

ELECTION ADMINISTRATION IN
CONSTITUTIONAL TROUBLE?
AN INVESTIGATION INTO PARTISANSHIP
REQUIREMENTS

Shannon Hardy*

* J.D. 2023, Columbia Law School; B.A. 2011, Niagara University, Political Science and International Relations. I would like to thank Professor Richard Briffault for his generous guidance, incredible support, and encouragement during the writing process. Thank you to all the *Columbia Human Rights Law Review* staff and editors, especially Arielle Gerber, Lauren Goff, and Sahana Thirumazhusai.

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INTRODUCTION

The United States is a nation deeply divided and polarized between political ideologies.¹ This divide in the electorate has led to widespread distrust in the electoral system,² which erodes the foundations of American democracy and has caused 66% of voters to believe that U.S. democracy is threatened.³ Hyper-partisanship and mistrust were on full display in the wake of the 2020 presidential election, in which nearly 70% of Republicans believed election fraud had affected the outcome while 90% of Democrats believed it was a free and fair election.⁴

The rise and fall of Donald Trump has led scholars, legislators, and the public to question the “nuts and bolts” of election administration.⁵ Without standardization, states have adopted a variety of election administration structures.⁶ Nineteen states administer elections through a multiperson board or commission.⁷ The provisions establishing these structures often contain partisan composition requirements.⁸ This Note considers the constitutionality

1. David French, *It's Clear that America is Deeply Polarized. No Election Can Overcome that*, TIME (Nov. 4, 2020), <https://time.com/5907318/polarization-2020-election/> [<https://perma.cc/5LZC-29G3>].

2. Tony Dokoupil, *Democratic and Republican Voters Share a Mistrust in the Electoral Process*, CBS NEWS (Jan. 6, 2022), <https://www.cbsnews.com/news/democratic-and-republican-voters-share-their-mistrust-in-the-electoral-process/> [<https://perma.cc/ZD63-4VLV>].

3. Anthony Salvanto et al., *CBS News Poll: A Year After Jan. 6, Violence Still Seen Threatening U.S. Democracy, and Some Say Force Can Be Justified*, CBS NEWS (Jan. 2, 2022), <https://www.cbsnews.com/news/january-6-opinion-poll-2022/> [<https://perma.cc/YR4N-UFNJ>].

4. Catherine Kim, *Poll: 70 Percent of Republicans Don't Think the Election Was Free and Fair*, POLITICO (Nov. 9, 2020), <https://www.politico.com/news/2020/11/09/republicans-free-fair-elections-435488> [<https://perma.cc/U2ZE-L6ZJ>].

5. DANIEL HAYS LOWENSTEIN ET AL., ELECTION LAW: CASES AND CONTROVERSIES 267 (5th ed. 2012).

6. *Election Administration at State and Local Levels: Overview, National Conference of State Legislatures*, NCSL, <https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx> [<https://perma.cc/C5HA-X6AF>].

7. See *infra* notes 22–23 and accompanying text.

8. See, e.g., 10 ILL. COMP. STAT. 5/1-A-2 (“2 shall be affiliated with the same political party as the Governor, and 2 shall be affiliated with the political party whose nominee for Governor in the most recent general election received the second highest number of votes.”); IND. CODE ANN. § 3-6-4.1-2 (c) (“Each member of the commission must be a member of a major political party of the state.”); MD. CODE ANN., Election Law § 2-101(e)(1) (“Each member of the State Board shall be

of these partisan composition requirements. Independent and non-major party voters are not entitled to appointment to a position on a state board of elections, but they do have the right to be considered without discriminatory disqualifications.⁹ This Note argues that partisan composition requirements in election administration are discriminatory disqualifiers that categorically exclude independent and non-major party affiliated voters from consideration for participation in election administration and are therefore an unconstitutional intrusion of their right to associate.

The First Amendment protects freedom of association.¹⁰ In *Carney v. Adams*, the Supreme Court recently raised the question of whether the consideration or requirement of party affiliation as a condition for governmental employment violates the First Amendment.¹¹ While the Supreme Court ultimately decided *Carney* on standing grounds and did not reach the merits of the constitutional questions raised by respondent, Justice Sotomayor's concurring opinion recognized that the constitutional questions raised here would likely be raised again.¹² Since the Court did not evaluate the merits of partisan provisions in governmental employment, there may be future challenges to similar provisions. While *Carney* focused on partisanship requirements in Delaware's judiciary,¹³ many

a member of one of the principal political parties.”); N.Y. CONST. art. II, §8 (“equal representation of the two political parties which, at the general election . . . cast the highest and the next highest number of votes.”); N.C. GEN. STAT. § 163-19(b) (“of the two political parties having the highest number of registered affiliates . . . [e]ach party chair shall submit a list of . . . nominees who are affiliated with that political party”); OKLA. ST. tit. 26, § 2-101.1 (“two (2) members . . . from one political party and one (1) member . . . from the other political party.”); TENN. CODE ANN. § 2-11-103 (“four (4) members of the commission shall be members of the majority party, and three (3) members of the commission shall be members of the minority party.”); VA. CODE ANN. § 24.2-102 (“representation shall be given to each of the political parties having the highest and next highest number of votes . . .”).

9. See *Turner v. Fouche*, 396 U.S. 346, 362 (1970) (“We may assume that the appellants have no right to be appointed to the . . . board of education . . . [b]ut the[y] . . . do have a federal constitutional right to be considered for public service without the burden of invidious discriminatory disqualifications.”)

