ELECTION ADMINISTRATION AS A LICENSED PROFESSION

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This Essay argues that election administrators should be subject to a professional licensing regime, much like licensing in medicine and law. Making election administration a licensed profession would not only expand requirements for training, but also enhance the professional identification of these officials, reinforcing norms of integrity and impartiality. By raising barriers to entry, licensing would make it more costly for partisans to obtain these offices. Licensing could also improve public confidence in the professionalism of election administration. Such a reform meets our moment. While many states have increased training requirements for election administrators, significant gaps remain. Moreover, existing reforms to election administration—ranging from creating nonpartisan structures to disclosing more information to shame outliers—have either stalled or been too indirect to confront the rising partisan challenges election administrators face. The Essay concludes with a case study illustrating how such a licensing regime could be implemented in Michigan.

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INTRODUCTION

In 1934, Joseph Harris began his detailed treatment of U.S. election administration—the most comprehensive at the time—with a condemnation: "There is probably no other phase of public administration in the United States which is so badly managed as the conduct of elections."[1] Harris concluded that election boards were too partisan,[2] poorly trained,[3] and inefficient.[4]

Fear and loathing of U.S. election administration has persisted. In recent decades, scholars and good government experts have lamented the lack of professionalism, uniformity, and centralization in election administration.[5] And in recent years, concerns of election administration have reached a boiling point. On the right, many worry about voter fraud and elections being rigged.[6] On the left, many are concerned that voter intimidation is increasingly unchecked and that partisans will take over administering elections, undermining the republic from within.[7]

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1. JOSEPH P. HARRIS, ELECTION ADMINISTRATION IN THE UNITED STATES 1 (1934).

2. *Id.* at 102.

3. *See id.* at 5–6.

4. *Id.* at 2–3.

5. *See, e.g.*, Zachary Newkirk, *An Untapped "Arsenal of Power": The Elections Clause, a Federal Election Administration Agency, and Federal Election Oversight*, 47 FLA. STATE U. L. REV. 143 (2020).

6. *See, e.g.*, Alexandra Berzon, *Kari Lake Will Present Election Fraud Claims in an Arizona County Court*, N.Y. TIMES (Dec. 21, 2022), https://www.nytimes.com/2022/12/21/us/politics/kari-lake-arizona-case.html.

7. *See, e.g.*, Heidi Przybyla, *'It's Going to Be an Army': Tapes Reveal GOP Plan to Contest Elections*, POLITICO (June 1, 2022, 6:30 AM),

For their part, election officials have performed admirably through an increasingly rancorous political culture and an election-year pandemic—and while facing violent threats against them. A 2023 survey reports that nearly half of local election officials are concerned about their safety and the safety of their colleagues, and eleven percent have personally experienced threats.[8] Those numbers are slightly lower than they were in 2022, in which more than half were concerned about their safety and seventeen percent had personally experienced threats.[9] Importantly, election officials themselves have doubts about the integrity of election administration: some fifty-six percent in 2023 were very worried or somewhat worried about political influence in the process.[10]

In this Essay, we offer a new—and practical—solution to the challenge of professionalizing U.S. election administration. The most common proposals for reforming election administration tend to fall into three categories: non-partisan administration, informational nudges, and voluntary actions.[11] Each of these suffers from fundamental problems. Bold ideas for non-partisan administration, while perhaps ideal in theory, have gone nowhere in recent years and are unlikely to be adopted soon, given both the highly polarized environment and institutional entrenchment of current partisan officials. Nudges like performance indexes and transparency are roundabout and indirect: they operate ex post through a complex and attenuated mechanism. It is unclear why we should expect them to propel us out of current challenges. And voluntary approaches are just that, voluntary. We describe the general issues with election administration and problems with existing solutions in Part I.

In Part II, we propose that states adopt a system of professional licensing for election administrators, as exists in other areas such as medicine and law. Under our approach, election administrators would have to take courses and pass an exam to practice their craft; they would have to pursue continuing professional education throughout their career; and they would be subject to discipline, license forfeiture, and penalties for violating the law. They should also receive heightened protections from threats and harassment. A professional licensing regime could help increase confidence in election administration because it would act as a

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https://www.politico.com/news/2022/06/01/gop-contest-elections-tapes-00035758 [https://perma.cc/46CQ-L3TG].

8. BRENNAN CTR. FOR JUST., LOCAL ELECTION OFFICIALS SURVEY 12–13 (2023), https://www.brennancenter.org/our-work/research-reports/local-election-officials-survey-april-2023.

9. BRENNAN CTR. FOR JUST., LOCAL ELECTION OFFICIALS SURVEY 6 (2022), https://www.brennancenter.org/our-work/research-reports/local-election-officials-survey-march-2022.

10. *See id.* at 8.

11. *See infra* Section I.B.

barrier to entry, preventing those who want to undermine elections or turn elections to partisan ends from doing so (at least without playing an *extremely* long game). It would signal to the public that election administrators are not unskilled workers or political hacks. And it would protect election administrators from the increased threats and dangers they face in the crossfire over the future of democracy.

Although professional licensing has recently come under criticism as a policy tool,[12] the reasons for criticisms are inapplicable to election administrators. Critics of licensing primarily oppose the practice because of its effects on labor markets. A professional license makes it harder, for example, for a person to become a hair braider. This reduces the number of people entering the field, closing down job opportunities and increasing prices for consumers. But these and related concerns simply do not apply to election administration: these are government jobs and there are a limited number of them.

We believe a professional licensing regime is more feasible and effective than other solutions, though we are mindful of its limits. It is more feasible than transformative proposals that some have offered to federalize elections or shift to nonpartisan operations. It has the potential to be more effective than nudges and voluntary policies. But that does not mean it is perfect. We cannot be certain that licensing would increase public confidence, though we are confident that penalties for threats and harassment and raising barriers to entry could help deter some of the most egregious dangers. We also do not believe professional licensing would be adopted everywhere all at once, nor convince those who reflexively oppose the ideas of expertise and professionalization in government. While our solution has something for both Republicans and Democrats, it is likely that in the current partisan configuration, only Democrats would pass legislation to improve election administration. But we think this solution is likely one Republicans could live with.

After outlining how and why a professional licensing regime would work to improve election administration in the United States, we then turn to a specific case study. We apply our approach to Michigan's election system. We picked Michigan because it is a purple state that has seen serious political challenges in recent years, including the attempted kidnapping and murder of the Governor[13] and efforts to elect avowed partisans to important electoral positions. It is also a state that, as of this

12. *See infra* Sections II.A–B.

13. Mitch Smith, *Trial Opens for Men Accused of Aiding Plot to Kidnap Michigan's Governor*, N.Y. TIMES (Aug. 23, 2023), https://www.nytimes.com/2023/08/23/us/michigan-whitmer-plot-trial.html.

writing, has a Democratic trifecta in its state government.[14] This makes it plausible that the state could pass legislation implementing a professional licensing regime.

Michigan currently has extensive training and accreditation requirements applicable to clerks of its many county and local level election commissions as well as to precinct inspectors.[15] Those requirements mandate continuing education certifications.[16] But they omit critical players in Michigan election administration, including the county-level and state boards of canvassers—the very bodies which received extensive lobbying in November 2020 to not certify the results of the presidential election.[17] As a model for similar reforms in other states, we make a specific proposal for filling these gaps in Michigan's training requirements: a new, more comprehensive licensing regime.

Democracy requires bureaucracy. The successful administration of a complex logistical system such as the election system requires technical knowledge, skill, practice, and adherence to procedures to safeguard outcomes. Elections give political voice to the ordinary person, but the infrastructure for elections requires experts to ensure its reliable functioning. We hope this proposal can help safeguard and strengthen America's electoral infrastructure—and ensure that the voice of the people is the engine of our democracy.

I. ELECTION ADMINISTRATION AND ITS DISCONTENTS

In this Part, we provide an overview of U.S. election administration, criticisms of the American system, and proposals to reform it. We argue that proposals in recent years are either infeasible or ineffective and that new ideas are needed to improve election administration—particularly in a highly volatile and polarized context.

A. Fear and Loathing of U.S. Election Administration

1. ELECTION ADMINISTRATION IN THE UNITED STATES

Americans exercise their vote in elections run by local jurisdictions under rules largely approved by state legislatures and state election

14. *See* Mitch Smith, *Statehouse Democrats Embrace an Unfamiliar Reality: Full Power*, N.Y. TIMES (Jan. 18, 2023), https://www.nytimes.com/2023/01/18/us/democrats-michigan-minnesota-maryland.html.

15. *See infra* Section III.B.

16. *See infra* Section III.B.

