



SYMPOSIUM ESSAY

Election Law in an Age of Distrust

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Abstract. Election law now operates in a sea of pervasive distrust. The voting wars have led to continual contestation over substantive voting policies. This distrust now also extends to the institutional side of the election process, with concerns that state legislatures, or state executive officials, or local election administrators, or Congress might seek to corrupt the process for partisan ends.

This essay argues that election law and practices must adapt to the context of this pervasive distrust. Policies and practices that might be fine under normal circumstances, but are likely to feed distrust today, should be re-thought. This short essay identifies seven initial measures that policymakers, election administrators, and even voters can take to help fend off distrust about the election process. These changes cannot eliminate perceptions—including groundless ones—that the process has been rigged, nor the risk that public figures will abuse their power over elections for partisan reasons. But it is essential that we recognize the fact of this pervasive distrust and do what we can to shore up the legitimacy of the election process.

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Introduction

Now is the winter of election law's discontent.¹ Even before the 2020 election, more than 40% of both Democrats and Republicans said they would not accept a win by the candidate from the other party, and the modal Democrat and Republican believed their candidate could lose only if the election were rigged.² Yet those days seem halcyon compared to the increasing spirals of mutual distrust unleashed since Election Day. Fifty-six percent of Republicans now say they are not confident that state *officials* in Democratic-controlled states will accept election results if their party loses; sixty-seven percent of Democrats say the same about officials in Republican-controlled states.³ Pandemic-driven changes in voting rules trigger suspicions among some. Rolling back any of those changes spawns similar suspicions among others. No voting change is innocent, or at least, perceived to be. But neither is the status quo.

The same distrust now pervades the institutional side of the election process. No institutional safe harbors exist any longer that generate widespread confidence that votes will be fairly tallied, free of partisan manipulation. At the highest level, concerns now exist about whether Congress will fairly “count” the states’ electoral votes. At the intermediate level, candidates now run for Secretary of State or Governor who proclaim their willingness to refuse to certify election outcomes. Even at the lowest level, such as local election boards, more explicitly partisan activists now seek office. Adding fuel to this fire, many political figures and various organizations are prepared to stoke their constituents’ perceptions that the process is rigged—whether out of sincere and accurate conviction, false perception, strategic efforts to mobilize voters, or other motives. Sixty-two percent of Americans are “very” or “somewhat” concerned about violence over the 2024 election.⁴

For the foreseeable future, our elections will take place in this sea of distrust. This is a fact, whether we like it or not. We need to build institutional buffers and legal policies to reduce the risk of partisan manipulation, but those can only do so much. Election law as well should adapt to the age of distrust.

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1. See William Shakespeare, *Richard III* act 1, sc. 1, 1.
 2. Tom Pepinsky, *Americans Are Already Set to Conclude that the 2020 Presidential Elections Were Rigged*, (Oct. 28, 2020), <https://perma.cc/AX57-2X9Z>; Chris Kahn, *Four in Ten Supporters of Biden, Trump Would Not Accept Election Defeat: Reuters/Ipsos Poll*, REUTERS (Oct. 25, 2020 3:04 AM), <https://perma.cc/9BX2-97VQ>.
 3. Dan Balz, Scott Clement & Emily Guskin, *Republicans and Democrats Divided Over Jan. 6 Insurrection and Trump's Culpability, Post-UMD Poll Finds*, WASH. POST (Jan. 1, 2022, 6:00 PM EST), <https://perma.cc/5UQE-CHAD>.
 4. See Anders Anglesey, *3 in 5 American Voters Fear Violence Over 2024 Presidential Election: Poll*, NEWSWEEK (Jan. 9, 2022, 8:25 AM EST), <https://perma.cc/8UUY-NFK2>.

That means certain policies and practices that would be fine under normal circumstances, but which are likely to trigger distrust today, need to be reconsidered. Modest compromises in other values might have to be made for the greater good of minimizing the practices on which distrust feeds. Few more dangerous moments exist for a democracy than a national election in which nearly half the country believes the result was illegitimate. Institutional changes cannot eliminate perceptions—including groundless ones—that the process has been rigged, nor the risk that public figures will abuse their power over elections for partisan reasons. But we must do what we can.

