hazard pay to increase recruitment).

78. Simkovits, *supra* note 74, at 93.

79. Pub. L. No. 116-136, tit. V, 134 Stat. 281, 530 (2020) (codified in scattered sections of the U.S.C.); see also Maggie Miller, *State and Local Officials Beg Congress To Send More Election Funds Ahead of November*, HILL (July 8, 2020, 5:31 PM), <https://thehill.com/policy/cybersecurity/506464-state-and-local-officials-beg-congress-to-send-more-election-funds-ahead> [<https://perma.cc/JH44-4RYX>].

grants directly to 2,500 local elections offices by the Center for Tech and Civic Life (“CTCL”), which was funded significantly by Priscilla Chan and Mark Zuckerberg. These grants proved to be a lightning rod for litigation and legislative attack.⁸⁰ But apart from the CTCL grants, LEOs acted largely within the traditional scope of their authority, albeit with considerably more initiative than skeptics might have anticipated.

2. Mail Voting

LEO efforts to make mail voting more accessible and attractive to voters were, if anything, more innovative and attentive to local circumstances and concerns, and, judging by the enormous shift to mail voting, even more successful. As already indicated, mail voting is far more complicated and uncertain for both voters and clerks. It entails many more steps, the filling out of more forms, checking of more boxes, and signing on more lines than in-person voting, with the timely mailing of ballots by and back to local election offices subject to the vagaries of the postal service. The massive shift to vote-by-mail entailed significant costs in terms of the need to educate voters and to obtain the equipment needed to print, mail, and tabulate the mail ballots. Here, too, CTCL grants were critical to LEO success.

LEOs took the initiative to make mail-in voting more easily available to and usable by voters in at least four different ways. First, as discussed later in this section, some sought to expand *eligibility* to vote by mail by arguing for expansive interpretations of the state laws limiting eligibility. Second, and more commonly, many sought to expand the *availability* of mail-in voting by sending mail-ballot applications, or mail ballots, to voters before receiving requests.⁸¹ Third, some sought to address the voter error problem by increasing educational outreach to voters, taking administrative actions that reduced the likelihood of errors, and seeking or adopting interpretations of state laws that rendered the

80. Multiple lawsuits were filed around the country by political groups—mostly with the term “voters alliance” in their name—to bar local elections offices from accepting or using CTCL grants. All were rejected. *See, e.g.*, *Wis. Voters All. v. City of Racine*, No. 20-CV-01487, 2020 WL 9254456 (E.D. Wis. Nov. 6, 2020); *Ga. Voter All. v. Fulton County*, 499 F. Supp. 3d 1250 (N.D. Ga. 2020); *Pa. Voters All. v. Centre County*, 496 F. Supp. 3d 861 (M.D. Pa. 2020); *Minn. Voters All. v. City of Minneapolis*, No. 20-2049, 2020 WL 6119937 (D. Minn. Oct. 16, 2020); *Tex. Voters All. v. Dallas County*, 495 F. Supp. 3d 441 (E.D. Tex. 2020); *Iowa Voter All. v. Black Hawk County*, No. C20-2078, 2020 WL 6151559 (D. Iowa Oct. 20, 2020); *Election Integrity Fund v. City of Lansing*, No. 20-cv-950, 2020 WL 6605987 (W.D. Mich. Oct. 19, 2020).

81. *See, e.g.*, Elise Viebeck, *Mailing of Ballots to All Voters in Las Vegas Area Puts Sharp Focus on Election Safeguards*, WASH. POST (May 29, 2020), https://www.washingtonpost.com/politics/ mailing-of-ballots-to-all-voters-in-las-vegas-area-puts-sharp-focus-on-election-safeguards/2020/05/28/912c099a-9f63-11ea-b5c9-570a91917d8d_story.html [https://perma.cc/3ZTS-G9NG (dark archive)]. The Nevada Secretary of State said she would send absentee ballots for the state’s June 9 primary to all active voters. *Id.* The Registrar of Voters in Clark County (the state’s most populous county and the home of Las Vegas) said he would go beyond the state’s plan by sending ballots to *inactive* as well as active registered voters. *Id.*

errors harmless.⁸² Fourth, LEOs around the country sought to address voter anxieties about the uncertain performance of the postal service by adopting new ways, or dramatically expanding old ways, for voters to return their ballots directly to elections offices without having to use the mail. This involved holding community events—like “Democracy in the Park”⁸³ in Madison, Wisconsin—at which ballots could be collected; sending mobile voting units—like Philadelphia’s “Voteswagon”⁸⁴—to libraries and other community locations to collect ballots; the use of drive-in, drive-through, and curbside voting by which motorists could return their ballots to early voting centers and election offices; and the expanded use of drop boxes at locations throughout the city or county.⁸⁵

Some of these LEO actions to make mail-in voting more available were legally unproblematic and simply highlighted the creative ability of LEOs to use their traditional powers to acquire technology, organize balloting, undertake voter information campaigns, sponsor community events, and manage their offices, albeit under difficult circumstances. Even without the use of legally uncertain measures, LEOs in North Carolina conducted elections with record-breaking turnout and the lowest mail ballot rejection rate in recent elections.⁸⁶ A study found that “[a]ccomplishing these feats required local election officials to adapt their processes in order to receive, count, and tabulate a five-fold increase in mail votes.”⁸⁷

Other actions raised significant legal issues, with LEOs pushing—or breaking through—the envelope of their administrative authority. Local efforts to get ballots to voters, facilitate error correction, or expand the use of drop boxes⁸⁸ were often more than arguably inconsistent with state law or administrative directives. To achieve their goals of vindicating the right to vote,

82. Examples of these efforts include the decision of the Maricopa County Recorder to make it easier for voters to correct their ballots in a manner not authorized by and arguably inconsistent with state law, see *infra* notes 92–97 and accompanying text, as well as the “prefilling” of voter information in absentee ballot applications by the county recorders in several Iowa counties, see *infra* notes 127–41 and accompanying text.

83. See JT Cestkowski, *City of Madison Stands by ‘Democracy in the Park’ Despite Letter from Republicans*, WKOW.COM (Oct. 1, 2020), https://www.wkow.com/news/politics/city-of-madison-stands-by-democracy-in-the-park-despite-letter-from-republicans/article_531e606c-b418-55d7-b68f-388a89a2db0b.html [<https://perma.cc/H6S3-39YV>].

84. See, e.g., Dan Koob, *Philadelphia Sends Out ‘Voteswagon’ To Collect Mail-In Ballots*, CBS PHILLY (May 30, 2020, 10:55 PM), <https://philadelphia.cbslocal.com/2020/05/30/philadelphia-sends-out-voteswagon-to-collect-mail-in-ballots/> [<https://perma.cc/YW2C-GP4T>].

85. See, e.g., Conklin, *supra* note 74.

86. See Christopher Middleton, *North Carolina 2020: Election Administration in the Coronavirus Pandemic*, in *THE VIRUS AND THE VOTE*, *supra* note 8, at 117, 134.

87. *Id.*

88. Only eight states explicitly permitted the use of drop boxes, although they had been available in some counties in at least nineteen states even before 2020. See Axel Hufford, *Ballot Drop Boxes in the 2020 Elections*, in *THE VIRUS AND THE VOTE*, *supra* note 8, at 354, 356–57.

some LEOs appealed to their states to change the relevant voting laws.⁸⁹ Sometimes state and local officials worked together to promote ballot access.⁹⁰ Others sued their state or supported or joined lawsuits brought by civic or political groups seeking to expand ballot access.⁹¹

But, as discussed more fully in the next section, in several instances state officials—governors, attorneys generals, and secretaries of state (the chief state elections officer in most states)—pushed back hard, suing to block these voter-friendly initiatives. Local officials lost these suits far more often than not, but taken together the cases illustrate both the willingness of local officials to go to bat for the voting rights of their constituents, and the unwillingness of the courts, even as they recognized the key operational role of local election administrators, to allow local administrators to pursue policies opposed by their states.

C. *LEOs in Court*

This section examines the principal litigations in four states—Arizona, Iowa, Ohio, and Texas—that together addressed the range of means local election offices sought to use to advance mail voting—eligibility, availability, error prevention and correction, and ballot return. It is organized by state, rather than by issue, because the focus here is not on the issues per se but on the nature and scope of local efforts and the judicial response to state-local conflict in this area.

89. See, e.g., Axel Hufford & Sarah Maung, *Pennsylvania 2020: Election Administration in the Coronavirus Pandemic*, in *THE VIRUS AND THE VOTE*, *supra* note 8, at 135, 143 (describing the Philadelphia City Commissioner’s appeal to the state legislature by mail to take immediate action to undo a state court decision concluding that mail ballots returned without “secrecy sleeves” had to be rejected).

90. See, e.g., *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 354 n.9 (Pa. 2020) (describing how four county election boards joined the Pennsylvania Secretary of State in seeking a resolution of the question of their authority to establish temporary ballot collection sites and to discount certain voter errors in the completion of absentee ballots); *Fontes v. State*, No. CV 2020-011845, 2020 WL 6498932, at *1 (Ariz. Super. Ct. Oct. 6, 2020) (order denying claim for declaratory, injunctive, and special action relief) (demonstrating that the Arizona Secretary of State and Maricopa County Recorder together supported a contested interpretation of state law); *cf.* *Democratic Senatorial Campaign Comm. v. Pate*, 950 N.W.2d 1, 2–3 (Iowa 2020) (per curiam) (ordering the Iowa Secretary of State to authorize mailing of absentee ballot applications to all voters but rejecting other county actions to facilitate the completion of mail ballot applications, following an initiative taken by three Iowa counties).

91. See, e.g., *Ohio Democratic Party v. LaRose*, No. 20CV-5634, 2020 WL 5637174, at *1 (Ohio Ct. Com. Pl. Sept. 15, 2020) (“This case concerns how voters may return absentee ballots for the November 3, 2020, general election, and specifically the possible use of multiple ballot ‘drop boxes’ in each county to which Ohio voters might return their absentee ballots if they elect not to rely upon the U.S. Mail.”); *In re State*, 602 S.W.3d 549, 550 (Tex. 2020) (“In this original proceeding, amidst the COVID-19 pandemic, and with elections upcoming in July and November, the parties ask us to determine whether a voter’s lack of immunity from the disease and concern about contracting it at a polling place is a ‘disability’ within the meaning of the statute.”).

1. Arizona

Between March and October 2020, Adrian Fontes—the Recorder for Maricopa County, Arizona’s most populous county (the fourth most populous county in the United States and the home of Phoenix, the state’s largest city)—undertook several controversial initiatives to make it easier for his constituents to vote by mail. These were challenged in three lawsuits brought by state officials or a hostile political organization.⁹²

Fontes first sought to facilitate the availability of absentee ballots. On March 13, 2020, with the COVID-19 pandemic rapidly emerging as a national crisis and the state’s presidential primary just four days away, Fontes announced he would mail ballots and a postage-paid return envelope to every registered voter in the county. As he explained, “We’re doing this . . . to make sure that every eligible voter can safely fill out a ballot, put it in the envelope and maintain appropriate social distance by just popping in and dropping it off at any of the polling locations that will be open on Tuesday.”⁹³ Arizona law provided for the mailing of ballots to all voters who had asked to be placed on the state’s “permanent early voting list,”⁹⁴ but in sending ballots to *all* registered voters in the county, Fontes went beyond state law. Fontes acknowledged this, but did not see it as a fatal obstacle: “There is no explicit authority in law for this and there’s also no prohibition in law.”⁹⁵

This was not the first time the County Recorder had treated state election law as a floor and not a ceiling on local efforts to facilitate voting.⁹⁶ In 2018, he opened up five “emergency voting centers” in the period between the end of early voting and Election Day to enable voters to cast their ballots if, as state law provided, they anticipated that due to “unforeseen circumstances” they would be unable to vote on Election Day. When some Republicans asserted

92. Dillon Rosenblatt, *Court Stops County Recorder from Sending Ballots to All Voters for Tuesday Election*, ARIZ. CAPITOL TIMES (Mar. 13, 2020), <https://azcapitoltimes.com/news/2020/03/13/court-stops-county-recorder-from-sending-ballots-to-all-voters-for-tuesday-election/> [https://perma.cc/DR2W-LZWJ].

