

The Future of Election Reform: From Rules to Institutions

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INTRODUCTION

The United States has reached a crossroads in election reform.¹ Before 2000, few people—aside from the state and local officials charged with running elections—paid much attention to such arcane matters as voting technology, provisional ballots, voter identification, and voter registration. Since then, we have seen unprecedented efforts at reform, most notably the federal Help America Vote Act of 2002 (HAVA).²

There undoubtedly have been significant improvements in election administration since 2000, due in large measure to the greater legislative, scholarly, and public attention that this area has received. But any discussion of the post-2000 improvements in election administration also must recognize the shortcomings of the reform efforts that have occurred to date. The U.S. Election Assistance Commission (EAC), which HAVA created to oversee its implementation, has been plagued by administrative difficulties.³ Although the 2008 presidential

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1. This Essay uses the term “election reform” to refer to the mechanics of elections, including such subjects as voting technology, voter registration, provisional voting, early and absentee voting, polling place operations, and post-election dispute resolution procedures. I do not include within this term such subjects as redistricting reform and campaign finance reform, which present a sufficiently distinct set of concerns to warrant separate treatment.
2. I have described these developments in greater length in Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1209-20 (2005) [hereinafter Tokaji, *Early Returns on Election Reform*]; and Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 470-74 (2008) [hereinafter Tokaji, *Voter Registration and Election Reform*].
3. See Heather K. Gerken, *Shortcuts to Reform*, 93 MINN. L. REV. 1582, 1608 (2009) (noting objections to EAC attempts to promote best practices); Richard L. Hasen,

election was free of the questions that surrounded the results in 2000 and (to a lesser extent) 2004,⁴ the absence of controversy is attributable primarily to the larger margin of victory. The protracted dispute over the result of Minnesota's 2008 U.S. Senate contest⁵—despite the fact that Minnesota probably has one of the better election systems in the country⁶—should remind us that close elections can test even the strongest electoral infrastructure.

This Essay argues that the focus of attention should shift from the *rules* governing elections to the *institutions* responsible for running them. Since 2000, reformers have devoted most of their attention to such issues as a paper trail for electronic voting machines, photo identification requirements, and the maintenance of voter registration lists. These policy debates largely have focused on the values of access and integrity, with Democrats generally stressing the former and Republicans the latter.⁷

These debates are important, but they miss two essential questions regarding the allocation of authority over election administration, specifically: (1) how administrative responsibilities should be divided among the federal, state, and local levels of government; and (2) how officials at each level, particularly those with direct responsibilities for running elections, are selected. Despite the sig-

The Untimely Death of Bush v. Gore, 60 STAN. L. REV. 1, 4 (2007) (commenting that the EAC “has so far proven ineffective and now appears in danger of becoming a new site for partisan stalemate over election reform”); Leonard M. Sham-bon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424, 428 (2004) (describing the EAC as an agency “designed to have as little regulatory power as possible”); Tokaji, *Early Returns on Election Reform*, *supra* note 2, at 1219–20 (discussing the EAC’s lack of power and underfunding early in its history); Jennifer Nou, Note, *Privatizing Democracy: Promoting Election Integrity Through Procurement Contracts*, 118 YALE L.J. 744 (2009) (discussing the EAC’s lack of authority with respect to voting technology).

4. For a discussion of the problems in 2004 in the key swing state of Ohio, see Tokaji, *Early Returns on Election Reform*, *supra* note 2, at 1220–39.
5. The Minnesota Supreme Court ultimately upheld Al Franken’s 312-vote victory over the incumbent Norm Coleman, rejecting an equal protection challenge predicated on *Bush v. Gore*. See *Coleman v. Franken*, 767 N.W.2d 453 (Minn. 2009).
6. The absence of any reliable metric by which to compare states’ election systems makes it difficult to say with any degree of confidence that any one system is better than another. See HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* 1 n.* (2009) (“[I]t is difficult to make precise claims about the current state of the election system because the data are so sparse.”). There is, however, good reason to believe that Minnesota operates one of the better systems in the country. In a qualitative study of five Midwestern states, conducted before the 2008 election season, my Moritz colleagues and I ranked Minnesota’s system first. See STEVEN F. HUEFNER, DANIEL P. TOKAJI & EDWARD B. FOLEY, *FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES* (2007).
7. See Tokaji, *Early Returns on Election Reform*, *supra* note 2, at 1213.

nificant advances in election administration that have occurred in recent years, little has changed in these two areas. Although HAVA and prior laws include some national requirements, our election system remains decentralized to a greater degree than any other democracy,⁸ with considerable authority vested in thousands of local election officials scattered across the country. The United States also is unusual, though not unique, in vesting responsibility in officials who are affiliated with political parties. Despite allegations of bias against Katherine Harris (Florida) in 2000, Ken Blackwell (Ohio) in 2004, and Jennifer Brunner (Ohio) and Mark Ritchie (Minnesota) in 2008, party-affiliated secretaries of state still are the norm. Accordingly, *decentralization* and *partisanship* remain the two dominant characteristics of American election administration.⁹ In the next phase of election reform, the focus should shift from rules to institutions—and, correspondingly, from the dueling values of access and integrity toward the twin problems of decentralization and partisanship.¹⁰

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8. For a summary of the institutions responsible for running elections in other democratic countries, see RAFAEL LÓPEZ-PINTOR, *ELECTORAL MANAGEMENT BODIES AS INSTITUTIONS OF GOVERNANCE* (2000), available at <http://www.undp.org/governance/docs/Elections-Pub-EMBbook.pdf>; LOUIS MASSICOTTE, ANDRÉ BLAIS & ANTOINE YOSHINAKA, *ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES* 83-97 (2004); and Oliver Ihl, *Electoral Administration*, in *ENCYCLOPEDIA OF EUROPEAN ELECTIONS* 87 (Yves Déloye & Michael Bruter eds., 2007).
 9. See Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 82 (2004); Daniel P. Tokaji, *The Birth and Rebirth of Election Administration*, 6 ELECTION L.J. 118, 121 (2007).
 10. Helpfully, Michael Pitts has noted the lack of clarity that sometimes surrounds the term “partisan” when it comes to the implementation and enforcement of election laws. Michael J. Pitts, *Defining “Partisan” Law Enforcement*, 18 STAN. L. & POL’Y REV. 324, 335-38 (2007). He is certainly right that some commentators (myself included) sometimes have used the term without adequately explaining what we mean. See Daniel P. Tokaji, *If It’s Broke Fix It: Improving Voting Rights Act Pre-clearance*, 49 HOW. L.J. 785, 824 (2006) (discussing allegations of “partisan affiliation” in the implementation of § 5 of the Voting Rights Act).

For purposes of this Essay, I use the term partisan to describe the manner in which officials are selected. As described below, a partisan method of selection does not necessarily mean that an official’s decisions will be unfair. Professor Pitts suggests that the standard for assessing any particular decision should be whether it is “defensible” and, if and only if it is not, the decision may fairly be deemed partisan. Pitts, *supra*, at 341. Whatever utility this definition of partisanship may have as a way of evaluating particular decisions, it is not sufficiently broad when it comes to assessing the structure of electoral institutions. Decisions made by election officials may be well within their permissible discretion, after all, but still systematically benefit their parties’ candidates.

This institutional turn is partially consistent with a trend in election law scholarship that Richard Hasen calls the “New Institutionalism.”¹¹ The unifying idea behind this emerging school of thought is the development of nonjudicial institutions that will improve the administration of elections by aligning the incentives of those in power with the public interest.¹² Professor Hasen thus characterizes this group of scholars as “expect[ing] less of courts and more of other mechanisms or institutions to stimulate change.”¹³ Prominent expositors of the new institutionalism in election law include Chris Elmendorf,¹⁴ Ned Foley,¹⁵ Heather Gerken,¹⁶ and Michael Kang.¹⁷

While the new institutionalists are right to emphasize the need to develop nonjudicial means by which to realign election officials’ incentives, the judiciary—and especially the federal court system—has a vital role to play in policing election administration.¹⁸ Though hardly apolitical, the federal judiciary as an

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11. See Richard L. Hasen, *Election Administration Reform and the New Institutionalism*, 98 CAL. L. REV. (forthcoming 2010) (reviewing GERKEN, *supra* note 6), available at <http://ssrn.com/abstract=1392299>. This is related, but not identical, to the new institutionalism in political science, which frames institutions as a “collection of rules and organized practices” rather than as entities that perform certain functions. See James G. March & Johan P. Olsen, *Elaborating the “New Institutionalism,”* in THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 3, 3 (R.A.W. Rhodes et al. eds., 2006). In this Essay, I use the term “institution”—and its variants in the more conventional sense—to refer to entities that play a role in the administration of elections.
 12. According to Michael Kang, a proponent of the new institutionalist approach to election law, the goal is to “align leadership incentives properly with the public interest but nonetheless promote democratic participation and engagement with the central questions of election law.” Michael S. Kang, *To Here from Theory in Election Law*, 87 TEX. L. REV. 787, 791 (2009) (reviewing GERKEN, *supra* note 6).
 13. Hasen, *supra* note 11, at 12.
 14. See Christopher S. Elmendorf, *Election Commissions and Electoral Reform: An Overview*, 5 ELECTION L.J. 425, 442 (2006).
 15. See Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL’Y REV. 350, 376-79 (2007).
 16. See GERKEN, *supra* note 6.
 17. See Kang, *supra* note 12.
 18. The new institutionalists are not monolithic in their views on the proper role of the courts with respect to election administration. Some are more sanguine than others about the benefits of judicial intervention. Compare Heather Gerken & Michael Kang, *An Institutional Turn in Election Law Scholarship*, in RACE, REFORM, AND REGULATORY INSTITUTIONS: RECURRING PUZZLES IN AMERICAN DEMOCRACY (forthcoming 2010) (expressing skepticism about the ability of courts to solve problems of partisanship in election law), with Christopher S. Elmendorf, *Structuring Judicial Review of Election Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 390-91 (2007) (arguing that courts should look for “danger signs” in constitutional cases challenging the administration of elections), and Foley, *su-*

institution is more independent of partisan politics than existing election management institutions in the United States. It is therefore critical that courts play an active role in supervising the administration of elections, at least until such time as we develop state-level institutions that can be trusted to run elections fairly and impartially.