10. U.S. CONST. amend. I.

11. *Carney v. Adams*, 141 S. Ct. 493 (2020).

12. *Id.* at 503 (Sotomayor, J. concurring).

13. *Id.* at 496.

government institutions also contain partisan composition employment requirements.¹⁴

Part I of this Note discusses background information required to answer whether partisanship requirements in election administration are constitutional: Section A considers current election administration structures and issues; Section B discusses the issues and arguments in *Carney*; and Section C explores freedom of association precedent. Part II of this Note evaluates the constitutionality of existing election administration structures: Section A examines state constitutional and statutory provisions regarding multimember election administration officials to determine if the language may constitute a First Amendment violation, and Section B discusses whether election administration officials fall under the exceptions to political affiliation discrimination in federal employment. Finally, Part III considers solutions to this issue through statutory reform and a shift towards independent nonpartisan election administration.

I: Background

A. Current Election Administration: Structures and Issues

Election administration in the United States is a decentralized system based on the tenet of federalism, leaving the majority of election administration responsibility, decision making, and implementation to state and local governments.¹⁵ Interestingly, there is little federal guidance and oversight in election administration, with the exception of the Federal Election Commission (regulating campaign finance)¹⁶ and the Election Assistance Commission (promulgating voting equipment and security requirements and dispensing federal election funding).¹⁷ As such, each state is free to take its own approach and form, with very few

14. This includes election administration roles. *See supra* note 6.

15. KAREN L. SHANTON, CONG. RSCH. SERV., R45549, THE STATE AND LOCAL ROLE IN ELECTION ADMINISTRATION: DUTIES AND STRUCTURES, CONGRESSIONAL RESEARCH SERVICE 1 (2019), <https://sgp.fas.org/crs/misc/R45549.pdf> [<https://perma.cc/6M8C-6XTG>]; Joshua Douglas, *(Mis)Trusting States to Run Elections*, 92 WASH. U. L. REV. 553, 580 (2015).

16. *Mission and History*, FED. ELECTION COMM'N, <https://www.fec.gov/about/mission-and-history/> [<https://perma.cc/YF54-5TLN>].

17. *About the U.S. EAC*, U.S. ELECTION ASSISTANCE COMM'N, <https://www.eac.gov/about-the-useac> [<https://perma.cc/NLJ6-M44H>].

mechanisms and standards for judicial review to ensure equitable access to franchise.¹⁸

Responsibilities of election administration vary but often include: determining the process of conducting elections, selecting poll site locations, conducting voter registration, maintaining lists of registered voters, setting voting districts in which registered voters are able to cast their ballots, purchasing and maintaining voting machines, ensuring accessibility of poll sites for all, setting rules and standards around absentee voting, hiring poll workers to staff poll sites, putting procedures in place to maintain election security, and counting both in person and mail in ballots, among many more.¹⁹ States have different ways of separating and delegating these duties. Some states consolidate all administrative/rulemaking and enforcement/adjudication/campaign finance duties under one state leader and their office.²⁰ Others place all administrative/rulemaking

18. *Election Administration at State and Local Levels*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <https://www.ncsl.org/elections-and-campaigns/election-administration-at-state-and-local-levels> [https://perma.cc/2WJU-B8HE]; Edward B. Foley et al., *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 673 (2017).

19. SHANTON, *supra* note 15, at 3–11.

20. There are 18 states that use this structure: Alabama, Colorado, Florida, Idaho, Louisiana, Massachusetts, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Dakota, Oregon, Pennsylvania, Texas, Utah, Vermont, and Wyoming. *Alabama Votes*, ALA. SEC'Y OF STATE, <https://www.sos.alabama.gov/alabama-votes> [https://perma.cc/ACV4-TY28]; *Elections & Voting*, COLO. SEC'Y OF STATE JENA GRISWOLD, <https://www.coloradosos.gov/pubs/elections/main.html> [https://perma.cc/9PWT-XYKL]; *Florida Division of Elections*, FLA. DEP'T OF STATE, <https://dos.myflorida.com/elections/> [https://perma.cc/PM3A-G8EQ]; *Elections Division*, IDAHO SEC'Y OF STATE'S OFFICE, <https://sos.idaho.gov/elections-division/> [https://perma.cc/L2WU-WTT4]; *Geaux Vote*, LA. SEC'Y OF STATE, <https://www.sos.la.gov/ElectionsAndVoting/Pages/default.aspx> [https://perma.cc/F242-SEEX]; *Election Division*, WILLIAM FRANCIS GALVIN SEC'Y OF THE COMMONWEALTH OF MASS., <https://www.sec.state.ma.us/ele/> [https://perma.cc/PH79-ADN4]; *Elections & Voting*, MICHAEL WATSON SEC'Y OF STATE, <https://www.sos.ms.gov/elections-voting> [https://perma.cc/2G4R-P3F7]; *Elections & Voting*, JOHN R. ASHCROFT, MO. SEC'Y OF STATE, <https://www.sos.mo.gov/elections> [https://perma.cc/P4TZ-P5NJ]; *Elections & Voter Services*, CHRISTI JACOBSEN MONT. SEC'Y OF STATE, <https://sosmt.gov/elections/> [https://perma.cc/9RHJ-J8R7]; *Elections*, NEV. SEC'Y OF STATE BARBARA K. CEGAVSKE, <https://www.nvsos.gov/sos/elections> (last visited Feb. 26, 2023) (on file with the *Columbia Human Rights Law Review*); *Notices*, N.H. DEP'T OF STATE, <https://sos.nh.gov/elections/information/notices/> [https://perma.cc/2MDC-JRWJ]; *Elections*, SEC'Y OF STATE N.D., <https://sos.nd.gov/elections.html> [https://perma.cc/

duties with one state leader and their office while placing all enforcement/adjudication/campaign finance duties with an ethics board.²¹ Others delegate all administrative/rulemaking duties and all