93. *Id.*

94. At the time of the litigation, Arizona election law provided for a “permanent early voting list,” ARIZ. REV. STAT. ANN. § 16-544 (2020). In 2021, the law was amended to provide only for an “active early voting list.” Act of May 11, 2021, ch. 359, 2021 Ariz. Legis. Serv. (West) (codified at ARIZ. REV. STAT. ANN. § 16-544 (2021)). Unlike under the pre-2021 law, an Arizona voter who has not voted early in all elections in the two previous consecutive election cycles will be removed from the early voting list. *See* ARIZ. REV. STAT. ANN. § 16-544H(4) (Westlaw through the 1st Spec. Sess. of the 55th Leg. and 1st Reg. Sess. of the 55th Leg.). The law on the books in the 2020 election had no such restriction.

95. Rosenblatt, *supra* note 92 (quoting Adrian Fontes).

96. For a general discussion of the role of floors versus ceilings in state-local conflicts, see RICHARD BRIFFAULT, NESTOR M. DAVIDSON & LAURIE REYNOLDS, *THE NEW PREEMPTION READER: LEGISLATION, CASES, AND COMMENTARY ON THE LEADING CHALLENGE IN TODAY’S STATE AND LOCAL GOVERNMENT LAW* 8–9 (2019) [hereinafter BRIFFAULT ET AL., *THE NEW PREEMPTION READER*].

Fontes's interpretation of "unforeseen circumstances" was more liberal than the law intended, he defended his action, saying, "The intent of the law is to make sure people who want to vote can vote All I'm trying to do is let people vote."⁹⁷

Although Fontes was able to implement this action to facilitate voting in 2018,⁹⁸ his 2020 effort in response to COVID-19 was immediately blocked by Arizona's Republican Attorney General who obtained an injunction premised on the theory that the Arizona law authorizing the county recorder to mail ballots to electors who "make a verbal or signed request to the county recorder" by eleven days before the election⁹⁹ was a ceiling, not a floor, that prohibited the Recorder from sending a ballot to anyone who had not requested one.¹⁰⁰ The Maricopa County Superior Court agreed and enjoined Fontes's action.¹⁰¹

A second Maricopa action sought to ameliorate the consequences of voter error. For both the March 2020 presidential preference primary and the August primary, the Recorder included with the mailed ballot an instruction that if the voter makes a mistake in marking a candidate's name, she can "cross out" the mistake by drawing a line through the name and the oval marked next to it and then filling in the oval next to the corrected selection. This differed from the provision of the state's Election Procedures Manual that requires the voter to destroy the ballot and request a new one—a more time-consuming and uncertain process.¹⁰² A group calling itself the Arizona Public Integrity Alliance sought a preliminary injunction barring Maricopa from including the correction instruction with mail ballots for the November election.¹⁰³ The Maricopa County Superior Court found the plaintiffs were likely to succeed on the merits of whether the county was required to follow the state rule but nonetheless denied the injunction.¹⁰⁴ The court expressed doubt whether voters would be

97. Jeremy Duda, *Republicans Question Fontes Decisions on Emergency Voting Centers*, ARIZ. MIRROR (Nov. 15, 2018, 4:54 PM), <http://www.azmirror.com/2018/11/15/republicans-question-fontes-decisions-on-emergency-voting-centers/> [<https://perma.cc/6WF3-3K4T>].

98. The Republican state legislature, however, subsequently adopted a new law tightening up on the ability of voters to use the emergency voting option. See *Arizona Law Restricting Emergency Voting Centers Goes into the Books*, KTAR (Apr. 18, 2019, 12:00 PM), <https://ktar.com/story/2539074/arizona-law-restricting-emergency-voting-centers-goes-into-the-books/> [<https://perma.cc/E2U9-EARP>].

99. ARIZ. REV. STAT. ANN. § 16-542(A), (E) (Westlaw through 2021 1st Spec. Sess. of 55th Leg. and 1st Reg. Sess. of 55th Leg.).

100. Verified Civil Complaint for Declaratory Injunctive, Special Action, and Quo Warranto Relief at 7, *Fontes v. Arizona*, No. CV 2020-011845, 2020 WL 6498932, at *7 (Ariz. Super. Ct. Oct. 6, 2020).

101. See Rosenblatt, *supra* note 92.

102. See *Ariz. Pub. Integrity All. v. Fontes*, LC2020-000252-001 DT, at *3–4 (Ariz. Super. Ct. Sept. 4, 2020) (order denying plaintiffs' application for a preliminary injunction and defendants' motion to dismiss) (discussing the relevant provision of the Secretary of State's Election Procedures Manual).

103. *Id.* at *1–2.

104. *Id.* at *5–6.

harmful by the instruction, noted the logistical difficulty and cost to the county of printing 2.5 million new instruction sheets in time to meet the statutory deadlines for mailing the ballots, and concluded that public policy weighed against the injunction.¹⁰⁵ As the court explained, under Arizona election procedure, if a voter returned a ballot that indicated two choices, the ballot would be rejected by the machine reader but given a manual review to determine the voter's intent.¹⁰⁶ In avoiding the need for the voter to request and obtain a second ballot, "the County Defendants' approach is understandable, and nothing suggests improper motives behind it."¹⁰⁷

The Arizona Supreme Court reversed in an opinion that sharply slapped down the Recorder and rejected his position that he was vindicating the rights of Arizona mail-in voters.¹⁰⁸ Invoking a trope used by many other state courts in the 2020 state-local election administration fights, the court emphasized the importance of statewide rules to maintain "impartiality, uniformity and efficiency."¹⁰⁹ The court emphasized the public interest in requiring the Recorder to abide by state law, and the plaintiffs' "beneficial[] interest[]" in compelling the Recorder "to perform his legal duty."¹¹⁰

The Maricopa Recorder's one litigation success involved advancing a position taken by the Democratic Secretary of State in the face of opposition from the Republican Attorney General. Under Arizona law, a voter who cannot go to the polls due to illness or disability is entitled to vote with the assistance of a bipartisan two-person special election board.¹¹¹ The board is required to deliver the ballot personally to the voter and provide the necessary assistance in-person.¹¹² But in 2020, "personal contact during the pandemic may entail a health risk to certain voters, especially those who are elderly or have compromised immune systems, and especially because the two members of the special election board will almost always be strangers to the voter."¹¹³ In response, the Secretary of State issued guidance authorizing county recorders to develop procedures for special election boards to use video meetings.¹¹⁴ Maricopa developed such a process, which essentially permitted the board to mark the ballot for the voter. As the Attorney General noted, under this

105. *Id.* at *6, 8.

106. *Id.* at *4.

107. *Id.* at *8.

108. *Ariz. Pub. Integrity All. v. Fontes*, 475 P.3d 303, 309 (Ariz. 2020).

109. *Id.*

110. *Id.* at 309–10. The court also concluded that the instructions could have been replaced in time to meet the deadlines; it did not consider the cost of doing so. *Id.* at 310.

111. ARIZ. REV. STAT. ANN. § 16-549(C) (Westlaw through 2021 1st Spec. Sess. of 55th Leg. and 1st Reg. Sess. of 55th Leg.).

112. *Id.*

113. *Fontes v. State*, 2020 WL 6498932, at *2 (Ariz. Super. Ct. Oct. 5, 2020) (order denying claims for declaratory, injunctive, and special action relief).

114. *Id.*

procedure, the voter would “never touch the ballot, mark it, sign it, or physically return it.”¹¹⁵ The Recorder, supported by the Secretary of State, brought suit for a declaration that the video board policy was lawful;¹¹⁶ the Attorney General counterclaimed, seeking a declaration of invalidity and injunctive relief.¹¹⁷

The Maricopa County Superior Court agreed with the Attorney General that the County Recorder “has no general authority over the conduct of elections, only the authority granted by statute.”¹¹⁸ The relevant statute required the interaction between a special election board and a voter to be “in person” and that “cannot be construed to mean by video meeting.”¹¹⁹ But the court also found the Recorder has a “duty” under federal law—“as does everyone involved in the election process”—to make “reasonable modifications” to state law to accommodate voters with disabilities.¹²⁰ When the Attorney General countered that “it is not the County Recorder’s place to decide what reasonable modifications must be made,” the court responded by emphasizing that “by statute, the County Recorder administers special election boards” so it was up to the Recorder in the first instance to decide whether a special election board could use the video procedure.¹²¹ Consequently, the court denied the Attorney General any injunctive or declaratory relief.¹²²

2. Iowa

The efforts of county auditors in three Iowa counties—Johnson, Linn, and Woodbury¹²³—to reduce the likelihood that voters would make mistakes in their absentee ballot applications and the work LEOs would have to undertake to correct those errors, culminated in two back-to-back decisions of the Iowa Supreme Court in mid-October 2020, both rejecting the LEOs’ efforts.

To obtain an absentee ballot, an Iowa voter must submit an application that includes their name, signature, date of birth, address, and “voter verification number,” which is either a driver’s license or ID number issued by the Department of Transportation, or a voter PIN number issued by the Secretary of State.¹²⁴ If the application is incomplete—e.g., missing the voter

115. *Id.* at *3.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at *3–4.

121. *Id.* at *4.

122. *Id.* at *6.

123. Their county seats are, respectively, Iowa City (home of the University of Iowa), Cedar Rapids, and Sioux City. The counties are, respectively, the fourth, second, and sixth most populous in the state.

124. See Democratic Senatorial Campaign Comm. v. Pate, 950 N.W.2d 1, 4 (Iowa 2020) (per curiam).

verification number—it will be rejected.¹²⁵ Many voters misplace the card with their verification number or make mistakes in completing the form.¹²⁶ Prior to 2020, to avoid having to contact the voter to get the additional information, county auditors often “prefilled” applications by including information, such as the verification number, drawn from the voter registration database.¹²⁷ Alternatively, if the application was submitted without the information, a county auditor’s office would complete it (and correct other minor errors) from public records.¹²⁸ In June 2020, however, the legislature passed a law eliminating these options. The new measure expressly required the voter to provide the necessary information and directed the auditors to contact the voter if there was a problem with the application or to obtain any information necessary to complete the application.¹²⁹

In July 2020, the Johnson, Linn, and Woodbury County Auditors began mailing absentee ballot applications to all registered voters in their counties—with prefilled ballot application forms—to facilitate absentee voting and lessen administrative expenses during the pandemic.¹³⁰ Thereafter, the Secretary of State obtained permission from the Iowa Legislative Council to send out absentee ballot applications statewide but also issued a “directive” to the county auditors barring them from using prefilled ballot request forms.¹³¹ Initially, the Secretary of State took no action to enforce the directive against the county auditors, but the Republican National Committee and other Republican plaintiffs sued the auditors to enjoin the mailing of prefilled applications and to claw back the forms of the voters who had completed and returned them.¹³² Iowa county courts, relying on state law and the Secretary of State’s directive, concluded the auditors lacked authority to prefill the absentee ballot forms and granted the Republicans the requested relief.

Several Democratic organizations then brought suit challenging the Secretary of State’s directive barring prefilling. A county district court granted a stay against the enforcement of the Secretary of State’s order, finding that the county auditors’ actions advanced the “public’s interest in maximizing voter participation in the upcoming general election . . . by making absentee voting as easy and widely available as possible.”¹³³ The state supreme court reversed the stay, finding the Secretary of State had acted within the scope of his

125. *Id.*

126. *See, e.g., id.* at 11 (Appel, J., specially concurring); League of United Latin Am. Citizens of Iowa v. Pate, 950 N.W.2d 204, 223–30 (Iowa 2020) (Oxley, J., dissenting).

127. *Democratic Senatorial Campaign Comm.*, 950 N.W.2d at 3.

128. *See League of United Latin Am. Citizens of Iowa*, 950 N.W.2d at 208 (per curiam).

129. *Democratic Senatorial Campaign Comm.*, 950 N.W.2d at 9–12 (Appel, J., specially concurring).

130. *Id.* at 3 (majority opinion).

131. *Id.* at 2–3.

132. *Id.* at 3.