My argument proceeds in three parts. Part I briefly reviews developments since 2000 and encapsulates the empirical research on the current state of election administration in the United States, focusing on the problems of decentralization and partisanship. Despite some major improvements, not much has changed regarding the institutions that run our elections. Part II looks abroad, comparing the manner of conducting elections in this country to what exists in other countries. Although we should be wary of overly simplistic comparisons to societies with quite different histories and constitutional structures, other countries have managed to establish elections that perform much better. Part III returns to the United States, articulating three principles that should guide the next wave of reform: (1) The focus of institutional reform should be on replacing party-affiliated chief election officials with entities that are more insulated from partisan politics; (2) Congress should be cautious about imposing new mandates where implementation would require federal administrative oversight; and (3) Federal courts, as the institution most independent of partisan politics, should play an essential role in policing the administration of elections for the foreseeable future.

I. LOOKING WITHIN: THE UNFINISHED BUSINESS OF ELECTION REFORM

Twenty-first-century election reform is both motivated and haunted by the specter of the 2000 election, including its controversial resolution by the U.S. Supreme Court. Florida's hanging chads exposed the dark underbelly of the American election infrastructure for all to see. And the public did not like what it saw. According to a 2004 survey of citizens in thirty-seven countries, the United States ranked next to last in the percentage of citizens who rated their election "very honest" or "somewhat honest," finishing just ahead of Vladimir Putin's Russia.¹⁹ And the United States was first, and thus worst, in the percentage of citizens rating their last election "very dishonest," outpacing not only Russia but also Hugo Chavez's Venezuela.²⁰

The Help America Vote Act of 2002 (HAVA) spurred some noteworthy improvements in election administration. Thanks largely to HAVA, the United

pra note 15, at 376-79 (urging the creation of specialized courts for election disputes).

19. Caroline Tolbert, Todd Donovan & Bruce E. Cain, *The Promise of Election Reform*, in *DEMOCRACY IN THE STATES: EXPERIMENTS IN ELECTION REFORM* 1, 7 (Bruce E. Cain et al. eds., 2008). The 2004 survey asked citizens how honest their last national election was. In the United States, the last national election had occurred in 2000.

20. *Id.* at 6-7.

States has nearly eliminated the antiquated punch-card voting machines that caused so many problems in Florida during the 2000 general election.²¹ While the new technologies are far from perfect, they have helped avoid the loss of hundreds of thousands of votes, perhaps as many as one million.²² HAVA further required that states provide provisional ballots to voters whose names do not appear on official lists or who lack adequate identification when they arrive at the polls.²³ Provisional ballots undoubtedly create problems of their own,²⁴ but they still represent an improvement over a system that turns away voters without offering them any chance to vote or to have their votes counted. Another laudable change was the requirement that every state maintain a statewide voter registration database, rather than maintaining all voter lists at the local level.²⁵ As challenging as the implementation of these databases has been,²⁶ in the long run they can be expected to improve election administration by making it easier to track transient voters and ensuring consistency in registration practices across jurisdictions. HAVA also created a federal agency, the Election Assistance Commission (EAC), charged with overseeing the implementation of its requirements. Although the EAC has experienced great difficulties in fulfilling its mission, for reasons explained below, the creation of a federal election management body was a significant step forward.

These are accomplishments worth recognizing, but they largely have failed to address two fundamental problems that may partly explain the public consternation that emerged in 2000. The first is the decentralization of election administration authority, not just to fifty states and territories but to thousands of local entities scattered across the country. The entities responsible for administering elections range from Los Angeles County, with over four million registered voters,²⁷ to tiny townships with just one polling place and a handful of

21. Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1075 (2007).

22. Charles H. Stewart III, *Residual Votes in the 2004 Election*, 5 ELECTION L.J. 158, 158 (2005) (estimating that one million votes were “saved” due to improvements in voting technology and procedures between 2000 and 2004).

23. 42 U.S.C. §§ 15482(a), 15483(b)(2)(B) (2006).

24. See Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 GEO. WASH. L. REV. 1193, 1204-05 (2005).

25. 42 U.S.C. § 15483(a).

26. For a discussion of some of these difficulties, see Daniel P. Tokaji, *Voter Registration and Institutional Reform: Lessons from a Historic Election*, 3 HARV. L. & POL’Y REV. ONLINE 1 (2009), http://www.hlpronline.com/Tokaji_HLPR_012209.pdf; and Tokaji, *Voter Registration and Election Reform*, *supra* note 2, at 471.

27. Press Release, Dean C. Logan, Registrar-Recorder/County Clerk, Los Angeles County, Los Angeles County Shatters Voter Registration Record (Oct. 10, 2008), available at http://www.lavote.net/general/pdfs/press_releases/10102008-105616.pdf.

registered voters.²⁸ These vastly different jurisdictions face very different challenges. While larger jurisdictions must manage thousands of precincts, all with different ballot styles and sometimes multiple languages, some smaller jurisdictions must get by without a single full-time employee and sometimes even without a computer. Such differences make it hard to ensure uniformity within a state, much less across states. The inconsistency in the manner in which Florida's punch-card ballots were recounted, which the Supreme Court in *Bush v. Gore*²⁹ found to violate the Equal Protection Clause, is just one example of the manifold disparities in how elections are run from one jurisdiction to another. Others include the technology used for voting,³⁰ the circumstances in which provisional ballots are used and counted,³¹ and the processing of absentee ballots.³² It often is unclear where state authority ends and local authority begins, which creates an environment ripe for finger-pointing when elections go awry.

Decentralization thus is at the root of many of the problems that have attracted public attention in recent years and, in some cases, found their way into the courts. In Ohio, for example, the Sixth Circuit found allegations of widespread disparities in voter registration, absentee ballots, polling place operations, poll workers, provisional voting, and disability access sufficient to state a claim based on *Bush v. Gore* and other equal protection cases.³³ This led eventually to a settlement between the plaintiff voting rights groups and the Ohio Secretary of State.³⁴ Whether or not such equal protection claims ultimately succeed in courts, the failure to accord equal treatment to voters within a state is troubling. At the extreme, it raises a concern comparable to that which gave rise to the "one person, one vote" line of cases—namely, that the votes of citizens in one part of a state will have greater value than those in another.³⁵

The second unaddressed problem is the partisan affiliation of the state and local officials charged with running elections. At the state level, partisan election administration—at least in the sense that officials running elections affiliate with or are appointed by political parties—is the norm. According to Rick Hasen, thirty-three states have a chief election official who is elected through a par-

28. HUEFNER ET AL., *supra* note 6, at 111, 113 (describing small towns in Wisconsin with only one polling place each).

29. 531 U.S. 98 (2000).

30. Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 *FORDHAM L. REV.* 1711, 1748-54 (2005).

31. Foley, *supra* note 24, at 1200-01.

32. See *Coleman v. Franken*, 767 N.W.2d 45 (Minn. 2009) (finding disparities in Minnesota's handling of absentee ballots insufficient to violate equal protection).

33. *League of Women Voters v. Brunner*, 548 F.3d 463 (6th Cir. 2008).

34. Lawyers' Committee for Civil Rights Under Law, *What LWVO v. Brunner Settlement Means for Ohio Voters*, http://www.lawyerscommittee.org/projects/voting_rights/page?id=0046.