17. *See infra* Sections III.B–C.

officials. State legislation establishes, often in great detail, the qualifications and processes for voting as well as the structure of state administration of elections. The chief elections official in the state has responsibility for approving election equipment, ensuring uniform implementation of election laws, and maintaining and updating centralized list of voter registrations.[18] Under direction from the state, more than 8,000 local jurisdictions bear responsibility for running of elections—processing registrations, processing mail-in and absentee ballots, siting polling places, operating voting machinery, hiring and training poll workers, and administering election day operations.[19]

The U.S. has not established a nonpartisan structure of election administration at either the state or local levels. The vast majority of states (thirty-three) elect their chief elections officer (CEO), typically to the office of secretary of state, in partisan elections, in the sense that the candidate runs associated with a party.[20] In the remaining states, the CEO is appointed by the governor (six),[21] selected by the legislature (four),[22] or appointed by a state board of commission of elections (seven) (itself typically selected by the governor with input from the legislatures).[23] Seven states have a hybrid structure in which the powers over elections are shared between an elected or appointed Secretary of State and board with party representation requirements.[24]

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18. KATHLEEN HALE, ROBERT MONTJOY & MITCHELL BROWN, ADMINISTERING ELECTIONS: HOW AMERICAN ELECTIONS WORK 32–33 (2015).

19. Richard Briffault, *Election Law Localism and Democracy*, 100 N.C. L. REV. 1421, 1423 (2022) (quoting PRESIDENTIAL COMM'N ON ELECTION ADMIN., THE AMERICAN VOTING EXPERIENCE 1 (2014), https://www.eac.gov/sites/default/files/eac_assets/1/6/Amer-Voting-Exper-final-draft-01-09-14-508.pdf) (characterizing local responsibilities). *See also* HALE, MONTJOY & BROWN, *supra* note 18, at 38–43.

20. HALE, MONTJOY & BROWN, *supra* note 18, at 37 tbl.2.2, 38 tbl.2.3 (listing states electing their CEOs through partisan elections); KAREN L. SHANTON, CONG. RSCH. SERV., R45549, THE STATE AND LOCAL ROLE IN ELECTION ADMINISTRATION: DUTIES AND STRUCTURES 12–13 tbl.5 (2019) (listing modes of CEO selection for each state); *Election Administration at State and Local Levels*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/elections-and-campaigns/election-administration-at-state-and-local-levels [https://perma.cc/Z9K3-2YUV] (Nov. 1, 2022) [hereinafter *NCSL Election Administration*].

21. *NCSL Election Administration*, *supra* note 20 (Delaware, Florida, New Jersey, Pennsylvania, Texas, and Virginia).

22. *Id.* (Maine, New Hampshire, Oklahoma, and Tennessee).

23. HALE, MONTJOY & BROWN, *supra* note 18, at 35–36; *NCSL Election Administration*, *supra* note 20 (Hawai'i, Illinois, Maryland, New York, North Carolina, South Carolina, and Wisconsin).

24. *NCSL Election Administration*, *supra* note 20 (Arkansas, Georgia, Indiana, Kentucky, Rhode Island, Tennessee, and West Virginia); HALE, MONTJOY & BROWN, *supra* note 18, at 36.

There is still further variation in the appointing of local election officials (LEOs) both between states and even within a state.[25] In over twenty states, local election officers are single individuals, about half of whom are elected and about half of whom are appointed.[26] In about ten states, the local election officer is a board, frequently appointed by the secretary of state or governor, with input from the parties.[27] Still another group of eighteen states divide election duties between multiple local officials with differing modes of appointment.[28] In a majority of states, the state's CEO cannot remove the LEOs.[29]

2. SCHOLARLY CRITIQUES

Election administration in the United States has been subject to sustained criticism since Reconstruction. In the Jim Crow era, states not only enacted notorious laws that directly impeded access to the polls—poll taxes and literacy tests with grandfather clauses for those who had voted in prior elections, for instance—but also used structures of election administration to diminish the chances of Black Americans to vote.[30] These strategies included vesting the local election administrators with broad discretion to judge whether individuals had satisfactorily completed a literacy or civics knowledge test.[31] Even as public officials began to devote increasing energy to administration in the 1920s, election administration lagged behind. In the first comprehensive treatment of election administration, published in 1934, Joseph Harris summarized

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25. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Election Meltdown*, 62 WASH. & LEE L. REV. 937, 977 (2005).

26. HALE, MONTJOY & BROWN, *supra* note 18, at 39–41; PAUL MANSON, NATALIE ADONA, JAY LEE & PAUL GRONKE, STAFFING THE STEWARDS OF DEMOCRACY: GENDER, RACE, AND REPRESENTATIVE BUREAUCRACY 16–18 (2022), https://evic.reed.edu/wp-content/uploads/2022/11/Staffing-the-Stewards_MPSA2021.pdf [https://perma.cc/RD3X-M39G].

27. *See* HALE, MONTJOY & BROWN, *supra* note 18, at 41–42; Briffault, *supra* note 19, at 1427.

28. HALE, MONTJOY & BROWN, *supra* note 18, at 42, 43 tbl.2.6; Briffault, *supra* note 19, at 1427.

29. HALE, MONTJOY & BROWN, *supra* note 18, at 33.

30. ALEC C. EWALD, THE WAY WE VOTE: THE LOCAL DIMENSION OF AMERICAN SUFFRAGE 127–28 (2009) (describing the use of local officials to exclude Black Americans from the vote).

31. *See id.* at 128 (describing the use of local officials to exclude). *See also* J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910, at 57–58 (1974).

the state of election administration as overly partisan,[32] relying on poorly trained staff,[33] and costly but inefficient structures.[34]

The 2000 presidential election was an inflection point for debates about election administration. Even before the Supreme Court issued its opinion in *Bush v. Gore*,[35] issues with counting ballots and outdated machinery exposed how far the nation's election infrastructure had been neglected and fallen behind prevailing technology.[36] In 2002, Congress enacted the Help America Vote Act (HAVA), which created the Election Assistance Commission to provide information to states about updating their voting systems, provided funding to states to improve their election systems, and imposed standards for voting systems, including requirements for streamline registration, for maintaining a state-wide electronic voter file, and for provisional voting.[37] HAVA has been widely credited with improving the technological systems used in election administration, virtually eliminating punch card machines and mechanical voting devices.[38]

Despite improvements in election administration and funding since 2002, scholars have long raised several fundamental objections to systems of election administration at the state level. The most prominent and persistent of those critiques are that: (1) our systems allow partisans too much of a role; (2) our systems allow too much control to be exercised by local officials; and (3) election administrators lack adequate training. In 2000, *Bush v. Gore* highlighted an institutional context of election administration in Florida which "involved partisan elected county canvassing boards and elected state officials who chaired the presidential campaigns for each party."[39] Following the 2000 election, a "near-consensus" among the legal academics writing on elections emerged "that partisan elections, lack of uniformity, and inadequate training on the local level are the country's most serious problems with running elections."[40]

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32. HARRIS, *supra* note 1, at 8–9.

33. *Id.* at 5.

34. *Id.* at 2–3.

35. 531 U.S. 98 (2000).

36. *See* Doug Lewis, *Parties and Politics: The Evolution of Election Administration*, *in* THE FUTURE OF ELECTION ADMINISTRATION 31, 31–32 (Mitchell Brown, Kathleen Hale & Bridgett A. King eds., 2020) (ebook).

37. Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666, 1668–78, 1704–14 (2002) (codified at 52 U.S.C. §§ 20901–04, 20921–30, 21081–85).

38. HALE, MONTJOY & BROWN, *supra* note 18, at 86 (describing improvement in voting technology following from HAVA).

39. Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 82 (2004).

40. RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN 197 (2012). *See also* Hasen, *supra* note 25, at 945 (arguing for

The United States, as has frequently been observed, is an extreme outlier globally in allowing partisan elected officials to administer elections.[41] Electing CEOs poses obvious problems, even when elections are nominally required to be nonpartisan.[42] Not only does it require the CEO to run a statewide campaign, but their "future retention in office or succession to other offices may depend to a large extent on party connections."[43] Appointment, whether by the governor alone or a legislative body, also does not ensure neutrality.[44] Richard Hasen made the case for nonpartisan election administration forcefully following the 2000 election.[45] Twenty years later, Hasen himself concludes that the "[t]he country has taken no steps" making these reforms, and "no such changes are on the horizon."[46]

Scholars have also lamented the extreme decentralization of election administration in the United States. In the response to the pandemic, local administrators proved extraordinarily resilient and responsive.[47] Yet the sheer number of jurisdictions conducting elections—many of them with fewer than 5,000 voters[48]—can lead to difficulties. In small jurisdictions, the chief election official frequently has a broad range of non-election related tasks. Indeed, fewer than one third of LEOs devote all or most of

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nonpartisan election administration); COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 49 (2005), https://www.eac.gov/sites/default/files/eac_assets/1/6/Exhibit%20M.PDF [https://perma.cc/8CFC-BP7T] ("Most other democratic countries have found ways to insulate electoral administration from politics and partisanship by establishing truly autonomous, professional, and nonpartisan independent national election commissions that function almost like a fourth branch of government."); Heather K. Gerken, *Getting from Here to There in Election Reform*, 34 OKLA. CITY U. L. REV. 33, 40 (2009) (summarizing critique of partisan-run elections).