In this short format, I will provide a brief taxonomy of some of these changes, with space for only a few words of explanation.

I. The Importance of Consistent Statewide Policies

Americans have become more aware of how remarkably decentralized election administration is, even for national elections. Palm Beach County's inept design of the 2000 presidential election ballot almost certainly cost Al Gore the presidency.⁵ Some pushback against this extreme decentralization has taken place, through legislation and doctrine. In the Help America Vote Act, Congress required that voter registration be managed at the state level. In *Bush v. Gore*, seven Justices agreed that permitting individual counties to make their own judgments as to what markings on a ballot counted as a valid vote created risks of unjustifiable arbitrariness, which also could be exploited—and appeared to be—for partisan advantage seeking.

During the 2020 pandemic election, many counties understandably adopted ad hoc, often last-minute, modifications to enable voting to take place safely. When called upon to issue guidance as some of these issues emerged, some Secretaries of State simply announced that the counties were free to do as they pleased. In normal times, different practices across a state's counties with respect to voting might be tolerable with minimal justification. And the difference between highly populous counties and smaller ones, including resources, can provide compelling justifications for certain differences in policies.

But compelling reasons do not exist for counties having different policies on, for example, whether voters have an opportunity to cure defects in their absentee ballot returns and under what circumstances. When different counties adopt different policies on such matters, claims that the process is unfair or corrupt will arise, particularly if elected county officials adopt

5. See Richard H. Pildes, *Disputing Elections*, in *THE LONGEST NIGHT: POLEMICS AND PERSPECTIVES ON ELECTION 2000* 69, 73 (Arthur Jacobson and Michel Rosenfeld eds., 2002).

choices that are likely to favor their partisan allies. Many policies, such as the number of drop boxes, can take account of differences between counties but be consistent statewide by being applied on a per capita basis in a way that ensures broad access. In the current culture of distrust, election administrators need to recognize that they cannot wash their hands of the responsibility to ensure as much statewide consistency as possible, other than when compelling justifications exist for differences across counties.

II. Distrust Thrives on Legal Uncertainty

In the age of distrust, legal uncertainty over election rules, never a good thing, is even more risky. Such uncertainty creates openings for partisan manipulation or perceptions of it. Even after an election, if the legal rules have not been settled clearly in advance, angry partisans can de-legitimize the outcome by asserting their preferred view of what the law “is,” then claim the election was compromised because “the law” was not followed. This is part of what happened in the aftermath of 2020, when claims were made that the election involved ‘legal irregularities’ that the courts had not addressed.

That election law should be clear and settled well in advance of the election is not controversial. But the key point is to recognize how traditional federal court doctrine can stand in the way of realizing this principle. Federal courts do not have the power to act except when a “case or controversy” exists. As a result, it can be difficult to get legal clarification in advance of the election process itself. In addition, this can also mean that when federal courts do finally get engaged, it is often at the most charged moment, when it will be obvious which candidate will benefit from the court’s ruling—or even when the outcome of the election turns on the court’s decision.⁶ This is not good for the courts or the election process.

A prominent example is the controversy over whether the Constitution is best read to contain an “independent state legislature” doctrine.⁷ This question arises for purposes of all national elections, under the Elections Clause, and for

6. Richard H. Pildes, *Why There’s So Much Legal Uncertainty About Resolving a Disputed Presidential Election*, THE CONVERSATION (Oct. 30, 2020, 8:48 AM EDT), <https://perma.cc/V67G-ZRKM>.

7. For recent debates among scholars on this issue, see generally Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501 (2021) (describing historical support for the independent state legislature doctrine); Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, SUP. CT. REV. (forthcoming 2021) (criticizing the independent state legislature doctrine); Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY’S L.J. (forthcoming 2022) (arguing that little historical support exists for the independent state legislature doctrine).

the presidential election in particular, under the Electors Clause. Whether such a doctrine exists, and if so, what its scope might be, will roil the 2022 and 2024 elections until fully resolved—especially because several Justices on the Supreme Court have signaled support for the doctrine.⁸ State election administrators and state courts, among others, need the answers to understand the constraints on their authority. Without clear resolution, campaigns and their allies will charge that every decision they dislike of a state court that applies the state constitution to invalidate a state law regulating national elections violates the Constitution. The same argument will be made about voter-initiated measures that change state election laws regulating national elections, as well as every discretionary act of election administrators or every judicial interpretation of state election law with which one campaign or another disagrees.

