

# COMMENTS

## WHY BLUE CITIES CAN CHALLENGE ELECTION SUBVERSION UNDER THE ELECTIONS CLAUSE\*

### I. INTRODUCTION

“It’s no longer about who gets to vote; it’s about making it harder to vote. It’s about who gets to count the vote and whether your vote counts at all.”<sup>1</sup> President Biden contrasted the tactics of Republican state legislators in states such as Georgia in 2021 with the tactics of white state and local public officials during the Jim Crow era.<sup>2</sup> He labeled the contemporary tactics “voter suppression” and “election subversion,” respectively.<sup>3</sup>

Under Jim Crow laws, literacy and character tests ensured that many Black citizens in some regions of the country did not vote at all.<sup>4</sup> Contemporary voter suppression laws, by contrast, make it more difficult for people who are eligible to vote to register or cast a ballot, with a disproportionate effect on Democratic voters, communities of color, and socially marginalized groups.<sup>5</sup> And recent election subversion laws empower state executive agencies or legislatures to investigate and punish local election administrators and oversee and overturn local election results.<sup>6</sup> While the House of Representatives went on to pass the legislation that President Biden alleged would remedy voter

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1. President Joseph R. Biden, Remarks by President Biden on Protecting the Right to Vote, (Jan. 11, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/01/11/remarks-by-president-biden-on-protecting-the-right-to-vote> [<https://perma.cc/DYM7-3437>].

2. *Id.*

3. *Id.*

4. See ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS 16–17 (2015) (comparing the election regimes in states in the American South before and after the major civil rights legislation of the 1960s).

5. *Id.* at 10–11.

6. Richard L. Hasen, *Trump Is Planning a Much More Respectable Coup Next Time*, SLATE (Aug. 5, 2021, 11:48 AM), <https://slate.com/news-and-politics/2021/08/trump-2024-coup-federalist-society-doctrine.html> [<https://perma.cc/HE5M-ZLN9>] [hereinafter Hasen, *A Much More Respectable Coup*].

suppression and election subversion,<sup>7</sup> the legislation failed to pass in the Senate, where Democrats could not overcome the filibuster to end debate.<sup>8</sup>

Election law expert and political scientist Richard L. Hasen identifies this phenomenon of aspiring partisan election subversion as not only unprecedented in American history but also the most important current threat to the electoral system.<sup>9</sup> He compares legislative attempts at subversion to the storming of the U.S. Capitol on January 6, 2021, with the difference being that the former bear a patina of legal legitimacy.<sup>10</sup> According to Hasen, the subversion could take multiple forms.<sup>11</sup> One involves state legislatures directly substituting their choice for the certified choice of the state's voters.<sup>12</sup> Another involves state and local election administrators abusing their discretion and committing fraud to achieve their desired partisan outcomes.<sup>13</sup>

This Comment focuses on the latter form of election subversion as it affects populous Democratic areas—or “blue cities”—in swing states like Georgia. According to David F. Damore, Robert E. Lang, and Karen A. Danielsen, a group of social scientists and public policy experts, the political landscape of the United States is better explained by a blue-metropolitan area/red-state paradigm than by a blue-state/red-state paradigm.<sup>14</sup> They examine the effect of “the political, cultural, demographic and economic differences distinguishing Democratic-voting blue metros from Republican-voting outlying rural and exurban areas [on] electoral politics and state policymaking.”<sup>15</sup> Their case studies of particular states explore how state political institutions “can empower rural interests at the expense of metros.”<sup>16</sup>

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7. Carl Hulse, *Sinema Rejects Changing Filibuster, Dealing Biden a Setback*, N.Y. TIMES (Jan. 13, 2022), <https://www.nytimes.com/2022/01/13/us/politics/sinema-voting-rights-bill.html> [<https://perma.cc/4UU4-2YRJ>].

8. Carl Hulse, *After a Day of Debate, the Voting Rights Bill is Blocked in the Senate*, N.Y. TIMES (Jan. 19, 2022), <https://www.nytimes.com/2022/01/19/us/politics/senate-voting-rights-filibuster.html> [<https://perma.cc/3S37-2FLX>].

9. Fabiola Cineas, *Protecting Voting Rights Isn't Enough To Save Democracy*, VOX (Jan. 13, 2022, 1:57 PM), <https://www.vox.com/22879991/election-subversion-voting-rights-us-elections-democracy> [<https://perma.cc/9LAQ-RC38>].

10. Hasen, *A Much More Respectable Coup*, *supra* note 6.

11. *Id.*

12. *Id.* Reporting has uncovered that former Vice President Pence supposedly considered accepting elector votes for Donald Trump from states that had certified Joe Biden as the winner. Richard L. Hasen, *Here's What Congress Can Do To Keep the Next Trump from Stealing an Election*, WASH. POST (Sept. 29, 2021, 10:33 AM), <https://www.washingtonpost.com/outlook/2021/09/29/stolen-elections-legislation-prevention> [<https://perma.cc/RS6Q-6V2T>]. President Trump's lawyer justified creating the alternative slates of electors by claiming that the certified results failed to account for widespread voter fraud. *Id.*

13. See Hasen, *A Much More Respectable Coup*, *supra* note 6.

14. David F. Damore, Robert E. Lang & Karen A. Danielsen, *BLUE METROS, RED STATES 1–2* (2020).

15. *Id.* at 2. President Trump challenged his announced losses to then-candidate Joe Biden in 2020 in a subset of these states, including Pennsylvania, Georgia, Michigan, Wisconsin, Arizona, and Nevada. See Ann Gerhart, *Election Results Under Attack: Here Are the Facts*, WASH. POST. (Mar. 11, 2021, 7:10 PM), <https://www.washingtonpost.com/elections/interactive/2020/election-integrity/> [<https://perma.cc/AU6C-R9X6>].

16. Damore, Lang & Danielsen, *supra* note 14, at 23. More pointedly, the authors observe that such disempowerment targets “the large-scale urban complexes driving the county's population and economic growth.” *Id.* at 385.

Focused on “the swing states that currently hold the balance of power in the Electoral College and the U.S. Senate,”<sup>17</sup> Damore, Lang, and Danielsen argue that “the 2016 and 2018 elections fortified the urban/rural delineation of the parties’ electoral bases” “by accelerating the conflation of density, race and ethnicity, and partisanship.”<sup>18</sup> Election subversion is one manifestation of this geographical polarization. Republican legislatures and election officials attempt to subvert the political will of their states’ blue metropolitan areas by asserting greater control over the administration of the elections there.<sup>19</sup> In other words, Republican partisanship today importantly consists of marshaling statewide power to blunt the representation of metropolitan area candidates and policy choices.

To be sure, many Republicans avowedly believe that, in the words of President Trump at the first presidential debate of the 2020 election, “[b]ad things happen in Philadelphia” and other blue cities.<sup>20</sup> Yet President Trump’s many claims of election fraud and maladministration throughout the 2020 election cycle lacked a factual basis.<sup>21</sup> Republican state legislators in states where Joe Biden was certified the winner by a narrow margin have continued to echo President Trump.<sup>22</sup> Over six months after President Biden took office, Arizona state senator Wendy Rogers (R) called for the prosecution of election administrators and the decertification of Arizona’s election results.<sup>23</sup> Georgia state senator Burt Jones (R) demanded an investigation into Georgia’s Secretary of State, alleging double-scanned and illegally cast ballots.<sup>24</sup> And, in Pennsylvania, Senate President Pro Tempore Jake Corman (R) supported an election audit involving the subpoenaing of election records and equipment.<sup>25</sup>

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17. *Id.* at 6.

18. *Id.*

19. *See id.* at 66–73 (describing the 2018 Georgia governor election between Democrat Stacey Abrams and Georgia’s secretary of state (and chief elections officer) Republican Brian Kemp).

20. *See* Danny Hakim, Stephanie Saul, Nick Corasaniti & Michael Wines, *Trump Renews Fear of Voter Intimidation as G.O.P. Poll Watchers Mobilize*, N.Y. TIMES, <https://www.nytimes.com/2020/09/30/us/trump-election-poll-watchers.html> [<https://perma.cc/W6DL-GVRU>] (Nov. 3, 2020); Kabir Khanna & Jennifer De Pinto, *What Drives Republican and Trump Voters’ Belief in Widespread Voter Fraud?*, CBS NEWS (July 21, 2021), <https://www.cbsnews.com/news/republicans-belief-voter-fraud-opinion-poll/> [<https://perma.cc/YK4W-N5PE>].

21. *See State Details of AP’s Review of Potential Voter Fraud Cases*, AP (Dec. 14, 2021), <https://apnews.com/article/joe-biden-arizona-donald-trump-voter-registration-tucson-c64bba90b8c074bf8bdfd2c751b6b0f2> [<https://perma.cc/5V9J-TQ9Z>] (reporting that the number of cases of potential voter fraud in six 2020 battleground states represented between only 0.03% and 1.9% of Biden’s margins of victory in the states).

22. *See, e.g.*, Allan Smith, *Wendy Rogers Embraced Trump’s Stolen Election Lie and Watched Her Star Rise*, NBC NEWS (Nov. 14, 2021, 1:05 PM), <https://www.nbcnews.com/politics/politics-news/wendy-rogers-embraced-trump-s-stolen-election-lie-watched-her-n1283510> [<https://perma.cc/C5KK-TFD9>]; Mike Brest, *Georgia Legislator Seeks Investigation into Raffensperger Over 2020 Election “Failures,”* YAHOO! NEWS (July 15, 2021), <https://news.yahoo.com/georgia-legislator-seeks-investigation-raffensperger-194600008.html> [<https://perma.cc/CWD2-XJXD>].

23. Smith, *supra* note 22.

24. Brest, *supra* note 22.

25. *Corman Applauds Commonwealth Court Ruling Supporting Election Investigation Subpoena*, PA SENATE REPUBLICANS (Jan. 10, 2022), <https://www.pasenategop.com/news/corman-applauds-commonwealth-court-ruling-supporting-election-investigation-subpoena/> [<https://perma.cc/BB8D-C6ZW>]; *Restoring Faith in Our Elections*, PA ELECTION INVESTIGATION, <https://paelectioninvestigation.com> [<https://perma.cc/3PCZ-D53V>] (last visited Feb. 1, 2023).

These allegations have generated more than partisan acclaim and campaign contributions.<sup>26</sup> They have also inspired considerable legislative activity regulating ballot access, the voting process, and election administration and oversight.<sup>27</sup> The purpose of this legislation is to shape the next election rather than relitigate the last one. Some provisions of these laws disproportionately impact Democratic voters within a state,<sup>28</sup> an effect that corresponds to the suppression tactic President Biden identified.<sup>29</sup> Others, however, create the possibility for the subversion tactic that he and election law scholars present as more alarming.<sup>30</sup>

This Comment refers to these laws aimed at subverting elections in blue cities as partisan targeting laws. Partisan targeting laws are (1) state laws (2) passed by Republican legislators after the 2020 presidential election (3) that alter the powers of local election administrators (4) so that elections in blue cities are more likely to produce Republican victories in federal elections.<sup>31</sup>

State election laws delegate pivotal operations in the administration of federal elections to “political subdivisions.”<sup>32</sup> Partisan targeting laws alter a political subdivision’s election administration powers in two ways. The first is suspension and removal from office of local election administrators for alleged violations of state election law, with the threat of formally increased state control.<sup>33</sup> The second is financial and criminal penalties for such violations, the threat of which indirectly controls local election administrators by chilling the vigor with which they perform their duties.<sup>34</sup>

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26. Smith, *supra* note 22.