SF5Q-9QBH]; *Voting & Elections*, OR. SEC'Y OF STATE SHEMA FAGAN, <https://sos.oregon.gov/voting-elections/Pages/default.aspx> [<https://perma.cc/Z9BG-EM5A>]; *Voting & Elections*, PA. DEP'T OF STATE, <https://www.dos.pa.gov/VotingElections/Pages/default.aspx> [<https://perma.cc/3MRM-WU7F>]; *Welcome to Texas Elections*, TEX. SEC'Y OF STATE JOHN B. SCOTT, <https://www.sos.state.tx.us/elections/> [<https://perma.cc/S87Y-QLHY>]; *Welcome to Vote.Utah.gov*, UTAH.GOV, <https://vote.utah.gov/> [<https://perma.cc/4NFG-U6E577RU-N653>]; *Elections Division*, VT. SEC'Y OF STATE, <https://sos.vermont.gov/elections/> [<https://perma.cc/6HZZ-QFAV>]; *Welcome to the Election Center*, WYO. SEC'Y OF STATE, <https://sos.wyo.gov/elections/> [<https://perma.cc/K6PR-HVWT>].

21. There are 13 states that use this structure: Alaska, Arizona, California, Connecticut, Iowa, Kansas, Maine, Minnesota, Nebraska, New Jersey, New Mexico, Ohio, and Washington. ALASKA STAT. §15.13.020 (2016); ALASKA DIV. OF ELECTIONS, <https://www.elections.alaska.gov/> [<https://perma.cc/Q2T6-PS3R>]; *Alaska Public Offices Commission*, ALASKA DEP'T OF ADMIN., <https://doa.alaska.gov/apoc/> [<https://perma.cc/Y8BQ-MSPM>]; ARIZ. REV. STAT. §16-955 (2022); *Elections*, SEC'Y OF STATE - STATE OF ARIZ., <https://azsos.gov/elections> [<https://perma.cc/49DA-JRDQ>]; *What We Do*, CITIZENS CLEAN ELECTIONS COMM'N, <https://www.azcleaselections.gov/what-we-do> [<https://perma.cc/LJ9B-ZT3Z>]; CAL. GOV'T CODE §83100 (2018); *Elections and Voter Information*, CAL. SEC' OF STATE, <https://www.sos.ca.gov/elections> [<https://perma.cc/6AXX-R2PT>]; *About the FPPC*, CAL. FAIR POL. PRACTICES COMM'N, <https://www.fppc.ca.gov/about-fppc.html> [<https://perma.cc/2Z7T-7PKP>]; CONN. GEN. STAT. §9-7a (2013); *Elections & Voting - Home Page*, THE OFFICE OF SEC'Y OF THE STATE, <https://portal.ct.gov/sots/Common-Elements/V5-Template---Redesign/Elections---Voting---Home-Page> [<https://perma.cc/UHB7-XKMV>]; *About Commission*, CONN. STATE ELECTIONS ENF'T COMM'N, <https://seec.ct.gov/Portal/Publications/about> [<https://perma.cc/LAS2-GKAJ>]; IOWA CODE §§68B.32, 69.16 (2022); *Voters*, IOWA SEC'Y OF STATE, <https://sos.iowa.gov/elections/voterinformation/> [<https://perma.cc/P75N-2P64>]; *Our Mission*, IOWA ETHICS & CAMPAIGN DISCLOSURE BD., <https://ethics.iowa.gov/about/our-mission> [<https://perma.cc/W444-BFZQ>]; KAN. STAT. ANN. §25-4119a (2021); *Elections*, STATE OF KAN. SEC'Y OF STATE, <https://sos.ks.gov/elections/elections.html> [<https://perma.cc/C9DY-FYQT>]; KAN. GOVERNMENTAL ETHICS COMM'N, <https://ethics.kansas.gov/> [<https://perma.cc/QN52-8EK8>]; ME. STAT. tit. 1, § 1002 (2022); *Elections & Voting*, STATE OF ME. BUREAU OF CORPS., ELECTIONS & COMM'NS, <https://www.maine.gov/sos/cec/elec/> [<https://perma.cc/JUF2-25CK>]; *About Us*, ME. COMM'N ON GOVERNMENTAL ETHICS & ELECTION PRACS., <https://www.maine.gov/ethics/about> [<https://perma.cc/VZ9Z-Y33G>]; MINN. STAT. § 10A.02; *Election Administration & Campaigns*, OFFICE OF THE MINN. SEC'Y OF STATE STEVE SIMON, <https://www.sos.state.mn.us/election-administration-campaigns/> [<https://perma.cc/VZ9Z-Y33G>]; *Mission Statement*, MINN. CAMPAIGN FINANCE AND PUBLIC DISCLOSURE BD., <https://cfb.mn.gov/citizen-resources/the-board/more-about-the-board/mission/> [<https://perma.cc/VL67-638Y>]; NEB. REV.

enforcement/adjudication/campaign finance duties with a single multimember board or commission.²² Still others create two separate