35. See Tokaji, *supra* note 30, at 1749.

tisan election process.³⁶ Other states have appointment processes, but, in many of those states, the chief election official is appointed by the state's governor (who, of course, is elected through a partisan process).³⁷ At the local level, about two-thirds of jurisdictions elect their election officials, and party-affiliated officials run elections in almost half of local jurisdictions.³⁸ One study of over 4500 local jurisdictions in the United States found that 46% had party-affiliated election authorities, while 14% had bipartisan and 39% had nonpartisan local election authorities.³⁹

This reality is contrary to the public's view of who *should* be running elections. Political scientists Michael Alvarez and Thad Hall conducted a national survey that found strong support for nonpartisan boards. Of the general population, 66% thought that local or state election officials who run elections should be nonpartisan, while only 19.6% thought they should be partisan.⁴⁰ Among registered voters, the percentage favoring nonpartisan election administration was even higher, at 70.3%.⁴¹ Only 1.5% of the general population and 0.9% of registered voters favored a single partisan elected official, the model that predominates at the state level, as opposed to a nonpartisan elected or appointed board.⁴²

Of course, the partisan affiliation of election officials does not necessarily make for biased decisions. A partisan official may, after all, do his or her best to administer elections impartially, without regard for partisan consequences. But the limited research available suggests that election officials do tend to make decisions that benefit their parties.

In the most detailed analysis to date, political scientists David Kimball, Martha Kropf, and Lindsey Battles found some evidence of an interaction between local election officials' partisan affiliations and provisional voting practices.⁴³ Democratic officials were slightly more likely to implement a more generous rule with respect to counting "wrong precinct" provisional ballots. In jurisdictions with a Democratic election authority, the number of provisional

36. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming Election Administration To Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 974 (2005).

37. *Id.* at 974-75.

38. David C. Kimball, Martha Kropf & Lindsay Battles, *Helping America Vote? Election Administration, Partisanship, and Provisional Voting in the 2004 Election*, 5 ELECTION L.J. 447, 453 (2006).

39. David C. Kimball & Martha Kropf, *The Street-Level Bureaucrats of Elections: Selection Methods for Local Election Officials*, 23 REV. POL'Y RES. 1257, 1262 tbl.4 (2006).

40. R. MICHAEL ALVAREZ & THAD E. HALL, PUBLIC ATTITUDES ABOUT ELECTION GOVERNANCE 6 (2005), available at http://www.cppa.utah.edu/publications/elections/Election_Governance_Report.pdf.

41. *Id.* at 7.

42. *Id.* at 6-7.

43. Kimball et al., *supra* note 38.

votes counted increased as the Democratic vote share increased. By contrast, in those with a Republican election authority, the number of provisional votes counted decreased as the Democratic vote share increased.⁴⁴ In a similar vein, Guy Stuart examined the use of centralized voter lists to purge felons from Florida's voting rolls. He found that Florida counties with Republican election officials tended to be more aggressive in purging voters from the rolls than those with Democratic election officials. This is consistent with partisan motivation, since Democrats generally are believed to be more seriously harmed by overly aggressive purges.⁴⁵

This evidence is cause for concern. It does not prove that election officials are discharging their duties in a biased manner, insofar as that means having a conscious intent to benefit oneself or one's party. Election officials inevitably enjoy considerable discretion, and reasonable minds sometimes disagree over the best way to interpret and implement the law. Empirical studies do, however, raise the concern that decisions will be based upon—or at least affected by—election officials' conscious or unconscious desire to benefit their parties and their candidates. Of course, it may well be that Democratic officials are ideologically predisposed to include as many voters as possible, while Republicans are ideologically predisposed to be more worried about fraudulent voting. In other words, ideology rather than party affiliation may be what is really influencing election officials' decisions. But whatever the explanation, this apparent pattern provides reason to question the impartiality of election administration.

This problem may be understood as an appearance of impropriety or, perhaps more helpfully (given that appearances are in the eye of the beholder), as a conflict of interest.⁴⁶ When election officials stand as party nominees, they inevitably have two interests. On one side is the trust of the electorate, arising from the officials' professional obligation to discharge their duties impartially, without regard for the consequences to their party or to themselves. On the other is their self interest, which may include loyalty to their party as well as their own re-election or election to a higher office. A conflict of interest exists, therefore, not only for party-affiliated election officials, but also for those who are elected on an officially nonpartisan ballot, since they too have an incentive to make rules that would advance their prospects for reelection. Such a conflict of interest may impair the judgment of even the most honest election official.⁴⁷

44. *Id.*

45. Guy Stuart, *Databases, Felons, and Voting: Bias and Partisanship of the Florida Felon List in the 2000 Elections*, 119 POL. SCI. Q. 453 (2004).

46. See Daniel Hays Lowenstein, *The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 323 (1989) ("A conflict of interest exists when the consequences of a decision made in the course of a relationship of trust are likely to have an effect, not implicit in the trust relationship, on either the interests of a person with whom the decision-maker has a separate relationship of trust or on the decision-maker's self-interest.").

47. *Id.* at 324 (noting that "even an honest person's judgment will be impaired when in a position of conflict").

Nor is the problem limited to elected officials. Each appointed election official also may have an incentive to curry favor with her party. For example, consider a state chief election official appointed unilaterally by the governor. Making decisions that are contrary to the interests of the governor's party could jeopardize the chief election official's prospects for reappointment. For example, if the chief election official were ambitious and were to covet a higher office, such a decision might jeopardize the official's chances of securing that office.

One might object that these concerns are merely speculative. And to be sure, it is impossible to get inside the heads of election officials to determine whether they actually are discharging their duties in a biased manner. It scarcely can be denied, however, that the manner in which state and local election officials are selected creates a conflict of interest by providing an incentive to benefit political parties, rather than to act in the impartial manner that citizens justifiably expect.⁴⁸

Of course, it is much easier to identify decentralization and partisanship as problems than it is to come up with satisfactory solutions. This is exemplified by the problems of the EAC.⁴⁹ Bipartisan by statute, the EAC includes two commissioners from each of the major parties. Although the EAC has authority to distribute HAVA funds for election improvements and to commission research, it was not given the authority to make regulations, save in one narrow area: the implementation of the mail registration requirements of the National Voter Registration Act (NVRA).⁵⁰

The EAC has faced enormous challenges in the first several years of its existence that have rendered the agency largely ineffective. Below is a summary of the EAC's most significant travails in its brief history.

(1) *Late Appointment of Commissioners.* The initial members of the EAC were not appointed by February 2003, as HAVA mandated. Instead, President Bush nominated the initial commission members in October 2003, and the Senate confirmed them in December 2003.⁵¹ By that time, of course, preparations for the 2004 election were well underway, limiting the EAC's ability to promote the election improvements that HAVA contemplated in time for that election.

48. See Christian M. Sande, *Where Perception Meets Reality: The Elusive Goal of Impartial Election Oversight*, 34 WM. MITCHELL L. REV. 729, 750 (2008) (advocating replacement of Minnesota's elected secretary of state with an appointed board, in order to promote impartial election oversight).

49. In the interest of disclosure, I have served on research teams for two EAC contracts, one on provisional voting and identification requirements and the other concerning the 2008 Election Day Survey. My discussion of the EAC does not rely on research that was conducted for these contracts.

50. 42 U.S.C. § 15329 (2006).

51. Tokaji, *Early Returns on Election Reform*, *supra* note 2, at 1219.

(2) *Insufficient Funding.* Early in its life, Congress failed to appropriate sufficient funds that HAVA authorized. Because distribution of money was the EAC's most important tool for improving election administration, this shortage of funding limited the EAC's ability to discharge the responsibilities that it had been given in connection with the 2004 election.⁵²

(3) *Lack of Regulatory Authority.* Without the power to promulgate regulations over any area but mail registration, the EAC is unable to ensure consistent interpretation and implementation of HAVA's requirements.⁵³ Because there is no agency that has the authority to issue binding interpretations of HAVA, state and local entities largely are left to their own devices in interpreting the law's vague and ambiguous requirements on such matters as provisional voting, disability access requirements, and statewide registration databases. And even where states choose to abide by EAC guidance—as a majority of states has done, with respect to the Voluntary Voting System Guidelines—the Commission lacks the power to ensure that those guidelines are followed.⁵⁴

(4) *Partisan Stalemate.* In the one area where it *does* have regulatory authority, the EAC has deadlocked. Democrats and Republicans on the EAC have been at odds over whether to allow the State of Arizona to require documentary proof of citizenship as a precondition to acceptance of the federal mail registration form.⁵⁵ Not surprisingly, Democrats have taken the position that such proof cannot be required, while Republicans have taken the position that the State should be allowed to demand such proof. This suggests that, if the EAC were given greater regulatory authority, it would be unable to reach agreement on the most controversial issues of the day. Where there is ambiguity over which forms of identification should be allowed or how states may go about purging voters from registration lists, for example, it is difficult to imagine Republicans and Democrats reaching agreement. In this respect, the EAC's experience resembles that of the similarly-structured Federal Election Commission (FEC), which also has been plagued by partisan deadlock.⁵⁶

52. *Id.*

53. Shambon, *supra* note 3, at 428.

54. See Nou, *supra* note 3, at 768-69 (2009) (characterizing the system for certifying that voting equipment meets federal guidelines as “highly fragmented, decentralized, and nontransparent” and with “weak federal oversight”).