27. See, e.g., S.B. 202 § 5, 156th Gen. Assemb., Reg. Sess. (Ga. 2021) (limiting absentee ballot access, prohibiting the distribution of certain items to voters in line, and providing for the temporary replacement of local election administrators by state appointees); Stephen Fowler, *What Does Georgia’s New Voting Law SB 202 Do?*, GBP NEWS, <https://www.gpb.org/news/2021/03/27/what-does-georgias-new-voting-law-sb-202-do> [https://perma.cc/2DXM-QNCK] (Mar. 27, 2021, 10:08 PM) (stating that S.B. 202 outlaws “passing out food and water to voters within 150 feet of the building that serves as a poll, inside a polling place or within 25 feet of any voter standing in line”).

28. See Complaint, *United States v. Georgia*, No. 121-cv-02575-JPB (N.D. Ga. June 25, 2021) (alleging that provisions of Georgia S.B. 202 limit opportunities for voters to obtain an absentee ballot, and the counting of out-of-precinct provisional ballots, prohibit the distribution of food and water to persons in line to vote, and intend to deny or abridge the right of Black Georgians to vote in violation of Section 2 of the Voting Rights Act).

29. See Biden, *supra* note 1.

30. See *id.*

31. While I do not rule out the possibility that Democratic states have passed or will pass partisan targeting laws, Democratic states tend to pursue partisanship in elections through gerrymandering, which the Supreme Court has found constitutional, see *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491–93 (2019), and since 2020 they have passed laws making it easier to vote, rather than more difficult. *Voting Laws Roundup: February 2022*, BRENNAN CTR. FOR JUST. (Feb. 9, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2022> [https://perma.cc/VH68-ZEN5].

32. See Justin Weinstein-Till, *Election Law Federalism*, 114 MICH. L. REV. 747, 752 (2016) (observing that states “delegat[e] most election administration responsibilities to local governments”); *Political Subdivision*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining a political subdivision as “[a] division of a state that exists primarily to discharge some function of local government”).

33. See *infra* Part II.A.1 for a discussion of partisan targeting laws that call for punishing local election administrators through suspension and removal from office for violations of state election law.

34. See *infra* Part II.B.2 for a discussion of partisan targeting laws that call for punishing local election administrators through financial and criminal penalties.

Section III argues that the populous Democratic political subdivisions likely to be harmed by partisan targeting laws have standing to challenge them under the Elections Clause of the U.S. Constitution.<sup>35</sup> In the absence of Congressional action, blue-city challenges may be an important vehicle through which to protect Democratic voters' rights in the localities that ultimately determine party control within the federal government. These key areas must be protected from unjustified and unconstitutional partisan encroachment.

## II. OVERVIEW

To raise a challenge to partisan targeting laws in federal court, political subdivisions in blue swing states would first have to demonstrate that (1) they have standing to bring a constitutional claim against their parent state under the Elections Clause and (2) they can prevail on the merits of that claim. Section II provides an overview of the areas of law that constrain theories of this challenge.

Part II.A discusses provisions of six partisan targeting laws enacted after the 2020 United States presidential election that create mechanisms for election subversion.<sup>36</sup> The laws contain two distinct types of provisions altering the power of local election administrators: suspension and removal provisions, and financial and criminal penalty provisions.<sup>37</sup> Part II.B reviews the extent of the duty imposed on states under the Elections Clause to pass laws that regulate federal elections.<sup>38</sup> Part II.C identifies relevant aspects of state election law that federal courts have addressed their duty and competence to intervene in, such as infringements on the right to vote, state legislatures' and state courts' enforcement of state election law, and partisanship in election administration—all on constitutional bases other than the Elections Clause.<sup>39</sup> Lastly, Part II.D reviews arguments over the limited conditions under which political subdivisions can bring a claim under the U.S. Constitution against their parent states in federal court.<sup>40</sup>

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35. See *infra* Section III for a discussion of a political subdivision's standing to challenge partisan laws under the Constitution's Elections Clause. U.S. CONST. art. I, § 4, cl. 1. ("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 Regulations, except as to the Places of chusing Senators.").

36. See, e.g., S.B. 202, 156th Gen. Assemb., Reg. Sess. (Ga. 2021).

37. See *infra* Part II.A.

38. See *infra* Part II.B.

39. See *infra* Part II.C.

40. See *infra* Part II.D.

### A. Partisan Targeting Provisions

More partisan targeting laws have been suggested than introduced,<sup>41</sup> and more have been introduced than enacted.<sup>42</sup> The following discussion focuses on two types of provisions that appear in multiple enacted laws. Part II.A.1. discusses suspension and removal provisions,<sup>43</sup> and Part II.A.2 discusses financial and criminal penalty provisions.<sup>44</sup> The provisions are distinctive exercises of state legislative or executive power over local officials implementing state election law.<sup>45</sup> All laws discussed are currently in effect.<sup>46</sup>

#### 1. Suspension and Removal Provisions

Suspension and removal provisions create mechanisms by which state officials, agencies, or legislatures can exert direct control over the local administration of elections.<sup>47</sup> Section 33 of Iowa Senate File 413, enacted into law in March 2021,<sup>48</sup> provides that the state commissioner or their designee may oversee the activities of a county commissioner sixty days before or after an election.<sup>49</sup> “Oversee” includes issuing a written notice and instructions for technical infractions.<sup>50</sup> The fine for each infraction can rise to \$10,000, and a commissioner who does not pay or appeal a fine within sixty

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41. Reid J. Epstein, *Wisconsin Republicans Push To Take Over the State's Elections*, N.Y. TIMES (Nov. 19, 2021), <https://www.nytimes.com/2021/11/19/us/politics/wisconsin-republicans-decertify-election.html> [<https://perma.cc/R7DW-BEJZ>] (reporting on calls within Wisconsin Republican politics, including from Wisconsin's Republican U.S. Senator, to abolish the bipartisan state agency that oversees elections in favor of direct control by the state legislature).

42. See, e.g., Luis Acosta Herrera, Opinion, *Election Law Changes Could Have Been a Lot Worse in Arizona, If Not for Efforts Like This*, AZ CENTRAL (July 22, 2021, 6:00 AM), <https://www.azcentral.com/story/opinion/op-ed/2021/07/22/arizona-voting-law-changes-relatively-sane-thanks-bipartisan-effort/8028444002> [<https://perma.cc/PQP4-DE8B>] (distinguishing partisan Arizona state election reforms introduced in 2021 from those that became law).

43. See *infra* Part II.A.1.

44. See *infra* Part II.A.2; compare, e.g., S.B. 644 § 3, 93rd Gen. Assemb. Reg. Sess. (Ark. 2021) (suspension and removal provision) with S.F. 413 § 9, 88th Gen. Assemb., Reg. Sess. (Iowa 2021) (criminal penalty provision).

45. Compare Iowa S.F. 413 § 24 (providing that an executive-branch official may oversee an election in a subdivision under certain conditions), with Ark. S.B. 644 § 3 (providing that a standing committee of the legislature may take over operation of elections in a subdivision).

46. See Iowa S.F. 413 § 73; S.B. 202 § 52, 156th Gen. Assemb., Reg. Sess. (Ga. 2021); S.B. 1 § 9.04, 87th Legis. Sess. (Tex. 2021); H.B. 2183 § 11, 2021 Legis. Sess. (Kan. 2021); S.B. 90 § 2, 2021 Legis. Sess. (Fla. 2021); Rachel Herzog, *Arkansas Session Rolls Out Array of Vote Laws*, ARK. DEMOCRAT-GAZETTE (May 9, 2021, 11:14 AM), <https://www.arkansasonline.com/news/2021/may/09/session-rolls-out-array-of-vote-laws> [<https://perma.cc/AK7P-Z3S5>].

47. Compare Iowa S.F. 413 § 24 (providing that an executive-branch official may oversee an election in a subdivision under certain conditions), with Ark. S.B. 644 § 3 (providing that a standing committee of the legislature may take over operation of elections in a subdivision).

48. Stephen Gruber-Miller, *Gov. Kim Reynolds Signs Law Shortening Iowa's Early and Election Day Voting*, DES MOINES REG. (Mar. 9, 2021, 10:44 AM), <https://www.desmoinesregister.com/story/news/politics/2021/03/08/iowa-governor-kim-reynolds-signs-law-shortening-early-voting-closing-polls-earlier-election-day/6869317002/> [<https://perma.cc/88LY-PDJ2>].

49. Iowa S.F. 413 § 24.

50. *Id.*

days is suspended from office for a period of up to two years.<sup>51</sup> Any suspended county commissioner is replaced by their deputy, and the state commissioner may direct their state staff to assist the new county commissioner.<sup>52</sup> Guidance issued by the state commissioner that is not subject to the rulemaking process may define what counts as an infraction.<sup>53</sup> This statute clearly demonstrates an extension of state legislative power over local election administration.

Similarly, Section 6 of Georgia Senate Bill 202, also enacted in March 2021,<sup>54</sup> provides that the Georgia State Election Board may “suspend county or municipal superintendents and appoint an individual to serve as the temporary superintendent in a jurisdiction.”<sup>55</sup> The temporary superintendent “shall exercise all the powers and duties of a superintendent as provided by law, including the authority to make all personnel decisions related to any employees of the jurisdiction who assist with carrying out the duties of the superintendent”<sup>56</sup> for at least nine months.<sup>57</sup> Section 5 of Senate Bill 202 provides that the chairperson of the board be elected by the General Assembly; that two members each be elected by majorities of the two houses of the General Assembly; and that the two members each be nominated, then appointed, on the basis of party affiliation.<sup>58</sup>

Arkansas Senate Bill 644, enacted in April 2021,<sup>59</sup> gives the Joint Performance Review Committee—a standing committee of the state legislature<sup>60</sup>—the power to recommend to the State Board of Election Commissioners that an election official be decertified for a violation of state election law.<sup>61</sup> If the Joint Performance Review Committee considers the violation(s) “severe” and a threat to a “county’s ability to conduct an equal, free, and impartial election, or the appearance of an equal, free and impartial election,” the State Board may then take over elections in the offending county.<sup>62</sup> Senate Bill 644 took effect without Republican Governor Asa Hutchinson’s signature.<sup>63</sup> The governor described it as an impermissible legislative “takeover” of election reviews.<sup>64</sup>

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51. *Id.* § 7.

52. *Id.*

53. *Id.* § 14.

54. Nick Corsaniti, *Georgia G.O.P. Passes Major Law To Limit Voting Amid Nationwide Push*, N.Y. TIMES (Mar. 25, 2021), <https://www.nytimes.com/2021/03/25/us/politics/georgia-voting-law-republicans.html> [<https://perma.cc/AFU3-LAEE>].