STAT. § 49-14,106 (2020); *Elections Division*, NEB. SEC'Y OF STATE ROBERT B. EVNEN, <https://sos.nebraska.gov/elections/elections-division> [<https://perma.cc/7QEF-RNR4>]; *Welcome*, NEB. ACCOUNTABILITY AND DISCLOSURE COMM'N, <https://nadc.nebraska.gov/> [<https://perma.cc/8XA2-TVS3>]; N.J. STAT. § 19:44A-5 (1984); N.J. DIV. OF ELECTIONS, DEP'T OF STATE, <https://nj.gov/state/elections/> [<https://perma.cc/FY2N-P2UN>]; *About ELEC*, N. J. ELECTION L. ENF'T COMM'N, <https://www.elec.nj.gov/aboutelec.htm> [<https://perma.cc/B7H5-6KTK>]; N.M. CONST. art. V, § 17; *Voting and Elections*, N.M. SEC'Y OF STATE MAGGIE TOULOUSE OLIVER (last visited Feb. 15 2022), <https://www.sos.state.nm.us/voting-and-elections/> [<https://perma.cc/M2JJ-2DA3>]; *About*, N.M. STATE ETHICS COMM'N, <https://www.sec.state.nm.us/about/> [<https://perma.cc/6SRZ-JLZA>]; OHIO REV. CODE ANN. § 3517.153 (2019); *Elections and Voting in Ohio*, FRANK LAROSE OHIO SEC'Y OF STATE, <https://www.sos.state.oh.us/elections/> [<https://perma.cc/J6EQ-S5SV>]; *About Us*, OHIO ELECTIONS COMM'N, <https://elc.ohio.gov/about-us> [<https://perma.cc/5Z4C-H9SW>] [<https://perma.cc/5Z4C-H9SW>]; WASH. REV. CODE § 42.17A.100; WASH. REV. CODE § 42.17A.110; WASH. REV. CODE § 29A.04.230; *About the PDC*, PUB. DISCLOSURE COMM'N, <https://www.pdc.wa.gov/about-pdc> [<https://perma.cc/ZV5B-JRFP>].

22. There are 16 states that use this structure: Arkansas, Delaware, Hawaii, Illinois, Indiana, Maryland, Michigan, New York, North Carolina, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, and Wisconsin. *See* ARK. CODE ANN. § 7-4-101; *About Us*, ARKANSAS ARK. STATE BOARD OF ELECTION COMM'RS, <https://www.arkansas.gov/sbec/about-us/> [<https://perma.cc/6Z2S-2SYU>]; DEL. CODE ANN. tit. 15, § 202 (2015); *About Agency*, STATE OF DEL. DEP'T OF ELECTIONS, <https://elections.delaware.gov/aboutagency.shtml> [<https://perma.cc/QQ27-GPXG>]; [<https://perma.cc/QQ27-GPXG>]; HAW. REV. STAT. §§ 11-7, 11.7-5 (2021); *About Us: Elections Commission*, STATE OF HAW. OFF. OF ELECTIONS, <https://elections.hawaii.gov/about-us/boards-and-commissions/elections-commission/> [<https://perma.cc/7JTY-8K97>]; ILL. CONST. art. III, § 5; 10 ILL. COMP. STAT. 5/1A-1 (2019); *Board Member Information*, ILL. STATE BD. OF ELECTIONS, <https://www.elections.il.gov/AboutTheBoard/BoardMembers.aspx> [<https://perma.cc/GHQ3-QLSG>]; IND. CODE § 3-6-4.1-2 (2022); *Election Commission*, SEC'Y OF STATE: ELECTION DIV., <https://www.in.gov/sos/elections/election-commission/> [<https://perma.cc/L36T-EYFL>]; MD. CODE ANN. ELECTION LAW § 2-102 (LexisNexis 2022); *About SBE*, MD. STATE BD. OF ELECTIONS, <https://elections.maryland.gov/about/index.html> [<https://perma.cc/C6TL-KQVP>]; MICH. CONST. art. II, § 7; MICH. COMP. LAWS § 168.22 (2022); *Board of State Canvassers: History and Duties*, MICH. SEC'Y OF STATE, <https://www.michigan.gov/sos/elections/bsc> [<https://perma.cc/3SSN-HF2B>]; N.Y. CONST. art. II, § 8; N.Y. ELECTION LAW § 3-100 (1) (McKinney 2014); *About Us*, N.Y. STATE BD. OF ELECTIONS, <https://www.elections.ny.gov/AboutSBOE.html> [<https://perma.cc/YW52-EPP5>]; N.C. GEN. STAT. § 163-19 (2022); *About*, N.C. STATE BD. OF ELECTIONS, <https://www.ncsbe.gov/about> [<https://perma.cc/5E9H-RGA9>]; 17 R.I. GEN. LAWS § 17-7-2 (2022); *About Us*, STATE OF R.I. BD. OF ELECTIONS, <https://elections.ri.gov/about/index.php#staff-directory> [<https://perma.cc/7JFM-QH3F>]; S.C. CODE ANN. § 7-3-10 (2022); *About the SEC*, S.

multimember boards or commissions: one to undertake all administrative/rulemaking duties and the other to undertake all enforcement/adjudication/campaign finance duties.²³ Further complicating and compounding issues of citizen mistrust in election administration, the majority of states consolidate power in a partisan election administration official who is either elected or appointed.²⁴ The other states with election administrative boards or commissions appoint members subject to statutory structures that often take partisanship affiliation into consideration.²⁵ The presence of partisan officials in election administration has led to concerns about self-