133. *Id.* at 5.

authority.¹³⁴ The court also took a swipe at the counties, noting that although Iowa counties enjoy constitutional home rule authority, the Iowa statute dealing with the procedure for obtaining an absentee ballot “overrides any home rule authority of county auditors” and that, “[n]othing in Iowa law restricts the Secretary of State’s ability to take prompt action when county auditors in specific counties are not following state election laws.”¹³⁵

Justice Brent Appel, concurring specially, parted company with the majority in assessing the practical reasonableness of the LEOs’ actions. As he explained, there was little ballot security gained—and a burden imposed on voting rights—by requiring voters to supply the identification information themselves:

[I]f a voter does not know their voter PIN number, they may contact the county commissioner of election, who will provide the voter that information to them if the caller provides two items of identification, e.g., name, address, or birth date. . . . One wonders why a voter who has forgotten or misplaced a PIN number may simply obtain it from the county auditor by providing publically [sic] available information, but the county auditor cannot send the number to the registered voter at his voting address on a prefilled absentee ballot request.¹³⁶

The prefilling issue came before the Iowa Supreme Court again in a direct attack by a voting rights group on the new statute barring auditors from correcting defective applications from information within auditors’ records.¹³⁷ The court found the burden on Iowa voters was neither severe nor discriminatory and was justified by the standard arguments about fraud and public confidence in the electoral process.¹³⁸ The dissent pointed to the burdens on the county auditors, who were struggling to protect the right to vote. As Justice Dana Oxley, writing for the three dissenters, put it:

The majority dismisses the record evidence not only about the pandemic and its effects on county auditors’ ability to keep up with record-breaking requests for absentee ballots—requests made at the urging of the defendant [the Secretary of State] that voting by mail is the safest way to vote—it also dismisses the record evidence about the significant number of ballot requests county auditors will receive with missing or incorrect information¹³⁹

134. *Id.* at 9.

135. *Id.* at 5.

136. *Id.* at 18–19 (Appel, J., specially concurring).

137. *League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 206–07 (Iowa 2020).

138. *Id.* at 209–11.

139. *Id.* at 217–18 (Oxley, J., dissenting).

She explained that “[t]o meet the demands of a record numbers of absentee ballot requests for the June primary, workers in auditors’ offices statewide worked overtime and added additional staff. In Scott County, for example, staff worked fourteen straight twelve-to-fourteen-hour workdays to meet the high demand for absentee ballots”—and that was under the old Iowa law that allowed them to correct incomplete or inaccurate information based on voter records in their database.¹⁴⁰ She cited the statement by the president of the Iowa State Association of County Auditors, issued with the approval of the association’s executive board, and affidavits submitted by county auditors from three different counties about the high percentage of absentee ballot applications with missing or incorrect ID numbers, the efficiency and security of the prior system of using information in the database to correct errors, and the enormous burdens on both administrators and voters posed by the new requirement.¹⁴¹ Although they did not prevail, the county auditors’ statements underscored their on-the-ground knowledge of the obstacles mail voters face and the LEO efforts to help voters overcome the hurdles added by the legislature.

3. Ohio

The focus of the litigation in Ohio was drop boxes—secure containers maintained by county boards of elections as a means for voters, concerned about the well-publicized delays in mail delivery by the U.S. Postal Service, to return their mail ballots directly to the elections office. Ohio law was silent on the use of drop boxes, but prior to 2020 some counties had used them—either inside the county elections office or as part of a drive-through facility outside the county office—and some had used them in the June primary.¹⁴² With the surge in mail-in voting, limiting drop boxes to county offices was often inadequate to handle the demand. During the primary, voters caused major traffic backups when they lined up in their vehicles to use the single drop boxes at the elections’ offices in urban places like Hamilton (Cincinnati) and Montgomery (Dayton) Counties.¹⁴³ For the general election, many counties, particularly larger urban ones, sought to place multiple drop boxes at satellite locations, such as public libraries, county agency buildings, or branch offices of the county sheriff. For example, Franklin County (Columbus) was considering four to five drop box locations around the county; Mahoning County (Youngstown) planned ten additional drop boxes at locations other than the board’s office.¹⁴⁴ Even in

140. *Id.* at 219.

141. *Id.* at 223–30.

142. *See* *Ohio Democratic Party v. LaRose*, No. 20CV-5634, 2020 WL 5637174, at *5–7 (Ohio Ct. Com. Pl. Sept. 15, 2020).

143. *Id.* at *5–6.

144. *Id.* at *6.

smaller, more rural counties, LEOs concerned about the “[s]poradic”¹⁴⁵ nature of local mail service sought to add satellite drop boxes.

On August 12, 2020, the Ohio Secretary of State moved to stop the counties by issuing Directive 2020-16, which “prohibited [county boards] from installing a drop box at any location other than the board of elections.”¹⁴⁶ Voters and the Ohio Democratic Party, with five cities and three counties supporting the plaintiffs as amici, challenged the directive in state court, and another set of voters and a civil rights group, again with supportive cities and counties as amici, sued in federal court.¹⁴⁷ The plaintiffs initially prevailed in the state court of common pleas. Relying heavily on the affidavits of the county boards for its findings of fact and on their general authority to administer elections, the court concluded that the secretary’s directive was “arbitrary and unreasonable” and that “every board of elections is legally permitted to consider enhancing safe and convenient delivery of absentee ballots, and may tailor ballot drop box locations or conceivably other secure options to the needs of their individual county.”¹⁴⁸ The court specifically rejected the Secretary’s contention that the one-drop-box-per-county rule promoted equality across the state:

Unless Ohio rearranges its government structure so that every county has roughly the same population and comparable geographic access to a drop box and places for voting, there will inevitably be serious inconvenience caused many voters by such an arbitrary rule. Treating one drop box per county as “equal” is equivalent to arguing that every county needs only 100 (or some other arbitrary number) of voting machines, regardless of the population. That view of “equal” treatment is nonsense.¹⁴⁹

The court of appeals reversed. It rejected the Secretary of State’s argument that Ohio law—which calls for the voter casting an absentee ballot to either mail the ballot to the county director of elections or to “personally deliver it to the director”¹⁵⁰—requires that delivery must occur only at the office of the county board of elections.¹⁵¹ But the court concluded that the Secretary’s directive did not violate the absentee ballot law and that nothing in Ohio law precluded the directive.¹⁵²

The federal litigation followed a similar path. The district court initially enjoined the Secretary’s directive; the Sixth Circuit then stayed the injunction

145. *Id.*

146. *Id.* at *1.

147. *Id.* at *1–2.

148. *Id.* at *18.

149. *Id.* at *16.

150. OHIO REV. CODE § 3509.05(A) (2022).

151. *See* Ohio Democratic Party v. LaRose, 159 N.E.3d 1241, 1249–53 (Ohio Ct. App. 2020).

152. *Id.* at 1256–57.

pending appeal in an opinion that noted, *inter alia*, the appeals court's view that the Secretary of State would likely succeed on the merits as the restriction on drop boxes was both reasonable and nondiscriminatory and "promote[d] uniformity, which in turn promotes the fair administration of elections."¹⁵³

Judge Helene White's dissent from the Sixth Circuit's decision, by contrast, is noteworthy for the great weight she gave to the role of the county boards under Ohio law and as a matter of common sense in deciding on the number and location of drop boxes. As she explained, "the legislature crafted a statute that . . . places primary responsibility for administering elections in bipartisan county boards of elections. These boards have the duty to oversee the administration of elections, including the duty to '[f]ix and provide the places for registration and for holding primaries and elections.'"¹⁵⁴ As she noted, "Although the Secretary has overall control of the election, and may promulgate directives, the individual county boards are granted the authority to control the local aspects of elections. . . . This makes sense; county populations, geographic dimensions, and infrastructure vary considerably throughout the state."¹⁵⁵ Like the state trial court, she dismissed the Secretary's asserted interest in statewide uniformity in the number of drop boxes per county as "ignor[ing] that each county has its own bipartisan election commission with knowledge of the county's needs. Uniformity in the number of ballot drop-off locations across counties with 850,000 voters and counties with less than 10,000 voters promotes unequal, rather than uniform, voting opportunities."¹⁵⁶

4. Texas

State and local officials clashed in state and federal courts over three issues affecting the availability of absentee ballots for Texas voters—eligibility, access to absentee ballot applications, and drop boxes. The first round broke out in the spring when a group of voters and the Texas Democratic Party sued the Travis County Clerk to expand the availability of mail voting.¹⁵⁷ Texas law limits mail voting to voters sixty-five and older or who have a "physical condition that prevents the voter from appearing at the polling place on election day without a likelihood . . . of injuring the voter's health."¹⁵⁸ The plaintiffs sought a declaration that the widespread community transmission of COVID-19 meant that every voter had a disability entitling them to vote by mail. The Travis County District Court agreed, directing both the county and the state to accept

153. A. Philip Randolph Inst. of Ohio v. LaRose, 831 F. App'x 188, 192 (6th Cir. 2020).

154. *Id.* at 193 (White, J., dissenting) (quoting OHIO REV. CODE § 3501.11 (2020)).

155. *Id.* at 194 (citing OHIO REV. CODE §§ 3501.04, 3501.05, 3501.11).

156. *Id.*

157. Travis County is the home of Austin and is the fifth most populous county in the state. *Travis County*, PLACE & SEE, <https://placeandsee.com/wiki/travis-county> [<https://perma.cc/KKF5-M6W9>].

158. TEX. ELEC. CODE ANN. §§ 82.002(a)(1), 82.003 (Westlaw through the end of the 2021 Reg. and Called Sess. of the 87th Leg.).

absentee ballot applications and absentee ballots from all voters who claimed disability due to COVID-19 for the July 14 runoff election and all subsequent elections in 2020.¹⁵⁹ The State immediately appealed. Travis County did not. Rather, Travis County, joined by four other counties—including Harris County (Houston) and Dallas County, the two most populous counties in the state—sought to defend the district court’s order.¹⁶⁰

While the State’s appeal was pending, Attorney General Ken Paxton issued a “guidance letter” rejecting the Travis County District Court’s interpretation of the mail-in ballot law. The letter directed county election officials to disregard the court’s interpretation and threatened “third parties” with criminal penalties if they “advise voters to apply for a ballot by mail for reasons not authorized by the Election Code, including fear of contracting COVID-19 without an accompanying qualifying disability.”¹⁶¹ After winning a temporary victory before the court of appeals, the plaintiffs ultimately lost when the Texas Supreme Court unanimously agreed with the Attorney General that lack of immunity to COVID-19 is not a “disability.”¹⁶² But the court rejected the Attorney General’s request for a writ of mandamus.¹⁶³

The court’s opinion—complemented by the three concurring opinions—has two striking features. First, the court gave considerable attention to the statements by county election officers and other LEOs supporting the district court’s reading of disability.¹⁶⁴ The court also acknowledged county efforts to promote voting by mail and to obtain additional funding to handle the influx of mail-in ballots.¹⁶⁵ This seems to have been intended to justify the court’s conclusion that the county officials had not “gone rogue” and would abide by the court’s decision so that a writ of mandamus need not be issued. The discussion also underscored the role of LEOs in voicing the concerns of local voters. As the court noted, the Harris County Clerk explained that “[e]lection officials . . . have advised [voters] to vote by mail if they do not have immunity to a highly contagious disease that is likely to injure their health.”¹⁶⁶ The Harris County District Attorney urged that “Harris County wishes to increase the ratio of VBM [vote by mail] as a practical not a partisan matter because doing

159. *Tex. Democratic Party v. DeBeauvoir*, No. D-1-GN-20-001610, 2020 Tex. Dist. LEXIS 983, at *7–8 (Apr. 17, 2020).

160. *See generally In re State*, 602 S.W.3d 549, 550 (Tex. 2020) (noting that the State petitioned the Texas Supreme Court for a writ of mandamus upon entry of the Travis County District Court’s order).

161. Letter from Ken Paxton, Att’y Gen. of Texas, to County Judges and County Election Officials (May 1, 2020), https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/Mail-in%20Ballot%20Guidance%20Letter_05012020.pdf [<https://perma.cc/5NVA-RF8H>].

162. *In re State*, 602 S.W.3d at 550.

163. *Id.*

164. *Id.* at 554–57.

165. *Id.* at 554.

166. *Id.*

so will enable less crowded conditions during in-person voting and thus better social distancing.¹⁶⁷ Similarly, the court explained that the Dallas County Commissioners Court—the county’s governing body—“issued a resolution stating that due to the threat of COVID-19, any voter who wanted a mail-in ballot could check the box indicating a disability.”¹⁶⁸ Although the court was not persuaded by the urban counties, it was willing to give voice to their concerns.