55. S.B. 202 § 6, 156th Gen. Assemb., Reg. Sess. (Ga. 2021).

56. *Id.*

57. *Id.* § 7.

58. *Id.* § 5.

59. S.B. 644, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021).

60. *Joint Performance Review (JPR)*, ARK. STATE LEG., Joint Performance Review (JPR), <https://www.arkleg.state.ar.us/Committees/Detail?code=520> [<https://perma.cc/LC55-VQ48>] (last visited Feb. 1, 2023).

61. Ark. S.B. 644 § 3.

62. *Id.*

63. Herzog, *supra* note 46.

64. *Id.*

## 2. Financial and Criminal Penalty Provisions

Financial and criminal penalty provisions subject local election officials to new or enhanced penalties, other than suspension or removal, for violations of state election law.<sup>65</sup> Kansas House Bill 2183 makes the receipt of private funds by a local election administrator for use in administering elections a felony.<sup>66</sup> Iowa Senate File 413 not only imposes a fine on a county commissioner for each technical infraction of Iowa election law<sup>67</sup> but also makes it a felony for any election administrator to fail to follow or implement state guidance issued outside of the rulemaking process.<sup>68</sup> Such conduct is criminal, even if not intentional.<sup>69</sup>

These statutes supplement penalty provisions already present throughout state election law,<sup>70</sup> but civil and criminal penalties were simultaneously added along with suspension and removal provisions.<sup>71</sup> The civil penalties run high: Texas Senate Bill 1 imposes on counties a civil penalty of \$1,000 for each failure of a local election administrator to comply with state voter registration list rules.<sup>72</sup> Florida Senate Bill 90 imposes a civil penalty of \$25,000 on a local election administrator if an election employee does not continuously monitor a ballot drop box.<sup>73</sup>

In response to the suspension and removal provision and the financial and criminal penalties provision added to state election bills, Democratic senators introduced the Preventing Election Subversion Act of 2021.<sup>74</sup> Section 4 of the Act finds that these provisions grant “wide latitude to suspend or remove local election administrators in cases where the statewide election administrators identify whatever the State deems to be a violation.”<sup>75</sup> Section 4 also notes the lack of an intent requirement and the possible variability of the standards for suspension or removal.<sup>76</sup> The Act would limit the removal of local election administrators to cases of “inefficiency, neglect of duty, or malfeasance in office.”<sup>77</sup>

The Act would also allow for removal of state proceedings to federal court, and for judicial review of decisions remanding the case to the state court or agency in which a

65. Compare S.F. 413 § 28, Explanation, 89th Gen. Assemb., Reg. Sess. (Iowa 2021) (as introduced, Feb. 18, 2021) (criminalizing departures from any state election guidance issued outside the rulemaking process), with S.B. 90 § 28, 123rd Leg., Reg. Sess. (Fla. 2021) (as enrolled, May 2, 2021) (imposing a \$25,000 penalty on a local administrator if an election drop box is not monitored by an election employee at any time for any reason).

66. H.B. 2183 § 1(c), (e), 89th Leg., Reg. Sess. (Kan. 2021) (as substituted by Senate, Mar. 20, 2021).

67. See Iowa S.F. 413 § 7. It is not clear whether each instance of a voter in a group or polling place in a subdivision allegedly affected by the violative conduct constitutes a separate infraction. See *id.*

68. *Id.* § 9, Explanation.

69. Preventing Election Subversion Act, S. 2155, 117th Cong. § 4(a)(11) (2021).

70. See, e.g., Fla. S.B. 90 § 27 (maintaining a prior provision that makes it a felony for a local election administrator to release results of the mail vote before polls close).

71. See Iowa S.F. 413 §§ 7–9; see also *Voting Laws Roundup: October 2021*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021> [<https://perma.cc/R5UJ-ECP9>].

72. S.B. 1 § 7.01, 87th Leg., 1st Called Sess. (Tex. 2021) (as engrossed, July 13, 2021).

73. Fla. S.B. 90 § 28.

74. See S. 2155.

75. *Id.* § 4(a)(11).

76. *Id.* §§ 4(a)(11)–(12).

77. *Id.* § 4(b)(1).



proceeding began.<sup>78</sup> The Attorney General must be given notice of a suspension or removal proceeding.<sup>79</sup> And finally, the Act creates a private right of action for an aggrieved local administrator and allows the United States to intervene in any suspension or removal proceeding.<sup>80</sup> Its provisions do not overlap with those of the For the People Act and John Lewis Voting Rights Act that President Biden spoke in unsuccessful support of,<sup>81</sup> or with those of the Electoral Count Modernization Act.<sup>82</sup> As of summer 2022, the Act has been referred to the Committee on Rules and Administration.<sup>83</sup>

### B. *The Purpose of the Elections Clause*

During the 2020 election season, many challenges to state election results after they were announced (and to state COVID-19-related ballot access decisions) raised novel claims under the Elections Clause.<sup>84</sup> The Elections Clause reads that “[t]he 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 Regulations, except as to the Places of choosing Senators.”<sup>85</sup> “Manner” includes “notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and [the] making and publication of election returns.”<sup>86</sup> Numerous Republican plaintiffs challenging election results in 2020 argued that elected state legislatures were the only state entities that could regulate federal elections, to the exclusion of state election officials, governors, or courts interpreting state law.<sup>87</sup>

Debates among the Framers and early Congresses about the meaning of the Elections Clause came to varying conclusions about the power of state legislatures.<sup>88</sup> The prevailing view held that the clause was an expansive grant of congressional power over states and state legislatures, while the minority view contended that the clause gave Congress the power only to regulate federal elections by default entirely should states refuse to do so.<sup>89</sup>

Writing for the Court in *Arizona v. Inter Tribal Council of Arizona, Inc.*,<sup>90</sup> Justice Antonin Scalia identified two functions for the clause: to “impose[] the duty . . . to

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78. *Id.* § 4(b)(4).

79. *Id.* § 4(b)(5)(A).

80. *Id.* §§ 4(b)(2)(A), 4(b)(5)(b).

81. *See* Hulse, *supra* note 7; *see also* H.R. 1, 117th Cong. (2021) (as passed by the House, Mar. 3, 2021); H.R. 4, 117th Cong. (2021) (as passed by the House, Aug. 24, 2021).

82. ANGUS KING, ET. AL, ELECTORAL COUNT MODERNIZATION ACT (2022), <https://www.king.senate.gov/imo/media/doc/mcg22051.pdf.pdf> [<https://perma.cc/A3UY-AXFA>] (last visited Feb. 1, 2023) (discussion draft).

83. S. 2155, 117th Cong. (2021).

84. *See* Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997, 999 (2021).

85. U.S. CONST. art. I, § 4, cl. 1.

86. *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

87. Sweren-Becker & Waldman, *supra* note 84, at 999–1000.

88. *See id.* at 1008–33, 1062–63.

89. *See id.*

90. 570 U.S. 1 (2013).

prescribe the time, place, and manner of electing Representatives and Senators” on States, and to “confer[] the power to alter those regulations or supplant them altogether” on Congress.<sup>91</sup> He clarified that “[t]he Clause’s substantive scope is broad,”<sup>92</sup> allowing Congress to “provide a complete code for congressional elections[.]”<sup>93</sup> The question in *Inter Tribal Council* was whether the National Voter Registration Act preempted an Arizona state law requiring documentary proof of citizenship to register in federal elections.<sup>94</sup> The Court held that it did.<sup>95</sup>

Writing for the Court two years later, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,<sup>96</sup> Justice Ginsburg identified the “dominant purpose” of the clause as being “to empower Congress to override state election rules.”<sup>97</sup> She identified another purpose, however: “to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate.”<sup>98</sup> This purposive reading of the clause expanded upon Justice Scalia’s reading in *Inter Tribal Council*.<sup>99</sup>

The issue in *Arizona Independent Redistricting Commission* was whether an Arizona referendum amending the state constitution to establish an independent commission and transfer redistricting authority from the state legislature to the commission violated the Elections Clause.<sup>100</sup> The Court held that it did not.<sup>101</sup> Specifically, the Court reasoned that

it would be perverse to interpret the term “Legislature” in the Elections Clause so as to exclude lawmaking by the people, particularly where such lawmaking is intended to check legislators’ ability to choose the district lines they run in, thereby advancing the prospect that Members of Congress will in fact be “chosen . . . by the People of the several States.”<sup>102</sup>

In other words, the case’s interpretation of the Elections Clause rested on “[t]he importance of direct democracy as a means to control election regulations”<sup>103</sup> and “the fundamental premise that all political power flows from the people.”<sup>104</sup>

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91. *Id.* at 8.

92. *Id.*

93. *Id.* at 8–9 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

94. *Id.* at 5.

95. *Id.* at 20.

96. 576 U.S. 787 (2015).

97. *Id.* 814–15.

98. *Id.* at 815.

99. Compare *id.* at 814–15, with *Inter Tribal Council*, 570 U.S. at 8–9.

100. *Ariz. Indep. Redistricting Comm’n*, 576 U.S. at 792.

101. *Id.* at 793.

102. *Id.* at 820 (quoting U.S. CONST. art. I, § 2, cl. 1).

103. *Id.* at 823.

104. *Id.* at 824.

C. *When Federal Courts Intervene in State Election Administration*

Federal courts must determine when they are obligated, permitted, or forbidden to hear a certain kind of claim or granting a certain form of relief.<sup>105</sup> Any claim under the Elections Clause would need to argue that a federal court should or must intervene to prevent the relevant state legislative, executive body, or court from enforcing a partisan law in a partisan manner against a blue city.<sup>106</sup> In presenting this claim, the subdivision would have to argue that, as a corporate entity, it has been delegated the duty to collectively express its voting residents' political will.<sup>107</sup>

Part II.C.1 illuminates how federal courts will intervene to remove unjustified burdens that States place on the individual right to cast a ballot, including, though under more limited circumstances than in the past, when that burden falls disproportionately on communities of color.<sup>108</sup> Part II.C.2 shows that federal courts' ability or inclination to intervene is less certain when the alleged harm is the conduct of a branch of state government enforcing state law in a particular election.<sup>109</sup> Lastly, Part II.C.3 explains how partisanship provides a basis for intervention on at least two definite grounds, namely when it animates racial gerrymandering or malapportionment.<sup>110</sup>

1. State Laws that Infringe on the Right To Vote

States have a duty under the Elections Clause to pass election laws, but Supreme Court precedent treats state residents' right to vote as a fundamental right that the Court will step in to protect against state laws of certain kinds.<sup>111</sup> As a result, the Court applies strict scrutiny to state laws that infringe the right to vote.<sup>112</sup> However, the Court has also held that state laws that take the form of "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself" are not such infringements.<sup>113</sup>

The Court applies a balancing test to determine whether the severity of the burden the state law places on the right to vote—a right protected by the First and Fourteenth

105. See *Lance v. Coffman*, 549 U.S. 437, 439 (2007) ("Federal courts must determine that they have jurisdiction before proceeding to the merits."); cf. Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENV. U. L. REV. 317, 318 (2012) ("I believe that the most important theme about the Roberts Court . . . is how it is consistently closing the courthouse doors. And I think this is pernicious because rights can be taken away directly, or they can be removed by making sure that nobody can go to court to vindicate them.")