41. *See, e.g.*, HALE, MONTJOY & BROWN, *supra* note 18, at 37 (showing that in survey of sixty-three democracies, zero percent had elected election administration officials, in contrast to seventy percent of U.S. states); Gerken, *supra* note 40, at 40 ("Every other mature democracy relies on professional administrators, protected from political interference, to run the election system.").

42. Hasen, *supra* note 25, at 977–78.

43. HALE, MONTJOY & BROWN, *supra* note 18, at 48.

44. Hasen, *supra* note 25, at 983–84.

45. *See* HASEN, *supra* note 40, at 197.

46. RICHARD L. HASEN, ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY 136 (2020).

47. *See* Briffault, *supra* note 19, at 1423–24 (describing the resourcefulness of local administrators in response to the pandemic).

48. *See* NATALIE ADONA, PAUL GRONKE, PAUL MANSON & SARAH COLE, STEWARDS OF DEMOCRACY: THE VIEWS OF LOCAL ELECTION OFFICIALS 13 (2019), https://democracyfund.org/wp-content/uploads/2020/06/2019_DemocracyFund_StewardsOfDemocracy.pdf [https://perma.cc/N2VE-UXZT].

their time to election administration.[49] They have to run their elections on limited budgets and with little support and little training.[50]

Training and professionalization concerns extend well beyond small jurisdictions.[51] In 2009, Heather Gerken reported that the average chief local elections official received less than twenty hours of training.[52] While training opportunities for local and state election officials have increased, and a majority of states now have some training requirements,[53] the requirement of training is not necessarily an indication of its depth, consistency, or quality. And many states still have no training requirements for election administrators.[54] Despite an increasing consensus around the knowledge, skills, and abilities necessary to election administration, the structures for creating a professionalized workforce still lag. "[E]lection administrators need formal education, regular training, networking opportunities, a path for advancement in their field, and recognition and respect as experts."[55]

3. PARTISAN CRITIQUES

Not surprisingly, partisan political actors have a host of concerns about election administration—and they have taken on a political currency since 2016 not seen since the demise of Jim Crow legislation. In recent years, both the Democratic and Republican parties have advocated for the importance of accurate vote counting and the updating

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49. *Id.* at 10.

50. HEATHER K. GERKEN, THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT 22–23 (2009).

51. *See id.* at 22; HASEN, *supra* note 40, at 197 (calling for professionalized election administration); Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 158–59 (2018) ("[T]he United States is one of a handful of countries to want for a professionalized election administration."). The same concern about training is even more acute with poll workers. *See* Thad E. Hall & Kathleen Moore, *Poll Workers and Polling Places*, *in* ELECTION ADMINISTRATION IN THE UNITED STATES: THE STATE OF REFORM AFTER *BUSH V. GORE* 175, 177 (R. Michael Alvarez & Bernard Grofman eds., 2014) ("[Poll workers] receive limited training from local election offices (LEO) and . . . do their jobs with little direct supervision by staff from the LEO."); Hasen, *supra* note 25, at 953 ("One obvious problem is that elections are administered on the retail level by poll workers, many of whom receive little or no training for the position . . . .").

52. GERKEN, *supra* note 50, at 22.

53. *NCSL Election Administration*, *supra* note 20 (suggesting that, in 2016, thirty-two states required some form of training for election administrators).

54. Mitchell Brown & Kathleen Hale, *The Evolution of Professionalism in the Field of Election Administration*, *in* THE FUTURE OF ELECTION ADMINISTRATION 103, 110, 111 tbl.7.1 (Mitchell Brown, Kathleen Hale & Bridgett A. King eds., 2020).

55. *Id.* at 113. *See also* Joshua S. Sellers & Justin Weinstein-Tull, *Constructing the Right to Vote*, 96 N.Y.U. L. REV. 1127, 1165, 1175 (2021) (noting the critical role of training to secure competent election administration).

of election equipment. The Democratic Party platform in 2020 endorsed post-election audits as means of generating voter confidence and transparency.[56] The Republican National Committee has also highlighted the importance of an accurate vote count, framing it as an aspect of national security reform.[57] And both national parties have endorsed some of the same technological advances in voting, such as modern voter-verified paper ballot systems.[58] But the parties have been opposed on other election administration problems.

Since the Supreme Court's 2013 decision in *Shelby County v. Holder*,[59] which halted the Voting Rights Act's requirement for preapproval of changes to state election laws in many jurisdictions with a history of voter discrimination,[60] Democrats have criticized policies that make voting more difficult—including laws that heighten ID requirements for registration and/or voting, restrict access to mail-in or absentee voting, limit poll hours and early voting opportunities, "purging" of voting rolls, and eliminating or rejecting same-day registration.[61] Democrats take the view that these restrictions have a disproportionate impact on younger, minority, and low-income voters.[62]

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56. *2020 Democratic Party Platform*, AM. PRESIDENCY PROJECT (Aug. 17, 2020), https://www.presidency.ucsb.edu/documents/2020-democratic-party-platform [https://perma.cc/2GBG-67JV].

57. REPUBLICAN NAT'L COMM., RESOLUTION ENSURING THE PEOPLE'S CONSTITUTIONAL RIGHT TO A FAIR, LEGAL, AND ACCURATE ELECTION (2021), https://prod-static.gop.com/media/4-RESOLUTION-ENSURING-THE-PEOPLE-1610471974.pdf.

58. *Compare 2016 Democratic Party Platform*, AM. PRESIDENCY PROJECT (July 21, 2016), https://www.presidency.ucsb.edu/documents/2016-democratic-party-platform [https://perma.cc/7ENA-64ZX], *with 2012 Republican Party Platform*, AM. PRESIDENCY PROJECT (Aug. 27, 2012), https://www.presidency.ucsb.edu/documents/2012-republican-party-platform [https://perma.cc/H3LF-7QPL], *and 2016 Republican Party Platform*, AM. PRESIDENCY PROJECT (July 18, 2016), https://www.presidency.ucsb.edu/documents/2016-republican-party-platform [https://perma.cc/X4MY-VZBW]. Because the Republican National Committee did not adopt a 2020 platform, the 2016 platform is still the "current" party platform. *See Resolution Regarding the Republican Party Platform*, AM. PRESIDENCY PROJECT (Aug. 24, 2020), https://www.presidency.ucsb.edu/documents/resolution-regarding-the-republican-party-platform [https://perma.cc/RQS3-CMDD].

59. 570 U.S. 529 (2013).

60. *Id.* at 544–50.

61. *See, e.g.*, STACEY ABRAMS, OUR TIME IS NOW: POWER, PURPOSE, AND THE FIGHT FOR A FAIR AMERICA 39–40, 129–36 (2020) ("Jurisdictions formerly covered under Section 5 have raced to reinstate or create new hurdles to voter registration, access to the ballot, and ballot counting."). *See also* For the People Act of 2021, H.R. 1, 117th Cong. §§ 1011–31, 1611, 2501–02 (2021) (proposing automatic registration, same-day registration, minimum early voting hours, and restrictions on purges to voter rolls, among other reforms).

62. *2012 Democratic Party Platform*, AM. PRESIDENCY PROJECT (Sept. 3, 2012), https://www.presidency.ucsb.edu/documents/2012-democratic-party-platform

The 2016 Democratic Party platform called for "restoring voting rights" for previous felons, in addition to vote-by-mail, automatic voter registration, and early voting.[63] The 2020 platform added the creation of an election day national holiday.[64] Democrats have criticized these laws as a means of voter suppression, with disproportionate impact on younger, minority, and low-income voters.[65]

More recently, there have been concerns that extreme right-wing, conspiracy theorists will attempt to takeover election administration offices and use those positions to rig elections in favor of their preferred candidates. QAnon supporters have attempted to win positions as chief elections officers in a variety of swing states.[66] Election deniers have continued to run for secretary of state positions.[67] In localities around the country, partisan Republicans are attempting to take over precinct committees, election inspector positions, and other local election offices.[68] Indeed, there have already been attempts to illegally tamper with election processes. According to a report in *Rolling Stone*, election officials in Spalding County, Georgia developed a plan for a third-party group to illegally copy data from voting machines and servers before it was scuttled.[69]

On the Republican side, the focus in the 2000s was on the possibility of election fraud. The Republican Party raised election fraud as an issue in its 2008 party platform, and it has continued to propose stricter voter ID requirements, barring or limiting vote-by-mail and early voting, and

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[https://perma.cc/2LG5-MZ6E]. *See also* ABRAMS, *supra* note 61, at 86–87 (noting that Black Americans are often the subject of suppression efforts but that suppression efforts also impact Latino communities, people with disabilities, and shift workers).

63. *2016 Democratic Party Platform*, *supra* note 58.

64. *2020 Democratic Party Platform*, *supra* note 56.