Second, in declining the Attorney General’s request for a writ of mandamus, the justices left some room for a broader COVID-19-influenced reading of “disability” than the Attorney General was willing to recognize. The court confirmed the position of the county election officers that they had no duty to probe a voter’s disability claim.¹⁶⁹ And the court agreed that “a voter can take into consideration aspects of his health and his health history that are physical conditions in deciding whether, under the circumstances, to apply to vote by mail because of disability.”¹⁷⁰ So, if a voter was concerned that she might be particularly susceptible to the virus or to a more serious case if infected, she might conclude she qualified for an absentee ballot, and the local election officer would have no obligation—or authority—to challenge her.¹⁷¹

A second round of state-local conflict occurred in August and September when Harris County Clerk Chris Hollins announced he would mail every registered voter in the county an application to vote by mail. The Director of Elections ordered him to drop the plan. When it was unclear whether Hollins would comply, the State sued, claiming the plan was beyond the clerk’s authority.¹⁷² Hollins enjoyed initial success in the local district court, which denied the State’s application for a temporary injunction,¹⁷³ and in the state court of appeals, which affirmed.¹⁷⁴ The State argued that Hollins’s proposal would confuse voters and cause some ineligible voters to apply for an absentee ballot, potentially “walking them into a felony.”¹⁷⁵ But the appeals court emphasized the “educational nature of the materials sent with the applications, specifically, the red-siren graphics accompanying a warning that, despite receiving the application, not all voters are eligible to vote by mail.”¹⁷⁶ Indeed, rather than confuse voters, the court of appeals found that for voters deciding

167. *Id.*

168. *Id.* at 556.

169. *Id.*

170. *Id.* at 560.

171. *Id.* at 561. Five justices in three concurring opinions went beyond the opinion of the court in emphasizing the final authority of the voter to determine whether, due to the pandemic, she is entitled to vote by mail. *See id.* at 562–63 (Guzman, J., concurring); *id.* at 563–64 (Boyd, J., concurring); *id.* at 567–71 (Bland, J., concurring).

172. *State v. Hollins*, 607 S.W.3d 923, 925 (Tex. Ct. App. 2020).

173. *Id.* at 927.

174. *Id.* at 930.

175. *Id.* at 925.

176. *Id.* at 926.

whether they were eligible to vote by mail based on having a disability, the Harris County mailer was quite helpful.¹⁷⁷ The Secretary of State's website failed to define disability, whereas the Harris County mailer provided the necessary information "including important details" that would be useful to voters making that decision, meaning there was little danger that a voter would commit fraud because of the mailer.¹⁷⁸ The court noted the Director of Elections' own statement that the Secretary of State doesn't "allow or disallow counties to do anything. Counties are the ones that run elections in Texas, we assist and advise."¹⁷⁹

The state supreme court, however, reversed and granted the temporary injunction.¹⁸⁰ The court emphasized the limited authority of county election officers in light of the "subordinate and derivative" position of counties, which possess "no sovereignty distinct from the state," and, in Dillon's Rule language, "only such powers and privileges as have been expressly or impliedly conferred upon them."¹⁸¹ The court rejected Hollins's argument that the state Election Code's grant of authority to county clerks to conduct voting by mail—called "early voting" under Texas law—or the clerk's more general statutory powers to manage and conduct elections locally impliedly authorized clerks to mail unsolicited ballot applications to all registered voters.¹⁸² Although Texas law did not forbid his action, it failed to provide the authorization that the court's Dillon's Rule reading of county clerk election authority required and so was *ultra vires*. The court stressed the importance of uniform application of the election code throughout the state as a justification for blocking local voting initiatives.¹⁸³ The court concluded that notwithstanding the lack of evidence that the county clerk's action would harm the integrity of the electoral process, the state's "sovereign" interest in overseeing its local governments and preventing local misapplication of state law supported granting the temporary injunction.¹⁸⁴

The final Texas state-local conflict was, as in Ohio, over options for returning absentee ballots. Governor Abbott issued an order on July 27, 2020, permitting absentee voters to return their ballots to county ballot centers early and in-person; that order did not impose a limit on the number of return centers

177. *Id.* at 928.

178. *Id.*

179. *Id.*

180. *State v. Hollins*, 620 S.W.3d 400, 403 (Tex. 2020).

181. *Id.* at 403–04.

182. *Id.* at 406–08.

183. *Id.* at 408.

184. *Id.* at 409–10.

per county.¹⁸⁵ In response, many counties “decided to offer multiple ballot return centers because ‘the size of some counties would make it difficult, if not impossible, for some voters to return their ballots to election administration headquarters in each county.’”¹⁸⁶ Harris County, for example, planned on eleven centers; Fort Bend County on five;¹⁸⁷ and Travis and Galveston Counties announced plans for multiple return centers.¹⁸⁸ However, on October 1, 2020, Governor Abbott issued a new order limiting the number of ballot return centers to one per county, citing the need for ballot security, and giving county officials less than twenty-four hours to close their satellite ballot return centers.¹⁸⁹ When voters and a pair of voting rights organizations brought suit, a federal district court granted a preliminary injunction barring enforcement of the order on the grounds that plaintiffs were likely to succeed on their claims that the order placed an undue burden on the right to vote and resulted in disparate treatment of absentee voters living in larger, more populous counties.¹⁹⁰ The court also addressed the burden the order placed on county officials, citing LEO statements and stating that they would have to address “the confusion and logistical complications created by the October 1 Order”; the administrative burden of “having to change our voter education materials and our staff training”; the impact on county efforts to meet federal requirements for accommodating disabled voters; and the threat to the health of election workers from increasing their exposure to the COVID-19.¹⁹¹

However, the Fifth Circuit in short order reversed,¹⁹² finding that the gubernatorial order’s limitation on ballot return locations placed little or no burden on the right to vote and was justified by the state’s interest in ballot security and uniformity in the administration of election law.¹⁹³ Any burden imposed on voters in larger or more populous counties was dismissed as de minimis: “More to the point, it applies a uniform rule to every Texas county and does not weight the votes of those in some counties more heavily than

185. Tex. Governor Greg Abbott, Proclamation Suspending Certain Statutes Concerning Elections on November 3, 2020 (July 27, 2020), https://gov.texas.gov/uploads/files/press/PROC_COVID-19_Nov_3_general_election_IMAGE_07-27-2020.pdf [<https://perma.cc/HD8J-N7D2>].

186. Tex. League of United Latin Am. Citizens v. Abbott, 493 F. Supp. 3d 548, 560 (W.D. Tex. 2020).

187. *Id.*

188. Tex. League of United Latin Am. Citizens v. Hughs, 978 F.3d 136, 141 (5th Cir. 2020).

189. *Abbott*, 493 F. Supp. 3d at 560.

190. *Id.* at 581–82.

191. *Id.* at 563–64. The Travis, Harris, Fort Bend and El Paso County Clerks or Election Administrators were technically defendants in the suit, but the court repeatedly cited their declarations in support of its decision to enjoin the Governor’s October 1 Order. *See id.* at 548, 559, 562–65, 580.

192. *Hughs*, 978 F.3d at 149–50.

193. *Id.* at 147–48 (noting that only 4 of 254 counties use multiple ballot return locations).

others.¹⁹⁴ As in Ohio,¹⁹⁵ formal uniformity across counties was used to deny equal treatment to the voters in the more populous counties.

A similar scenario played out in the state courts, with the trial court enjoining the governor's order, the court of appeals affirming the injunction, and the Texas Supreme Court staying the injunction and then reversing.¹⁹⁶ The state court echoed the Fifth Circuit's analysis of the right-to-vote issues but gave more attention to the state-local aspect of the conflict, specifically rejecting the argument that the governor's order improperly "intrudes on local officials' prerogatives."¹⁹⁷ Indeed, in rejecting the argument that the order disparately burdened voters in populous or geographically large counties, the court sought to rationalize it as consistent with what it described as "Texas's county-based system of elections."¹⁹⁸ Under that system,

county lines are frequently what determines how convenient voting may be for any given voter. The plaintiffs' assertion that the Constitution is violated when voters of one county face slightly greater logistical barriers than voters in another county . . . if taken seriously . . . would condemn Texas's county-based election apparatus to interminable litigation.¹⁹⁹

* * *

The state-local election litigations in these four states are marked by two common themes. First, the willingness of some urban-area LEOs, aware of the practical difficulties facing their constituents in voting during the pandemic, to adopt expansive interpretations of their powers to facilitate voting and oppose the voting-restrictive actions of state officials, whether as litigants, amici, or affiants, in court. Second, when LEO activism was challenged by state officials, the LEOs nearly always lost, sometimes after an initial lower court victory. State supreme courts and federal courts of appeals repeatedly focused on the limited nature of local authority, the hierarchical superiority of state officers, and the asserted value of statewide uniformity in the application of state election laws, notwithstanding the considerable interlocal variation in the conditions and circumstances of voting. In elections at least, statewide uniformity may often lead to the unequal treatment of voters from different localities. State supremacy and the asserted interest in uniformity also mark the state legislative attack on LEOs in 2021, which is the subject of the next part.

194. *Id.* at 149.

195. *See supra* notes 146–56 and accompanying text.

196. *Abbott v. Anti-Defamation League Austin, Sw. & Texoma Regions*, 610 S.W.3d 911, 916, 923 (Tex. 2020).

197. *Id.* at 918.

198. *Id.* at 923.

199. *Id.*

III. BACKLASH: THE STATE LEGISLATIVE ATTACK ON ELECTION LAW LOCALISM

2021 witnessed a tsunami of state legislative action in Republican-dominated states to make voting more difficult and the administration of election laws more partisan. These states adopted measures that burden mail voting and early voting, impose “harsher voter ID requirements, and make[] faulty voter purges more likely.”²⁰⁰ With respect to election administration, they reduce the role of state-level election officials in offices currently held by Democrats or by Republicans who displayed some commitment to professional implementation of voting laws in 2020.²⁰¹ Although the attack on independent election administration targeted some state officers, 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.²⁰² This assault on local election administration has three main strands:

- (i) Denying LEOs the authority to take some of the specific actions they took or attempted to take in 2020, such as by prohibiting the sending of mail ballot applications to voters who did not request them;²⁰³ limiting the number, availability or location of early voting places and drop boxes; and barring mobile, drive-through, curbside, or 24-hour voting.²⁰⁴

200. See, e.g., *Voting Laws Roundup: October 2021*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021> [<https://perma.cc/4YSD-H2AS>]; *A Threat to Our Democracy: Election Subversion in the 2021 Legislative Session*, VOTING RTS. LAB (Sept. 29, 2021), <https://votingrightslab.org/a-threat-to-our-democracy-election-subversion-in-the-2021-legislative-session/> [<https://perma.cc/S3TH-LRDJ>].

201. See, e.g., Quinn Scanlan, *10 New State Laws Shift Power over Elections to Partisan Entities*, ABC NEWS (Aug. 16, 2021, 3:29 PM), <https://abcnews.go.com/Politics/dozen-state-laws-shift-power-elections-partisan-entities/story?id=79408455> [<https://perma.cc/K9JK-WYKH>].

202. The backlash did not end in 2021 but continued into 2022. See, e.g., Shawn Johnson, *GOP Election Bills Would Make Legislature More Powerful and Absentee Voting More Difficult*, WIS. PUB. RADIO (Feb. 9, 2022, 5:00 AM), <https://www.wpr.org/gop-election-bills-would-make-legislature-more-powerful-and-absentee-voting-more-difficult> [<https://perma.cc/5D8G-FLEV>]; Michael Wines, *Republicans Want New Tool in Elusive Search for Voter Fraud: Election Police*, N.Y. TIMES (Jan. 20, 2022), <https://www.nytimes.com/2022/01/20/us/voting-rights-election-police.html> [<https://perma.cc/RNR6-LV4M> (dark archive)]; *Arizona Republicans Continue Voter Suppression and Election Subversion Efforts*, DEMOCRACY DOCKET (Jan. 25, 2022), <https://www.democracymocket.com/alerts/arizona-republicans-continue-voter-suppression-and-election-subversion-efforts/> [<https://perma.cc/7R66-TK7A>] (describing bills to eliminate early voting, no-excuse mail-in voting, and emergency voting centers); *Virginia Republicans Introduce 20 Bills To Restrict Mail-In Voting*, DEMOCRACY DOCKET (Jan. 18, 2022), <http://www.democracymocket.com/alerts/virginia-republicans-introduce-20-bills-to-restrict-mail-in-voting/> [<https://perma.cc/C5KD-UZ3R>].

203. See, e.g., Election Integrity Act of 2021, § 25(a)(1)(C)(ii), 2021 Ga. Laws 14, 38–39 (codified at GA. CODE ANN. § 21-2-381 (2021)); Act of Mar. 8, 2021, § 43(1)(c), 2021 Iowa Acts 22, 31 (codified at IOWA CODE § 53.2(1)(c) (2021)).