55. See Sean Greene, *Arizona Secretary of State Prepares for Legal Action Against the EAC: Proof of Citizenship Requirement Remains Controversial*, ELECTIONLINEWEEKLY, Apr. 3, 2008 (on file with the Yale Law & Policy Review); Posting of Dan Tokaji to Equal Vote Blog, <http://moritzlaw.osu.edu/blogs/tokaji/2006/08/disagreement-on-eac.html> (Aug. 7, 2006, 22:30 EDT).

56. Donald Simon, *Current Regulation and Future Challenges for Campaign Finance in the United States*, 3 ELECTION L.J. 474, 485 (2004); Benjamin Weiser & Bill McCal-

(5) *Failure To Release Information.* Among the most important functions of the EAC are to fund research and to serve as a clearinghouse of information. Yet even here, the EAC has fallen short of expectations. Most notably, it failed to release a preliminary report that it had commissioned on voting fraud. The report, co-authored by one person aligned with Republicans and another aligned with Democrats, found little evidence of in-person voter fraud. The decision not to release the report apparently was made under pressure from officials in the George W. Bush Administration who were intent on exaggerating the magnitude of such fraud. The report ultimately made headlines when it was leaked to the *New York Times*, leading to an internal investigation.⁵⁷

(6) *Agency Capture.* The EAC has two boards that are charged with giving it advice: a 110-member Standards Board, and a 37-member Board of Advisors.⁵⁸ By statute, all of the Standards Board members must be election officials, and election officials occupy many of the slots on the Board of Advisors as well.⁵⁹ The result is that the EAC is influenced disproportionately by the interest of election officials, to the point that it is wary of releasing any guidance or information to which election officials object. Even the suggestion that the EAC attempt to promote “best practices” has encountered pushback among election officials.⁶⁰ Early in the EAC’s life, the National Association of Secretaries of State (NASS) called for this new federal agency to be disbanded.⁶¹ While the NASS does not appear to have retracted this position, it no longer is pressing actively for the EAC’s elimination. And why should they? Given the substantial power that election officials enjoy within the EAC, there is little reason for them to challenge its existence.

With the benefit of hindsight, it now is clear that the EAC was built to fail. Deprived of almost any regulatory power, shortchanged in its infancy, and given a structure that amplifies the voice of election officials relative to other stakeholders and makes stalemate on hot-button issues practically inevitable, the EAC has little of effectively addressing the problems that arise from the decentralization and partisanship of American election administration. If there were an obvious fix for the administrative difficulties that the EAC has experi-

lister, *The Little Agency That Can’t: Election-Law Enforcer Is Weak by Design, Paralyzed by Division*, WASH. POST, Feb. 12, 1997, at A1.

57. Hasen, *supra* note 3, at 20–21; Tova Andrea Wang, *A Rigged Report on U.S. Voting?*, WASH. POST, Aug. 30, 2007, at A21.

58. 42 U.S.C. §§ 15343–44 (2006).

59. For a list of members of the EAC’s advisory and standards board, see United States Election Assistance Commission, EAC Advisory Boards, <http://www.eac.gov/about/committees>.

60. Gerken, *supra* note 3, at 1608.

61. Hasen, *supra* note 3, at 4.

enced—one that feasibly could be enacted and implemented—such a fix would be worth pursuing. It is far from clear, however, that there is an alternative structure that will work. And even if there were, it is not at all clear how such a fix could realistically be enacted into law. We must therefore look elsewhere for solutions.

In sum, HAVA contains some limited federal mandates that have promoted greater consistency, but these changes have had very little impact on an institutional structure that diffuses authority to thousands of street-level bureaucrats. The federal agency created to administer HAVA's requirements has been rendered impotent, at least when it comes to clarifying the law or policing the conduct of state and local officials. Moreover, it is doubtful that we would *want* to confer greater authority on the EAC as presently structured, given the dominance of state and local officials on its boards and its inability to reach agreement across party lines on the most important—and therefore the most controversial—issues of the day. Despite the significant improvements that have occurred since 2000, then, little has changed in regard to the decentralization and partisanship of American election administration.

II. LOOKING ABROAD: ELECTION MANAGEMENT IN OTHER COUNTRIES

In considering whether the United States can improve the institutions responsible for running its elections, the experience of other democratic countries is instructive. The spread of democracy since the 1970s—from Southern Europe, to Latin America, to Central and Eastern Europe, to Africa and Asia⁶²—arguably is the most important development of the late twentieth century.⁶³ Accompanying this trend is a growing recognition that an independent and trustworthy chief election authority is a critical component of a genuine democracy.⁶⁴ As one comparative study puts it: “Free and fair elections cannot take place without a legitimate and transparent electoral administration.”⁶⁵ The International Institute for Democracy and Electoral Assistance has compiled a list of “internationally recognized electoral standards,” one of which is the establishment of an “autonomous and impartial” electoral management body.⁶⁶ By

62. LÓPEZ-PINTOR, *supra* note 8, at 16-19.

63. Thomas M. Franck, *Legitimacy and the Democratic Entitlement*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 28 (Gregory H. Fox & Brad R. Roth eds., 2000); Pildes, *supra* note 9, at 29-30.

64. LÓPEZ-PINTOR, *supra* note 8, at 11.

65. MASSICOTE ET AL., *supra* note 8, at 83; *see also* Elmendorf, *supra* note 14, at 446 (2006) (“The overwhelming majority of democracies in the world today assign the administration of elections to a commission with some degree of independence from the government.”).

66. INT’L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, *INTERNATIONAL ELECTIONS STANDARDS: GUIDELINES FOR REVIEWING THE LEGAL FRAMEWORK OF ELECTIONS* 37 (2002), *available at*

the same token, the failure of some nascent democracies, especially in Africa, may be attributed to the absence of an independent body to manage elections.⁶⁷

There is an obvious appeal to autonomous election management bodies that can be trusted to run elections impartially. At the same time, there are countries that seem to run their elections quite effectively without an independent commission, as explained below. There may well be good reasons for having different types of election authorities in different countries. A country's history, institutional culture, and constitutional structure—for example, whether it has a parliamentary or presidential system—are among the factors that may affect the optimal structure of election management. In short, there is no simple answer to the question of what type of election authority works best. But commentators increasingly view at least some degree of insulation from partisan politics, along with a permanent staff of professional civil servants, as vital.⁶⁸

Although there is no uniform taxonomy in existing comparative studies, electoral management bodies may be divided into three categories.⁶⁹ The first and most common is an *independent electoral commission*.⁷⁰ Most democratic countries have this type of structure.⁷¹ In some countries, the executive appoints members of the commission, while in others they are appointed by the legislature.⁷² In those where the legislature chooses the commission members, some countries require a supermajority vote, while others require only a simple majority.⁷³ Still other countries have commissions with members selected by a combination of entities, sometimes including the judiciary.⁷⁴

<http://www.idea.int/publications/ies/upload/6.%20Electoral%20Management%20Bodies.pdf>.

67. LÓPEZ-PINTOR, *supra* note 8, at 19.

68. *Id.* at 120; *see also* Frank Emmert, Christopher Page & Antony Page, *Trouble Counting Votes? Comparing Voting Mechanisms in the United States and Selected Other Countries*, 41 CREIGHTON L. REV. 3, 25 (2007) (discussing Canada's "tradition of non-partisan civil service dating back to 1918").

69. *See* LÓPEZ-PINTOR, *supra* note 8, at 21-25 (identifying independent electoral commission, government-run elections, and government under supervisory authority as three main categories); MASSICOTTE ET AL., *supra* note 8, at 83-97 (identifying commissions, single public officials, and government ministers as three other categories of electoral management bodies); Ihl, *supra* note 8, at 88-89 (identifying the executive branch, independent commissions, and autonomous courts as three alternative categories). The discussion below mostly follows López-Pintor's tripartite taxonomy, while incorporating some explanatory material from the other two sources.

70. LÓPEZ-PINTOR, *supra* note 8, at 21.

71. One study found that 79 of 148 countries (53%) had an independent commission. *Id.* at 25.

72. MASSICOTTE ET AL., *supra* note 8, at 94.

73. *Id.*

74. *Id.* at 95.

Among the countries with an independent commission, Australia has been singled out as a model.⁷⁵ The Australian Electoral Commission (AEC), established in 1984, operates independently of the government and is responsible for the conduct of federal elections. It consists of just three members: a federal court judge, an electoral commissioner, and one other nonjudicial member.⁷⁶ All three members are appointed by the governor general, who formally exercises supreme executive power but in practice acts on the advice of the prime minister, for renewable seven-year terms.⁷⁷ The conduct of Australian elections is decentralized, if not quite to the same degree as in the United States. The country is divided into 148 electoral districts (known informally as electorates), for each of which the AEC appoints an officer with responsibility for administering elections in that district.⁷⁸ Serious complaints about the AEC's performance have been uncommon,⁷⁹ and the agency has received high public approval ratings.⁸⁰

In the second category of electoral management, authority to run elections is lodged in an official within the *executive branch of government*.⁸¹ This is the model embraced in 20% of democratic countries.⁸² Among them are a number of Western European countries, including Belgium, Denmark, Sweden, and Finland.⁸³ Authority sometimes is delegated by a central election authority to local officials. In Belgium and Denmark, for example, the Ministry of Interior is responsible for elections, with local officials temporarily appointed to run elections.⁸⁴ In Sweden, the National Tax Board serves as the central election authority, with 280 local municipal committees responsible for actually conducting elections.⁸⁵

Such a system raises obvious concerns, given that the election authority lacks independence from the parties in control of government.⁸⁶ Yet some of the countries that maintain this system earn relatively high marks from their

75. *Id.* at 99-101; LÓPEZ-PINTOR, *supra* note 8, at 146;

76. LÓPEZ-PINTOR, *supra* note 8, at 146.

77. MASSICOTTE ET AL., *supra* note 8, at 99.

78. *Id.* at 100.