65. *See 2012 Democratic Party Platform*, *supra* note 62.

66. Sue Halpern, *Behind the Campaign to Put Election Deniers in Charge of Elections*, NEW YORKER (Sept. 20, 2022), https://www.newyorker.com/news/daily-comment/behind-the-campaign-to-put-election-deniers-in-charge-of-elections.

67. Adrian Blanco & Amy Gardner, *Where Election Deniers Are on the Ballot Near You*, WASH. POST (Nov. 8, 2022, 3:14 PM), https://www.washingtonpost.com/elections/interactive/2022/election-deniers-running-for-office-elections-2022/.

68. *See* Nick Corasaniti & Reid J. Epstein, *How Republican States Are Expanding Their Power Over Elections*, N.Y. TIMES (July 1, 2021), https://www.nytimes.com/2021/06/19/us/politics/republican-states.html.

69. Justin Glawe, *Pro-Trump Georgia Officials Plotted to Swipe Voting Data. We Caught Them*, ROLLING STONE (Oct. 12, 2022), https://www.rollingstone.com/politics/politics-news/trump-georgia-election-officials-big-lie-2020-1234609561/ [https://perma.cc/F7SP-VK6N].

greater protections against election fraud.[70] The 2012 platform suggested that proof of citizenship laws were needed to stop "significant and growing" voter fraud, which the platform described as "political poison."[71] In response to the growth of vote-by-mail, the 2012 platform stated that vote-by-mail lacks verification of identities and is thus susceptible to mass fraud.[72] The 2016 Republican National Committee platform continued to embrace stricter voter ID requirements and voter-verified paper ballot trails as mean to counteract voter fraud.[73]

Republican criticism of election administration reached a new level with President Trump's repeated claims of voter fraud following both his 2016 election and 2020 loss.[74] In President Trump's efforts to discredit the results of the 2020 presidential election—"the big lie"[75]—he repeatedly alleged that that there was a "major fraud" and "a fraud on the American public."[76] Numerous officials at the federal, state, and local level embraced and repeated President Trump's unfounded and dangerous assertions.[77]

Fears of election tampering on both sides carry through to voters' perceptions of election administration. Whereas in 2018, 29% of Republican voters thought that the November elections would be administered "very well," that number fell to 11% in 2022.[78] In 2018, merely 18% of Democrats anticipated that the November election would be "very well" administered.[79] By 2022, that number had risen to 35%.[80]

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70. *2008 Republican Party Platform*, AM. PRESIDENCY PROJECT (Sept. 1, 2008), https://www.presidency.ucsb.edu/documents/2008-republican-party-platform [https://perma.cc/NXC8-EPW2].

71. *2012 Republican Party Platform*, *supra* note 58.

72. *Id.*

73. *2016 Republican Platform*, *supra* note 58.

74. *See* Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & PUB. POL'Y 57, 58 (2017); Ron Elving, *Claims of Voter Fraud, Old as the Republic, Still Work as Weapons for Trump*, NPR (Sept. 4, 2022, 5:00 AM), https://www.npr.org/2022/09/04/1120904265/claims-voter-fraud-donald-trump [https://perma.cc/A59Q-SF6N].

75. Bennie G. Thompson, *Foreword* to H.R. REP. NO. 117-663, at x–xi (2022).

76. *Id.* at 9.

77. *See* MAJOR GARRETT & DAVID BECKER, THE BIG TRUTH: UPHOLDING DEMOCRACY IN THE AGE OF THE BIG LIE 114–15, 138–41, 145–48 (2022) (describing the role of those amplifying the "Big Lie" and censuring those exposing it).

78. PEW RSCH. CTR., TWO YEARS AFTER ELECTION TURMOIL, GOP VOTERS REMAIN SKEPTICAL ON ELECTIONS, VOTE COUNTS 4 (2022), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2022/10/PP_2022.10.31_election-turmoil_REPORT.pdf [https://perma.cc/XA95-9TYS].

79. *Id.*

80. *Id.*

Polling also suggests that Republican voters harbor concerns of voter fraud and vote counting: only 37% of Republican supporters have some confidence that mail ballots will be counted accurately, and only 26% are "very confident" that in-person votes will be counted accurately.[81] At the same time, polling also highlights that Democratic voters remain concerned about voter suppression: 44% of Democrats had concerns about the accessibility of voting places and 67% feared some eligible voters would be prevented from voting.[82]

4. THE DANGERS OF ADMINISTRATION

On top of these challenges, election administrators have recently found themselves in danger. All across the country, administrators are facing online harassment and death threats.[83] According to some reports, law enforcement has not been able or willing to address these dangers.[84] Some election officials have resigned, citing death threats as a reason for quitting.[85] These dangers are a problem whether or not they are addressed. Neutral administrators will simply not want to take or stay in these critically important positions if they and their families are subjected to harassment and threats.

B. Reform Proposals

In response to longstanding criticisms, scholars, politicians, parties, and interest groups have proposed a wide variety of election reforms. Many reforms pertain to ease of registration and access to voting. Others either directly address or implicate election administration—the

81. *Id.* at 5.

82. Taylor Orth & Kathy Frankovic, *Most Democrats and Republicans Believe Democracy Is Under Threat, but Disagree on How*, YOUGOV US (Nov. 2, 2022, 4:45 PM), https://today.yougov.com/topics/politics/articles-reports/2022/11/02/democrats-republicans-believe-democracy-threatened [https://perma.cc/HS38-RN9A].

83. Cat Zakrzewski, *Election Workers Brace for a Torrent of Threats: 'I KNOW WHERE YOU SLEEP,'* WASH. POST, https://washingtonpost.com/technology/2022/11/08/election-workers-online-threats/ (Nov. 8, 2022, 11:28 AM); Jessica Huseman, *For Election Administrators, Death Threats Have Become Part of the Job*, PROPUBLICA (Aug. 21, 2020, 6:00 AM), https://www.propublica.org/article/for-election-administrators-death-threats-have-become-part-of-the-job [https://perma.cc/FSC3-G26P].

84. Linda So & Jason Szep, *U.S. Election Workers Get Little Help from Law Enforcement as Terror Threats Mount*, REUTERS (Sept. 8, 2021, 10:00 AM), https://www.reuters.com/investigates/special-report/usa-election-threats-law-enforcement/ [https://perma.cc/D2DH-B7YZ].

85. *See, e.g.*, Neil Vigdor, *All Three Election Officials Resigned in a Texas County, with at Least One Citing Death Threats*, N.Y. TIMES (Aug. 18, 2022), https://www.nytimes.com/2022/08/18/us/politics/texas-gillespie-elections-threats.html.

structures and personnel who run elections. We focus on three of the latter reforms: nonpartisan administration, informational solutions, and voluntary and partial professionalization.

1. NONPARTISAN ADMINISTRATION

As noted above, in the majority of states, the state's chief election officer (often the secretary of state) is elected in a partisan election—and many local jurisdictions' chief election officers are also either elected or appointed in what is, in practice, a partisan appointment process.[86] The case for nonpartisan election officials is a strong and clear one: those running elections "should not have a vested interest in their outcome."[87] Given the current level of partisan distrust, the argument for nonpartisan administrators is perhaps stronger than ever. When an election official selected through a partisan process makes a principled decision that happens to align with the interest of his or her party's candidates, as Hasen points out, "opponents in today's highly charged partisan atmosphere will naturally accuse the official of bias."[88] Since the election in 2000, allegations of partisan bias have only gotten louder, even though it is often impossible to know if partisan bias or principled judgment best explains the official's conduct.[89]

As Hasen observes, the principles of election administration are not subject to serious debate—eligible voters should be allowed to vote in a system that accurately counts votes, administered by officials who do not act in ways that favor the election of any particular candidates.[90] Thus, in principle, it should be easy to agree on the criteria for and practice of neutral election administration.[91] To advance this goal, in 2005, Hasen proposed that election officials should be appointed and subject to confirmation by a legislative supermajority, akin to the federal advice-and-consent process.[92] The supermajority requirement was intended to ensure the officials are acceptable to both parties; though it would not, of course, satisfy that goal in states with a partisan supermajority. Analogous provisions could also be adopted at the local level.[93]

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86. *See NCSL Election Administration*, *supra* note 20.

87. Hasen, *supra* note 25, at 974.

88. *Id.* at 979.

89. *See id.* at 979–82.

90. *See id.* at 988.

91. *See id.*

92. *See id.* at 984, 973 n.148 (making this proposal and suggesting that such a nonpartisan state official would select local counterparts).

93. *See id.* at 973 n.148 (noting that at the local level single-party domination is more frequent so a supermajority check will be less effective producing a nonpartisan official).