C. ELECTION COMM'N, <https://www.scvotes.gov/about-sec> [<https://perma.cc/MM5K-5ZFS>]; S.D. CODIFIED LAWS § 12-1-5 (2022); *State Board of Elections*, S. D. SEC'Y OF STATE, <https://sdsos.gov/about-the-office/board-of-elections/default.aspx> [<https://perma.cc/AP22-WYF4>]; TENN. CODE ANN. § 2-11-103 (2022); *Tennessee State Election Commission*, TENN. SEC'Y OF STATE, <https://sos.tn.gov/elections/guides/tennessee-state-election-commission> [<https://perma.cc/B4V3-XTHE>]; VA. CODE ANN. § 24.2-102 (2022); *About Us*, VA. DEP'T OF ELECTIONS, <https://www.elections.virginia.gov/contact-us/about.html> [<https://perma.cc/SF9M-BX77>]; W. VA. CODE § 3-1A-1 (2022); *Elections Division*, W. VA. SEC'Y OF STATE MAC WARNER, <https://sos.wv.gov/elections/Pages/default.aspx> [<https://perma.cc/2EDA-UK8Z>]; WIS. STAT. §15.61(2022); *About the Wisconsin Elections Commission ABOUT THE WISCONSIN ELECTIONS COMMISSION*, WIS. ELECTIONS COMM'N, <https://elections.wi.gov/about-the-wec> [<https://perma.cc/L8KQ-PPJF>].

23. There are three states that use this structure; Georgia, Kentucky, and Oklahoma. See GA. CODE ANN. § 21-2-30 (2022); STATE ELECTION BD., ELECTIONS, <https://sos.ga.gov/page/about-state-election-board-board> [<https://perma.cc/9MWA-UNZ5>]; GA. CODE ANN. § 21-5-4 (2022); *About the Commission*, GA. GOV'T TRANSPARENCY AND CAMPAIGN FIN. COMM'N, <https://ethics.ga.gov/agency-personnel/> [<https://perma.cc/GSC4-AM5C>]; KY. REV. STAT. ANN. § 117.015 (2022); *About Us*, COMMONWEALTH OF KY. STATE BD. OF ELECTIONS, <https://elect.ky.gov/About-Us/Pages/State-Board-of-Elections.aspx> [<https://perma.cc/P3YX-P93H>]; KY. REV. STAT. ANN § 121.110 (2022); *Board Members*, KY. REGISTRY OF ELECTION FIN., <https://kref.ky.gov/about/Pages/Board-Members.aspx> [<https://perma.cc/7ZWG-8R73>]; OKLA. CONST. art. III, § 2; OKLA. STAT. tit. 26 § 2-101.1 (2022); *State Election Board Secretary and Members*, OKLA. STATE ELECTION BD., <https://oklahoma.gov/elections/about-us/secretary-and-board.html> [<https://perma.cc/B785-WTFS>]; OKLA. CONST. art. XXIX, § 1; *Commission History*, OKLA. ETHICS COMM'N, https://www.ok.gov/ethics/Commission/Commission_History/index.html [<https://perma.cc/GY4R-FKEH>].

24. *Election Administration at State and Local Levels*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 3, 2020), <https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx> [<https://perma.cc/YFV5-G5QG>].

25. See *infra* Part II.

dealing and distortion of the electoral process to achieve specifically desired results, often through suppression of minority voters.²⁶

Some scholars have championed election administration reform to move away from partisan structures towards a more balanced approach that decreases concern over acts of self-dealing.²⁷ At first glance, multimember boards seem more apt to safeguard elections and access to franchise because of bipartisan or balance requirements which stand in contrast to power consolidated in a single partisan administrator. However, this Note argues that even “bipartisan” boards of elections infringe on non-major party affiliates’ freedom of association. In reinforcing the Democratic-Republican duopoly, election administration officials are empowered to rig the system and retain power, not by providing the best policy outcomes and winning fair elections but by manipulating the rules of the game and decreasing competition.²⁸

26. Saul Zipkin, *Administering Election Law*, 95 MARQ. L. REV. 641, 647 (2011) (“[H]eighted concern about electoral provisions that appear to be motivated by ‘political’ interests, designed to promote particular outcomes on partisan or incumbent-protecting grounds (or both).”); see also Heather Balas, *To Trust Election Results, We Must Trust the People Administering Them*, ELECTION REFORMERS NETWORK (June 1, 2022), <https://electionreformers.org/to-trust-election-results-we-must-trust-the-people-administering-them/> [https://perma.cc/JZ3C-RRST] (“In today’s hyper-polarized era, it’s clear we no longer can [count on election administration officials to act impartially].”); Kevin Johnson, *New Models Can Keep Partisans Out of Election Administration*, ELECTION REFORMERS NETWORK (Feb. 1, 2022), <https://electionreformers.org/new-models-can-keep-partisans-out-of-election-administration/> [https://perma.cc/G68V-9NRJ] (“[T]here are good reasons why no other democracy in the world elects its election officials”); *The Impact of Voter Suppression on Communities of Color*, BRENNAN CTR. FOR JUST. (Jan. 10, 2022), <https://www.brennancenter.org/our-work/research-reports/impact-voter-suppression-communities-color> [https://perma.cc/MH8X-ULA8].