79. *Id.* at 101.

80. LÓPEZ-PINTOR, *supra* note 8, at 153.

81. *Id.* at 24 (referring to this category as "elections . . . entirely managed by the government"); *see also* MASSICOTTE ET AL., *supra* note 8, at 97 (discussing countries in which a minister is charged with the conduct of elections).

82. LÓPEZ-PINTOR, *supra* note 8, at 25.

83. *Id.* at 27, 59.

84. *Id.* at 59.

85. *Id.*

86. Ihl, *supra* note 8, at 88.

citizens for the honesty of their electoral systems.⁸⁷ The apparent success of the executive-based model in these countries probably is attributable to the existence of a trustworthy core of professional, career civil servants, which in turn is attributable to their parliamentary systems of government.⁸⁸ Long-term professionals may be in a better position to resist political pressures from the ruling party or coalition and, therefore, to discharge their responsibilities evenhandedly despite the fact that the election authority formally is part of the government.⁸⁹ The different structure of European-style parliamentary government thereby creates a functional if not formal independence from partisan politics. By contrast, in a presidential system like the United States, these pressures would be more difficult to resist.

The third and final category may be termed *divided authority*. It includes those countries in which the government runs elections with the oversight of the judiciary (as in France, where elections are administered by the Ministry of Interior under the supervision of constitutional and administrative courts),⁹⁰ and those in which there only is limited national coordination in a highly decentralized system (as in the United States, where most authority is delegated to state and local officials).⁹¹ Depending on one's taxonomy, these might be considered either two different models or variations on a single model.⁹² To emphasize that there are different ways of slicing power, I have chosen to group them so as to diminish any one group's ability to distort election results systematically. Such a division may be *horizontal* among different branches of the national government, or *vertical* among national, regional, and local units of government. These different ways of allocating authority may be analogized to the

87. The 2004 Tolbert et al. survey found that 96.3% of Danish citizens, 95.5% of Finnish citizens, 89.3% of Swedish citizens, and 86.4% of Belgian citizens rated their last national election very honest or somewhat honest. Tolbert et al., *supra* note 19, at 7. See also MASSICOTTE ET AL., *supra* note 8, at 101 (“[M]any countries whose elections are administered by a public official or minister have been successful in preventing fraud or other irregularities.”).

88. See LÓPEZ-PINTOR, *supra* note 8, at 66 (noting the trend toward “permanent professional staff to support electoral bodies”); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 698-701 (2000) (arguing that parliamentary systems encourage the development of “neutral competence,” with professional civil servants in a better position to resist politicization than in presidential systems).

89. See Ackerman, *supra* note 88, at 704 (quoting Terry M. Moe & Michael Caldwell, *The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems*, 150 J. INSTITUTIONAL & THEORETICAL ECON. 171, 188 (1994)) (noting that British-style parliamentary system breeds “civil servants with reputations for honesty, expertise, and neutral competence”).

90. LÓPEZ-PINTOR, *supra* note 8, at 22, 60-61; Ihl, *supra* note 8, at 88.

91. LÓPEZ-PINTOR, *supra* note 8, at 21, 26. López-Pintor groups these two categories under the heading “[g]overnment under supervisory authority.” *Id.* at 25-26.

92. *Id.* at 26.

American constitutional structure, with a horizontal division corresponding to what we call separation of powers and a vertical division corresponding to our federalism. Countries with some sort of divided authority model account for 27% of the world's democracies.⁹³ Thus, the United States is in the minority—and at the far end of the spectrum in the hyper-decentralized character of our system—but we are not alone. Other countries also have decentralized systems, albeit systems that lack the degree of localism that predominates in the United States.

This summary comparison reveals a hidden benefit in the decentralization of American elections. Although decentralization makes it more difficult to ensure consistent administration of the rules and equal treatment of voters, it also makes it harder for any single interest to “steal” an election. When authority is diffused not merely to fifty state chief election officials, but to thousands of local officials, it is practically impossible for any party to capture the machinery of American elections. The close judicial supervision of American elections—which has increased in the years since 2000⁹⁴—provides an additional check on one party or other interest group exerting too much influence.

Unfortunately, American-style decentralization can only accomplish so much. It does not eliminate the problems that exist when a state chief election official enjoys considerable discretion to administer state election law in a manner that benefits his or her party. For Republican voters in Ohio who believe that the Democratic Secretary of State is applying state law to benefit Democrats, it surely is little consolation that Indiana has a Republican Secretary of State who may be applying that state's law to benefit Republicans. A recent example is the Minnesota senatorial recount. Although Minnesota has a model election system in many respects,⁹⁵ it still has a partisan elected Secretary of State (currently Democrat Mark Ritchie).⁹⁶ The Minnesota Secretary of State sits on the state canvassing board, along with four state court judges.⁹⁷ While some commentators believed that the recount process was conducted fairly, others (including the *Wall Street Journal's* editorial page) accused Ritchie of “machinations” designed to ensure that fellow Democrat Al Franken prevailed.⁹⁸ Whether or not true, such accusations are inevitable when party-affiliated officials are responsible for running elections, due to the conflict of interest that comes with the job.

One solution simply is to make state law clearer, eliminating vagueness and ambiguity and making sure that it covers the universe of problems that might

93. *Id.* at 25.

94. Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. (forthcoming Dec. 2009) (showing an increase in election litigation between 1996 and 2008).

95. See HUEFNER ET AL., *supra* note 6, at 137-59.

96. See Sande, *supra* note 48, at 732.

97. MINN. STAT. § 204C.31(2) (2009).

98. Editorial, *Funny Business in Minnesota*, WALL ST. J., Jan. 5, 2009, at A12.

arise in running elections. Doing so would minimize the discretion that officials enjoy in interpreting and applying the law. While there are undeniable advantages to clarifying election laws,⁹⁹ it is practically impossible for legislative bodies to anticipate every circumstance that will complicate the administration of elections. Moreover, the attempt to do so can lead to hopelessly intricate election laws that are impenetrable to election officials. An example is Ohio's 2006 law amending the rules on provisional voting, which lists thirteen categories of individuals who should be given provisional ballots¹⁰⁰ and a convoluted set of instructions on which ballots should be counted.¹⁰¹ Such arcane rules prove difficult for election officials with legal training, let alone thousands of volunteer poll workers, to understand or apply consistently. Put simply, there is an inherent tension between clarity and complexity. Although we can try to reduce vagueness and ambiguity in election law, some discretion is inevitable and even desirable to promote consistent application.

Comparison of the U.S. system to that of other countries thus crystallizes both the virtues and flaws of American election administration. Decentralization helps prevent national elections from being captured by one party or the other. Further, it provides a check against catastrophic incompetence, insofar as a mistake in one state or county—for example, the failure to supply polling places with the access cards needed for electronic voting¹⁰²—will not bleed over into others. Given the problems that have plagued the EAC in its first few years, we can only imagine the nightmarish scenarios that would ensue were that body (as presently constituted) given the authority to run federal elections.

On the other hand, the virtues of decentralization do not diminish the conflicts of interest that exist for most state and local election officials. While countries without independent electoral commissions can work effectively, those systems appear to depend on the existence of a trustworthy core of professional civil servants that can insulate election officials from political pressure. The vertical division of authority accomplished by vesting authority in local, state, and federal officials may reduce the danger of one party rigging a nationwide election. But it does not provide adequate checks on the considerable authority that state and local officials enjoy, nor does it ensure the consistent application of law. It is therefore critical to develop institutional means by which to promote impartial decision making among those running elections.

99. I have argued in favor of clear rules established in advance of elections. Tokaji, *Early Returns on Election Reform*, *supra* note 2, at 1246-49.

100. OHIO REV. CODE ANN. § 3505.181 (LexisNexis 2006).

101. *Id.* § 3505.183.

102. See *A Look at What Went Wrong in Montgomery*, WASH. POST, Sept. 14, 2006, at A25 (reporting that the voter access cards needed for electronic voting were not delivered to 238 polling places in Montgomery County, Maryland, for the September 2006 election).