The Supreme Court had an opportunity to begin bringing clarity to this issue after President Biden’s election victory was settled and he had been inaugurated. In a challenge to a decision of the Pennsylvania Supreme Court, which had held that the state constitution required extending the election-code deadline for receipt of absentee ballots, the Court was asked to decide whether the state court’s action violated the independent state legislature doctrine.⁹ In many ways, the context was ideal for the Court: the election was over and the number of ballots involved was far too small to affect the result in Pennsylvania. The Court could have provided some clarity about a major legal issue that will repeatedly disrupt the federal election process until settled.

But the Court declined to hear the case.¹⁰ No doubt the Court considered the case moot. Perhaps the Court was reluctant as well to take action that might be perceived to cast any doubt on the legitimacy of the 2020 election, even though any decision would have had no legal effect on the outcome. More recently, four Justices on the Court indicated they would grant certiorari on this issue, in a case in which the North Carolina Supreme Court invoked the state constitution to invalidate the congressional district map that the state

8. See *Democratic Nat’l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 34 n.1 (2020) (mem.) (Kavanaugh, J., concurring in denial of application to vacate stay); *Republican Party of Pennsylvania v. Boockvar*, 141 S. Ct. 1, 1-2 (2020) (statement of Alito, J., in which Justices Thomas and Gorsuch joined).

9. See *Republican Party of Pa. v. DeGraffenreid*, 141 S. Ct. 732, 732-33 (2021) (Thomas, J., dissenting from denial of certiorari); see *id.* at 738 (“The decision to leave election law hidden beneath a shroud of doubt is baffling. By doing nothing, we invite further confusion and erosion of voter confidence.”).

10. Amar and Amar argue the Court should have taken the case. See *supra* note 7 (manuscript at 50 n. 99).

legislature had enacted following the 2020 Census.¹¹ Even so, the Court will not decide that case until well after the mid-term elections.

To be sure, the federal courts are not going to revisit for the election context long-established fundamental understandings of the Article III constitutional limits on federal judicial power. But there are still ways that the federal courts can be more proactive in providing clarity to election law. For example, even if there is no conflict in the lower courts and the Supreme Court agrees with the decision of the court below on a critical issue—such as the independent state legislature doctrine—the Court should still grant certiorari and take the case. A definitive and early resolution from the Supreme Court is better for federal elections nationwide than leaving certain issues to create political conflict around election administration and fester across the lower courts. Similarly, there are discretionary elements in certain jurisdictionally-related doctrines, such as mootness, ripeness, the imminence of legal injury, and others. In the election context—particularly in our era of distrust—courts should become more willing to construe that discretion in ways that bring early clarity to election law. The conventional judicial stance is that rigorous application of the passive virtues to limit federal court involvement is an exercise in humility. In the election context, that mindset is misplaced. Particularly in an age of distrust, state and federal courts must assist in providing as much legal clarity as possible. The earlier in the election process, the better.

III. Ensuring that an Accurate Vote Count Can be Completed Quickly

As soon as lockdowns took hold in March 2020, it became clear that the fall election would involve a ‘massive surge’ in absentee voting. In our culture of election distrust, that raised a specific new risk on which suspicions could prey. As I wrote at the time, in a passage the Supreme Court quoted in the Wisconsin election case, “late-arriving ballots open up one of the greatest risks of what might, in our era of hyperpolarized political parties and existential politics, destabilize the election result. If the apparent winner the morning after the election ends up losing due to late-arriving ballots, charges of a rigged election could explode.”¹²

11. *Moore v. Harper*, 142 S. Ct. 1089 (2022) (Kavanaugh, J., concurring in denial of application for stay) (Alito, J., dissenting from denial of application for stay).

12. *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 33 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) (quoting Richard H. Pildes, *How to Accommodate a Massive Surge in Absentee Voting*, U. CHI. L. REV. ONLINE, June 2020, at 45, 46).

That does not mean, of course, that those charges were justified then or would be going forward. But it is not hard to imagine that they will arise again. To be sure, future elections are not likely to see levels of absentee voting nearly as high as in the pandemic election of 2020. But those rates are still likely to be higher than they were before 2020. Given this, we cannot ignore the continuing risk that the longer it takes to resolve the vote count, the more distrust will feed on that delay.