106. Cf. Erwin Chemerinsky, *Closing the Courthouse Doors to Civil Rights Litigants*, 5 U. PA. J. CONST. L. 537, 539 (2002) (describing the Burger Court's tendency to channel civil rights litigation from federal court to state court through the doctrines of abstention and standing and the Rehnquist Court's tendency to preclude judicial forums for such litigation altogether).

107. Cf. Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. REV. 1, 35 (2012) (arguing that "[l]ocalities have enormous untapped potential as enforcers of constitutional norms and full participants in law and policy debates").

108. See *infra* Part II.C.1.

109. See *infra* Part II.C.2.

110. See *infra* Part II.C.3.

111. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

112. See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667–68, 670 (1966).

113. *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983); see, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (upholding, under the Anderson standard, an Indiana law that required voters to present government-issued photo ID at the polls against a facial attack).

Amendments—is matched by a narrow tailoring of the law to advance a compelling state interest.<sup>114</sup> For example, in *Crawford v. Marion County Election Board*,<sup>115</sup> a plurality of the Court upheld an Indiana law requiring that voters show government-issued photo ID at the polls.<sup>116</sup> The Court reasoned that, because the state still allowed for people who could not afford a driver’s license or other photo ID to vote by executing an affidavit at the local clerk’s office, the law was sufficiently tailored to achieve the state interests of preventing voter fraud and promoting faith in the integrity of elections.<sup>117</sup>

Debates have ensued over whether the state need only assert the interest in protecting integrity and reliability or whether “a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed” is required.<sup>118</sup> Section 2 of the Voting Rights Act of 1965 also empowers federal courts under the Fifteenth Amendment to strike down state laws that abridge or deny the right to vote based on race,<sup>119</sup> though recent precedent has relaxed the standard under which such laws are scrutinized.<sup>120</sup>

## 2. State Courts’ and Legislatures’ Enforcement of State Election Law

Another context where federal courts have intervened in a state’s administration of federal elections is when a state court order, pursuant to state election law, does not contain adequate safeguards to ensure equal protection of citizens’ votes.<sup>121</sup> *Bush v. Gore*<sup>122</sup> involved a different constitutional clause regulating elections, the Presidential Electors Clause, which vests States with the power to determine the “Manner” by which they select their choice for president.<sup>123</sup> Specifically, the Court considered whether a recount ordered by the Florida Supreme Court to determine which candidate won the state’s electoral votes violated the Electors Clause by usurping the legislature’s role in establishing how electors are selected.<sup>124</sup> The Court ruled on Equal Protection rather than Electors Clause grounds, holding that the ordered recount process was “inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer.”<sup>125</sup> These procedures did not satisfy “rudimentary requirements of equal treatment and fundamental fairness” that the Court reasoned were inherent in equal protection.<sup>126</sup>

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114. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

115. 553 U.S. 181 (2008).

116. *Id.* at 188–89.

117. *Id.* at 197–204.

118. *Id.* at 209 (Souter, J., dissenting).

119. 52 U.S.C. § 10301.

120. *See Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021) (upholding Arizona laws prohibiting the counting of out-of-precinct ballots and the submission of a ballot by someone other than the voter or their family member or caregiver under Section 2 of the Voting Rights Act).

121. *See Bush v. Gore*, 531 U.S. 98, 109–11 (2000).

122. 531 U.S. 98 (2000).

123. U.S. CONST. art. II, § 1, cl. 2.

124. *Bush v. Gore*, 531 U.S. at 103.

125. *Id.* at 109.

126. *Id.*

The Court noted that it was not deciding the question of “whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.”<sup>127</sup> Rather, the Court’s holding was “limited to the present circumstances,”<sup>128</sup> casting doubt on the case’s precedential value.<sup>129</sup> The decision did not act as “an engine of election administration reform,” driving states to ensure that state legislatures select “an honest broker to design and implement fair and impartial electoral rules” or driving federal courts to force states to do so.<sup>130</sup>

As of the writing of this Comment, no controlling opinion of the Court has cited *Bush v. Gore*.<sup>131</sup> However, the opinion was cited in an order concurrence and an order dissent of cases litigating the 2020 election.<sup>132</sup> These citations lend little support to the theory that *Bush* has potential as a “*dormant* . . . constitutional precedent” that federal courts could cite in providing remedies for partisan election administration.<sup>133</sup> However, the citation in *DNC v. Wisconsin State Legislature*<sup>134</sup> supports the theories about the exclusive authority of state legislatures to regulate elections to the exclusion of other state actors.<sup>135</sup> The citation focuses on the role of federal courts in protecting the intent of state legislatures implementing their responsibilities under the Elections and Presidential Electors Clauses from state judicial interference.<sup>136</sup>

Concurring in the denial of an application to reinstate a Wisconsin district court’s order moving back the State’s absentee ballot receipt deadline for COVID-19-related reasons, Justice Kavanaugh cited *Bush v. Gore* for the proposition that “the text of the Constitution [Article II] requires federal courts to ensure that state courts do not rewrite state election laws.”<sup>137</sup> The reason is that “a state court’s ‘significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.’”<sup>138</sup>

At one extreme, supporters of the Electoral College vote certification challenge argued that state legislatures could unilaterally cast their states’ electoral college votes for their preferred candidate, no matter the apparent outcome of the statewide vote—that

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127. *Id.*

128. *Id.*

129. See Chad Flanders, Comment, *Bush v. Gore and the Uses of “Limiting,”* 116 YALE L.J. 1159, 1159 (2007).

130. See Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 4 (2007) [hereinafter Hasen, *Bush v. Gore*].

131. See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 35 n.2 (2013) (Thomas, J., dissenting); *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring); *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 733 (2021) (Thomas, J., dissenting).

132. See *DNC*, 141 S. Ct. at 34 n.1 (Kavanaugh, J., concurring); *Degraffenreid*, 141 S. Ct. at 733 (Thomas, J., dissenting).

133. Hasen, *Bush v. Gore*, *supra* note 130.

134. 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring).

135. See *supra* Part II.B.

136. See *DNC*, 141 S. Ct. at 34 n.1 (Kavanaugh, J., concurring).

137. *Id.*

138. *Id.* (citation omitted).

is, for Trump over Biden.<sup>139</sup> *Bush v. Gore* may thus be a live precedent for supporters of election subversion.

### 3. Partisan Election Administration

Along with the revival of *Bush v. Gore*, a watershed 2019 case, *Rucho v. Common Cause*,<sup>140</sup> suggests that federal intervention in state legislatures' activity in the elections arena to enforce the Constitution is disfavored. Where *Bush* concerned the inconsistent manner of an ordered recount,<sup>141</sup> *Rucho* concerned frank partisanship in districting.<sup>142</sup> Plaintiffs from Maryland and North Carolina challenged the drawing of legislative districts in their states to favor, respectively, the Democratic and Republican parties under the First Amendment, Equal Protection, and Elections Clauses.<sup>143</sup> The Court held that "partisan gerrymandering claims present political questions beyond the reach of the federal courts."<sup>144</sup>

Under the political question doctrine, federal courts cannot decide, and thus must deem nonjusticiable, fundamentally political questions.<sup>145</sup> *Baker v. Carr*,<sup>146</sup> a case involving the alleged malapportionment of Tennessee's legislative districts,<sup>147</sup> identified the factors that courts must use to determine whether the issue in a case is a nonjusticiable political question.<sup>148</sup> These factors include whether the Constitution assigns the issue to another branch of government, whether there are manageable judicial standards for resolving the issue, whether resolution requires a policy judgment, and whether resolution by the federal court would show a lack of respect for the other branches of government.<sup>149</sup> Applying the factors is a case-by-case inquiry.<sup>150</sup>

The *Rucho* Court reasoned that the Framers were aware of partisan gerrymandering and concluded that some degree of it must be constitutional when they left state legislatures to draw electoral districts.<sup>151</sup> Its political question analysis focused on the judicially discoverable and manageable standards factor.<sup>152</sup> The Court conceded that excessively partisan districting was "incompatible with democratic principles[.]"<sup>153</sup> It

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139. See Trip Gabriel & Stephanie Saul, *Could State Legislatures Pick Electors To Vote for Trump? Not Likely*, N.Y. TIMES (Jan. 5, 2021), <https://www.nytimes.com/article/electors-vote.html> [<https://perma.cc/5TE4-8FC4>].

140. 139 S. Ct. 2484 (2019).

141. *Bush v. Gore*, 531 U.S. 98, 100–03 (2000).

142. *Rucho*, 139 S. Ct. at 2491–93.

143. *Id.*

144. *Id.* at 2506.

145. G. Michael Parsons, *Gerrymandering & Justiciability: The Political Question Doctrine After Rucho v. Common Cause*, 95 IND. L.J. 1295, 1299 (2020).

146. 369 U.S. 186 (1962).

147. *Id.* at 192–95.

148. *Id.* at 217.

149. *Id.*

150. See *id.* ("The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.")

151. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494–96 (2019).

152. See *id.*

153. *Id.* at 2506.

nevertheless concluded that no such proper standards for identifying unconstitutional partisan gerrymandering were available.<sup>154</sup> In other words, the Constitution required federal courts to tolerate state legislatures' partisan drawing of state districts.<sup>155</sup>

The Court did note two established exceptions: racial gerrymandering and malapportionment.<sup>156</sup> In the Court's words, these are areas in which "there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts."<sup>157</sup> The Court reasoned that the Fourteenth and Fifteenth Amendments gave the federal courts such a role to play to ensure, respectively, that each person's vote counts equally and that the vote is not denied or infringed on the basis of race in the drawing of districts.<sup>158</sup> Under this reasoning, the allocation of power between political parties to shape electoral districts is not subject to a similar constitutional command.<sup>159</sup> Some scholars have suggested that the holding is so broad as to amount to a "normative defense of . . . the legitimacy of employing partisanship to acquire political power" that bars any role for federal courts in policing partisanship in election administration.<sup>160</sup>

#### D. Political Subdivision Standing

If the Elections Clause protects blue cities from partisan targeting, and federal courts deem a demand for relief in such a case justiciable, a threshold question is whether political subdivisions are proper plaintiffs. The history of political subdivision standing doctrine does not clearly indicate that political subdivisions may bring suit against their parent states under the Elections Clause.<sup>161</sup> A well-argued dissent in a Tenth Circuit case from 2010, however, articulates a persuasive theory of why the Elections Clause belongs to a category of constitutional rights under which political subdivisions can bring such claims.<sup>162</sup>

Part II.D.1 reviews the Supreme Court cases announcing the categorical rule that political subdivisions lack standing to bring any constitutional claims whatsoever against their parent states.<sup>163</sup> Part II.D.2 discusses a Supreme Court racial gerrymandering case that casts doubt on this categorical rule in the context of states' manipulation of political

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154. *Id.* ("[J]udicial action must be governed by *standard, by rule,*' and must be 'principled, rational, and based upon reasoned distinctions' found in the Constitution or laws. Judicial review of partisan gerrymandering does not meet those basic requirements." (alteration in original) (citation omitted)).