A nonpartisan structure for administration along the lines proposed by Hasen could potentially help. But it does suffer from some limitations. First, as Hasen himself has acknowledged, there has been virtually no movement by states in this direction.[94] Second, it is not clear that an advice-and-consent regime would be workable in a highly polarized environment, even putting aside that some states have supermajorities of one party. Suppose, for example, that Democrats were to push through reforms along these lines as a good government measure. It is not clear why partisan activists would not try to block nominees in order to deliberately disrupt election administration. In the federal context, for example, nominees are often delayed or blocked without any just cause except for political advantage.[95] The nonpartisan approach, while attractive in principle, faces mounting obstacles.

2. INFORMATIONAL SOLUTIONS

To incentivize improvement in election administration, scholars and civil society groups have suggested and experimented with a variety of informational solutions, most prominently through the creation of indexes which rank states' elections on a wide variety of metrics.[96] Perhaps most notably, Heather Gerken advocated for the creation of a "Democracy Index" which would rank states and localities quantitatively on a wide variety of metrics that shed light on the character and quality of election administration.[97] Gerken argued that given the decentralization of election administration, a ranking could have set in motion a cycle of local competition,[98] by which low-ranking jurisdictions would be "shamed" into improving their capacities.[99] Gerken imagined that election administrators, the public, and legislative overseers would respond to how their jurisdiction was ranked—devoting energy to improving areas in which they fared poorly.[100]

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94. HASEN, *supra* note 46, at 136.

95. See, for example, the nomination of then-Judge Merrick Garland to the Supreme Court.

96. For an early example, the Caltech/MIT Voting Technology Project introduced measures to qualify "lost" votes immediately following the 2000 election. Charles Stewart III, *The Elections Performance Index: Past, Present, and Future*, *in* THE FUTURE OF ELECTION ADMINISTRATION 119, 120 (Mitchell Brown, Kathleen Hale & Bridgett A. King eds., 2020).

97. GERKEN, *supra* note 50, at 26–37 (proposing a one-stop-shopping ranking).

98. *Id.* at 24, 26.

99. *Id.* at 75.

100. *Id.* at 76–86. *See also* Richard L. Hasen, *Election Administration Reform and the New Institutionalism*, 98 CALIF. L. REV. 1075, 1086 (2010) (reviewing HEATHER K. GERKEN, THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT (2009)).

In 2013, the Pew Charitable Trusts produced the first version of what became the Election Professionals Index (EPI), which is now administrated by the MIT Election Data and Science Lab.[101] The EPI is an outcome-based system, measuring seventeen aspects of state election performance, ranging from registration rates, voter turnout, voter wait time, and the availability of online registration to the percentage of mail ballots that are unreturned, the percentage of registrations that are rejected, and percent of provisional ballots rejected.[102] By design, the EPI takes "the individual voter as the lodestone and valued direct measures of experience" of the voters.[103] The EPI provides a helpful portrait of U.S. elections and a baseline to assess areas of election administration in which there have been relative improvements or declines in the states.[104]

But informational proposals suffer from some serious limitations. First and foremost, because they do not impose any regulatory requirements, they do not directly prevent problems with election administration. Election tampering, data breaches, security issues, fraud—all of these problems would still take place under any index-style solution. Second, to the extent informational approaches have a mechanism to identify and address problems in election administration, the ex post mechanism is extremely attenuated and complex. Indexes require (1) updating the index's elements after an election for every jurisdiction; (2) publishing the finished rankings; (3) election officials

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101. *See* Stewart, *supra* note 96, at 119–20. *See also Elections Performance Index*, MIT ELECTION DATA + SCI. LAB, https://electionlab.mit.edu/research/projects/election-performance-index [https://perma.cc/R3AL-G8S8].

102. Stewart, *supra* note 96, at 123–24 tbl.8.1 (listing the seventeen dimensions). *See also Tennessee in 2020*, MIT ELECTION DATA + SCI. LAB, https://elections.mit.edu/#/data/map?view=state-profile&state=TN&year=2020 [https://perma.cc/G34J-FVUM].

103. Stewart, *supra* note 96, at 128.

104. In a recent comparison of each EPI indicator from 2008 to 2016, Charles Stewart found that significant improvement with no states declining on a couple of indicators: the existence of online voter registration and post-election audits. *Id.* at 141. Several other indicators—such as voting wait time and percentage of provisional ballots rejected—saw an improvement in most but not all states. *See id.* at 140 fig.8.3, 141. For three of the indicators—turnout rate, mail ballot unreturned rate, and residual vote rate (which measures the difference between the number or voters voting and the number of votes cast at the top of the ticket)—the average score fell. *Id.* at 141.

Beginning in 2019, Kathleen Hale and Mitchell Brown began to develop a separate index focused on the capacity of election administrators to perform their jobs called the Election Administration Professionalism Index (EAPI). *See* KATHLEEN HALE & MITCHELL BROWN, HOW WE VOTE: INNOVATION IN AMERICAN ELECTIONS 202–03 (2020). This newly created EAPI focuses on inputs. It captures percentage of the national certification of election administers, whether state-level administrators are members of boards of key national organizations, and whether state training programs are mandated. *Id.* at 242.

believing that the general public, elites, or actual or potential candidates for office will care about the ranking; (4) who will then blame the election official; and finally (5) actually remove them from office. On top of that, election officials then have to be able to make changes to address the underlying problems or encourage state legislatures to give them additional authorities and resources. This is a roundabout way to ensure compliance. Third, while performance-based metrics like the Pew/MIT regime are helpful simply as an informational resource, performance-based metrics cannot capture all that is necessary to ensure a secure, resilient, and reliable election infrastructure. For example, imagine a system that has high performance ratings but in which all power and authority is vested in a single elected official. If that official is replaced with one bent on disrupting the election, democracy will suffer in the next election. Institutions, process, and personnel matter, not just outcomes. Fourth, it has been more than a decade since Gerken's proposal and a decade since the Pew/MIT index, and the dangers to election administration are perhaps greater than ever. Even if the Pew/MIT index has meant the dangers are lower than they would have been, this informational mechanism alone is not sufficient to address the magnitude of the current challenge. None of this is to say there is enough information about U.S. elections. This information is helpful, particularly in our fragmented elections system. But informational approaches need further support to safeguard election administration from those who want to undermine it.

3. PARTIAL AND VOLUNTARY PROFESSIONALIZATION

Another important response to concerns about the quality of election administration has been to focus on the training of election officials. Since the 1990s, a patchwork of states and private organizations, such as the Elections Center and the National Association of Elections Officials, have offered systematic training to election officials.[105] By 2010, a wide array of non-governmental organizations, research organizations, and state organizations of election officials began to provide training. Today, the University of Minnesota and Auburn University offer degrees and certifications at both the undergraduate and graduate levels in election administration.[106] And over the past two decades, states have increased their own training offerings, as well as adopted mandates for training.

105. Mitchell Brown & Kathleen Hale, *The Evolution of Professionalism in the Field of Election Administration*, *in* THE FUTURE OF ELECTION ADMINISTRATION 103, 107 (Mitchell Brown, Kathleen Hale & Bridgett A. King eds., 2020).

106. *Id.* at 109.

Today, nearly two-thirds offer some training;[107] in sixteen states, training can lead to some form of certification.[108] Thirty-two states require some form of training for election officials.[109]

The scope of officials subject to training, whether those trainings require continued education, and the rigor of those requirements is highly varied. The State of Michigan is a case in point. As we discuss below, although the state requires clerks of election commissions to have training, including every two years to maintain accreditation, the requirement does not reach many significant local and state officials responsible for conducting elections.

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In short, election administration is in a place of fragility. Both Democrats and Republicans are questioning the reliability of election administration. Election administrators themselves are under assault. And existing solutions to the problem are infeasible or have been insufficient.

II. ELECTION ADMINISTRATION AS A LICENSED PROFESSION

In this Part, we make the case that election administration should become a licensed profession. We first provide a brief overview of how occupational licensing regimes work, and canvass their benefits and drawbacks. We then argue that there are significant benefits to adopting a licensing regime for election administrators—and critically, that the downsides of licensing regimes in other parts of the economy largely do not apply to the election administration context. Finally, we discuss how to design an election administration licensing regime.

A. Licensing: An Overview

Licensed professions are fields in which practice or employment requires having a state-issued license. Unlike mere registration with the state or an optional certification to demonstrate skills, licensing is mandatory.[110] To get a license, an individual must usually have some

107. HALE & BROWN, *supra* note 104, at 58.

108. *Id.* at 58, 73 n.9 (noting that formal certification programs exist in Arizona, Colorado, Connecticut, Florida, Georgia, Iowa, Michigan, Minnesota, Mississippi, Montana, North Carolina, South Carolina, Virginia, Washington, and Wisconsin).

109. *NCSL Election Administration*, *supra* note 20.