Two measures can reduce this risk. First, states must permit election officials to process absentee ballots either as they come in or well before Election Day, so that they can be included in the vote tallies released on Election Night. Processing these ballots does not mean counting them, but rather doing all the preparatory work needed so that they can be counted as soon as polls close. In 2020, I did what I could, through writings and public appearances, to convince legislators in Pennsylvania, Wisconsin, and Michigan to change their policies to permit this, but to no avail.¹³

Second, deadlines for the receipt of absentee ballots need to be thought about in this context of distrust. In 2020, these deadlines took on an existential character, with some appearing to believe the election's outcome could hinge on these deadlines. Constitutional litigation challenging Election Night receipt deadlines was brought in many states. The perception of how consequential these deadlines could be was based partly on how many absentee ballots came in days after election day in some primaries, when the pandemic first broke upon the scene; it was also based on concerns as to how efficiently the U.S. Postal Service would handle absentee ballots. When federal judges, and ultimately the Supreme Court, refused to extend Wisconsin's receipt deadline past Election Night, dissenting judges predicted that as many as 100,000 ballots might be thrown out for arriving too late.¹⁴ Yet even with the Election Night deadline remaining in place, it turned out that only 1,045 ballots arrived too late to meet the Election Night deadline.¹⁵ The number of ballots that arrived too late to be counted, including in other states that had Election Night deadlines, was similarly low.¹⁶

13. See, e.g., Richard H. Pildes, *Reducing One Source of a Potential Election Meltdown*, LAWFARE (Mar. 20, 2020, 11:19 AM), <https://perma.cc/9V7K-S5HZ>; *Expert Panel to Discuss Pennsylvania's Election Law*, PENN STATE HARRISBURG (Sept. 25, 2020), <https://perma.cc/9Q64-WGXN> (describing panel convened to discuss election law in Pennsylvania, featuring Author and other experts).

14. *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 40 (2020) (Kagan, J., dissenting); *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 643-44 (7th Cir. 2020) (Rovner, J., dissenting).

15. For the details in this paragraph, see Richard H. Pildes, *There's a Surprising Ending to All the 2020 Conflicts Over Absentee Ballot Deadlines*, THE CONVERSATION (April 7, 2021, 8:30 AM EDT), <https://perma.cc/MXK3-L64X>.

16. *Id.*

In less distrustful times, none of this might matter. Voters would have the patience to wait many days past Election Day and not suspect the process if candidates who were ahead in the numbers released on Election Night ended up behind several days later. But in our current times, the more absentee ballots that can be processed and included in Election Night vote totals, the better.

IV. Threats to Election Administration

In the age of election distrust, we now face the reality that election administrators performing their roles in good faith are nonetheless subject to being harassed, threatened, coerced, or worse. When the Freedom to Vote Act was retrofitted to address the threat of election subversion, several provisions were included to address this reality. These included provisions making it a federal crime to intimidate officials involved in tabulating, canvassing, or certifying the vote,¹⁷ along with other criminal provisions protecting those involved in running elections from threats, coercion, and attempts to intimidate—including in retaliation for their performance of their official duties. Congress invoked its power to regulate national elections, pursuant to the Constitution’s Elections Clause, as the source of authority to enact these provisions and related ones.¹⁸

Yet one complexity in how much Congress can do to ensure the lawful administration of federal elections is that, unlike most democracies, we have no national institutions or officials to administer our national elections (let alone the professionalized, independent institutions many democracies employ).¹⁹ The system depends on state and local officials, many of them elected in partisan elections. To prevent efforts to corrupt the process from within, an additional provision of the Freedom to Vote Act would also have prohibited state election administrators from removing local election officials, with respect to their role in administering federal elections, except for good cause.²⁰ Local officials would have been given the right to bring an action in federal court to enforce this provision.