204. See, e.g., Election Integrity Act of 2021 § 20, 2021 Ga. Laws at 33–34 (codified at GA. CODE ANN. § 21-2-266 (2021)); Act of Mar. 8, 2021 § 53, 2021 Iowa Acts at 32–33 (codified at IOWA CODE

(ii) Making it harder for LEOs to do their jobs generally, such as by prohibiting them from accepting private donations,²⁰⁵ which were crucial to the ability of many local agencies to successfully conduct elections in 2020; by imposing new reporting requirements;²⁰⁶ or by giving new rights to potentially disruptive partisan poll watchers.²⁰⁷

(iii) Taking a page from the punitive preemption playbook²⁰⁸ and authorizing the imposition of fines or criminal penalties for local actions deemed inconsistent with state law and providing for the removal of local officials and their replacement by state designees.²⁰⁹

§ 53.17(1) (2021)); Election Integrity Protection Act of 2021, §§ 3.04, 3.12–3.13, ch. 1, 2021 Tex. Sess. Law Serv. (West) (codified at TEX. ELEC. CODE ANN. §§ 43.031, 85.061(a), 85.062 (2021)).

205. *See, e.g.*, Election Integrity Act of 2021 § 9, 2021 Ga. Laws at 24–25 (codified at GA. CODE ANN. § 21-2-71 (2021)); Act of May 3, 2021, § 1(c), 2021 Kan. Sess. Laws 1107, 1107 (codified at KAN. STAT. ANN. § 25-2436(c) (2021)); Act of June 30, 2021, § 3501.054(B), 2021 Ohio HB 110 (LexisNexis) (codified at OHIO REV. CODE § 3501.054(B) (2021)).

206. *See, e.g.*, Act of Mar. 8, 2021 §§ 60, 64, 2021 Iowa Acts at 34, 35 (codified at IOWA CODE §§ 53.19(1), 53.30 (2021)) (adding new reporting requirements concerning absentee ballots, including date returned, date opened, method of return, and concerning affidavits and provisional ballots).

207. *See, e.g., id.* § 45 (codified at IOWA CODE § 53.2); Election Integrity Protection Act of 2021 § 2.09, 2021 Tex. Sess. Law Serv. (West) (codified at TEX. ELEC. CODE ANN. § 87.028 (2021)).

208. *Cf.* Briffault, *supra* note 11, at 2002–08 (discussing the rise of punitive preemption).

209. *See, e.g.*, Election Integrity Act of 2021 §§ 6–7, 2021 Ga. Laws at 21–22 (codified at GA. CODE ANN. § 21-2-33 (2021)); Act of Mar. 8, 2021 § 9–11, 2021 Iowa Acts at 23 (codified at IOWA CODE §§ 39A.6–7 (2021)) (providing for fines of up to \$10,000 and suspension of county election commissioners for “technical infractions” of election law, and for referrals to the attorney general for investigation and prosecution); Election Integrity Protection Act of 2021 §§ 2.06, 4.06, 4.09, 7.04, 2021 Tex. Sess. Law Serv. (West) (codified at TEX. ELEC. CODE ANN. §§ 18.065, 33.051, 33.061(a), 276.015–019 (2021)) (creating new offenses for local election boards or officials).

Although laws with one or more of these measures were adopted in a wide range of states, including Arizona,²¹⁰ Arkansas,²¹¹ Florida,²¹² Indiana,²¹³ Kansas,²¹⁴ Ohio,²¹⁵ and South Carolina,²¹⁶ arguably the most sweeping measures—worthy of some detailed attention—were enacted in Georgia, Iowa, and Texas.

Georgia. Georgia's S.B. 202 was the first of 2021's major anti-local voting laws. The measure, which took effect in March 2021, combines all of the major elements of antilocal voting change, including restrictions on pro-democracy actions, burdens on LEO performance, and threats to displace local administration. The law prohibits sending absentee ballot applications that have not been specifically requested by the voter;²¹⁷ prohibits the use of portable or mobile polling facilities other than during an emergency declared by the governor;²¹⁸ limits possible early voting sites;²¹⁹ and limits the number of drop boxes to the lesser of one per 100,000 registered voters or the number of early voting locations.²²⁰ Many of these provisions seem directly targeted at actions

210. See Act of Apr. 9, 2021, ch. 199, 2021 Ariz. Legis. Serv. (West) (codified at ARIZ. REV. STAT. ANN. § 16-407.01 (2021)) (prohibiting acceptance of private donations for preparing for or conducting an election); Act of July 9, 2021, § 1L, 2021 Ariz. Legis. Serv. (West) (codified at ARIZ. REV. STAT. ANN. § 16-542L (2021)) (prohibiting mailing early ballots to voters who have not requested one).

211. See Act of Apr. 27, 2021, § 1, Act 736, 2021 Ark. Legis. Serv. (West) (codified at ARK. CODE ANN. § 7-1-103 (2021)) (prohibiting distribution of unrequested absentee ballots and increasing requirements concerning handling of absentee ballots); Act of Apr. 27, 2021, §§ 1–2, Act 973, 2021 Ark. Legis. Serv. (West) (codified at ARK. CODE ANN. §§ 7-5-404(a)(3)(A), -411(a)(2)–(3) (2021)) (eliminating ability to return absentee ballots to satellite offices); Act of Apr. 27, 2021, §§ 1–7, Act 974, 2021 Ark. Legis. Serv. (West) (codified in scattered sections of ARK. CODE ANN.) (adding new procedures for investigating and new penalties for violations of election laws).

212. See Act of May 6, 2021, §§ 2, 24(1)(c)(7), 28, 31, ch. 2021-11, 2021 Fla. Sess. Law Serv. (West) (codified at FLA. STAT. ANN. §§ 101.62(1)(c)(7), 101.69, 102.141, 97.0291 (2021)) (barring unrequested provision of absentee ballots or acceptance of private funds; increasing poll watcher access; imposing new requirements concerning drop boxes; and reporting concerning absentee ballots and Election Day vote tabulations).

213. See Act of Apr. 23, 2021, Pub. L. No. 109-2021, 2021 Ind. Acts 1022 (codified in scattered sections of IND. CODE) (prohibiting acceptance of private contributions for “preparing, administering, or conducting elections”).

214. Act of May 3, 2021, § 1, 2021 Kan. Sess. Laws 1107, 1107 (codified at KAN. STAT. ANN. § 25-2436 (2021)) (prohibiting acceptance or use of private contributions for election administration).

215. See Act of June 30, 2021, § 3501.054(B), 2021 Ohio HB 110 (codified at OHIO REV. CODE § 3501.054(B) (2021)) (prohibiting acceptance of private contributions “for any costs or activities related to voter registration, voter education, voter identification, get-out-the-vote, absent voting, election official recruitment or training, or any other election-related purpose”).

216. See H.B. 3444, 124th Gen. Assemb., 2021–2022 Reg. Sess. § 1 (S.C. 2021) (requiring county boards of elections to follow the “standardized processes” as well as the policies and procedures of the State Election Commission, with penalties for noncompliance). As this Article was going to press, H.B. 3444 had passed the South Carolina Senate but had not yet been approved by the state House of Representatives.

217. Election Integrity Act of 2021, § 25(a)(1)(C)(ii), 2021 Ga. Laws 14, 38–39 (codified at GA. CODE ANN. § 21-2-381 (2021)).

218. *Id.* § 20(b) (codified at GA. CODE ANN. § 21-2-266(b)).

219. *Id.* § 26(c)(1)–(4) (codified at GA. CODE ANN. § 21-2-382(c)).

220. *Id.* § 26(c)(1) (codified at GA. CODE ANN. § 21-2-382(c)(1)).

that Fulton County and other metro-area Atlanta election offices took in 2020. For example, the law would prohibit Fulton from using the two mobile voting vans that it purchased and used in 2020 and would cut the number of drop boxes from the ninety-four used in 2020 to a maximum of twenty-three.²²¹ The law not only limits the number of drop boxes but also prohibits making them accessible twenty-four hours a day as many were in 2020. Instead, they must be placed indoors in government buildings and accessible only during early voting hours, making them unavailable during nonbusiness hours and, thus, useless to working voters who have daytime jobs.²²²

Beyond these obstacles to making voting easier, S.B. 202 places new constraints on the ability of LEOs to do their jobs. It bars local election boards from accepting private funding,²²³ which was crucial to the ability of many LEOs to address the challenges posed by COVID-19.²²⁴ It makes it easier for poll watchers to challenge voters by eliminating limits on the number of challenges a poll watcher can make.²²⁵ It also imposes new administrative requirements such as the printing of ballots on costly “security paper”²²⁶ to enable ballot authentication, tighter deadlines for key election processes like absentee ballot processing and vote counting,²²⁷ and more requirements to track the types and total number of ballots cast.²²⁸ Precinct-level officials must now report the number of Election Day and provisional ballots as soon as the polls close; counting and tabulating “shall not cease” until all such ballots are counted and tabulated; and they must report by 10 p.m. the day after Election Day all ballots cast on Election Day, all ballots cast during early voting, and all absentee ballots returned by the Election Day deadline.²²⁹ These reporting requirements

221. See Nick Corasaniti & Reid J. Epstein, *What Georgia's Voting Law Really Does*, N.Y. TIMES, <https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html> [<http://perma.cc/CNC2-7QEH> (dark archive)] (Aug. 18, 2021).

222. *Id.*; Election Integrity Act of 2021 § 26, 2021 Ga. Laws at 43–44 (codified at GA. CODE ANN. § 21-2-382 (2021)).

223. Election Integrity Act of 2021 § 14, 2021 Ga. Laws at 28 (codified at GA. CODE ANN. § 21-2-212 (2021)).

224. See, e.g., Emma Hurt, *Why Local Election Officials in Georgia Take Issue with Many Parts of New Law*, NPR (Apr. 16, 2021, 5:01 AM), <https://www.npr.org/2021/04/16/987825440/why-local-election-officials-in-georgia-take-issue-with-many-parts-of-new-law> [<https://perma.cc/DE6V-XZQ6>] (quoting statement by Douglas County Registrar in suburban Atlanta that grants from nonprofits were the “only reason” his county was able to afford the election).

225. Election Integrity Act of 2021 §§ 15–16, 2021 Ga. Laws at 28–31 (codified at GA. CODE ANN. §§ 21-2-229 to -230 (2021)).

226. *Id.* § 23 (codified at GA. CODE ANN. § 21-2-372 (2021)).

227. *Id.* § 36 (codified at GA. CODE ANN. §§ 21-2-420 to -421 (2021)).

228. *Id.* § 28 (codified at GA. CODE ANN. § 21-2-385 (2021)).

229. *Id.* § 36 (codified at GA. CODE ANN. §§ 21-2-420 to -421 (2021)).

will likely be particularly burdensome for populous metropolitan area counties.²³⁰

Most troubling for the prospect of local pro-democracy initiatives in election administration, the law authorizes the State Election Board²³¹ to suspend and replace local superintendents of elections.²³² This would follow a “performance review” that could be initiated either by the state board itself or by a small number of state legislators from the affected county.²³³ Although there is certainly some justification for state oversight of the performance of local elections offices,²³⁴ in the current climate of intense political polarization and sharp policy and ideological divisions in some states between suburban and rural-dominated state governments and voters in urban areas, the new local board suspension authority raises the prospect of a hostile red state government taking over election administration in blue counties for partisan purposes. As if to substantiate this fear, Republican state officials wasted little time in targeting the new removal process on Democratic Fulton County, when the State Election Board in mid-August 2021 appointed a majority-Republican panel to review the performance of the county election board.²³⁵ Subsequently, the Fulton County elections director announced his resignation as of the end of 2021.²³⁶

Iowa. Iowa’s 2021 election law also combines limits, burdens, and punishments. It prohibits local election commissioners from sending an

230. *Id.*; Stephen Fowler, *2020 Was Tough but Georgia Election Officials Say Future Elections Won’t Be Easier*, NPR (Sept. 4, 2021), <https://www.npr.org/2021/09/04/1034128221/2020-was-tough-but-georgia-election-officials-say-future-elections-wont-be-easier> [https://perma.cc/WD3E-KFK3]; Hurt, *supra* note 224.

231. The law also restructures the State Election Board to increase the influence of the legislature and reduce that of the independently elected secretary of state. Previously the secretary of state had been the chair of the board. Under S.B. 202, the secretary is reduced to an ex officio nonvoting member; all the voting members are selected by the legislature, or by the governor, who must appoint nominees designated by the executive committees of the state political parties. Election Integrity Act of 2021 § 6, 2021 Ga. Laws at 21 (codified at GA. CODE ANN. § 21-2-33.1 (2021)).

232. *Id.*

233. *Id.* §§ 7, 11–12 (codified at GA. CODE ANN. §§ 21-2-33.2, -92, -105 to -108 (2021)).