110. S. DAVID YOUNG, THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA 5 (1987).

amount of schooling or education (prior to licensure, and sometimes continuing education throughout their career) and experience (such as an internship or supervised period of practice); they must satisfy a set of personal qualifications (such as citizenship, residency, and moral character); and they must pass an examination.[111] Standards for licensed professionals are generally set by boards, and individuals can have their licenses revoked for failing to adhere to professional standards.[112]

Licensing has three primary benefits. First, it ensures that individuals in the profession have a certain amount of expertise and training, and it threatens them with losing their license if they fail to adhere to the common standards of the profession. This is meant to ensure that there is a high quality of service, "protect[ing] the public against incompetent or dangerous practitioners."[113] Second, the requirements for licensing and ongoing professional education are meant to create an ethos and culture among members that builds and reinforces norms of integrity and service. Professionals are meant to be impartial, rational, and have an altruistic attitude that takes the commitment to serve others and the public seriously.[114] Third, licensing can enhance public trust in the profession. In many arenas, individuals cannot evaluate the quality of the good or service they are getting, and market mechanisms do not work sufficiently well to protect the public.[115] For example, if you have a surgery that is botched, it is not satisfying to just have another surgery from another practitioner. In economics, this is called the lemons problem, drawing on the example that car buyers do not know if a used car is in good shape or is a lemon until it is too late.[116] Licensing ensures professionals have a minimum amount of training and competence,

111. *Id.* at 29; MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 8 (2006).

112. REBECCA HAW ALLENSWORTH, THE CLUB: OUR BROKEN SYSTEM OF PROFESSIONAL LICENSING (forthcoming 2024). The distinction between licenses and certifications is generally that in a licensing regime, the license is required to perform the service or job. Some states require "certifications" as a prerequisite to performing the job; we treat those required certifications as licensing regimes.

113. THE WHITE HOUSE, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 11 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf. *See also* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1111 (2014).

114. STANLEY J. GROSS, OF FOXES AND HEN HOUSES: LICENSING AND THE HEALTH PROFESSIONS 71–75 (1984).

115. THE WHITE HOUSE, *supra* note 113, at 11; Edlin & Haw, *supra* note 113, at 1115–16.

116. George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489 (1970).

thereby enhancing public confidence and trust in the goods and services that licensed professionals provide.

Occupational licensing regimes also have a number of potential downsides. First, licensing erects a barrier to entry for new practitioners. This reduces the number of people in the industry or sector.[117] Fewer members of the profession mean higher prices for consumers.[118] Relatedly, limiting members of the profession means a reduction in the quantity of services provided, potentially to suboptimal levels.[119] A reduction in the number and types of professionals can also mean lower levels of competition, innovation, and entrepreneurship in the sector.[120] Finally, because licensing takes place at the state level, it serves as a barrier to geographic mobility. Professionals who want to move to a new state will need to get a new license.[121]

B. The Case for Licensing in Election Administration

Licensing regimes offer a number of benefits that are desirable in the election administration context. First, election administration requires individuals to execute on a discrete set of tasks, for which there is a defined set of knowledge, skills, and abilities.[122] This technical body of knowledge and these particular skills can be taught, and administrators who deviate from these rules can be identified. Second, many licensed occupations tend to have—and to foster actively—an ethic and culture of integrity and professionalism. We want election administrators to see themselves as impartial administrators, not as partisans for one side or the other.

Raising the barriers to entry to become an election administrator is also desirable. We do not want mere partisans and hacks—and particularly those who seek office on a whim in order to advance the cause of their party or faction—to have control over administering elections. Rather, we want administrators who will fairly and neutrally

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117. KLEINER, *supra* note 111, at 8–10.

118. Edlin & Haw, *supra* note 113, at 1096, 1098, 1113.

119. *See id*. at 1113.

120. THE WHITE HOUSE, *supra* note 113, at 12.

121. *See* YOUNG, *supra* note 110, at 59–61; THE WHITE HOUSE, *supra* note 113, at 13.

122. *See* Hasen, *supra* note 25, at 988–89 (noting that "the fundamental principles of neutral election administration are not subject to serious debate," namely, "[e]very eligible voter should be allowed to vote, and votes should be counted accurately, in a system that is as free from fraud as possible" (footnotes omitted)); Brown & Hale, *supra* note 105, at 113 (suggesting that the knowledge, skills, and abilities for election administration include understanding the architecture of election administration; familiarity with the local, state, and federal agencies and private sector actors; and the ability to analyze information related to current challenges in light of current policy).

conduct a process that generates trust and confidence. Elections also suffer from the lemons problem. Even though elections are competitive, election administration is not. Voters cannot know whether an election is administered fairly in advance, and they would have no real alternative in any case, save for boycotts and protests.[123] Professional training and licensing can therefore enhance public confidence that the administrators are acting in line with professional guidelines.

Importantly, the primary drawbacks of occupational licensing largely do not apply in the election administration context. The worry that licensing erects a barrier that means too few doctors, nurses, lawyers, or hairdressers, does not apply in the case of election administration. There are a discrete number of government jobs as election administrators in each jurisdiction. While a town or state could, without licensing, have twice as many hairdressers or nurses, that is just not the case for election administrators. The number of positions is determined by the government and funded by taxpayers, not by the marketplace. Similarly, the concern that a smaller labor pool will drive up prices for consumers makes little sense in the context of election administrators. There are no "consumers" in the traditional market analysis who are paying a fee for a particular service. Nor are election administrators able to set their charges. Salaries are determined according to government pay scales.

Other downsides to licensing regimes are even less problematic. To the worry that licensing might reduce innovation and entrepreneurship in the profession, election administration is an area in which entrepreneurship beyond the accepted methods of practice is undesirable. Administrators should follow election rules and interpret them transparently. Innovation can be accommodated through updates to licensing requirements. Restrictions to interstate mobility are also less concerning. While the work of a doctor or hairdresser does not change across state lines, election laws do—and considerably so. Haircuts and knee surgery are the same in Toledo or Tallahassee; election administration is not. As we have noted, the American election administration system is not a single system. It is highly fragmented and varied.[124] Administrators must know the rules and system in their particular jurisdiction. Their work is inevitably contextual.

The primary downside of making election administration into a licensed profession is ensuring there are enough people who have and get the qualifications for the positions. That is, if there are a specified number of positions, will people still get a license, knowing that they

123. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

124. *See* Hasen, *supra* note 25, at 952; Briffault, *supra* note 19, at 1423–24.

might not get the job? Here, it is notable to compare other entry restrictions for government positions. The Postal Service requires background checks and successful passage of an examination for certain positions.[125] Air traffic controllers have to meet a variety of requirements, including citizenship, age, medical status, background check, pre-employment examination, work experience or a Bachelor's degree, and training.[126] In these cases, and others, entry restrictions are designed in a manner that still enables a wide range of people to apply for jobs.

More broadly, we think that a licensing regime offers two additional benefits as a way to professionalize election administration: political feasibility and policy efficacy. It is hard to imagine the United States adopting a nationalized election administration system, akin to what is common in some other countries. But licensing individual workers does not require building a federal agency or any other structural change to the fragmented election administration system. This makes it potentially far more politically feasible. States where Democrats control a trifecta could pass such a system without the blowback of it seeming like a reform designed for partisan advantage. In fact, such an approach might even get some Republican support because it addresses issues of voter and election fraud. The proposal thus operates as a form of anti-hardball, turning down the temperature of partisan politics over time—even though it might need to be passed along partisan lines.[127]

Although the modesty of the proposal makes it politically viable, it does not render the proposal impotent. In fact, licensing would be an effective solution for a limited set of problems. First, because licensure is mandatory (unlike optional certification), licensing would make it harder for partisans, hacks, and unserious individuals to take over election administration. It would not be impossible for a con artist to play the long game over a matter of months or years and still end up in the job. But it would be harder. Second, licensing would give defenders of election integrity—including administrators themselves—more standing and support. They could point to following these best practices and to their role as licensed professionals as further proof of the integrity of elections. This could, in turn, help with public trust on the margins. In a moment of potential democratic crisis, this is no small thing. Finally, professionalization could help retain and support election administrators

125. *USPS Online Job Application System – Assessment & Examination*, U.S. POSTAL SERV., https://about.usps.com/careers/job-application/usps-assessment-examination.pdf [https://perma.cc/P4P9-NJXY].

126. *Be ATC - FAA Hiring Air Traffic Controllers*, FAA (Sept. 5, 2023), https://www.faa.gov/be-atc [https://perma.cc/467Z-N3AP].

127. *See* David E. Pozen, *Hardball and/as Anti-Hardball*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 949 (2019).

themselves. As we shall see, design of an election administration licensing regime should also include penalties for interfering with or intimidating professional administrators. Such protections could, at least somewhat, stem the tide of retirements and resignations from administrators who are tired of being harassed.

In recent years, some state legislatures have targeted election administrators with criminal penalties and other policy actions that largely seem designed to harass, intimidate, and retaliate against administrators who successfully ran elections during the COVID-19 pandemic.[128] Licensing would not stop such efforts. State legislatures can, of course, pass laws governing their elections so long as they comply with constitutional requirements. But this proposal does offer a pathway for states that want to improve, professionalize, and defend their election system from individuals who might seek to subvert it for partisan ends.