27. See Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL’Y REV. 125, 132 (2009) (advocating for nonpartisan election administration); Daniel P. Tokaji, *Truth, Democracy, and the Limits of Law*, 64 ST. LOUIS U. L. J. 569, 581 (2020) (“In the sphere of election law, the most promising remedy is to improve the functioning of the bodies that are responsible for administering our elections.”).

28. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 650 (1998).

B. *Carney v. Adams*: Issue and Argument

In *Carney v. Adams*, one of the major questions brought before the Supreme Court was whether provisions in the Delaware Constitution that provided major/minor party requirements regarding judiciary positions violated the U.S. Constitution.²⁹ The constitutional provision in question states:

First, three of the five Justices of the Supreme Court in office at the same time, shall be of one major political party, and two of said Justices shall be of the other major political party.

. . . .

[A]t any time . . . not more than one-half . . . [or] a bare majority of the members . . . shall be of the same major political party, the remaining members of such offices shall be of the other major political party.³⁰

The Court separated these provisions into the “major party” requirement (applying to three state courts) and the “bare majority” requirement (applying to five state courts) respectively.³¹ Adams was a registered Independent who wished to join the Delaware judiciary and challenged these provisions because he was categorically excluded from eligibility because of his party association.³²

The federal district court held in favor of Adams’ motion for summary judgement, finding the provisions to be an unconstitutional “restriction on governmental employment based on political affiliation.”³³ The Third Circuit affirmed in part, finding the major party requirement to be an unconstitutional violation of all non-major party affiliated persons’ freedom of association guaranteed by the First and Fourteenth Amendments.³⁴ The Third Circuit did not evaluate the bare majority requirement, as it found that the provisions were not severable.³⁵ Certiorari was granted to Carney, the current governor of Delaware, challenging Adams’ standing as well as the lower courts’ finding of unconstitutionality.

29. *Carney v. Adams*, 141 S. Ct. 493, 497 (2020).

30. DEL. CONST. art. IV, §3.

31. *Carney*, at 497.

32. *Id.* at 499–500.

33. *Adams v. Carney*, 2017 U.S. Dist. LEXIS 200304, at *14 (D. Del. 2017).

34. *Adams v. Governor of Del.*, 922 F.3d 166, 176–83 (2019).

35. *Id.* at 183–84.

Ultimately, the Supreme Court unanimously overturned the Third Circuit's decision for lack of standing.³⁶ While the Court never reached a decision on the merits in this claim, Justice Sotomayor's concurrence recognized that the "constitutional questions in this case will likely be raised again."³⁷ She explains that bare majority requirements have existed for hundreds of years and help increase ideological diversity.³⁸ However, she also comments that major party requirements are rarer and may require additional constitutional analysis.³⁹ As such, this Note will focus solely on major party provisions in election administration.

C. Freedom of Association Precedent

1. Constitutional Challenges and Politics

"The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization."⁴⁰ The Constitution grants individuals the freedom to pursue interests and ideas with others.⁴¹ This includes the freedom of political association and affiliation with the political party of one's choice,⁴² the freedom not to associate,⁴³ the freedom to remain politically neutral,⁴⁴ and the freedom to keep private information regarding one's past and present political associations.⁴⁵

36. *Carney v. Adams*, 141 S. Ct. 493, 497 (2020).

37. *Id.*, 141 S. Ct. at 503 (Sotomayor, J. concurring).

38. *See Id.* at 503 (Sotomayor, J. concurring) ("Bare majority requirements preclude any single political party from having more than a bare majority of the seats in a public body . . . and have been shown to help achieve ideological diversity.").

39. *See Id.* at 503 (Sotomayor, J. concurring) ("Major party requirements . . . are far rarer . . . and arguably impose a greater burden on First Amendment associational rights.").

40. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986).

41. *NAACP v. State of Alabama, ex rel. John Patterson*, 357 U.S. 449, 462–63 (1958) (discussing that compelled disclosure of membership roster would "affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they . . . have the right to advocate" because disclosure may withdraw fearing the consequences of exposure of their beliefs through their association).

42. *Buckley v. Valeo*, 424 U.S. 1, 15 (1976); *Kusper v. Pontikes*, 414 U.S. 51, 56–57 (1973).

43. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

44. *Welch v. Ciampa*, 542 F.3d 927, 939 (1st Cir. 2008) ("We can discern no principled basis for holding that an employee who supports an opposition group is

As such, citizens have the constitutional right to create and develop new political parties to pursue common political ends.⁴⁶ In addition to the individual, political parties themselves (governmental structures and activities) are protected under the freedom to associate.⁴⁷ However, the Court in *Burdick v. Takushi* recognized that states have the authority to regulate party activities, elections, and ballots to some extent to decrease disorder and increase fairness in campaigns and elections.⁴⁸ It falls on states to create election regulations and laws; “[e]lection laws will invariably impose some burden upon individual voters.”⁴⁹ However, these burdens must not infringe on basic constitutional protections.⁵⁰

To evaluate constitutional challenges to state election administration laws, the reviewing court must weigh the character and magnitude of the burden imposed on the voter against the state interest that justifies the burden. The court must focus not only on the legitimacy and strength of each interest, but also on the extent to which the burden is necessary.⁵¹ This flexible standard has become known as the *Anderson-Burdick* test.⁵² If the burden is a narrowly tailored and reasonable means to achieve the compelling state

protected by the First Amendment but one who chooses to remain neutral is vulnerable to retaliation.”)

45. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

46. *Norman v. Reed*, 502 U.S. 279, 288 (1992).

47. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997) (“The independent expression of a political party’s views is ‘core’ First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees.”) (quoting *Colorado Republican Federal Campaign Comm.* 518 U.S. 604, 616 (1996)).

48. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citing *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

49. *Id.* (listing registration processes, eligibility of candidates, or voting process as examples).

50. *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 449 (1974) (“To be sure, administration of the electoral process is a matter that the Constitution largely entrusts to the States. But, in exercising their powers of supervision over elections . . . the States may not infringe on basic constitutional protections.” (quoting *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973) (internal quotations omitted))).

51. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

52. *See Burdick*, 504 U.S. at 434 (1992).

interest that is not severely or overly burdensome, it is likely to be upheld.⁵³

For example, a party is able to nominate its own candidate but may not be entitled to have the candidate appear on the ballot as that party's candidate if the candidate is already on the ballot for a different party. In these situations, party members can still vote for their candidate of choice, just under a different banner.⁵⁴ However, in other cases, restrictions to ballot access cannot unjustly discriminate against independent candidates in favor of the two-party system.⁵⁵ A central goal of democratic politics is ensuring that the political process produces policies representative of the interests and views of its constituents, which requires an appropriately competitive political environment.⁵⁶ As such, the Court has invalidated severe restrictions on individual participation in party primaries, like statutory waiting periods, holding that such restrictions on individuals' freedom to associate deprives them of a voice in choosing their party candidates.⁵⁷ Additionally, the Court held that election laws where the burden falls heavily on non-major party affiliates "undermine[] the free association rights of those candidates and voters whose political preference lie outside the mainstream."⁵⁸

2. Political Association and Employment

53. See *Anderson*, 460 U.S. at 789 (1983) (upholding state ballot access requirements that set reasonable standards a party must meet for their candidate to appear on the ballot).

54. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 360 (1997) (upholding state ban on fusion candidates as not severely burdensome because they can still vote for their candidate of choice, just not under their party name).

55. *Williams v. Rhodes*, 399 U.S. 23, 31–32 (1968).

56. *Issacharoff & Pildes*, *supra* note 28 at 646 ("Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interests and views of the citizens.").

57. *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) ("By preventing the appellee from participating at all in Democratic primary elections during the [23 month] statutory period, the Illinois statute deprived her of any voice in choosing the party's candidates, and thus substantially abridged her ability to associate freely with the party of her choice.").

58. Bennett Matelson, *Tilting the Electoral Playing Field: The Problem of Subjectivity in Presidential Election Law*, 69 N.Y.U. L. REV. 1238, 1256 (1994) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 793–94 (1983)).

Constitutional political association claims are often brought in relation to employment decisions based on partisan affiliation.⁵⁹ Political patronage has a longstanding history in the United States as a type of cronyism whereby officials in power grant governmental benefits and resources to others on the basis of partisan loyalty.⁶⁰ Government employment has been recognized as a public benefit.⁶¹ The First Amendment “prohibits a state from excluding a person from a profession or punishing him solely because he is a member of a particular political organization”⁶² For example, loyalty oath requirements for access to government benefits are generally unconstitutional.⁶³ Political patronage has been most commonly seen in the U.S. through the conference of or dismissal from public employment.⁶⁴ As such, this relationship between patronage practices, an individual’s freedom of political association, and eligibility for government employment has been litigated in a line of Supreme Court cases known as the Patronage Cases: *Elrod v. Burns*,⁶⁵ *Branti v. Finkel*,⁶⁶ and *Rutan v. Republican Party*.⁶⁷

59. See, e.g., *Elrod v. Burns*, 427 U.S. 347 (1976) (protecting most non-civil-service employees from patronage dismissal); *Rutan v. Republican Party*, 497 U.S. 62 (1990) (expanding protection from patronage practices to hiring, promotion, transfer, and recall); *O’Hare Truck Serv. v. City of Northlake*, 518 U.S. 712 (1996) (extending protection from patronage employment practices to independent contractors).

60. Brian L. Porto, *The Constitution and Political Patronage: Supreme Court Jurisprudence and the Balancing of First Amendment Freedoms*, 13 PACE L. REV. 87, 87 (1993) (“[T]o the victor belong the spoils of the . . . enemy’ . . . expresse[s] the philosophical underpinning of the longtime practice in American politics of hiring and firing public employees because of their partisan political affiliations.”); Christopher V. Fenlon, *The Spoils System in Check? Public Employees’ Right to Political Affiliation & the Balkanized Policymaking Exception to § 1983 Liability for Wrongful Termination*, 30 CARDOZO L. REV. 2295, 2301 (2009) (“[I]t is important to recognize the role of political patronage in American history. Political patronage is a practice ‘as old as the American Republic.’”) (citing *Boyle v. County of Allegheny Pennsylvania*, 139 F.3d 386, 394 (3d Cir.1998)).

61. *Elrod*, 427 U.S. at 360 (regarding “a government benefit, such as public employment”).

62. *Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971).

63. *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952) (holding loyalty oath for employment unconstitutional); *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974) (holding party wide loyalty oath for access to ballot unconstitutional).

64. Porto, *supra* note 60, at 87.

65. 427 U.S. 347 (1976).