III. LOOKING FORWARD: THREE PRINCIPLES OF REFORM

My focus on institutional solutions is not unique. Some prominent election law scholars recently have emphasized the need to develop institutions that will “harness politics to fix politics.”¹⁰³ Their shared goal is to alter election administrators’ incentives so as to align them with the public interest. My colleague Ned Foley, for example, has advocated the development of an amicus court, which would “shadow” election litigation in an effort to induce more evenhanded judicial decisions.¹⁰⁴ Chris Elmendorf has urged the development of advisory commissions, modeled on those in the United Kingdom and other countries, which would recommend election law reforms.¹⁰⁵ And in the most extended and nuanced example to date, Heather Gerken has recommended the development of a *U.S. News & World Report*-style ranking, the “Democracy Index,” which would measure the performance of state election systems, in an effort to induce healthy competition among state election officials.¹⁰⁶

The turn toward institutional solutions is salutary and laudable. Nevertheless, I have three differences with new institutionalism in election law, at least as a matter of emphasis. First, I am more optimistic about the possibility of creating entities—at least at the local and state level—that are insulated from partisan politics and therefore might run elections more impartially. Second, I am less optimistic about creating other entities—especially at the national level—that effectively will counter the problems created by decentralization and partisanship by (as Michael Kang puts it) “channel[ing] competition among leaders in the direction of the public good.”¹⁰⁷ The third difference, which follows from the other two, is that I believe that courts—especially the federal judiciary—have an essential role to play in policing the administration of elections. In this sense, the argument that follows could be considered a defense of what might be termed the “old institutionalism” in election law. While new institutionalists are right to warn against juri-centrism, the federal courts have an essential role to play in the street-level work of democracy.

These differences roughly correspond to three principles that should guide election reform efforts in the years to come. In the course of explicating these principles, I consider and respond to the insights of the new institutionalism in election law.

103. Posting of Heather Gerken to TPMCafé, http://tpmcafe.talkingpointsmemo.com/2009/01/23/harnessing_politics_to_fix_politics/ (Jan. 23, 2009, 17:17 EST); see also Gerken & Kang, *supra* note 18.

104. Posting of Edward B. Foley to Election Law @ Moritz, <http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=157> (June 19, 2007).

105. Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366 (2005).

106. GERKEN, *supra* note 6, at 5.

107. Kang, *supra* note 103.

A. *State-level Reform Should Focus on Replacing Partisan Election Officials with Entities That Enjoy Greater Independence from Partisan Politics*

The most important institutional reform is the development of state election management bodies that are insulated from partisan politics. This conclusion is in keeping with the emerging international consensus, described above,¹⁰⁸ that an independent chief election authority is a hallmark of democratic legitimacy. It certainly is true that other countries, most notably those in Western Europe, seem to manage their elections effectively without an independent electoral management body, but these countries have institutional cultures quite different from our own.

The conflicts of interest to which party-affiliated state election officials are subject cannot be denied seriously. But one might object fairly that the very self-interest that creates the problem renders it difficult to fix. Where one party is dominant, that party can be expected to fight any effort to take away administrative authority from an elected secretary of state. In more competitive states, both parties will have an interest in preserving an elected office for which members of their party may run. Only a party that is hopelessly out of power is likely to promote an independent electoral authority, but such a party is unlikely to achieve change on its own. Professor Gerken has termed this type of barrier the “here to there” problem.¹⁰⁹ In short, it does no good to promote pie-in-the-sky reforms that have no chance of being enacted.

Without minimizing the political difficulty of creating state-level entities that are independent of partisan politics, however, such reforms are far from hopeless. For example, in 2007, the Wisconsin Legislature enacted a law that vested authority over election administration in a six-member Government Accountability Board (GAB), composed of retired judges. Confirmation of nominees to this commission must be achieved by a two-thirds vote of the state senate, a process designed to produce bipartisan consensus on the nominees and evenhanded decisionmaking by the Board as a whole.¹¹⁰ Of course, not every state has the strong “good government” tradition of Wisconsin.¹¹¹ But at least in states with direct democracy, which allow for initiatives to be enacted directly by the electorate without legislative approval, it may be possible to bypass hostile legislative bodies.¹¹²

108. See *supra* notes 65-67 and accompanying text.

109. GERKEN, *supra* note 6, at 7.

110. HUEFNER ET AL., *supra* note 6, at 115.

111. See *id.* at 111.

112. A further objection might cite the experience of Ohio, in which voters rejected an initiative that would have transferred election authority from an elected secretary of state to a board that would be more insulated from partisan politics. See Ohio Secretary of State, State Issue 5: November 8, 2005, <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2005ElectionsResults/>

Another objection to the establishment of independent election management bodies in the states is that they just will not work. Responding to this objection is difficult given that such bodies scarcely have been established outside of Wisconsin. Though it is too early to make a definitive judgment on the GAB, early reports provide reason for optimism.¹¹³ Given the limited experience with such institutions in the United States, it is worth experimenting with this and other models of independent election administration at the state level.¹¹⁴

To this point, I have focused on reforms to state-level institutions rather than on changes to the thousands of local entities with actual responsibility for supervising elections. It is important to note the functional differences between state and local election officials. Broadly speaking, state officials are responsible for ensuring that election laws are applied fairly and consistently across the state.¹¹⁵ They enjoy considerable discretion in filling the inevitable gaps left by federal and state election law, which includes the provision of guidance to local officials on how the law should be interpreted. Local officials exercise discretion, too, but theirs has less to do with the interpretation of law than with the implementation of rules made by legislatures or state officials.¹¹⁶ Local entities

05-1108Issue5.aspx (last visited Nov. 30, 2009). That initiative, however, was closely linked with three other initiatives that would (among other things) have significantly altered redistricting and campaign finance rules, and opponents campaigned against these three initiatives as a group. In any event, the defeat of a single initiative does not prove that the effort is harmless.

113. My colleague Nate Cemenska and I conducted interviews in Wisconsin for a forthcoming report on election administration in five Midwestern states funded by the Joyce Foundation. All our interviewees had generally favorable views on the conduct of the GAB in the 2008 election season. Interviews with Neil V. Albrecht, Assistant Dir., Milwaukee Election Comm'n; Andrea Kaminski, Executive Dir., League of Women Voters of Wis.; Kevin Kennedy, Legal Counsel, Wis. Gov't Accountability Bd.; and Robert Ohlsen, County Clerk, Dane County (June 8-9, 2009).
114. The Center for Democracy and Election Management has drafted model legislation that would create one form of independent electoral commission. See CTR. FOR DEMOCRACY & ELECTION MGMT., NONPARTISAN ELECTION ADMINISTRATION: MODEL LEGISLATION FOR THE STATES (2009), available at <http://www1.american.edu/ia/cdem/pdfs/NonpartisanModelLegislation08-2009.pdf>. Another possibility, suggested by Professor Hasen, is to have a single official who is nominated by the governor and confirmed by a supermajority of the state legislature. See Hasen, *supra* note 36, at 984.
115. See Jocelyn Friedrichs Benson, *Democracy and the Secretary: The Crucial Role of the State Election Administrators in Promoting Accuracy and Access to Democracy*, 27 ST. LOUIS U. PUB. L. REV. 343, 359 (2008) (describing state chief election officials' responsibilities).
116. *Id.* ("Though states may abdicate responsibility for administering elections to local government, and while the extent of that abdication differs a great deal from state to state, statewide officials are usually empowered to exert supremacy over the local authorities should they choose to do so.").

may have to decide how many voting machines to allocate to each precinct but not whether provisional ballots will be counted if cast in the wrong precinct. A bipartisan board with equal numbers of Republicans and Democrats, as exists in the State of Ohio, may actually work at the local level. At the state level, by contrast, such a structure almost surely would result in disaster, resulting in partisan stalemate on the most important and controversial interpretive and rulemaking issues.¹¹⁷

These observations should lead us to be somewhat more cautious in pressing for reforms at the local level than at the state level. It is difficult to say, based on the evidence that exists presently, which model of local election administration works best. Either a bipartisan board or a nonpartisan, appointed official *may* be effective—I emphasize the *may*, given the limitations of the existing research. The local structure that seems most problematic is a single individual elected by voters, as is the case in 61% of localities.¹¹⁸ But even this structure may work effectively, depending on the states' political culture. In Wisconsin, for example, many local clerks are elected, but there is little evidence of partisanship in the discharge of their duties.¹¹⁹ Still, a system in which local election officials are themselves subject to election presents a clear conflict of interest. States with this type of structure would be well advised to consider alternatives. Even if they have managed their elections with minimal controversy in the past, they can expect trouble in the event of a close election such as those that occurred in Florida in 2000, Washington in 2004, and Minnesota in 2008.

B. Congress Should Avoid Imposing New Rules Whose Implementation Would Require Significant Federal Administrative Oversight

As an antidote to the problems inherent in the hyper-decentralized American election system, reformers might be tempted to advocate new federal mandates or give the EAC greater regulatory power. The experience in implementing HAVA calls for extreme caution in this area. There exists no federal administrative agency that can be trusted to implement new federal mandates, and it is far from clear that one can be created in the foreseeable future.