This particular provision would likely stir constitutional controversies, whether in Congress or in the courts. These local officials serve in dual-hatted

17. Freedom to Vote Act, S. 2747, 117th Cong. § 3 (2021).

18. U.S. CONST. art. I, § 4.

19. For reform proposals on how to reduce partisanship in election administration, see KEVIN JOHNSON, THE CARTER CTR. & ELECTION REFORMERS NETWORK, NEW MODELS FOR KEEPING PARTISANS OUT OF ELECTION ADMINISTRATION 4, 15-19 (Jan. 2022), <https://perma.cc/4PJG-JKGA>.

20. See Freedom to Vote Act, S. 2747, 117th Cong. § 3001 (2021).

roles. They are state officials, administering state and local elections, but they also administer federal elections. The key feature of the for-cause removal provision is its insertion of federal courts into the role of overseeing aspects of election administration. Opponents will argue that the Constitution does not permit Congress to define the internal organization of state government, such as circumstances under which state officials can remove other state or local officials from office, even if they administer federal elections at the same time they administer state and local elections. Perhaps courts would uphold this provision, but this highlights the difficulty of finding effective solutions to protect the integrity of national elections run in our extraordinarily decentralized fashion.

As part of its effort to reduce the risk of election subversion, including through reform of the Electoral Count Act, Congress ought to incorporate many of these elements from the Freedom to Vote Act that seek to protect the integrity of election administration from external and internal threats.

V. Pick Your Poison in Presidential Elections: Congress or the States?

Nowhere is the distrust of the institutions that run our elections now more profound than when it comes to presidential elections. Starting in 2000, members of Congress began to object to accepting the electoral votes from some states based on these members' view that there was something wrong with that state's voting process. Then, in 2020, with far more serious consequences, eight Republican Senators and 139 Republican representatives objected to accepting votes from one or more states.²¹

The Electoral Count Act (ECA),²² which governs the relationship between Congress and the states, needs to be reformed to reflect the age of distrust. But while some issues in ECA reform are easy, such as re-affirming that the Vice President's role is purely ministerial, there is no longer widespread confidence that we can trust either Congress or the relevant state authorities. Would Congress, for partisan reasons, reject the vote from particular states? If a state sends two slates of electors, would Congress vote to accept one of those slates not because that slate reflects the actual, legally valid vote in that state, but rather for partisan reasons? When it comes to the states, would key state officials certify a slate of electors that does not accurately reflect the legally valid vote in that state; would state officials gridlock over certification, in states like Michigan, in which bipartisan four-member boards must certify; or

21. Karen Yourish, Larry Buchanan & Denise Lu, *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. TIMES (Jan. 7, 2021), <https://perma.cc/NA6M-MS5R>.

22. 3 U.S.C. Ch. 1.

would state officials refuse, for partisan reasons, to certify a slate of electors at all?

No matter where the final authority is located to decide on the lawful winner of a state's vote, there is no way to squeeze out of the system completely the risk that this decision-maker will abuse their authority for partisan reasons. If the concern is that states will act corruptly, perhaps a reformed ECA should give Congress power to reject a state's returns. But then how to ensure Congress does not abuse this power?

One temptation is to define specific, narrow circumstances in which Congress can reject a state's returns. But to believe those terms would effectively constrain Congress is likely illusory. A congressional majority disposed to act for partisan reasons would insist that its rejection of a state's votes complied with whatever grounds for objection the ECA permitted.

Some scholars believe the Constitution itself does not permit Congress to reject a state's votes based on judgments about the legality or propriety of the state's voting process.²³ Some scholars also conclude that the current ECA denies Congress any power to reject a state's votes based on the view that there were flaws in the state's voting process.²⁴ And indeed, Congress has only once even arguably rejected a state's vote when a state has sent a single slate of electors; that occurred in 1872, in the aftermath of the Civil War, when Arkansas was in effect having its own internal civil war and which actors represented the legitimate government was itself in doubt.²⁵

In designing a reformed ECA in the midst of pervasive distrust, it is important to bear in mind that Congress is a political institution. The Joint Session also operates under tremendous time constraints. Moreover, it will operate without any judicial oversight: federal courts are not going to enforce the ECA in the midst of the Joint Session of Congress, when Congress convenes to receive the states' electoral votes. In addition, while presidential elections rarely come down to the vote of a single state, a partisan Congress determined to concoct justifications for rejecting a state's votes would surely reject those from enough states to shift the election's winner. There are serious arguments, then, for the ECA to establish a bright-line rule that Congress

23. See Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1793 (2002) ("Finally, to the extent that the joint convention rejects electoral votes contained in authentic electoral certificates as not 'regularly given,' the Electoral Count Act violates the anti-Congress principle of presidential election, the pro-states and pro-state legislatures principle of presidential election, and the pro-electors principle of presidential election.").