234. For example, after recounting numerous incidents of egregious errors by local boards of election across New York, a New York State Senate committee presented moderate and well-reasoned recommendations for expanding the state role with respect to local boards, including more standard-setting, training, and the resolution of partisan deadlocks. See N.Y. STATE S. ELECTIONS COMM., REPORT AND FINDINGS OF THE NEW YORK STATE SENATE ELECTIONS COMMITTEE 31–32 (2021), https://www.nysenate.gov/sites/default/files/press-release/attachment/elex1115_vfinal.pdf [https://perma.cc/JM7V-D2MD].

235. Nick Corasaniti, *Potential G.O.P. Takeover of Atlanta-Area Election Board Inches Forward*, N.Y. TIMES (Aug. 18, 2021), <https://www.nytimes.com/2021/08/18/us/politics/georgia-elections-republicans.html> [https://perma.cc/KK7N-76HK (dark archive)].

236. See Associated Press, *Election Director in Georgia’s Fulton County Resigning*, U.S. NEWS (Nov. 3, 2021, 4:30 PM), <https://www.usnews.com/news/politics/articles/2021-11-03/election-director-in-georgias-fulton-county-resigning> [https://perma.cc/2CG3-Q2G6].

absentee ballot application unless the voter specifically requests one.²³⁷ Reflecting the litigation that took place in Iowa in 2020, it specifically prohibits prefilling any field in an absentee ballot application other than the type or date of the election.²³⁸ Tracking the anti-drop-box measures in other states, it limits the number of drop boxes to one per county and requires that the drop box be in the office of an elections commissioner or on property owned and maintained by the county that surrounds a commissioner’s office.²³⁹ It imposes burdensome new reporting requirements, including reports concerning the number of absentee ballot forms received, ballots sent to voters, and ballots received from voters with separate indications of whether the ballots were returned by mail, drop box, or by hand.²⁴⁰ The law also includes multiple punitive provisions. It makes it a crime—election misconduct in the third degree—for an LEO to interfere with a poll watcher;²⁴¹ threatens LEOs with felony prosecution for election misconduct in the first degree for failing to perform election duties;²⁴² and authorizes the imposition of fines of up to \$10,000 on a county election commissioner and suspension of the commissioner from office for up to two years if the state election commissioner determines the LEO committed a “technical infraction” of the election law.²⁴³

More generally, the law highlights the limited nature of LEO powers and the hierarchical superiority of state law and state officials. It specifically provides that “the county commissioner of elections 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 state commissioner of elections.²⁴⁴ The state commissioner may issue guidance, binding on local boards, concerning election laws and rules without having to go through the state’s rulemaking process²⁴⁵—thereby addressing and eliminating an issue raised in the challenge to the Secretary of State’s 2020 order concerning absentee ballot applications.²⁴⁶ A local election official who fails to follow the state commissioner’s guidance can be charged with first degree election misconduct.²⁴⁷

237. See Act of Mar. 8, 2021, § 43, 2021 Iowa Acts 22, 31 (codified at IOWA CODE § 53.2 (2021)) (absentee ballot application); *id.* § 49 (codified at IOWA CODE § 53.8 (2021)) (absentee ballot).

238. *Id.* § 44 (codified at IOWA CODE § 53.2(2) (2021)).

239. *Id.* § 53 (codified at IOWA CODE § 53.17(1) (2021)).

240. *Id.* §§ 60, 64 (codified at IOWA CODE §§ 53.19(1), 53.30 (2021)).

241. *Id.* § 7 (codified at IOWA CODE § 39A.4(1)(b) (2021)).

242. *Id.* § 3 (codified at IOWA CODE § 39A.2(1) (2021)).

243. *Id.* §§ 9–11 (codified at IOWA CODE §§ 39A.6–7 (2021)).

244. *Id.* § 19 (codified at IOWA CODE § 47.2(1) (2021)).

245. *Id.* § 18 (codified at IOWA CODE § 47.1(1) (2021)).

246. See *supra* notes 133–35 and accompanying text.

247. Act of Mar. 8, 2021 § 3, 2021 Iowa Acts at 22 (codified at IOWA CODE § 39A.2(1) (2021)).

Texas. Perhaps not surprising given the repeated state-local election battles of 2020, Texas’s S.B. 1²⁴⁸—enacted after a protracted but ultimately unsuccessful effort by the Democratic minority in the legislature to prevent a quorum²⁴⁹—contains multiple provisions targeting local election officers. With respect to the process of voting, it bars drive-through voting and twenty-four-hour voting.²⁵⁰ It also prohibits any voting in or collection of ballots by motor vehicles.²⁵¹ These were all techniques used by LEOs, particularly in urban counties,²⁵² to expand voters’ options. In Harris County alone, 127,000 voters used drive-through voting in 2020.²⁵³ The law limits early voting to sites inside buildings that are regularly maintained as offices for elections functions²⁵⁴ and makes it illegal for LEOs to send mail ballot applications to anyone, including voters eligible to vote by mail, who had not specifically requested an application.²⁵⁵ Indeed, it makes it a felony for a public official to send someone a mail ballot application that the person did not request or to prefill any part of an application.²⁵⁶ It prohibits public officials from doing anything to “facilitate” the distribution of absentee ballot applications by third parties, such as nonpartisan community organizations or get-out-the-vote groups.²⁵⁷ The combination of new requirements for mail ballots and restrictions on the ability of LEOs to help voters comply with the law in distributing voter registration and absentee ballot forms, as well as new requirements with respect to voter ID, led to a sharp increase in the rejection of ballot applications for mail ballots for Texas’s March 2022 primary election as well as additional burdens for LEOs and voters alike.²⁵⁸ As this Article was going to press, a federal district enjoined,

248. Election Integrity Protection Act of 2021, ch. 1, 2021 Tex. Sess. Law Serv. (West) (codified as amended in scattered sections of TEX. ELEC. CODE ANN.).

249. See, e.g., Benjamin Swasey, *After a Bitter Fight, the Texas House Passes a Restrictive Voting Bill*, NPR (Aug. 27, 2021, 9:50 AM), <https://www.npr.org/2021/08/27/1031154177/after-a-bitter-fight-the-texas-house-passes-a-restrictive-voting-bill> [<https://perma.cc/K8PQ-4Z4H>].

250. Election Integrity Protection Act of 2021 §§ 3.09–10, 2021 Tex. Sess. Law Serv. (West) (codified at TEX. ELEC. CODE ANN. §§ 85.005–006 (2021)).

251. *Id.* § 3.04 (codified at TEX. ELEC. CODE ANN. § 43.031(b) (2021)).

252. Nick Corasaniti, *Republicans Target Voter Access in Texas Cities, but Not Rural Areas*, N.Y. TIMES, <https://www.nytimes.com/2021/04/24/us/politics/texas-republicans-voting.html> [<http://perma.cc/EBT4-A5MJ> (dark archive)] (May 30, 2021).

253. Election Integrity Protection Act of 2021 § 3.04, 2021 Tex. Sess. Law Serv. (West) (codified at TEX. ELEC. CODE ANN. § 43.031(b) (2021)).

254. *Id.* § 3.12 (codified at TEX. ELEC. CODE ANN. § 85.061(a) (2021)).

255. *Id.* § 5.04 (codified at TEX. ELEC. CODE ANN. § 84.0111 (2021)).

256. *Id.* § 7.04 (codified at TEX. ELEC. CODE ANN. §§ 276.015–9 (2021)).

257. *Id.* §§ 5.04, 7.04 (codified at TEX. ELEC. CODE ANN. §§ 84.0111, 276.015–9 (2021)).

258. See, e.g., Alex Ura, *Thousands of Texas Mail-In Votes Still in Jeopardy Under New GOP Voting Restrictions*, TEX. TRIB. (Mar. 2, 2022, 3:00 PM), <https://www.texastribune.org/2022/03/02/texas-primary-ballot-rejections/> [<https://perma.cc/X9TF-WCHY>]; Marissa Martinez, *Texas Officials Bemoan ‘Lack of Foresight’ as They Struggle with GOP’s New Voting Law*, POLITICO (Feb. 10, 2022, 4:31 AM), <https://www.politico.com/news/2022/02/10/texas-gop-voting-law-primaries-00007473> [<https://perma.cc/83GV-WXA5>]; Eugene Scott, *Election Officials in Texas Reject Hundreds of Ballot Applications Under*

as a violation of the First Amendment, a closely related provision of S.B. 1 that makes it an offense, subject to criminal and civil penalties, for a local election official to “solicit[] the submission of an application to vote by mail from a person who did not request an application.”²⁵⁹

The law also provides significant new protections for partisan poll watchers and punishments for poll workers who try to limit their potentially disruptive activities. Poll watchers must be allowed “free movement” within a polling place and are “entitled to sit or stand near enough to see and hear the activity” at the polling place.²⁶⁰ Indeed, it is now a criminal offense for a poll worker “to obstruct the view of a watcher or distance the watcher from the activity or procedure to be observed in a manner that would make observation not reasonably effective.”²⁶¹ Poll watchers are entitled to watch poll closing activities “including the sealing and transfer of a memory card, flash card, hard drive, data storage device, or other medium” and to follow the transfer of election materials to a regional tabulating center.²⁶² The degrading of the integrity of LEOs and the potential for partisan troublemaking could not be clearer.²⁶³

State’s New Voting Restrictions, WASH. POST (Jan. 14, 2022, 5:34 PM), https://www.washingtonpost.com/politics/texas-voting-ballots-republicans/2022/01/14/97c3d2de-7580-11ec-b202-b9b92330d4fa_story.html [<https://perma.cc/N325-EQHJ>] (dark archive)].

259. *Longoria v. Paxton*, No. 21-CV-1223-XR (W.D. Tex. Feb. 11, 2022) (order granting preliminary injunction) (quoting TEX. ELEC. CODE ANN. § 276.016(a)(1) (2021)).

260. Election Integrity Protection Act of 2021 § 4.07, 2021 Tex. Sess. Law Serv. (West) (codified at TEX. ELEC. CODE ANN. § 33.056 (2021)).

261. *Id.* § 4.09 (codified at TEX. ELEC. CODE ANN. § 33.061 (2021)).

262. *Id.* § 4.08 (codified at TEX. ELEC. CODE ANN. § 33.0605 (2021)).

263. As an example of the kind of harm these so-called “poll watcher” protection laws can inflict, Texas’s Republican Attorney General Ken Paxton sought to indict the Travis County (Austin) Clerk on the charge of unlawfully obstructing a poll watcher. *See* Reese Oxner, *Amid Texas GOP’s Effort To Question Electoral Integrity, Attorney General Tried To Indict Travis County Elections Chief*, TEX. TRIB. (Dec. 20, 2021, 7:00 PM), <https://www.texastribune.org/2021/12/20/texas-ken-paxton-travis-county-elections/> [<https://perma.cc/HPB4-PUPQ>]. The investigation grew out of a complaint from a poll watcher that she was obstructed “from entering and completing her duties at the Travis County central counting station.” *Id.* According Travis County Clerk Dana DeBeauvoir,

the biggest challenge she faced during [the 2020] election came from poll watchers, who, unlike election workers, are inherently partisan figures “These poll watchers were getting in people’s faces and [would] scream and spit. We’re in the middle of a pandemic. So the idea is that they’re either deliberately trying to infect people or they’re just intimidating with that implication,” she said.

Id. The case against DeBeauvoir was thrown out by the grand jury, but only after she had racked up \$75,000 in legal fees. *Id.* The county ultimately reimbursed the fees, although DeBeauvoir did not know that when she paid them. *Id.* Under S.B. 1, unlawfully obstructing a poll watcher is a Class A misdemeanor, punishable by up to a year in prison, a \$4000 fine, or both. *Id.*; *see also* Paige St. John, *Election Watchers Snap Photos of Workers, Challenge Voter Signatures as Recall Nears*, L.A. TIMES (Sept. 10, 2021, 12:38 PM), <https://www.latimes.com/california/story/2021-09-10/election-chiefs-wary-of-california-recall-vote-fraud-claims> [<https://perma.cc/UEB8-NAQZ>] (dark archive)].

The backlash against LEOs—including name-calling, verbal abuse, personal attacks, baseless claims of fraud, calls for audits, and threats of violence—for doing their jobs is disturbing and has led to a surge in LEO retirements and departures.²⁶⁴ And attacks on election workers did not end with the 2020 election.²⁶⁵ What is particularly disquieting is the extent to which these states have fed the narrative of LEO misconduct through legislative changes that target the local actions, and the local authority, that contributed to the success of the 2020 election.