C. Designing an Election Administration Professional Licensing System

How should a state design a licensing regime for election administration? As we have seen, every state's election administration system is different. As a result, there is not necessarily a one-size-fits-all approach for licensing election administrators. In this Section, we discuss some of the major components and offer a menu of options for how states might think about designing a licensing regime to professionalize election administration.

1. APPLICABILITY

To whom should licensing apply? State systems are structured differently, so each state would need to determine the universe of administrators who would need to be licensed. At the extremes, one could imagine requiring licensing only for the top-level state administrators—the chief elections officer and perhaps a few others—or requiring it of all persons involved in elections, including poll workers. Neither of these approaches are likely to be suitable. Limiting requirements to top officials will not cover the county or city level officials that are on the front lines of most administrative issues, and including poll workers is likely infeasible. Instead, states should consider requiring licensure for all election administrators, even the many who perform these roles part-time, except ordinary poll workers.

128. Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Court*s, 2022 WIS. L. REV. 1337, 1354–56; Briffault, *supra* note 19, at 1423–24.

Such an approach would bring some challenges. In many states, election administrators are elected officials—either at the local level (like county clerks) or at the state level (like the secretary of state). States could take a few different approaches to addressing this situation. One possibility is to require licensure as a necessary qualification to run for those elected positions. Qualifications for some elected positions are common in the United States. For example, attorneys general and judges are required to be lawyers,[129] which in turn, means being licensed by the state bar association. Another possibility is that states could reduce the number of elected election administration positions, and instead turn these positions into career, civil service jobs. This would have the further benefit of enabling professional growth and development over time (in the form of promotions to broader geographic authority) and of preventing bad actors from using democracy to undermine democracy. But either approach would help safeguard the system.

2. EDUCATION, EXAMINATION, AND TRAINING

Licensure should include two sets of education requirements: pre-job requirements and continuing education. Pre-job requirements could include some minimal education levels (*e.g.*, a high school equivalence degree) plus a high score on an examination that tests general civics knowledge and election administration processes. This would require applicants for jobs to want to learn about the election system and invest in it before being entrusted to manage it. Administrators should also be required to satisfy continuing education requirements, like lawyers and other professions do. Such a requirement would serve two functions: first, it would keep administrators up to date on changes and challenges (like cybersecurity), and second, it would help them build a professional culture and ethos. Groups like the Elections Center already provide conferences and training that could satisfy these requirements. After passing the examination, possible administrators should also have to take and pass a training course before they can be hired. This course would teach them more about the election system and help instill in them a deeper sense of duty and integrity. The Elections Center currently runs voluntary training programs. States could require this course or further develop the training they currently offer.

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129. *See Judges and Hearing Officers*, U.S. BUREAU OF LAB. STAT. (Sept. 20, 2023), https://www.bls.gov/ooh/legal/judges-and-hearing-officers.htm; *Attorney General Office Characteristics*, NAT'L ASS'N ATT'YS GEN., https://www.naag.org/news-resources/research-data/attorney-general-office-characteristics/ [https://perma.cc/FM5G-MHLU].

3. EXPERIENCE

While requiring experience in election administration might create a chicken and egg problem for applicants, requiring some degree of proof of commitment to fair elections might not. For example, applicants could be required to be registered to vote in their state or jurisdiction and to have actually voted in some number of prior elections. They could also be required to have volunteered as a poll-worker on election day. Such a requirement would ensure that administrators have a demonstrated commitment to civic duties, and it would weed out some set of individuals who only recently became engaged in elections.

4. PERSONAL REQUIREMENTS

As with other important government positions, states could require that administrators meet requirements of U.S. citizenship, residency in the state, a background check, and good moral character. These kinds of requirements are common in other professions.[130]

5. PENALTIES AND DISCIPLINE

Professional election administrators, like other licensed professionals, need to be held responsible for violating their professional duties. In other areas, licensed professionals can lose their license for violating their duties. Scholars have shown that licensing boards dominated by members of the profession are often too lax with respect to enforcement.[131] Therefore, states have several design choices to overcome this problem of lax enforcement. They could assign the disciplinary function to an independent board of senior state officials in roles that encourage integrity. For example, this independent board might include one election official, chosen at random, plus the chief justice of the state supreme court, the solicitor general of the state, and other similar officials. This would ensure that election administrators do not protect their own. Alternatively, the enforcement for violations could be placed in the hands of a single official, such as the secretary of state. With adequate resources, a single enforcement official could act with

130. For example, the American Bar Association recommends that lawyers satisfy moral character and fitness standards to gain admission to the bar. *See* NAT'L CONF. BAR EXAM'RS & ABA SECTION LEGAL EDUC. & ADMISSIONS TO BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2021 vii–ix (Judith A. Gundersen & Claire J. Guback eds., 2021).

131. ALLENSWORTH, *supra* note 112.

more dispatch, though of course the priority given to enforcement will be more dependent on the single official in which it is vested.[132]

6. Penalties for Interfering with, Harassing, or Threatening Administrators

At the same time, states should include provisions that criminalize interfering with election administration or harassing, intimidating, or threatening election administrators.[133] Administrators should be free and safe in their ability to run the machinery of American democracy. Those who seek to prevent them from doing so should face significant penalties.[134]

7. Transitioning to Licensing

States would also need to build in a transition period to this new system. This would likely include grandfathering in current administrators with respect to the experience and other entry requirements, and a transition period for current administrators to go through a training module. New administrators would have to meet these requirements. At the same time, the Elections Center and other independent organizations should ramp up their offerings, so that they will be able to meet the demand and needs of state requirements.

III. Case Study: Michigan

Michigan has one of the most decentralized election systems in the nation, involving over 1,600 county, city, and township clerks in election administration.[135] Although Michigan requires training and certification for the vast majority of its election officials, it imposes no training requirements on county or state canvassing boards—the very boards that drew President Trump's and the nation's attention in 2020.[136]

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132. For an account of why single agency officials can be superior to multimember bodies, see Ganesh Sitaraman & Ariel Dobkin, *The Choice Between Single Director Agencies and Multimember Commissions*, 71 Admin. L. Rev. 719 (2019).

133. These protections have merit independent from any reforms for education and licensing of state election administrators, see, for example, Garrett & Becker, *supra* note 77, at 226–28 (arguing for greater protection of election officials and workers from threats), but also should be paired with requirements for licensure.

134. Such penalties could be adopted independent of this proposal, of course.

135. *Michigan's Elections System Structure Overview*, Mich. Dep't of State, https://www.michigan.gov/sos/elections/voting/voters/special-topics/michigans-elections-system-structure-overview [https://perma.cc/K7PS-2WLK].

136. *See id.*

A. Structure of State Administration

Michigan's chief elections official is an elected secretary of state, who has general "supervisory control" over local election officials and oversees the Bureau of Elections.[137] In addition to rulemaking powers,[138] the secretary of state is responsible for the education and certification of most election officials.[139] Within the Department of State, the Bureau of Elections administers these training and certification programs.[140] The secretary of state appoints the Director of the Bureau of Elections, who is vested with the power to perform the secretary of state's duties with respect to election administration under the direction of the secretary.[141]

Michigan has three other sets of local and statewide election officials: (1) county and local election commissioners; (2) election precinct inspectors; and (3) state and county canvassing boards. Each county has a board of county commissioners, composed of the county clerk, chief probate judge, and the county treasurer.[142] Local municipalities—cities, townships, and villages—also have their own election commissions, each composed of a clerk and two other municipal officials.[143] The city and township commissions appoint precinct inspectors and are obliged to appoint "as nearly as possible" an equal number of precinct inspectors from each major party.[144] Each of Michigan's eighty-three counties also has a county board of canvassers,[145] which is responsible for canvassing the votes cast and reporting the results to the state board of canvassers.[146] The county boards are composed of four members, two from each of the major parties.[147] The state board of canvassers compile the county returns and determine the results of statewide elections.[148] The state board is also composed of four

137. *See* MICH. COMP. LAWS § 168.21 (2023).

138. MICH. COMP. LAWS § 168.31(1)(a).

139. MICH. COMP. LAWS §§ 168.31(1)(j)–(m).

140. *See* MICH. COMP. LAWS § 168.33.

141. MICH. COMP. LAWS § 168.32(1).

142. *Get to Know Your Election Officials*, MICH. DEP'T OF STATE, https://www.michigan.gov/sos/elections/voting/voters/special-topics/get-to-know-your-election-officials [https://perma.cc/8MNY-5PSV].

143. For cities, the election commission is composed of the city clerk, city attorney, and the city assessor. For townships, the board is composed of the township clerk, township supervisor, and township treasurer. *Michigan's Election System Structure Overview*, *supra* note 135.

144. MICH. COMP. LAWS § 168.674(2).

145. *See Michigan's Election System Structure Overview*, *supra* note 135.