24. See Derek Muller, *Electoral Votes Regularly Given*, 55 GA. L. REV. 1529, 1544, 1551-52 (2021).

25. Ned Foley, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* 114-16 (2016).

cannot look behind a state's returns to judge the validity of its voting process—an affirmation of the overwhelming historical practice that reigned until recent decades.

But what about the risk that the process in the states will be corrupted? To change the outcome of the election, that would likely have to happen in more than one state. Worth noting, also, is that the voting and vote-counting process in the states, unlike in Congress, is surrounded by judicial review. State courts, for certain, and federal courts as well, will be available to entertain legal disputes over the voting, tabulating, and certification processes. Still, many state supreme courts are elected in partisan or non-partisan elections and there will be concerns from both sides of the political spectrum that one state supreme court or another might tilt the deck for partisan reasons.

Thus, we are searching for some intermediate, less political institution between the states and Congress that limits Congress' role appropriately but ensures that the state processes fully comply with all relevant law—that the candidate who lawfully wins the election is indeed certified as the winner. In my view, the federal courts are the best institutional bet for that role. In addition, federal constitutional law already imposes significant safeguards against partisan manipulation of the vote counting process. First, *Bush v. Gore*²⁶ makes it unconstitutional for states to treat ballots in an arbitrary, unequal manner. Second, although less well-known, a line of due process election cases prevents any state actor from departing significantly from pre-existing state law and practice in the guise of applying or interpreting state election law.²⁷ This due process doctrine prevents state actors, in effect, from making “new law” in their role of implementing or interpreting election law. This principle does not turn every dispute over state election law into a federal issue, but it does police against substantial departures from established state practice in the guise of interpreting state election laws. As an example, the federal courts held that, when pre-existing state practice would have excluded certain absentee ballots from being counted (even though they were legal votes), a state supreme court decision to include those ballots violated due process.²⁸ This due process doctrine thus constrains the potential manipulation of the vote counting process. Third, if the Supreme Court endorses the “independent state legislature” doctrine, that could have significant destabilizing effects on election law—but it could also prevent election administrators from departing too far from pre-existing state election law. That doctrine, too, could then be

26. 531 U.S. 98, 104 (2000).

27. For a summary and analysis of these cases, see generally Richard H. Pildes, *Judging “New Law” in Election Disputes*, 29 FLA. ST. U. L. REV. 691 (2001).

28. *Id.* at 702-04.

another check against departures from pre-existing election law that would be motivated by partisan advantage seeking.

Federal courts thus already have substantive tools to constrain pre-certification manipulation of the vote counting process in the states. But the last step in the process is the duty of the executive, typically the Governor, to transmit to the Archivist of the United States and others the certificates of ascertainment, which specify which electors the state is sending to the electoral college (and which should be consistent with the candidates who have been certified as the winners). To provide insurance that nothing goes awry at this last step, a reformed ECA could specify that a candidate has the right to go to federal court to argue the ascertainment certificate is not in compliance with federal law and that federal courts have the power to order that the certificate be modified so that it does comply with federal law.²⁹

VI. Transparency and Accountability

Little need be said here, other than to flag the issue. Jurisdictions should use voting systems that produce paper ballots, and they should run risk-limiting audits after the election. Strong chain-of-custody and retention requirements for ballots and voting equipment are essential.³⁰ Election observers and poll watchers from both sides or non-partisan ones should be able to meaningfully observe the process, subject to requirement that they not interfere with election officials or the voting process.³¹

VII. Voting in Person as a Counter to Election Subversion and Distrust

Thus far, I have focused on policy, doctrinal, and institutional changes that might help mitigate election distrust. I want to close by shifting to one measure

29. A reformed ECA should also address the risk that some state actor, at the state or local level, might refuse to certify at all, or that an even-numbered certification body would be gridlocked and not able to certify. The first line of defense against these possibilities would be mandamus in the state courts, but a federal backup role would provide further assurance that legal process will be complied with. I am indebted on the ECA issues to discussions with Ned Foley, Ben Ginsberg, Derek Muller, and Brad Smith.