264. See, e.g., Zach Montellaro, *Local Election Officials Are Exhausted, Under Threat and Thinking About Quitting*, POLITICO (Mar. 10, 2022, 5:01 AM), <https://www.politico.com/news/2022/03/10/election-officials-exhausted-under-threat-00015850> [<https://perma.cc/YT9P-4V4W>]; Saja Hindi, *Colorado Clerks Targeted by Election-Fraud Conspiracy Groups*, DENVER POST (Mar. 3, 2022), <https://www.governing.com/security/colorado-clerks-targeted-by-election-fraud-conspiracy-groups> [<https://perma.cc/746F-AK2K>]; Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Man Charged for Threatening Nevada State Election Worker (Jan. 27, 2022), <https://www.justice.gov/opa/pr/man-charged-threatening-nevada-state-election-worker> [<https://perma.cc/XM7M-Y7C2>]; Gary Fineout, *A Dire Warning from Florida Election Officials*, POLITICO (Oct. 21, 2021, 6:58 AM), <https://www.politico.com/newsletters/florida-playbook/2021/10/21/a-dire-warning-from-florida-election-officials-494791> [<https://perma.cc/W947-UDPR>]; Jeremy Schwartz, *Trump Won Hood County in a Landslide. His Supporters Still Hounded the Elections Administrator Until She Resigned.*, TEX. TRIB. (Oct. 12, 2021, 5:00 AM), <https://www.texastribune.org/2021/10/12/hood-county-elections-administrator-trump/> [<https://perma.cc/NJ7W-M4AU>]; Tom Hamburger, Rosalind S. Helleman & Amy Gardner, *We Are in Harm's Way: Election Officials Fear for Their Personal Safety amid Torrent of False Claims About Voting*, WASH. POST (Aug. 11, 2021, 2:59 PM), https://www.washingtonpost.com/politics/election-officials-threats/2021/08/11/bb2cf002-f9ed-11eb-9c0e-97e29906a970_story.html [<https://perma.cc/Z9S3-2R2T> (dark archive)]; 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> [<http://perma.cc/TP4A-ALH6> (dark archive)] (discussing Iowa county LEO who quit because she feared felony prosecution under Iowa's new law for authorizing extra pay to recruit poll workers in 2020); Carl Smith, *Under Fire and Overworked, Election Officials Feel Unsafe*, GOVERNING (June 18, 2021), <https://www.governing.com/now/under-fire-and-overworked-election-officials-feel-unsafe> [<https://perma.cc/Y3QN-WX53>]; *Election Officials Under Attack*, BRENNAN CTR. FOR JUST. (June 16, 2021), <https://www.brennancenter.org/our-work/policy-solutions/election-officials-under-attack> [<https://perma.cc/7ZUM-HLFN>].

265. See, e.g., Tim Elfrink, *As GOP Candidate Used RV for 24/7 Watch, Anchorage Election Staff Say They Faced 'Unprecedented Harassment.'* WASH. POST (May 28, 2021, 4:09 AM), https://www.washingtonpost.com/nation/2021/05/28/anchorage-election-harassment-bronson-dunbar/?utm_campaign=wp_main&utm_medium=social&utm_source=facebook [<https://perma.cc/EW92-FUKE> (dark archive)] (discussing intimidating and confrontational behavior by "citizen observers" supporting the ultimately victorious candidate in the Anchorage, Alaska, mayoral runoff election); St. John, *supra* note 263 (discussing misinformation about and harassment of election workers in the September 2021 California gubernatorial recall vote).

IV. LESSONS FROM ELECTION ADMINISTRATION LOCALISM: FOR
ELECTIONS AND FOR LOCALISM

A. *The Local Role in Election Administration*

This Article spotlights the positive role local election officials played in the 2020 election, but it would be a mistake to overstate the benefits of local administration in running elections.

Local boards can be partisan or incompetent.²⁶⁶ Local officials may be slow in carrying out federal mandates expanding voting rights.²⁶⁷ Interlocal inconsistencies in the application of election rules can be troubling.²⁶⁸ The very lack of uniformity in the conditions and circumstances of voting resulting from extensive state delegation of the responsibility for election administration to local governments with significantly different resources can result in the unequal availability of the right to vote in different counties in the same state.²⁶⁹ The use of older or inadequately maintained voting technology in some counties can lead to a higher error rate in the recording of votes.²⁷⁰ LEOs will not always be professional or committed to the evenhanded administration of elections; indeed, some may actively try to subvert the integrity of the election.²⁷¹ The significant role that local election offices played in 2020 has already sparked

266. See, e.g., N.Y. STATE S. ELECTIONS COMM., *supra* note 234, at 10–18 (recounting multiple errors over a period of years by both New York City and upstate county boards of elections); Timothy Bella, *Georgia Election Workers Fired for Allegedly Shredding Hundreds of Voter Registration Forms*, WASH. POST (Oct. 12, 2021, 10:30 AM), <https://www.washingtonpost.com/politics/2021/10/12/georgia-fultoncounty-election-workers-fired/> [<https://perma.cc/W7RE-ADTN> (dark archive)]; Lach, *supra* note 13; Magnarelli & Golden, *supra* note 13.

267. See, e.g., Weinstein-Tull, *Election Law Federalism*, *supra* note 54, at 759–60.

268. See, e.g., *Zicarelli v. Allegheny Cnty. Bd. of Elections*, 2021 WL 101683, at *1 (W.D. Pa. 2021) (detailing how two counties within the same state senate district took different approaches to whether a type of voter error required rejection of absentee ballots).

269. See, e.g., Cholden-Brown, *supra* note 62, at 129–30.

270. See, e.g., *Stewart v. Blackwell*, 444 F.3d 843, 871 (6th Cir. 2006). *But cf.* *Wexler v. Anderson*, 452 F.3d 1226, 1227 (11th Cir. 2006) (rejecting constitutional challenge to different manual recount procedures in counties using different voting machinery); Cholden-Brown, *supra* note 62, at 134–35. For a limited defense of interlocal variation in voting rules as an appropriate response to differences in voting conditions, such as the size of the voting population, see Hasen, *supra* note 63, at 205–09.

271. See, e.g., Maggie Astor, *Colorado County Clerk Indicted in Voting Security Breach Investigation*, N.Y. TIMES (Mar. 9, 2022), <https://www.nytimes.com/2022/03/09/us/politics/tina-peters-colorado-election.html> [<https://perma.cc/NWW2-XUJN> (dark archive)]; Cristina Cabrera, *Yet Another GOP Colorado Election Clerk Faces Probe over Potential Election Security Breach*, TALKING POINTS MEMO (Feb. 4, 2022, 2:50 PM), <https://talkingpointsmemo.com/news/yet-another-gop-colorado-election-clerk-probed-over-potential-voting-security-breach> [<https://perma.cc/24BP-YBK7>].

efforts by partisans and ideologues—including at the local level²⁷²—to take control of these offices.²⁷³

Nor were LEOs the only heroes in the 2020 election. Many state election officers also took a leadership role in dealing with the unprecedented burdens posed by COVID-19 and in expanding access to the ballot.²⁷⁴ So, too, state officers resisted efforts by copartisans to undo election results.²⁷⁵ Democracy-enhancing election administration need not be a matter of state versus local.

Still, given the long tradition of disparaging the local role in running elections and the trend toward centralizing election law decision-making at the state level, it is important to recognize what 2020 demonstrated—that local election administration can provide an effective response to emergencies and LEOs can move vigorously to vindicate access to the ballot for their constituents.

This is not the place for a theory of the appropriate division of state and local roles in election administration. It is unclear whether such a complete theory is possible, just as it is unclear whether there can be a comprehensive theory for the division of state and local roles more generally. However, a few observations are possible.

First, many of the concerns at work in thinking about state-local relations generally are relevant to election administration, but they may play out in different ways. When the election involves a state or federal office or a state

272. See, e.g., Schwartz, *supra* note 264; Niall Stanage, *The Memo: Attacks on Democracy Seep down to School Boards, Election Offices*, HILL (Sept. 4, 2021, 11:55 AM), <https://thehill.com/homenews/the-memo/570826-the-memo-attacks-on-democracy-seep-down-to-school-boards-election-offices> [<https://perma.cc/U9G2-DR22>]; Nick Corasaniti & Reid J. Epstein, *How Republican States Are Expanding Their Power over Elections*, N.Y. TIMES, <https://www.nytimes.com/2021/06/19/us/politics/republican-states.html> [<https://perma.cc/ND97-DEE3> (dark archive)] (July 1, 2021) (describing how, in Georgia, partisan county governments are using new laws to take control of local election boards).

273. See, e.g., Tim Reid, Nathan Layne & Jason Lange, *Special Report: Backers of Trump's False Fraud Claims Seek To Control Next Elections*, REUTERS (Sept. 22, 2021, 7:19 AM), <https://www.reuters.com/world/us/backers-trumps-false-fraud-claims-seek-control-next-us-elections-2021-09-22/> [<http://perma.cc/S5KX-7P8T> (staff-uploaded archive)].

274. See, e.g., *Why Your Secretary of State Matters*, DEMOCRACY DOCKET (July 23, 2021), <https://www.democracymatters.com/explainers/why-your-secretary-of-state-matters/> [<https://perma.cc/VF53-4HR9>] (citing the democracy-enhancing work of secretaries of state in Arizona, California, Colorado, Michigan, and Vermont).

275. See, e.g., Richard Fausset, *'It Has To Stop': Georgia Election Official Lashes Trump*, N.Y. TIMES, <https://www.nytimes.com/2020/12/01/us/politics/georgia-election-trump.html> [<https://perma.cc/5FH3-JDSS> (dark archive)] (Jan. 7, 2021); David Eggert, Zeke Miller & Colleen Long, *Michigan Certifies Biden Win Despite Trump's GOP Overtures*, L.A. TIMES (Nov. 23, 2020, 1:45 PM), <https://www.latimes.com/world-nation/story/2020-11-23/michigan-certifies-biden-win-despite-trumps-gop-overtures> [<http://perma.cc/7R88-69NX>]. *But cf.* David Eggert, *GOP Replaces Canvasser Who Certified Biden's Win in Michigan*, US NEWS (Jan. 19, 2021, 4:41 PM), <https://www.usnews.com/news/best-states/michigan/articles/2021-01-19/whitmer-names-new-republican-to-michigan-election-board> [<https://perma.cc/D8AE-9GFA> (staff-uploaded archive)] (describing how Michigan Republicans refused to renominate to the Board of State Canvassers the Republican canvasser who voted to certify Joe Biden's win over Donald Trump).

ballot proposition, local rules can have an external effect on state policy or the representation of voters beyond the locality.²⁷⁶ However, to the extent that local measures operate to expand democracy (without raising the risk of fraud) and increase the voice of a community's voters, that can be handled by other communities adopting similar measures rather than having the state suppress the more democracy-enhancing locality.²⁷⁷ So, too, the problem of interlocal variation in balloting rules—such as voting hours, drive-through voting, satellite voting locations, and the use of drop boxes—is not a problem *for voters* as each voter votes in only one place at one time. However, given possible voter mobility between elections, centralizing the voter registration database with the state as HAVA requires makes sense.²⁷⁸

Second, some general issues in local government law such as interlocal inequality in resources and the limitations on personnel, skills, and administrative capacity, particularly for smaller local units, are critical factors in election administration. Many local governments lack staff with the expertise necessary for handling the increasingly sophisticated questions of voting technology evaluation and cybersecurity, so it makes sense to vest many aspects of technology selection, cybersecurity requirements, and LEO training criteria with the state. Given the possibility of local corruption or the capture of a local board by a political faction, state performance standards and oversight are also appropriate.²⁷⁹

Third, the 2020 election demonstrated that the greatest assets of local election boards—as with local government generally—are their grasp of local conditions and relationships with other local entities such as community groups, nonprofits, for-profit businesses, and other local governments, which they can use to leverage their resources and design and implement locally appropriate voting mechanisms. As the record in many of the 2020 cases indicates, local circumstances are incredibly diverse. Densely populated urban areas, sprawling lightly populated rural areas, communities with large numbers of elderly people, or localities where working people can't get to the polls during ordinary business hours all raise different issues for assuring access to the ballot. Local boards are particularly well-positioned to understand distinctive local problems and adopt local solutions. The many court decisions in 2020 that focused on the state's interest in uniformity in the balloting process got it exactly wrong. This is one

276. See, e.g., Cholden-Brown, *supra* note 62, at 118–20 (discussing spillovers from local election decisions).

277. Cf. RICHARD BRIFFAULT, LAURIE REYNOLDS, NESTOR M. DAVIDSON, ERIN ADELE SCHARFF & RICK SU, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 419–20, 462–65 (9th ed. 2022) (discussing the significance of the presence or absence of external effects in determining the appropriate scope of local decision-making).