155. *Cf. infra* Section III.

156. *Rucho*, 139 S. Ct. at 2495–96.

157. *Id.* The Court does not address the role or nonrole of federal courts in resolving issues that do not arise from the drawing of congressional districts under the "manner" requirement of the Elections Clause. *See id.*

158. *See id.* at 2496–97 (explaining the Fourteenth Amendment basis for the malapportionment exception and—citing *Gomillion v. Lightfoot*, a case that bases its holding on the Fifteenth Amendment—the reasoning for the racial gerrymandering exception).

159. *See id.*

160. *See, e.g.,* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Dirty Thinking About Law and Democracy in Rucho v. Common Cause*, in *ACS SUPREME COURT REVIEW* 293, 315 (3d ed. 2019).

161. *See infra* Part II.D.

162. *See infra* Part II.D.3.

163. *See infra* Part II.D.1.

subdivision boundaries for partisan ends.<sup>164</sup> Part II.D.3 examines two cases out of the Tenth Circuit that have paved the way for political subdivisional standing to bring constitutional claims against parent states under limited circumstances.<sup>165</sup> The dissent in the latter case articulates a more expansive view than the majority regarding the constitutional rights that political subdivisions have standing to vindicate.<sup>166</sup> As a result, a persuasive theory of why political subdivisions have standing under the Elections Clause against their parent states exists and could serve as persuasive authority in other circuits.<sup>167</sup>

### 1. The Early Categorical Prohibition

State legislatures pass election laws, but political subdivisions do much of the work of running elections.<sup>168</sup> And although political subdivisions run elections as instrumentalities of the state, they also run them on behalf of the residents of the subdivisions, acting as “units of representative democracy.”<sup>169</sup> Partisan targeting laws also have consequences for the employment, reputation, liberty, and even safety of local election administrators.<sup>170</sup> The Elections Clause question, however, is whether the partisan targeting laws cause a constitutional injury to political subdivisions considered as delegates of a state’s duty to regulate federal elections under the Clause. If so, the subdivisions themselves ought to have recourse in the federal courts for exercises of state legislative and executive power that suspend, remove, or otherwise penalize them, on a partisan basis, over their implementation of state law.<sup>171</sup> Such recourse would aim to ensure that subdivisions have to administer federal elections pursuant to state election law, and that they are punished under state election law only to the extent that the state law is consistent with the U.S. Constitution.<sup>172</sup>

One doctrinal issue resulting from the status of political subdivisions as instrumentalities of the state is whether they have standing to bring suit against their

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164. See *infra* Part II.D.2.

165. See *infra* Part II.D.3.

166. See *infra* Part II.D.3.

167. See *infra* Part III.A.

168. See Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 778–80 (2016) (surveying the varieties of delegation of election responsibilities under state law to local governments).

169. Morris, *supra* note 107, at 45, 35 (“Localities have enormous untapped potential as enforcers of constitutional norms and full participants in law and policy debates.”).

170. See Fredreka Schouten, *Embattled Election Chief in Fulton County Resigns*, CNN (Nov. 3, 2021), <https://www.cnn.com/2021/11/03/politics/fulton-county-election-chief-resigns/index.html> [<https://perma.cc/4LZB-5CZM>] (reporting on the resignation of the head election official in the county in which most of Atlanta is located prior to any possible removal by the state election board).

171. See *infra* Part III.A.; cf. S. 2155, 117th Cong. (2021) (creating a private right of action for local election officials who are the target of proceedings but not for political subdivisions that may have election operations and results impacted in a partisan fashion by such proceedings).

172. Cf. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 4–5 (2013) (construing the National Voter Registration Act requirement that states “accept and use” a uniform federal form to register voters in federal elections to preempt Arizona election law where the federal form required an averment of citizenship on penalty of perjury and state law required documentary evidence of citizenship).



state.<sup>173</sup> A state's challenge to standing is one issue that could be dispositive as to whether, for example, Fulton County—in which most of Atlanta is located—or its Registration and Elections Board can sue the state of Georgia in federal court to challenge targeting provisions that take power away from Fulton County election officials.<sup>174</sup>

To have standing in federal court, a plaintiff generally must show an injury in fact that is concrete, particularized, and actual or imminent; that the defendant likely caused the injury; and that judicial relief would likely redress the injury.<sup>175</sup> Political subdivision standing doctrine concerns the threshold requirements that federal courts have determined a political subdivision, such as a city, must meet before applying the general Article III test.<sup>176</sup> The doctrine reflects federal courts' judgments about their lack of jurisdiction "over certain controversies between political subdivisions and their parent states."<sup>177</sup>

Federal courts have traced this doctrine back to two Supreme Court cases: *Hunter v. City of Pittsburgh*<sup>178</sup> and *City of Trenton v. New Jersey*.<sup>179</sup> In *Hunter*, residents of the then-extant city of Allegheny disputed a petition brought by the city of Pittsburgh to merge the two.<sup>180</sup> A Pennsylvania statute provided the voting mechanism by which the merger could be effected.<sup>181</sup> Allegheny alleged that the statute violated the Contracts, Takings, and Due Process Clauses of the U.S. Constitution.<sup>182</sup> Focusing on the Contracts Clause and Due Process claims, which the Court analyzed as raising substantial federal questions, the Court reached stark conclusions.<sup>183</sup>

On the Contracts Clause claim, the Court found that an implied contract between the city and its citizens and taxpayers, which would bar the use of taxes for a consolidated city, did not exist.<sup>184</sup> Thus, there was no contract impaired by state law under the Contracts Clause.<sup>185</sup> The due process claim alleged that the statute's method of voting enabled a larger, worse-run city to overpower and swallow up a smaller, better-run city without any recourse for the residents of the latter who would likely become subject to

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173. See Morris, *supra* note 107, at 22–25 (analyzing the rule from *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907) that political subdivisions cannot bring constitutional claims against their parent states in light of federal courts doctrine).

174. See Jane C. Timm & Teaganne Finn, *Part of Republican Trend, Georgia Election Board Moves Toward Fulton County Takeover*, NBC NEWS (Aug. 18, 2021, 5:19 PM), <https://www.nbcnews.com/politics/elections/georgia-election-board-review-fulton-county-votes-setting-possible-takeover-n1277060> [<https://perma.cc/Y5GV-YHFK>] (reporting on an investigation that could spawn a challenge to a suspension and/or removal proceeding).

175. *Transunion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

176. See *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 630 (10th Cir. 1998).

177. *City of Hugo v. Nichols*, 656 F.3d 1251, 1255 (10th Cir. 2011).

178. 207 U.S. 161 (1907).

179. 262 U.S. 182 (1923); see *Gomillion v. Lightfoot*, 364 U.S. 339, 342–43 (1960). *But see* *City of Hugo v. Nichols*, 656 F.3d 1251, 1255 (10th Cir. 2011).

180. *Hunter*, 207 U.S. at 161–65.

181. *Id.* at 161.

182. *Id.* at 165–67.

183. *Id.* at 175–76.

184. *Id.* at 176–77.

185. *Id.*

increased taxation.<sup>186</sup> On this claim, the Court explained the principles that “[t]he number, nature and duration” of cities’ powers “to acquire, hold, and manage personal and real property” and “the territory over which they shall be exercised rest[] in the absolute discretion of the State.”<sup>187</sup>

Decided eighty-five years before *Lujan v. Defenders of Wildlife*,<sup>188</sup> which articulated the modern test for Article III standing,<sup>189</sup> *Hunter* implied that political subdivisions could not have a dispute against states because the two are not distinct parties.<sup>190</sup> States can control the existence and powers of cities “conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.”<sup>191</sup> Thus, the Court held that the plaintiffs’ appeal necessarily failed because the state had absolute power over municipal property held and used for government purposes.<sup>192</sup>

In *City of Trenton*, Trenton, New Jersey challenged a judgment for the state regarding a statutory license fee for the diversion of stream or lake water for public use above a certain threshold.<sup>193</sup> The city argued that the fee not only violated a decades-old grant from the state for unlimited use but also (as was claimed of the merger statute in *Hunter*) violated the Contracts, Takings, and Due Process clauses of the U.S. Constitution.<sup>194</sup> The Supreme Court roundly rejected the city’s arguments, finding “no substantial federal question.”<sup>195</sup>

The Court cited *Hunter* for the proposition that the city, qua political subdivision, is “a convenient agency for the exercise of such of the governmental powers of the state as may be intrusted [sic] to it.”<sup>196</sup> Given this principal-agent relationship, the Court wrote that “the state may withhold, grant or withdraw powers and privileges as it sees fit.”<sup>197</sup> The Court elaborated on *Hunter* by noting that state constitutional protections, to the contrary, could provide political subdivisions some measure of protection against state power.<sup>198</sup> However, the Court limited its holding to the law at issue in the case, meaning to the New Jersey statute and the constitutional provisions on which Trenton relied.<sup>199</sup>

Ten years later, in *Williams v. Mayor and City Council of Baltimore*,<sup>200</sup> the Supreme Court issued a more categorical doctrinal statement about the constitutional rights of

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186. *Id.* at 177.

187. *Id.* at 178.

188. 504 U.S. 555 (1992).

189. *See Transunion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

190. *See Hunter*, 207 U.S. at 179.

191. *Id.*

192. *Id.*

193. *City of Trenton v. New Jersey*, 262 U.S. 182, 183 (1923).

194. *Id.*

195. *Id.* at 192.

196. *Id.* at 185–86.

197. *Id.* at 187.

198. *See id.*

199. *See id.* at 192 (“We hold that the city cannot invoke these provisions of the federal Constitution against the imposition of the license fee or charge for diversion of water specified in the state law here in question.”).

200. 289 U.S. 36 (1933).

political subdivisions than in *Hunter* or *City of Trenton*. The *Williams* Court applied the concept of standing, writing that a political subdivision is “without standing to invoke the protection of the Federal Constitution.”<sup>201</sup> *Williams* involved a challenge by the leaders of Baltimore and Annapolis to a state statute exempting much of the property in use by the Washington, Baltimore & Annapolis Electric Railroad Company, which was in state receivership at the time, from county and city taxes, among other charges.<sup>202</sup> The plaintiffs challenged the statute on federal equal protection, state constitutional, and state statutory construction grounds.<sup>203</sup> Justice Cardozo expanded *City of Trenton*’s holding in dispatching the federal equal protection argument: “A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator.”<sup>204</sup>

## 2. Possible Standing in the Election Context

Although *Williams* has not been overruled, later cases have qualified and recharacterized its holding.<sup>205</sup> One case arose from discrimination in voting.<sup>206</sup> In *Gomillion v. Lightfoot*,<sup>207</sup> the Court, despite the seemingly broad holding of *Williams*, heard a constitutional challenge to an act of the Alabama legislature redrawing the boundaries of the City of Tuskegee.<sup>208</sup> The redrawing of the lines had the effect of removing most of the city’s Black voters and very few of its white ones—reshaping the city from a square to an “uncouth twenty-eight-sided figure.”<sup>209</sup> Although the lawsuit was brought by Tuskegee residents against local officials, the relief they sought was a declaratory judgment that the state law violated the U.S. Constitution, and an injunction against enforcement of the state act by local officials.<sup>210</sup> The Middle District of Alabama granted the local officials’ motion to dismiss, reasoning that the federal courts had no control over duly elected and convened legislatures’ setting of municipal boundaries, and the Fifth Circuit Court of Appeals affirmed the lower court.<sup>211</sup>

Writing for the Supreme Court, Justice Frankfurter framed the case as raising “serious questions . . . concerning the power of a State over its municipalities in relation to the Fourteenth and Fifteenth Amendments.”<sup>212</sup> Answering the respondents’ argument that the power states exercised over political subdivisions is absolute, Justice Frankfurter wrote that this argument misstated “the reach and rule of this Court’s decisions in the leading case of *Hunter v. City of Pittsburgh* . . . and related cases.”<sup>213</sup> Those cases, he

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201. *Id.* at 47.