The issue of voter registration provides one example of this difficulty. Section 303 of HAVA requires every state to maintain a statewide registration database.¹²⁰ It also requires agreements between state election officials and state motor vehicle authorities for the purpose of “match[ing]” information between their databases.¹²¹ The basic idea is to improve the accuracy of state registration

117. Tokaji, *supra* note 10, at 833 (describing problems with a bipartisan structure for federal election agencies).

118. Kimball & Kropf, *supra* note 39, tbl.1.

119. HUEFNER ET AL., *supra* note 6, at 114.

120. 42 U.S.C. § 15483 (2006).

121. *Id.* § 15483(a)(5)(B)(i).

lists. But HAVA is silent about both how this matching is to be accomplished and what the consequences of a failed match should be.¹²²

With no agency empowered to make rules on the subject, this ambiguity predictably led to litigation in the 2008 election cycle. In Ohio, the state Republican Party brought an action under § 1983, claiming that Secretary of State Jennifer Brunner, a Democrat, had not complied with HAVA's matching requirement. Brunner resisted the relief sought on the ground that there were approximately 200,000 new voters whose information did not "match" and who potentially could be disenfranchised if stricken from voting lists.¹²³ A federal district court nevertheless granted the Ohio Republican Party's claim for injunctive relief, and the Sixth Circuit affirmed en banc.¹²⁴ The U.S. Supreme Court reversed—thereby removing the injunction—*not* on the merits, but on the ground that there was no right of action for the Ohio Republican Party or other private actors to enforce the relevant provision of HAVA.¹²⁵

The Supreme Court's decision was consistent with existing precedent, which requires that an "unambiguously conferred right" be provided by statute in order to sue under § 1983.¹²⁶ HAVA's matching requirement conferred no such right on the Ohio Republican Party or any other entity.¹²⁷ The court's ruling nevertheless creates a serious practical problem: There is no means for any private citizen to obtain a definitive ruling on the meaning of this provision.¹²⁸ The only evident way of securing a judicial interpretation would, instead, be for the United States government to bring suit against an allegedly noncomplying state.

The absence of an entity empowered and competent to clarify statutory ambiguities thus creates a serious obstacle to the implementation of federal laws, and the difficulty only increases with the complexity of the federal requirement. Reformers, therefore, should be very cautious about pressing for new federal mandates that would require administrative implementation. An example is the attempt to implement a Canadian-style model of universal registration, in which government agencies assume the affirmative responsibility for registering voters rather than placing the onus on voters to register themselves,

122. Tokaji, *supra* note 26, at 6.

123. *Id.* at 8-9. In the interest of disclosure, I served as an attorney for amici voting rights groups in this litigation.

124. *Id.*

125. *Brunner v. Ohio Republican Party*, 129 S. Ct. 5 (2008).

126. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002).

127. *But see Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004) (finding a right of action under § 1983 to enforce HAVA's provisional voting requirements).

128. Tokaji, *supra* note 26, at 11.

as in our present system.¹²⁹ This is a worthy idea and one deserving of state-level experimentation, but it is difficult to see how a universal registration system could be implemented effectively on the national level. In contrast to the United States, Canada benefits from a respected and independent election management body, Elections Canada, which is responsible for assembling registration lists.¹³⁰ Until there is a federal agency capable of exercising oversight over the assembly of voter registration lists, universal voter registration—at least at the national level—will remain an impractical dream. Conceivably, Congress could impose a broad mandate for universal voter registration and leave the details to the states. But as long as most states still have a partisan, elected chief election official, their implementation of such a mandate can be expected to vary dramatically, with Democratic officials favoring more expansive registration practices designed to promote access and Republicans urging more restrictive practices to prevent ineligible voters from being registered. The absence of an effective federal agency unavoidably will impair the effectiveness and evenhandedness of any national effort at universal voter registration.

The lack of an effective federal election authority poses a serious challenge even for reforms that should be less controversial. One example is the Democracy Index that Professor Gerken recommends. As noted above,¹³¹ the idea behind this index is to induce healthy competition among states, leading them to improve their administrative practices. A prerequisite to creating such an index is the collection of reliable data. Achieving this reality has turned out to be much more difficult than one might expect.¹³² Therefore, Thad Hall and have recommended a “money for data” exchange, in which states would receive federal funds for elections in exchange for the provision of reliable data. Professor Gerken recommends further (and I agree) that Congress should give the EAC the authority to punish states that fail to provide complete and accurate data.¹³³ But that probably is all that we can expect from the EAC, as presently constituted. Given the influence that election officials enjoy and the hot-button nature of some of the things that the Democracy Index would measure, it is inconceivable that the EAC could actually construct such an index. As Professor

129. The Brennan Center for Justice is among the groups that have called for universal voter registration. See WENDY R. WEISER, MICHAEL WALDMAN & RENÉE PARADIS, BRENNAN CTR. FOR JUSTICE, VOTER REGISTRATION MODERNIZATION (2009), available at <http://www.brennancenter.org/page/-/publications/VRM.Proposal.2008.pdf>.

130. Emmert et al., *supra* note 68, at 16; see also LÓPEZ-PINTOR, *supra* note 8, at 64 (describing the Canadian election management structure).

131. See *supra* note 106 and accompanying text.

132. See GERKEN, *supra* note 6, at 113-14; see also Posting of Thad Hall & Daniel P. Tokaji to Election Law @ Moritz, <http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=153> (June 5, 2007) (noting difficulties in getting accurate elections data from the states).

133. GERKEN, *supra* note 6, at 119.

Gerken wisely suggests, that responsibility is better left to a private, nonpartisan foundation than placed in the hands of the EAC or another federal agency.¹³⁴

This does not mean Congress should avoid any mandates on state and local election authorities. There are some election reforms that can be implemented feasibly without federal administrative support. One example is Election Day Registration (EDR), which has increased turnout in states where it has been adopted.¹³⁵ In contrast to universal voter registration, EDR has a proven track record in the U.S. and does not require federal administrative oversight—though effective implementation would require the availability of a private right of action. Until such time as the United States develops an effective federal agency for overseeing election administration, more complicated reforms should be pursued at the state level.¹³⁶

C. As the Governmental Institution Most Independent of Partisan Politics, the Federal Courts Should Play an Active Role in Policing the Administration of Elections

Having discussed the limitations of other institutions charged with the administration of American elections, I turn to the judiciary. The rise in election litigation since 2000 often is noted and sometimes is lamented as an unfortunate development. But it is not necessarily a political evil for courts, especially the federal bench, to scrutinize the administration of elections. To the contrary, judicial intervention sometimes is warranted—especially in cases brought prior to Election Day—given the conflicts of interest that exist for other institutional actors.

My position that courts have a vital role to play in policing election administration does not rest on the naïve view that judges are free from partisan or ideological bias.¹³⁷ Federal judges are, however, more insulated from partisan politics than any other institution of the federal government. Article III gives federal judges job security that no elected official enjoys. More to the point, Article III provides a freedom from the conflict of interest that is endemic to a system in which those running elections also must run as candidates.

134. *Id.* at 118.

135. See Tokaji, *Voter Registration and Election Reform*, *supra* note 2, at 499 & nn.378, 380 & 383.

136. One might respond to this point by arguing that the solution is not to abandon federal law reform efforts but to create an effective federal agency. This may be easier said than done. See Nathaniel Persily, *In Defense of Foxes Guarding Hen-houses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 674 (2002) (describing the difficulty in designing institutions that are “authentically nonpartisan and politically disinterested”). The better course, for now, is to allow the states to experiment with an independent election authority—like that of Wisconsin—and to learn from their experiences.

137. As Michael Kang persuasively argues, judges often “appear to fall back on their personal attachments” when deciding political cases. Kang, *supra* note 12, at 807.

This is my sharpest point of departure from the new institutionalism. Although it is appropriate to promote nonjudicial solutions to partisan self-interest, courts are presently the institution best suited to police self-interested conduct by election officials. Perhaps the day will come when election officials enjoy sufficient independence from partisan politics—or when their incentives align sufficiently with the public interest—that active judicial supervision of their decisions is unnecessary. But that is not the present reality, nor is it likely to be the reality for the foreseeable future. As I explained in Part II, the United States' system is best classified as one of divided authority. The problem is that too much authority is vested in state and local officials—and necessarily so, given the difficulties in establishing an effective electoral management body at the federal level. The difficulty of achieving an adequate vertical division of power (among local, state, and federal authorities) makes it all the more important to improve the horizontal division of authority—and, in particular, to give the judiciary greater control over elections, as is the case in some other countries with divided authority models. I am not advocating that the United States wholeheartedly embrace the French model, in which an executive branch official runs elections under the close supervision of courts.¹³⁸ But a greater degree of judicial involvement in elections would provide a useful check on the partisan decisionmaking that otherwise would creep into our excessively decentralized system.