278. See, e.g., *Statewide Voter Registration Systems*, U.S. ELECTION ASSISTANCE COMM'N (Aug. 31, 2017), <https://www.eac.gov/statewide-voter-registration-systems> [https://perma.cc/E4LL-UXUF].

279. See N.Y. STATE S. ELECTIONS COMM., *supra* note 234, at 31–32.

area where mandating a leveling-down uniformity in the face of diverse local conditions makes little sense; letting local boards use their local knowledge and resources to address these varying local needs and problems seems the better approach.²⁸⁰ Or, to borrow again from the general literature of state-local relations, this seems like an area where state laws should be a floor and not a ceiling.²⁸¹

A final, and particularly speculative, point. Looking at the record of the 2020 election, it is striking to see how many local election offices acted as if they felt they had a mission to make voting accessible and to enable as many people as possible to vote.²⁸² Perhaps because they were the frontline workers in direct contact with voters and actually responsible for delivering the election to their communities, they felt some obligation to make the election work. To be sure, it is not clear that all local election boards acted that way—and many state election officials also displayed that same sense of mission—but one argument for protecting a local role in election administration is the possibility that the more direct connection between government and individual members of the public at the local level may itself provide an incentive for doing a professional job.²⁸³

B. *Lessons for Localism from Local Election Administration*

Local election administration ought to be a poor candidate for providing lessons about localism generally. Most elections are run by counties, which typically lack home rule and enjoy less lawmaking autonomy than municipalities. With respect to state and federal elections, the local role is formally administrative—to implement state laws and carry out state rules locally. Local governments cannot engage in substantive policy-making with

280. See, e.g., BARRY C. BURDEN, THE EXPERIENCES OF MUNICIPAL CLERKS AND THE ELECTORATE IN THE NOVEMBER 2020 GENERAL ELECTION IN WISCONSIN 29–34 (2021), <https://electionlawblog.org/wp-content/uploads/Burden-2020-Wisconsin-Election-Report.pdf> [<http://perma.cc/PS7N-YGWK>] (noting differences in commitment to public education and innovation in facilitating voter access to the ballot varied between larger and smaller elections offices).

281. See, e.g., BRIFFAULT ET AL., THE NEW PREEMPTION READER, *supra* note 96, at 8–10; see also BURDEN, *supra* note 280, at 34 (“When there are disagreements, the right statewide approach might be to provide municipalities with options rather than mandates. Some minimum standards of service need to be established for the entire state, . . . communities will . . . benefit from the ability to innovate to serve the particular needs of their populations. For example, having a single set of statewide deadlines for requesting and returning absentee ballots is essential so that voters are treated equally under the law. On the other hand, it seems counterproductive to ban drop boxes in all communities or to prevent clerks from allowing in-person absentee voters from inserting ballots directly into tabulators because some smaller jurisdictions are not interested in these options.”).

282. See BURDEN, *supra* note 280, at 28 (noting that because 18% of clerks surveyed suggested that the 2020 experience made them more likely to continue serving, “weathering the challenges of the elections enhanced some clerks’ commitments to serving voters”).

283. See ADONA ET AL., *supra* note 33, at 23–24 (“The LEOs we surveyed overwhelmingly expressed voter-centric attitudes and endorsed statements that value voter education and outreach.”).

respect to federal and state elections, and there is little or no thought that they should. In some states, the state is involved in the selection of LEOs, and state executive branch officers oversee local election administration. From this perspective, local elections commissioners and boards are indistinguishable from state administrative officers carrying out state law locally.

Yet, local election administration does provide at least three lessons about localism more generally. First, even with the severe restrictions on local power, LEOs—many of whom are either locally elected or appointed by locally elected officials—enjoy a degree of discretion and can make a difference in advancing the interests of their constituents. Some of their actions were innovative, locally responsive uses of their administrative discretion in finding new ways to hire poll workers, locate and operate polling places, or implement early voting and mail voting procedures. Others went beyond what state law clearly permitted or occasionally challenged what state law required. When the state pushed back, the LEOs typically lost. But in many counties and cities, LEOs used their limited powers to do what all local governments at their best try to do—implement locally developed or tailored policies that improve the lives of their constituents. Even these extremely weak local units nicely demonstrate the possibilities of activist local government.

Second, as with other local governments—albeit more so—the power of local election officers is fragile and easily curtailed. Legislatures may adopt laws stripping them of their powers and subjecting them to criminal penalties, or in an extreme case, threaten them with impeachment.²⁸⁴ State governors, attorneys general, or secretaries of state may issue directives limiting LEO discretion; these will usually be sustained in court. Two of the pro-state strands that dominate most state-local jurisprudence—the state’s formal hierarchical superiority in the state-local structure and the asserted functional value of statewide uniformity as a justification for preempting local innovation—repeatedly recurred in 2020’s state-local election litigation. Recent and pending state election law changes, with their mix of ideological restrictions, requirements, and punishments, also resonate closely with the main themes of the new preemption.

Third, the democratic accountability of local elections officers, which contributed to the commitment of so many of them to vindicating the right to vote, may also be their Achilles’ heel when antidemocratic forces mobilize at the local level. Just as not all local communities support progressive values, with many instead electing officials and adopting policies that promote more

284. See, e.g., Ford Turner, *Pennsylvania House Republicans Threaten To Remove Lehigh County Elections Board Unless It Rescinds Acceptance of Undated Absentee Ballots*, MORNING CALL (Nov. 17, 2021, 7:27 PM), <https://www.mcall.com/news/elections/mc-nws-pa-elections-house-reforms-20211117-ybyorcfqmarja2te2yhpnvokm-story.html> [<https://perma.cc/TG8F-YXAL> (staff-uploaded archive)].

politically conservative programs,²⁸⁵ not all local elections officers will be pro-democratic. In the aftermath of the 2020 election and former President Trump's repeated unsubstantiated claims of election fraud, in many states Trump supporters have moved to take over local election offices. In Michigan, for example, where the members of county election canvassing boards are appointed by the political parties, local Republican leaders are replacing Republicans on canvassing boards who voted to approve results showing a Biden victory with other Republicans who have shown sympathy for the Trumpian "big lie."²⁸⁶ Where LEOs are elected, Trumpists are running for these offices and winning. In Lancaster and York Counties, Pennsylvania, candidates who embraced Trump's false claims of election fraud won elections as local election judges and election inspectors in 2021.²⁸⁷ One of these new local election judges participated in the January 6, 2021, "Stop the Steal" rally that led to the storming of the U.S. Capitol.²⁸⁸ Trump supporters are also seeking to be hired to work inside local elections offices.²⁸⁹

Elections for local elections offices have traditionally been relatively noncompetitive. The positions are relatively low level, and given the large number of one-party jurisdictions, they are rarely contested at the general election. The emergence of a corps of highly motivated partisan candidates and applicants for these positions who "see the issue of election system control as a matter of life and death,"²⁹⁰ could have the potential to undermine democracy

285. See, e.g., RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 115–38 (2017) (discussing the local role in promoting racial segregation); Shawn E. Fields, *Second Amendment Sanctuaries*, 115 NW. U. L. REV. 437, 437–501 (2020) (discussing local resistance to state gun control laws); Eric E. Stern, Note, *A Federal Builder's Remedy for Exclusionary Zoning*, 129 YALE L.J. 1516, 1520–56 (2020) (discussing the local role in promoting exclusionary zoning).

286. See Sam Levine, *Why Are Michigan Republicans Quietly Replacing Key Election Officials?*, GUARDIAN (Oct. 14, 2021, 10:00 AM), <https://www.theguardian.com/us-news/2021/oct/14/michigan-republicans-election-officials-fight-to-vote> [<https://perma.cc/99J6-VYA9> (staff-uploaded archive)]; Amy Gardner, Tom Hamburger & Josh Dawsey, *Trump Allies Work To Place Supporters in Key Election Posts Across the Country, Spurring Fears About Future Vote Challenges*, WASH. POST (Nov. 29, 2021, 6:00 AM), https://www.washingtonpost.com/politics/trump-allies-election-oversight/2021/11/28/3933b3ce-4227-11ec-9ea7-3eb2406a2e24_story.html [<https://perma.cc/5FT2-Z9JU> (dark archive)] [hereinafter Gardner et al., *Spurring Fears*].

287. Gardner et al., *Spurring Fears*, *supra* note 286.

288. See Charles Homans, *In Bid for Control of Elections, Trump Loyalists Face Few Obstacles*, N.Y. TIMES, <https://www.nytimes.com/2021/12/11/us/politics/trust-in-elections-trump-democracy.html> [<https://perma.cc/37B6-WBKY> (dark archive)] (Dec. 15, 2021).

289. Gardner et al., *Spurring Fears*, *supra* note 286; see also Stephanie McCrummen, 'Gutted': What Happened When a Georgia Elections Office Was Targeted for Takeover by Those Who Claim the 2020 Election Was a Fraud, WASH. POST (Mar. 14, 2022, 6:00 AM) (discussing consequences of dissolution of nonpartisan county election board), <https://www.washingtonpost.com/nation/2022/03/14/georgia-elections-fraud-purge/> [<https://perma.cc/Z6RB-3L6Y> (dark archive)].

290. Homans, *supra* note 288.

at the key point of contact between the election system and voters.²⁹¹ Indeed, there have already been instances of Trumpian local election officials attempting to breach the security of local voting systems.²⁹² On the other hand, at the risk of grasping at straws, one possible consequence of the new attention antidemocratic forces are giving to election administration²⁹³ at the state as well as at the local level, is a dawning awareness by pro-democracy activists that election administration is as critical to a viable democracy as the substantive laws governing voting.²⁹⁴

Perhaps the most important lesson for localism is that election administration localism may not be all that different from localism writ large. Even when local power is limited it has the potential to be effective—but it is fragile. When the state turns against local authority, the legal system offers local governments little protection. And the kinds of policies local governments pursue will reflect the outcome of local politics rather than any inherent political bent in local government. Indeed, for election administration as for local government generally, the defense of local authority turns on the degree of political support for or opposition to what the local government has been doing rather than on any commitment to localism per se.

291. See, e.g., Nicholas Riccardi, ‘*Slow-Motion Insurrection*’: *How GOP Seizes Election Power*, AP NEWS (Dec. 30, 2021), <https://apnews.com/article/donald-trump-united-states-elections-electoral-college-election-2020-809215812f4bc6e5907573ba98247c0> [<http://perma.cc/D78M-DWHE>] (describing efforts by Republican extremists in Arizona, Michigan, Pennsylvania, and Wisconsin to take control of election administration).

292. See, e.g., Amy Gardner, Emma Brown & Devlin Barrett, *Attempted Breach of Ohio County Election Network Draws FBI and State Scrutiny*, WASH. POST (Nov. 19, 2021, 3:55 PM), https://www.washingtonpost.com/politics/attempted-breach-ohio-election/2021/11/19/12417a4c-488c-11ec-b8d9-232f4afe4d9b_story.html [<https://perma.cc/42MB-J7ZF> (dark archive)].

293. Another consequence is the unprecedented level of spending in elections for elected election-administrative positions, such as secretary of state. See Ian Vandewalker & Lawrence Norden, *Financing of Races for Offices That Oversee Elections: January 2022*, BRENNAN CTR. FOR JUST. (Jan. 12, 2022), <https://www.brennancenter.org/our-work/research-reports/financing-races-offices-oversee-elections-january-2022> [<https://perma.cc/5WXG-WKW7>].

294. See, e.g., Ezra Klein, *Steve Bannon Is on to Something*, N.Y. TIMES (Jan. 9, 2022), <https://www.nytimes.com/2022/01/09/opinion/trump-bannon-trumpism-democracy.html> [<https://perma.cc/PJ7R-24BM> (dark archive)]; Michael Barajas, *Voting Rights Advocates Search for Opportunities To “Go Local” in Texas*, BOLTS MAG. (Feb. 9, 2022), <https://boltsmag.org/voting-rights-advocates-search-for-openings-to-go-local-in-texas/> [<https://perma.cc/E5SZ-ZNQ8>] (discussing candidates in the Democratic primary for Travis County Clerk competing on protecting and expanding access to the ballot).