202. *Id.* at 38–39.

203. *Id.* at 40–47.

204. *Id.* at 40.

205. *See, e.g.,* *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Branson School District RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998).

206. *Gomillion*, 365 U.S. 339.

207. 364 U.S. 339 (1960).

208. *Id.* at 340.

209. *Id.*

210. *Id.*

211. *Id.* at 340–41.

212. *Id.* at 341.

213. *Id.* at 342.

reasoned, support only the narrow “principle” that “no constitutionally protected contractual obligation arises between a State and its subordinate governmental entities solely as a result of their relationship.”<sup>214</sup> As a result, states do not have “plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of . . . municipal corporations” but are only “unrestrained by the particular prohibitions of the Constitution considered in those cases.”<sup>215</sup>

Frankfurter contrasted the “principle” in these cases with the “specific limitation” on state power represented by the Fifteenth Amendment.<sup>216</sup> The propriety of this limitation rests on the principle that “[l]egislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution.”<sup>217</sup> Without such a possibility of constitutional enforcement against the states, “any impairment of voting rights” by states would be permissible “so long as it was cloaked in the garb of the realignment of political subdivisions.”<sup>218</sup> Therefore, the redrawing of the boundaries of Tuskegee, if done for the reasons the plaintiffs alleged, discriminated against the city’s Black racial minority in violation of the Fifteenth Amendment.<sup>219</sup>

Specifically, the redistricting may have “deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city’s boundaries.”<sup>220</sup> Judicial scrutiny of the Alabama law under the Fifteenth Amendment required looking beyond the “form” of the act to its “inescapable human effect.”<sup>221</sup> In conclusion, Justice Frankfurter articulated an even broader principle about the limits of state power: “When a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.”<sup>222</sup>

Although not explicitly announced in the case’s holding, this statement seems to suggest that if the plaintiffs proved that the statute in question deprived Black Tuskegee residents of the right to vote, it would violate the Fifteenth Amendment.<sup>223</sup> An unresolved question is whether the narrower principle that Justice Frankfurter offers—what could be called the constitutional treatment of political subdivisions principle that “[l]egislative control of municipalities, no less than other state power, lies within the

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214. *Id.* at 343.

215. *Id.* at 344. Justice Frankfurter also cited *City of Trenton v. New Jersey*, 262 U.S. 182, 183 (1923), *City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394 (1919) (applying *Hunter* to a claim brought under the state constitution), and *Laramie County Commissioners v. Albany County Commissioners*, 92 U.S. 307 (1875) (applying the view of political subdivisions in *Hunter* to a claim brought under the state constitution prior to *Hunter*).

216. *Gomillion*, 364 U.S. at 343.

217. *Id.* at 344–45.

218. *Id.* at 345.

219. *Id.* at 346.

220. *Id.* at 347.

221. *Id.*

222. *Id.*

223. *See id.* at 346 (“The petitioners here complain that affirmative legislative action deprives them of their votes and the consequent advantages that the ballot affords. When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment.”).

scope of relevant limitations imposed by the United States Constitution”<sup>224</sup>—is dictum or a binding rule from the case. The question is complicated because Justice Frankfurter characterizes the statements giving rise to the alleged principle of absolute state power over municipal subdivisions as “seemingly unconfined dicta.”<sup>225</sup> This question matters today because federal courts of appeals developing political subdivision standing doctrine dispute the significance of *Gomillion* as a precedent that narrows the holding of *Williams*.<sup>226</sup>

Another interesting question the decision leaves unanswered is whether the plaintiffs would have been entitled to relief under the Equal Protection Clause of the Fourteenth Amendment if they carried their burden in showing the discriminatory nature of the act.<sup>227</sup> Justice Whittaker, in concurrence, contended that since the Black citizens of Tuskegee—based on what he could tell from the pleadings—enjoyed the same right to vote as that of other residents in their new district, and the effect of the Act was to segregate citizens by district, the relevant constitutional limitation on state power emanated from the Equal Protection Clause of the Fourteenth Amendment, rather than from the Fifteenth Amendment.<sup>228</sup> Generally, Supreme Court precedent has narrowed the path by which antidiscrimination challenges can strike down state election legislation.<sup>229</sup> And, while *Gomillion* remains a landmark case, its impact as precedent has been superseded somewhat by the passage of the Voting Rights Act of 1965<sup>230</sup> and subsequent precedent interpreting<sup>231</sup> and striking down<sup>232</sup> parts of that Act.

### 3. Standing to Enforce Certain Constitutional Rights

In recent decades, the Tenth Circuit Court of Appeals has taken the lead in developing political subdivision standing doctrine. In *Branson School District RE-82 v. Romer*,<sup>233</sup> the court held that political subdivisions have standing to sue the states that created them in federal court on the basis of the Supremacy Clause and putatively controlling federal law.<sup>234</sup> The case involved a challenge by school districts and

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224. *Id.* at 344.

225. *Id.* at 344.

226. *See infra* Part II.D.4; *City of Hugo v. Nichols*, 656 F.3d 1251, 1256, 1267 (10th Cir. 2011).

227. *See Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring).

228. *Id.*

229. *See* Franita Tolson, *Election Law “Federalism” and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2221–37 (2018).

230. Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. § 10301); *see* Jonathan L. Entin, *Of Squares and Uncouth Twenty-Eight-Sided Figures: Reflections on Gomillion v. Lightfoot After Half a Century*, 50 WASHBURN L.J. 133, 146 (2010).

231. *See Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021) (upholding Arizona laws prohibiting the counting of out-of-precinct ballots and the submission of a ballot by someone other than the voter or their family member or caregiver under § 2 of the Voting Rights Act).

232. *See Shelby Cty. v. Holder*, 570 U.S. 529 (2013) (striking down the formula in § 4 of the Voting Rights Act determining which jurisdictions’ changes to election laws are subject to Justice Department preclearance).

233. 161 F.3d 619 (10th Cir. 1998).

234. *Id.* at 628.

public-school students to an amendment to the Colorado Constitution dealing with school trust lands under the Colorado Enabling Act, a federal statute.<sup>235</sup>

The question was whether school districts could sue their state to prevent enforcement of a state constitutional amendment potentially contrary to federal law.<sup>236</sup> To reach its conclusion about standing, the Tenth Circuit recharacterized the holdings of *Williams* and *Trenton*, writing that their bar on constitutional challenges applied only to those provisions of the Constitution that protect individual liberties, as opposed to those provisions that protect structural or collective rights.<sup>237</sup> The former list emphatically includes the Fourteenth Amendment.<sup>238</sup> In contrast to the Fourteenth Amendment, the Supremacy Clause is a “structural” protection.<sup>239</sup> A political subdivision that suffers injury at the hands of their parent state as a result of the state’s misapplication of federal law can sue to ensure that the state respects the Constitutionally-prescribed balance of power between the federal government and the states.<sup>240</sup>

The Court also imposed a requirement, guided by a Supreme Court precedent it found analogous between a state agency commissioner and another state agency, that the political subdivision be “substantially independent” from the state.<sup>241</sup> The ability to hold property, enter into contracts, and sue, as well as independently elected leadership, were generalizable factors that weighed into a finding of substantial independence.<sup>242</sup>

In *City of Hugo v. Nichols*,<sup>243</sup> the Tenth Circuit again addressed the political subdivision standing question sua sponte, to determine whether it had jurisdiction to hear the case.<sup>244</sup> *Hugo* involved a dispute between an Oklahoma city and the Oklahoma Water Resources Board over the board’s water allocation decisions.<sup>245</sup> The city argued that the decisions were unconstitutional under the dormant commerce clause.<sup>246</sup> The court read *Branson* to endorse *Gomillion*’s cabining of the earlier political subdivision standing cases.<sup>247</sup> However, the court distinguished *Branson* in the present case, contrasting the Supremacy Clause’s function of securing a right under another federal law, as a proper structural basis for constitutional challenge, with the Commerce Clause’s, as a

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235. *Id.* at 625–27.

236. *Id.* at 625.

237. *See id.* at 628–29.

238. *Id.* at 628 (citing cases for the proposition that political subdivisions cannot challenge their parent states under the Fourteenth Amendment from the Eleventh, Sixth, Fifth, Seventh, and Second Circuits).

239. *Id.* at 629. This analysis of how an individual-liberty-protection provision of the Constitution is an inappropriate basis for political subdivision standing does not mention *Gomillion*. *See id.* Although the plaintiffs in that case were Tuskegee residents, the opinion’s principle that a state can be subject to suit under the Fifteenth Amendment for its treatment of political subdivisions suggests both that those subdivisions could sue the state and that they could be entitled to redress under a provision of the Constitution that protects individual liberty. *See id.*

240. *Id.*

241. *Id.*

242. *See id.*

243. 656 F.3d 1251 (10th Cir. 2011).

244. *Id.* at 1255.

245. *Id.* at 1253–54.

246. *Id.* at 1254.

247. *Id.* at 1256.

“substantive provision” that itself is a source of federal rights.<sup>248</sup> Ensuring that political subdivisions obtain the protection of “a federal statute directed at protecting political subdivisions” is a proper basis for standing,<sup>249</sup> while asserting their substantive constitutional rights against parent states is not.<sup>250</sup> Underlying this distinction is the Supreme Court’s “historic [sic] understanding of the Constitution as not contemplating political subdivisions as protected entities vis-a-vis their parent states.”<sup>251</sup>

The majority engaged at length with the dissent, which would have found that Hugo had standing to sue the Oklahoma Water Resources Board.<sup>252</sup> Noting that sixty-five years had passed between *Williams* and *Branson*, the dissent characterized the lack of a Supreme Court denial of standing based on political subdivision status between the two decisions as indicative of a trend to narrow the *Williams* doctrine.<sup>253</sup> The dissent claimed that the majority opinion represented an attempt, after *Branson*, to “freeze [the Tenth] Circuit’s exception to the political subdivision standing doctrine to certain preemption claims.”<sup>254</sup> However, the dissent argued, *Branson*’s exception was broader, opening the door to suit by political subdivisions for vindication of structural rights under the Constitution, the full list of which the court left for determination in future cases.<sup>255</sup> The dissent read *Gomillion*, as well as a Supreme Court case in which New York school districts sued New York State challenging a state statute under the First Amendment Establishment Clause, as supporting the limiting of the doctrine formalized in *Branson*.<sup>256</sup> And the dissent would have held that rights under the dormant commerce clause belong on the list of structural Constitutional rights that political subdivisions can vindicate.<sup>257</sup>

Elaborating on the distinction between structural and individual rights *Branson* relied upon in distinguishing Supremacy Clause claims from Fourteenth Amendment and Contracts Clause claims, the dissent offered two suggestions.<sup>258</sup> First, structural rights concern “the relative authority of federal and state government,” while individual rights concern “the limits of government authority over the individual.”<sup>259</sup> Second, the Constitution can be divided into provisions that were “written to protect” one or the other.<sup>260</sup> While the Bill of Rights and the Contracts, Due Process, and Equal Protection Clauses were written to limit government authority over the individual, the Supremacy and Commerce Clauses were written to protect the authority allocated between federal and state government.<sup>261</sup>

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248. *Id.*

249. *Id.* at 1257.