In a sense, this concern returns us to those problems which prompted the Supreme Court's intervention in Florida's 2000 election. As I have argued previously, *Bush v. Gore* is understood best as growing out of the Court's concern with the excessive discretion vested in the officials charged with implementing state election laws.¹³⁹ Where election officials enjoy such discretion, it is susceptible to misuse. That concern is no less real today than it was at the time *Bush v. Gore* was decided, given the continuing predominance of partisan state and local election authorities. The problem is that it always is difficult to say for sure whether any particular decision is the product of partisan bias. An official may be acting based upon a plausible (or at least arguable) construction of the statute, yet intending to benefit himself or his party; but it is of course impossible to read officials' minds and ascertain with any certainty which decisions are motivated by such an intent. Courts must therefore have some guideposts or presumptions upon which to rely in assessing election officials' actions.

As a practical matter, there are at least two ways in which this concern might be translated into legal doctrine, in both constitutional and statutory cases.¹⁴⁰ The first is to accord less judicial deference to decisions made by partisan

138. LÓPEZ-PINTOR, *supra* note 8, at 60–61.

139. Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2488–90 (2003).

140. I leave to the side *Bush v. Gore*-type equal protection claims, which I (like many others) have addressed elsewhere. See *id.* at 2510–15; Tokaji, *supra* note 21, at 1072–78.

election officials than to those made by independent electoral management bodies, at least when those decisions appear to benefit the official's party. While there may be some circumstances in which the partisan impact is difficult to judge, there are many that have a clear partisan valence. Returning to an earlier example, consider an election authority's registration matching protocol that is challenged as inconsistent with HAVA. A court might give less deference to a decision made by a partisan chief election official (like the Ohio Secretary of State) than to an independent electoral commission (like the Wisconsin GAB).¹⁴¹

Of course, the law cannot mean one thing when applied to one defendant and something else when applied to another. But courts do not merely "say what the law"¹⁴² is when they decide cases. They often rule on cases that turn on disputed facts or on mixed questions of fact and law. In many election disputes, the factual predicate underlying an election administrator's decision is called into question—for example, whether a particular registration practice would have the effect of removing eligible voters from the rolls or reducing the risk of fraud. A federal court might accord greater deference to such factual determinations when made by impartial election authorities than by partisan chief election officials.¹⁴³ Federal courts, moreover, enjoy considerable discretion in determining whether to grant equitable relief and in fashioning that relief.¹⁴⁴ Furthermore, in constitutional cases, courts may take into account the process followed by the relevant actor when determining whether a violation has occurred.¹⁴⁵ There are, accordingly, doctrinal hooks by which a federal court might incorporate the insight that partisan election officials are less trustworthy than independent electoral management bodies. Doing so might also cause legislative bodies to consider changing state law to create such institutions.¹⁴⁶

141. This example is not hypothetical. There was, in fact, litigation against both the Ohio Secretary of State and the Wisconsin GAB on this very topic in 2008. See Tokaji, *supra* note 26, at 8-9.

142. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

143. For a similar argument, see Christopher S. Elmendorf, Refining the Democracy Canon 41-43 (Aug. 24, 2009) (unpublished manuscript, on file with the Yale Law & Policy Review) (urging a canon of interpreting election statutes, in which administrative agencies would not receive a presumption of deference if they are partisan in structure).

144. See, e.g., *Winter v. NRDC*, 129 S. Ct. 365, 381 (2008) ("An injunction is a matter of equitable discretion . . .").

145. See, e.g., *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 267 (1977) (identifying the "specific sequence of events leading up to the challenged decision" as a factor to be considered in determining whether discriminatory intent has been shown in an equal protection case).

146. This suggestion bears a passing resemblance to Sam Issacharoff's provocative proposal that the Supreme Court "forbid ex ante the participation of self-interested insiders in the redistricting process." Samuel Issacharoff, *Gerrymandering and Po-*

The second doctrinal form that this concern might take is a more generous standard for recognizing a private right of action in claims challenging the conduct of partisan election officials. Here, again, the registration matching litigation provides an instructive example. As I noted previously,¹⁴⁷ the U.S. Supreme Court correctly applied existing law in rejecting the Ohio Republican Party's claim that the Democratic Secretary of State was violating HAVA. The statute lacked the "unambiguously conferred right" that the Court has deemed essential in a § 1983 case predicated on the violation of a federal statutory right.¹⁴⁸

The consequences of denying a right of action are severe. If private actors cannot sue to enforce the requirements of HAVA, then the only possible plaintiff is the U.S. government. And if the government does not sue—and it may be especially unwilling to do so when the state official's decision serves the interest of the party in the White House—there is no effective way of ensuring a state's compliance with federal law. Without a federal court looking over her shoulder, a secretary of state is left free to pursue partisan self-interest, even if it conflicts plainly with the requirements that federal law imposes. For this reason, the "unambiguously conferred right" standard should be relaxed in cases where a party-affiliated election official's decision is challenged under HAVA or other federal election laws. A right of action under § 1983 should instead be presumed, absent clear evidence to the contrary.

Given that no such judicial presumption exists presently, it is imperative that Congress expressly include a private right of action when it imposes new mandates on state and local officials. For example, if Congress were to impose a national mandate that all states offer EDR, then it should include a corresponding private right of action. A citizen in a state that fails to offer such registration could then seek judicial relief to compel compliance. Providing this right of action generates an essential check on state election officials. It also is necessary to ensure the availability of a forum in which to secure clarification of vague or ambiguous statutory mandates, which is especially important given the EAC's lack of regulatory authority. Until such time as state and local election authorities are insulated from partisan politics, a private right of action is essential.

For federal courts to engage in close supervision of elections would likely raise questions for those concerned with federalism. There is no doubt as to Congress's authority to regulate federal elections under Article I, § IV of the Constitution.¹⁴⁹ To the extent that Congress enacts a law regulating elections, it

litical Cartels, 116 HARV. L. REV. 593, 643 (2002). My proposal, however, is not nearly as radical as his. I do not argue that all decisions made by partisan chief election officials be invalidated, only that courts look more skeptically on their decisions than on those made by commissions more insulated from partisan politics.

147. See *supra* notes 126-127 and accompanying text.

148. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 282 (2002).

149. See U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regula-

may give federal courts power to enforce that law. Even when it comes to state and local elections, the Supreme Court has demonstrated special concern for practices that impede one's ability to vote and have one's vote counted.¹⁵⁰ In cases ranging from *Harper v. Virginia* to *Bush v. Gore*, the Court has not required the same showing of intentional discrimination that is generally required for a claim of qualitative vote dilution. It follows that Congress should have greater latitude when it regulates election administration practices that may have the effect of denying citizens their votes entirely rather than simply diluting their votes.¹⁵¹ So, too, courts should be especially vigilant when constitutional challenges are brought against such practices.

As I have acknowledged already, there are benefits that derive from dividing authority over elections. A genuine federalism, however, implies some *balance* of power among the federal, state, and local levels. In our present system, power is disproportionately allocated to officials at the state and local level. With no effective federal administrative agency capable of counterbalancing this power, federal courts are the institution best suited to fill the breach. That is not to say that the federal judiciary should step into every election controversy that emerges. Particularly when litigants bring suit very close to an election, and a status quo-altering injunction would disrupt settled plans, federal courts are well-advised to proceed cautiously. At the same time, having federal courts look over the shoulders of state and local election officials—especially those with a partisan affiliation—provides a healthy check on their otherwise broad discretion.

CONCLUSION

With the 2000 election an increasingly distant memory, there is a great risk that election reform will fade from the public agenda. This concern is particu-

tions.”). This clause has been interpreted to give Congress broad power to regulate congressional elections. *See, e.g., Smiley v. Holm*, 285 U.S. 355 (1932); *Ass’n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833 (6th Cir. 1997); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411 (9th Cir. 1995); *Ass’n of Cmty. Orgs. for Reform Now v. Edgar*, 56 F.3d 791 (7th Cir. 1995).

150. Daniel P. Tokaji, *Intent and Its Alternatives: Defending the New Voting Rights Act*, 58 ALA. L. REV. 349, 368-74 (2006).

151. *Id.* at 372-73 (arguing that Congress has greater constitutional power when it comes to vote denial than it does with respect to vote dilution). A forthcoming article by Joseph Fishkin persuasively argues that there are special individual rights at stake in new vote denial controversies, like those involving voter identification, that are not reducible to structural values. *See* Joseph Fishkin, *Equal Citizenship and the Individual Right To Vote* (Nov. 15, 2009) (unpublished manuscript, on file with the Yale Law & Policy Review). Fishkin’s argument provides a theoretical defense for the greater solicitude that the Court sometimes has accorded to practices that prevent people from voting or having their votes counted, as opposed to practices that dilute the voting strength of some groups.

larly true in an era of budget constraints, which hinder governments' abilities to fund significant improvements to our democratic infrastructure. Yet the institutional deficiencies that fueled the firestorm of 2000 remain. American election administration is as decentralized and partisan today as it was then. These deficiencies are partly to blame for smaller-scale conflagrations that arise in every election cycle. The new institutionalism in election law reminds us of the need to consider nonjudicial solutions for these problems. Courts should not be at the center of our efforts to improve the way that we run elections, but they cannot be left out either. Until the United States develops independent electoral management bodies, as so many other countries have, federal courts have a vital role to play in policing election administration.