146. *Id.*; MICH. COMP. LAWS § 168.826(1).

147. *See* MICH. COMP. LAWS §§ 168.24a(1), (7).

148. MICH. COMP. LAWS § 168.841(1).

members, two from each major political party, appointed by the governor with the advice and consent of the senate.[149]

B. Training and Certification Requirements

Michigan has extensive training and certification requirements for election officials, and yet those requirements still have significant gaps. At the center of Michigan's election training requirements are clerks of the county elections and local election commissions. The clerks of these election commissions must be trained by the Director of the Bureau of Elections, and complete training at least every two years to maintain "accreditation" as a clerk.[150]

The Bureau of Elections Director is required to train both new and continuing county clerks, who in turn have initial responsibility for training local elections board within the county.[151] The director is also required to train the county, city, and township clerks who in turn train precinct inspectors.[152] Precinct inspectors "shall not serve" unless they have completed a training in the preceding two years, or pass a test administered by the county, city, or township commission.[153]

The training required by both clerks and precinct inspectors, while not referred to as a licensing requirement, is a functional equivalent because it requires training as a condition of serving in the role.

These training requirements, however, have three significant gaps:

(1) *Non-Clerk Members of Election Commissions*. For counties, the board of election commissions is composed of the county clerk, the chief or only probate judge and the county treasurer.[154] For city boards, the boards include the city clerk, city attorneys and assessors.[155] For township boards, township clerks, township supervisors and treasurers.[156] Michigan's training and continuing education requirements for "accreditation" expressly apply to "clerks," but do not make explicit mention of the non-clerk members of these boards receiving election training. The Michigan Election Code could be read as applying training requirements to "election officials" not merely the clerks on these boards.[157] But in current practice, the non-clerk members of election

149. MICH. COMP. LAWS § 168.22(3).
150. MICH. COMP. LAWS § 168.33(4).
151. *See* MICH. COMP. LAWS § 168.33.
152. MICH. COMP. LAWS § 168.33(2).
153. MICH. COMP. LAWS § 168.683.
154. MICH. COMP. LAWS § 168.23(1).
155. MICH. COMP. LAWS § 168.25.
156. MICH. COMP. LAWS § 168.26.
157. For instance, the Michigan Secretary of State's obligations include the duty to "[e]stablish and require attendance by all new appointed or elected *election officials* at

commissions at the county and local levels are not required to undergo and maintain state election training.[158]

(2) *County and State Boards of Canvassers*. Neither the state nor county boards of canvassers are required to undergo training in election administration.

(3) *Secretary of State and Elections Bureau Director*. Neither the secretary of state nor the Director of the Bureau of Elections are required to undergo training in election administration, though these two officials are responsible for administrating training programs across the state.

C. Political Controversy

During the 2020 election, President Trump's allegations of voter fraud in Michigan ignited partisan conflict on the Wayne County Board of Canvassers (which includes Detroit) and at the State Board of Canvassers.[159] The Wayne County Board of Canvassers initially blocked certification of the county's votes.[160] Both Republican members of the board voted against certification.[161] Following intense public criticism and the secretary of state's agreement to conduct a later audit of Wayne County precincts, both Republican members voted to certify the county on a second round of voting.[162] Although that certification ended the Wayne County board's legal duties, both Republican members (reportedly after contacts from President Trump) signed affidavits later that night to rescind their votes to certify the county.[163] No legal provision enabled them to withdraw their certifying vote, so the Wayne County certification process ended.

As the controversy over the Wayne County Board of Canvassers was unfolding, attention and partisan lobbying turned to the State Board of Canvassers. The Bureau of Elections recommended that the State

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an initial course of instruction within 6 months before the date of the election," and to "[e]stablish a curriculum for comprehensive training and accreditation of all county, city, township, and village *officials* who are responsible for conducting elections." MICH. COMP. LAWS §§ 168.31(1)(j), (*l*) (emphases added).

158. *See* E-mail from Kristin Dougan, Manager, Training & Election Assistance, Mich. Bureau of Elections, to Kevin Stack (Aug. 5, 2023) (on file with the *Wisconsin Law Review*).

159. *See* McKenzie Sadeghi, *Fact Check: Wayne County Board of Canvassers Voted Twice on Certifying Election Results*, USA TODAY (Nov. 19, 2020, 2:59 PM), https://www.usatoday.com/story/news/factcheck/2020/11/19/fact-check-wayne-countyboard-voted-twice-certify-election-results/3776203001/ [https://perma.cc/59RU-ARDF].

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

Board certify the statewide results, noting that it "did not identify unusual patterns in unofficial reporting; the examples identified were typical human error similar to that which has occurred in past elections."[164] Despite this recommendation, after a heated meeting on November 23, the board narrowly certified Michigan's sixteen electoral votes on a 3-0-1 vote, with one Republican member of the board abstaining.[165] The other Republican member, Aaron Van Langevelde, at the time, a staff attorney and policy advisor for the Michigan House Republican Caucus, voted to certify the election results.[166] Van Langevelde emphasized that the law provided no discretion to the board, and that they needed to vote for certification.[167] He remarked, "We have no authority to request an audit, to delay or block certification, to review inaccuracies that happened at the local level. Those results have been certified. Our duty is to look at those certified results, look at the math, and then certify. The statute couldn't be more clear."[168] Van Langevelde's term on the board expired at the end of January 2021, and the Michigan Republican Party did not nominate him for another term.[169]

D. An Election Administration Licensing Regime for Michigan

A licensing requirement for all members of Michigan's election commissions, as well as its county and state canvassing boards, could be implemented by new legislation or by regulations promulgated by the secretary of state under existing statutory authority.[170] Michigan has a Bureau of Professional Licensing (BPL), which oversees occupation and health licensing for private positions, such as accountants, barbers, engineers, real estate brokers, and a myriad of health occupations.[171] There is no doubt the BPL has experience with licensed professions. But given that the secretary of state also has experience with training and

164. David Boucher, *Michigan Board Votes to Certify Election Results Despite GOP Calls to Delay*, DETROIT FREE PRESS (Nov. 23, 2020, 7:40 PM), https://www.freep.com/story/news/politics/elections/2020/11/23/did-michigan-certifyelection-results-board-canvassers/6388768002/ [https://perma.cc/K77M-MDNJ].

165. *See id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. Paul Egan, *Republican Party Moves to Replace GOP Board Member Who Voted to Certify Michigan Election*, DETROIT FREE PRESS (Jan. 18, 2021, 8:20 PM), https://www.freep.com/story/news/politics/elections/2021/01/18/gop-does-notreappoint-vanlangevelde-board-canvassers/4207223001/ [https://perma.cc/89RN-UY8Y].

170. *See* MICH. COMP. LAWS § 168.31(1)(a) (2023).

171. *Professional Licensing*, LICENSING & REGUL. AFFS., https://www.michigan.gov/lara/bureau-list/bpl [https://perma.cc/9F25-QA9W].

accreditation requirements for clerks and these requirements are for public positions, it makes more sense for the secretary of state to administer a new licensing or expanded accreditation requirements in house.[172]

Alternatively, the secretary of state has a broad statutory grant of authority to promulgate rules "for the conduct of elections and registrations in accordance with the laws of this state."[173] The Michigan courts have not narrowed this broad grant of authority, so the secretary could presumably issue regulations that require licensure for all election administrators. In addition, the secretary has authority to "[e]stablish . . . training and accreditation" for election clerks as well as to create "continuing election education program[s]."[174] Under this authority, the secretary could implement expanded accreditation and continuing education requirements, which would amount to a new licensing regime.

As suggested above, this licensing regime should apply not only to clerks of election commissions, but also to the non-clerk members of those commissions as well as to the members of county and state canvassing boards. It also could be extended to the secretary of state, or at least to the Director of the Bureau of Elections. That would mean that every official with significant responsibility over elections at the local and state level would be subject to professional licensing requirements or similar accreditation.

CONCLUSION

Although there has been significant progress in providing education to election officials and many states have made efforts to require some form of training for those officials, there are still significant gaps in the coverage and scope of training requirements for election officials. We argue that introducing a professional licensing regime—which requires training and continuing education for election officials—would be a pragmatic step toward professionalizing election administration. Given that the knowledge, skills, and capacities involved in election administration are well established, these jobs should be recognized as the professions that they are. This increased professionalization of election administration may help boost their credibility and, just as important, reinforce to the election officials themselves their norms of professionalism.

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172. Briffault, *supra* note 19, at 1463 (arguing that it makes sense to vest training of local officials with state not local authorities).

173. MICH. COMP. LAWS § 168.31(1)(a).

174. MICH. COMP. LAWS §§ 168.31(1)(j)–(k).

This kind of reform is most likely to be politically viable in states controlled by Democrats, but we believe the proposal to be one that could be supported by some in the Republican Party as well. A licensing regime could move election administration toward greater professionalization in ways that could supplement other ongoing efforts to improve the reliability, integrity, and quality of American democracy.

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