250. *Id.* at 1258.

251. *Id.* at 1259.

252. *Id.* at 1265 (Matheson, J., dissenting).

253. *Id.*

254. *Id.* at 1270.

255. *Id.*

256. *See id.* at 1267–69; *see also* Bd. of Ed. of Sch. Dist. No. 1 v. Allen, 392 U.S. 236 (1968).

257. *City of Hugo*, 656 F.3d at 1272 (Matheson, J., dissenting).

258. *Id.* at 1271–75.

259. *Id.* at 1272.

260. *Id.* at 1272–73.

261. *Id.*

### III. DISCUSSION

Building on the persuasive theory of political subdivision standing developed in Part II.D.3,<sup>262</sup> Part III.A argues that political subdivisions have standing to bring Elections Clause challenges to partisan targeting laws.<sup>263</sup> Political subdivisions have standing because they satisfy Article III standing requirements and are substantially independent of the state, and because the Elections Clause is a structural protection that ensures a proper federal-state balance.<sup>264</sup>

Part III.B argues that populous Democratic political subdivisions have a compelling merits case against partisan targeting laws under the Elections Clause.<sup>265</sup> Not only is the case justiciable on political question grounds but striking down the targeting provisions would advance the Election Clause's purpose by ensuring the legitimacy of federal elections.<sup>266</sup> Such relief would also be easy to administer and enforce.<sup>267</sup>

#### A. *A Theory of Blue City Standing Under the Elections Clause*

Struggles caused by how difficult states make it to become an eligible voter or to cast a vote, and fears about how much one's vote matters compared to eligible voters in other districts of one's state, remain vitally important, but they are hardly new.<sup>268</sup> By contrast, the worry of a voter in the Atlanta metropolitan area today is quite different. They might worry that the officials overseeing their federal elections are unaccountable state actors with blatant partisan motives, rather than directly accountable local actors carrying out nonpartisan responsibilities.<sup>269</sup> And the unique problem with the threat of election subversion is that even if vote suppression and dilution disappear, their disappearance would not necessarily prevent subversion that changes election outcomes. If districts were drawn fairly and voting were easy, partisan state actors validating and counting ballots could still alter the results of elections once votes are cast. This possibility of post-election manipulation of the vote count is the reason why election subversion is, in the words of Richard L. Hasen, fairly described as a "respectable coup."<sup>270</sup>

This Comment argues that partisan targeting laws enable election subversion and that the Elections Clause is an effective vehicle by which blue cities and their election agencies can challenge the fraudulent or suppressive election administration that the laws enable. A challenge under the Elections Clause may have more success than recent

262. See *supra* Part II.D.3.

263. See *infra* Part III.A.

264. See *infra* Part III.A.

265. See *infra* Part III.B.

266. See *infra* Part III.B.

267. See *infra* Part III.B.

268. See Berman, *supra* note 4, at 10–11.

269. See Richard L. Hasen, Opinion, *Republicans Aren't Done Messing with Elections*, N.Y. TIMES (Apr. 23, 2021), <https://www.nytimes.com/2021/04/23/opinion/republicans-voting-us-elections.html> [<https://perma.cc/A9LD-KRDW>]; see also Ian Milhiser, *Georgia Republicans Didn't Waste Any Time in Using Their New Voter Suppression Law*, VOX (Aug. 5, 2021, 8:30 AM), <https://www.vox.com/22607616/georgia-republicans-fulton-county-atlanta-voter-suppression-sb202-jim-crow>.

270. Hasen, *A Much More Respectable Coup*, *supra* note 6.



efforts to combat voter suppression and vote dilution for two main reasons: (1) the structural nature of the protection the Clause affords and (2) the ability to distinguish targeting laws' partisanship from the partisan gerrymanders *Rucho* found were nonjusticiable.

In the language of the dissent in *City of Hugo*, the Elections Clause was written to protect structural rights and thus is an exception to the prohibition on political subdivision constitutional claims against parent states announced in *Williams*.<sup>271</sup> Ensuring that states regulate federal elections ensures that the will of their voters in selecting the members of the national legislature and the presidency finds constitutionally valid expression. Elections Clause scholarship characterizes this purpose as protecting federal power from state interference.<sup>272</sup> An incident of protecting federal power from state interference, however, is protecting political subdivisions, such as cities and local election agencies, from state interference with their delegated power to run federal elections. The effects of such interference reverberate in the districts where the subdivision runs a state's elections. Viewed in this manner, the Elections Clause protects these political subdivisions as a mechanism to protect the structural federal-state dynamic it was designed to guarantee.

These political subdivisions also pass the substantially independent test the Tenth Circuit formulated in *Romer*.<sup>273</sup> They elect independent leadership, possess property, can enter into contracts, and can be sued.<sup>274</sup>

Moreover, blue cities and local election agencies satisfy general Article III standing requirements. Analyzing the nature of the injury involves questions about whether these political subdivisions are proper plaintiffs.<sup>275</sup> The primary injury results from the threat of replacing the local voter's local official, or that local official's effective control, with a partisan state appointee. At the point control changes hands, the voter ceases to participate in an electoral process overseen by an official with a formal commitment to count their vote as part of the expression of the political will of the subdivision electorate. Even if control does not change hands, the threats of civil and criminal penalties for conduct previously within the local official's discretion,<sup>276</sup> or unclear guidance,<sup>277</sup> regardless of whether the conduct is intentional,<sup>278</sup> have a chilling effect on the official's performance of their duties to meet the needs of the voters of the subdivision.

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271. *City of Hugo v. Nichols*, 656 F.3d 1251, 1270 (10th Cir. 2011) (Matheson, J., dissenting).

272. *See* Tolson, *supra* note 229, at 2217 ("Traditional federalism doctrine prioritizes experimentation in governance dispersed among the fifty states—a variation that emerges, in part, from limiting the reach of the federal government. In contrast, the Elections Clause has its own unique set of values that place a premium on congressional sovereignty.").

273. *See* Branson Sch. Dist. RE-82 v. *Romer*, 161 F.3d 619, 629 (10th Cir. 1998).

274. *See id.* (finding that school district plaintiffs were substantially independent political subdivisions for purpose of standing analysis because they were essential beneficiaries of federal trust, able to sue and be sued, able to enter into contracts, and were led by independently elected leadership).

275. *See supra* Part II.D.

276. *See, e.g.*, S.B. 90 § 28, 123rd Leg., Reg. Sess. (Fla. 2021) (as enrolled, May 2, 2021) (regulating local ballot drop box monitoring).

277. *See, e.g.*, S.F. 413 § 14, 88th Gen. Assemb., Reg. Sess. (Iowa 2021) (imposing criminal liability for violations of guidance issued outside the normal rulemaking process).

278. *See* S. 2155, 117th Cong. § 4(a)(11) (2021) (noting the lack of an intent requirement across state laws).

Beyond this primary injury, the potential secondary injury is not just troubling, but terrifying: a hypothetical local voter's validly cast vote is not counted and certified because of the actions of the partisan state appointee.<sup>279</sup> The Republican state appointee could apply state and local law and regulations governing aspects of voting such as voter eligibility and vote certification to reject as many Democratic ballots as possible.<sup>280</sup> A comparable injury could certainly be claimed by a resident of the political subdivision whose eligible vote was allegedly impacted or by a candidate who was certified as the loser of a race. But a unique injury affects the political subdivision with which the state gives control over the administration of elections when the state can selectively manipulate or take back that control.

If partisans target a local election agency, the agency's right as a political subdivision to implement state law by expressing the will of its voters in state and federal elections becomes, in effect, subject to suspension or abrogation by the state. Not even the extreme statement of parent-state power in *Hunter* suggests such broad grant of power to a parent state with respect to its political subdivisions.<sup>281</sup> By way of analogy, the early political subdivision cases strongly imply that, as a constitutional matter, the state legislature of Georgia could break up Atlanta into several cities.<sup>282</sup> They do not, however, imply that the state legislature could handpick the mayors of those cities. If the state cannot constitutionally interpose itself between local voters and the election of their local government, it should not be able to interpose itself between local voters and the election of federal officials. There is some political autonomy following from the state's creation of the political subdivisions that, once given, cannot be taken away.<sup>283</sup>

The Preventing Election Subversion Act addresses the problem only at the level of the individual administrator by creating a private right of action in federal court and a role for the United States to assist plaintiffs in such cases.<sup>284</sup> The result of a successful action would be the restoration of the status quo.<sup>285</sup> This result would constitute a limited rebuke of the state agency or legislature that initiated the suspension and removal proceedings. The reinstatement of a commissioner after a partisan removal proceeding would not redress the injury to the blue city or election agency for which they work. Federal declaratory and injunctive relief rendering the targeting provisions void, however, would vindicate the rights of the political subdivision and protect the votes of its residents.<sup>286</sup> It would effectively redress the injury fairly traceable to the actions of the state's enforcement of partisan targeting laws.

Just because a significant number of Republican state legislators want to chill the conduct of local election officials, or have appointees liberally toss votes, does not

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279. See Milhiser, *supra* note 269.

280. See *id.*

281. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907) (stating that parent states can control the existence and powers of cities “conditionally or unconditionally, with or without the consent of the citizens, or even against their protest”).

282. See *id.* (“The State, . . . at its pleasure may . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation.”).

283. See *id.*

284. S. 2155, 117th Cong. § 4(a) (2021).

285. S. 2155 § 4(b)(2)(A).

286. See *infra* Part III.B.

guarantee that such officials or appointees would do so. However, pressure within the party to subvert the outcome,<sup>287</sup> combined with the appointee's willingness to serve despite the lack of a factual basis for claims of outcome-determinative fraud that gave rise to the targeting laws,<sup>288</sup> makes such conduct more likely. And waiting until the damage is done, and an election has been successfully subverted, for better proof is a self-defeating option. The proof may not be accessible, and the subversive conduct may become normalized.