30. See U.S. ELECTION ASSISTANCE COMM'N, BEST PRACTICES: CHAIN OF CUSTODY (2021) (providing detailed analysis of best practices on chain of custody).

31. Rebecca Green, *Election Observation Post-2020*, 90 FORDHAM L. REV. 467, 492-99 (2021); see also BIPARTISAN POL'Y CTR., POLICY TO ADVANCE GOOD FAITH ELECTION OBSERVATION 4-5 (Jan. 10, 2022), <https://perma.cc/3UJZ-3Y6J>.

that voters themselves can take into their own hands to do so: voting in person.³²

Election officials have less discretion over in-person voting than absentee voting. The rules for early in-person and election day voting are largely set by legislation and typically fairly clear and straightforward. The expansion of early voting, along with greater use of absentee voting, also now makes long polling lines on election day less likely. In addition, many voting technologies now indicate to a voter at the polling place if they have made a mistake on their ballot, such as voting twice for the same office, and will provide an opportunity for the voter to correct their ballot on the spot. And to the extent any dispute arises about whether a voter is eligible to vote, voters have the right to cast a provisional ballot, which must be counted if the voter establishes their eligibility to vote.³³ The greater the percentage of ballots cast in person, the closer to complete the publicly released tallies will be on Election Night or soon after. To be sure, there can still be conflicts over some aspects of in-person voting, such as the location of precincts or early voting sites, and requirements such as the type of documents required to establish a voter's identity.

But absentee voting entails greater procedural requirements, since voting is not done in a public polling place under the eyes of election officials and poll observers. These requirements inevitably are less familiar to voters and put a greater burden on them. In some states, ballots are rejected because officials conclude the signature on the ballot does not match the voter's signature on file; or because the returned ballot arrives too late; or because the ballot is not returned in a "secrecy sleeve" that must then be put inside the ballot envelope,³⁴ as well as for other reasons. In some places, voters will have an opportunity to cure some of these defects; in other places, they will not. In addition to putting more of a burden on voters, these issues create more opportunities for the exercise of discretionary judgment in the hands of election administrators compared to in-person voting. After 2020, legislatures in many states have enacted more specific rules for the absentee-ballot process. Many of these rules are controversial, but even with them, there remains more play in the joints in the absentee-ballot system than in the system of in-person voting.

32. See also Richard H. Pildes, *The Three Words That Can Avert an Election Nightmare*, CNN (Sept. 14, 2020), <https://perma.cc/852E-TN9G> (asserting the importance of "voting in person").

33. In 2020, 78.3% of provisional ballots ultimately were counted, either in full or part. U.S. ELECTION ASSISTANCE COMM'N, ELECTION ADMINISTRATION AND VOTING SURVEY 2020 COMPREHENSIVE REPORT 17 (2021).

34. See NAT'L CONF. OF STATE LEGISLATURES, *Table 13: States That Must Provide Secrecy Sleeves for Absentee/Mail-In Ballots* (Mar. 15, 2022), <https://perma.cc/UL4S-552E>.

Those increased opportunities for the exercise of administrative discretion are all the more troubling if more partisan activists get elected to important election administration posts at the state or local level. Moreover, even if election officials act in good faith, perceptions that election officials are manipulating the absentee-balloting process for partisan reasons is greater than for in-person voting because of the greater discretion that exists in the absentee system. For just these reasons, Black voters have always been more distrustful of absentee voting and have disproportionately cast their ballots in person, even during the pandemic.³⁵ Those voters want to see their ballots go directly into the voting machine. Because there is less discretion in the administration of in-person voting compared to absentee voting, the process of voting in person, including early voting, can reduce the risk of election subversion, as well as the perception that it is taking place.

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Despite these suggestions, no glorious summer awaits our elections. The winter is likely to be long and bitter.

35. In the pandemic election of 2020, only thirty-nine percent of Black Biden supporters voted absentee, while sixty-four percent of white Biden voters did so (and forty-six percent of voters did overall). See PEW RSCH. CTR., *The Voting Experience in 2020* (Nov. 20, 2020), <https://perma.cc/FM7R-FK2P>.