Any well-functioning state election system needs a mechanism to punish election administrators who neglect or violate their legal duties.<sup>289</sup> But the simultaneous adoption of systemic changes that make the replacement administrator the appointee of a state body, when the state body is a partisan antagonist to the locality, creates the appearance of partisan targeting. When members of the executive or legislative election body—or the legislators that created that body—raise unsubstantiated doubts about the performance of the local official and attribute an unwanted election outcome to that performance, the circumstantial evidence of actual partisan targeting increases.<sup>290</sup>

The initiation of proceedings that can result in the takeover of the local office by an appointee strengthens the case even more.<sup>291</sup> Even if the state's takeover is temporary, a partisan, temporary superintendent, whose term spans an election, injures the political subdivision by illegitimately seizing the type of control over elections previously delegated to that subdivision.<sup>292</sup> The extent of the possible injury grows where the replacement has their predecessors' full range of powers, including the power to hire and fire.<sup>293</sup> While states do not inflict constitutional harm when they, for example, take over political subdivisions entirely, such as underperforming school districts, such activity does not implicate the Constitution. Federal elections do.

Specific features of the targeting provisions, understood in the context of state politics, reinforce the reality of this partisan bent. For example, the structure of the Georgia State Election Board that Senate Bill 202 empowers to “suspend county or municipal superintendents and appoint an individual to serve as the temporary superintendent in a jurisdiction”<sup>294</sup> ensures Republican dominance. The General Assembly elects the Chairman of the Board; two members are elected, respectively, by majorities of the two houses of the General Assembly; and two members are nominated and appointed, respectively, on the basis of party affiliation.<sup>295</sup> Both houses of the

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287. See *supra* notes 20–23 and accompanying text.

288. See *State Details*, *supra* note 21 (reporting that the number of cases of potential voter fraud in six 2020 battleground states represented between only 0.03% and 1.9% of Biden's margins of victory in the states).

289. See RICHARD L. HASEN, *ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY* 47–74 (2020) (chronicling recent instances of incompetent election administration in Florida, Michigan, and Georgia).

290. See, e.g., Milhiser, *supra* note 269 (describing the initiation of an investigation into Fulton County election administrators on the basis of allegations by Republican members of the Georgia General Assembly).

291. See, e.g., *id.*

292. See *id.*

293. See S.B. 202 § 6, 156th Gen. Assemb., Reg. Sess. (Ga. 2021).

294. *Id.*

295. *Id.* § 5.

General Assembly have solidly Republican majorities.<sup>296</sup> The recently redrawn legislative map may have the effect of preserving those majorities.<sup>297</sup> To have this body operate elections for the city of Atlanta would present a clear opportunity to subvert elections.

*B. A Theory of Entitlement to Relief under the Elections Clause*

Once a political subdivision gets into court under the Elections Clause's structural exception to the political subdivision standing doctrine, it needs a merits theory under that clause to prevail. The duty the Election Clause places on states need not be implemented through political subdivisions, but when it is, targeting subdivisions for investigation and punishment wrecks a constitutional injury to them under the Clause.<sup>298</sup> Punishing subdivisions for speculative problems, such as permissive voter fraud, abdicates the manner of holding elections that the state legislature has prescribed through state law and that the executive branch is charged with implementing. In other words, the targeting laws are presented as ways to ensure the implementation of state law, but their effect is, in fact, the opposite. They give state officials the capacity to step into the shoes of local officials and make not only the official's typical discretionary decisions as the state officials would prefer but also decisions contrary to state law, while cloaked in the mantle of a temporary corrective custodian.<sup>299</sup> In the process, they put the legitimacy of federal elections in that state in doubt.

The purpose of the Elections Clause is to protect Congress's interest in ensuring legitimate federal elections.<sup>300</sup> The partisan use of the Clause's powers to suspend and remove, or otherwise penalize local election officials, does not serve that purpose.<sup>301</sup> Moreover, *Arizona Independent Redistricting Commission* expanded the universe of cases in which the Elections Clause required interpretation beyond those involving congressional action.<sup>302</sup> The decision read "Legislature" to include the people of Arizona, as their will was expressed through a statewide referendum establishing an

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296. See *Representatives*, GA. GEN. ASSEMB. (2021), <https://www.legis.ga.gov/members/house> [<https://perma.cc/R5J7-H59H>]; *Senators*, GA. GEN. ASSEMB. (2021), <https://www.legis.ga.gov/members/senate> [<https://perma.cc/F56E-YFPM>].

297. Mark Niese, *Final Vote Completes Redistricting of Georgia General Assembly*, ATLANTA J.-CONST. (Nov. 15, 2021), <https://www.ajc.com/politics/final-vote-completes-redistricting-of-georgia-general-assembly/SQV457F63BGWJN6XEOSHKPQJTE> [<https://perma.cc/HD2R-VZRU>].

298. See *supra* Part III.A; U.S. CONST. art. I, § 4, cl. 1.

299. See, e.g., S.B. 202 § 6.

300. Tolson, *supra* note 229, at 2221.

301. Cf. Jamal Greene, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1021, 1054 (2005) ("Congress has a constitutional duty under the Guarantee Clause to remedy state capture by undemocratic factions through the Elections Clause."). The Guarantee Clause states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." U.S. CONST. art. IV, § 4. An argument could be made that the violation of Fulton County voters' rights is potentially so fundamental that the State of Georgia has abdicated its constitutional obligation to maintain a representative government. It is settled doctrine, however, that a claim over the legitimacy of an election under the Guarantee Clause is nonjusticiable. Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 849 (1994).

302. See *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 820 (2015).

independent redistricting commission.<sup>303</sup> The Court’s justification was that the Clause could not plausibly be read to place the will of the legislature before the will of the people.<sup>304</sup>

Extending the logic of the opinion, state lawmaking that interferes with the prospect that members of Congress will, in fact, be “chosen . . . by the People of the several states”<sup>305</sup> violates the Elections Clause. The principle that “all political power flows from the people”<sup>306</sup> dictates that states should not choose or hamper local election administrators so that political power flows from the state political apparatus interposed between the people of a subdivision and their federal representatives. The history of American election law provides plenty of examples in which, even if it is reasonable to say that state legislatures and executives are duly elected representatives of the people of all the areas of their states, their oversight of election administration nevertheless militates against all political power flowing from the people of some of those areas.<sup>307</sup> Although the Court has become more conservative since *Rucho*, and the dissent of Chief Justice Roberts was stinging,<sup>308</sup> this proposition suggests that a challenge to state laws that thwart the democratic will of political subdivisions is not outside the ambit of the Elections Clause.

The political subdivision Elections Clause claim against partisan targeting laws is also distinguishable from the Elections Clause claim against partisan gerrymandering that the Court found nonjusticiable in *Rucho*.<sup>309</sup> *Rucho*’s statement that the Court has no role in adjudicating which expressions of partisanship are unconstitutional in the gerrymandering context<sup>310</sup> does not foreclose the Elections Clause claim here. *Rucho* did not reach the Elections Clause question.<sup>311</sup> The case was decided on the threshold Article III question of justiciability by way of the political question doctrine, based in particular on the lack of judicially discoverable and manageable standards.<sup>312</sup> The same analysis does not extend to partisan suspension, removal, and penalty provisions. The provisions could be struck down as severable from the laws of which they were a part. A federal court could guide the drafting of replacement provisions or merely send the state back to the drawing board. Either way, the state would lose the power it sought to exercise unconstitutionally.

*Rucho* does suggest that federal courts hearing political subdivisions’ claims might presume that there is no role for the federal judiciary in weakening any distorting effect partisanship has on the results of American elections beyond racial gerrymandering and

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303. *Id.*

304. *Id.* at 823–24.

305. *Id.* at 820 (omission in original) (quoting U.S. CONST. art. I, § 2).

306. *Id.* at 824 (citing *McCulloch v. Maryland*, 17 U.S. 316, 404–05 (1819)).

307. *See, e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339, 347–48 (1960) (striking down an act of the Alabama state legislature drawing Black residents out of the boundaries of the city of Tuskegee).

308. *See Ariz. Indep. Redistricting Comm’n*, 576 U.S. at 824–54 (Roberts, C.J., dissenting).

309. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019).

310. *Id.*

311. *Id.* at 2508.

312. *Id.* at 2506–07. The Court had not before decided a political question doctrine case on this factor alone, suggesting that the analysis has become less a balancing test and more a set of strict requirements, any one of which could render a case nonjusticiable. *See Parsons, supra* note 145, at 1297.

malapportionment.<sup>313</sup> Partisanship is political; as the reasoning goes, politics must be left to the political branches.<sup>314</sup> The opinion stresses that the Elections Clause concerns what Congress may do to check state legislatures, not what federal courts may do.<sup>315</sup> But the urge for judicial institutional self-restraint is not the same as a constitutional jurisdictional bar in every context where partisanship can taint federal office elections.

The *Rucho* plaintiffs won in the district courts and courts of appeals—not on Elections Clause grounds, but rather on Equal Protection grounds.<sup>316</sup> An alternative way of condemning the targeting laws is to argue that they accord “arbitrary and disparate treatment to voters in . . . different counties,”<sup>317</sup> that is, that such state action violates the Equal Protection Clause with respect to voters in disfavored subdivisions. However, this claim is unavailable to political subdivisions since the right to equal protection of the laws is a straightforward example of an individual, rather than structural, constitutional protection. Moreover, the careful limiting language of *Bush v. Gore* has robbed it of force as an Equal Protection Clause precedent, and, as a result, its current career seems to be to furnish support for arguments empowering state legislatures against any other authorities that would challenge the legislature’s will with respect to a given election—to support election subversion.<sup>318</sup> The Elections Clause will be the device by which the partisan targeting laws are dispatched, whether through Congress or the federal courts.

#### IV. CONCLUSION

The congressional veto and the political check on state legislators should not be the only ways the partisan targeting laws are challenged. Waiting for Congress to act, especially when the composition of Congress results from the partisan gerrymandering allowed by *Rucho*, is one difficult approach to the problem. Mobilizing residents of states where partisan targeting laws are in force to repeal or mitigate their effect is another difficult approach because state gerrymanders create a similar problem. The Elections Clause, as the constitutional authority under which the Preventing Election Subversion Act would be enacted,<sup>319</sup> should be a sufficient basis for litigation to strike down state laws that create real doubt about the legitimacy of federal elections.

If geographical polarization and the problem of election subversion worsen, necessity may make one or all of these avenues more feasible. Regardless, it is right to set the perceived political disempowerment of Republican partisans aside and take steps to redress the actual disempowerment of blue cities (except to the extent widely acknowledged to be permitted by the Constitution).<sup>320</sup> Atlanta, Philadelphia, and Phoenix cannot be allowed to become, through displays of fear and control, haggard or

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313. Charles & Fuentes-Rohwer, *supra* note 160, at 293.

314. *See id.*

315. *See Rucho*, 139 S. Ct. at 2507–08.

316. *Id.* at 2492–93.

317. *Bush v. Gore*, 531 U.S. 98, 107 (2000).

318. *See supra* Part II.C.2.

319. S. 2155, 117th Cong. § 4(a)(1) (2021).

320. *See* Damore, Lang & Danielsen, *supra* note 14, at 10 (observing that the Electoral College system “underrepresent[s]” urban interests).

ventriloquist entities, running their elections fearfully without sufficient resources or not really running them at all.