3. The Patronage Cases

The Court in *Elrod* recognized “[t]he cost of the practice of patronage is the restraint it places on freedoms of belief and association,”⁶⁸ because “if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.”⁶⁹ This is related to the unconstitutional conditions doctrine, which prohibits the government from denying a benefit on the basis of constitutionally-protected activities.⁷⁰ Conversely, “whatever an express constitutional provision forbids government to do directly it equally forbids government to do indirectly.”⁷¹

While political patronage practices “clearly infringe[] First Amendment interests,”⁷² a state may abridge these freedoms if they demonstrate an overriding vital state interest that is narrowly tailored and cannot be served in a less burdensome way.⁷³ In general, employment decisions for government positions that are made with political motivations are heavily scrutinized by the Court.⁷⁴

The question presented in *Elrod* was whether partisan dismissal of individual non-civil-service employees solely based on their opposite party affiliation constituted an unconstitutional infringement of their associational rights.⁷⁵ The state claimed several interests that are advanced through patronage employment practices, including the need for effective and efficient government, the need for loyalty to enforce new policies, and the need to preserve the

66. 445 U.S. 507 (1980).

67. 497 U.S. 62 (1990).

68. *Elrod*, 427 U.S. at 355.

69. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

70. *Libertarian Party of Ohio v. Wilhem*, 988 F.3d 274, 279 (6th Cir. 2021).

71. William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445–46 (1968).

72. *Elrod*, 427 U.S. at 360.

73. See *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (“[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”); *American Party of Texas v. White*, 415 U.S. 767, 781 (1974) (holding ballot access limitations “are constitutionally valid measures, reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways”).

74. Fenlon, *supra* note 60, at 2297.

75. *Elrod v. Burns*, 427 U.S. 347, 349 (1976).

democratic process.⁷⁶ In evaluating these interests, the Court clarified that the overriding, legitimate, vital interest which may allow a state to interfere with an individual's associational rights must be a *state* interest, not a *party* interest.⁷⁷

Of these three arguments, the Court was most interested in the need for loyalty to ensure enforcement of new policy goals, but Justice Brennan's plurality opinion concluded that limiting the practice to policymaking officials was sufficient.⁷⁸ Overall, the Court found the state party's arguments unpersuasive, holding that patronage dismissal was not the least restrictive means to achieve their stated goals and that patronage dismissals of non-policymaking, non-confidential individuals amounted to unconstitutional infringements on their associational rights.⁷⁹

This question of patronage dismissal based solely on party affiliation was raised again in *Branti v. Finkel* when, after a new public defender dismissed assistant public defenders on partisan grounds, the Court reaffirmed its application of strict scrutiny and the *Elrod* decision of unconstitutionality.⁸⁰ The Court engaged in a more detailed analysis to sort which types of positions allow political affiliation to be a legitimate consideration in employment decisions. It reasoned that a position may be political in nature without being confidential or requiring policymaking and that partisan affiliation is not always relevant in policymaking or confidential positions.⁸¹ Justice Stevens opined that the focus should instead be whether an individual's personal beliefs conforming to those of the supervisory authority is *required for effective performance* of the public position.⁸² The Court held that a public defender's purpose and duty is to their client, not a party, and therefore partisan affiliation was not required for effective performance.⁸³ The Court even suggested that requiring such allegiance would undermine the purpose of the position.⁸⁴

76. *Id.* at 364–72.

77. *Id.* at 363 (“In the instant case, care must be taken not to confuse the interest of partisan organizations with governmental interests”).

78. *Id.* at 367.

79. *Id.* at 373.

80. *Branti v. Finkel*, 445 U.S. 507, 517 (1980).

81. *Id.* at 518.

82. *Id.*

83. *Id.* at 519.

84. *Id.* at 519–20.

In *Rutan*, the Court expanded its holdings on patronage protection to other employment related issues, such as hiring, promotion, transfer, and recall after layoffs.⁸⁵ In that case, the governor of Illinois placed a hiring freeze on all positions with limited exceptions subject to his specific permission.⁸⁶ Factors used for approval included an individual's past voting record, promise to join the Republican party, and support of party officials.⁸⁷

Criticisms of the patronage protection in both of these opinions' dissents and in subsequent scholarship have focused on the supposed benefits of the patronage system to the structure of American democracy.⁸⁸ Dissenting in *Elrod*, Justice Powell stressed the importance of patronage in increasing public participation in the political process and helping to foster stable political parties which in turn allow the public more indirect control over the function of government through institutional responsibility to voters.⁸⁹ In *Rutan*, Justice Scalia articulates the supposed benefits of strong parties and his belief that the two party duopoly in the United States has obviously stabilizing effects by forcing both parties toward the political center.⁹⁰ He argues this prevents excessive political fragmentation, even claiming that the tradition should be upheld because it enjoys a long history in US politics.⁹¹ A few years later the Court reaffirmed the belief that stable parties create stable political systems and allowed states to enact reasonable regulations that may favor the two-party system.⁹² Notably, none of these arguments and conclusions were supported by any empirical evidence and have been criticized as mere predilection.⁹³

85. *Rutan v. Republican Party*, 497 U.S. 62, 65 (1990).

86. *Id.*

87. *Id.* at 69.

88. Porto, *supra* note 60, at 91 (identifying several sources of criticism ranging from political scientists believing the decision ignored the importance of patronage to maintaining strong political parties to law review commentaries that view the standards for determining which positions are subject to patronage-based personnel decisions as confusing and vague).

89. *Elrod*, 427 U.S. 347, 379 (1976) (Powell, J., dissenting).

90. *Rutan*, 497 U.S. 62, 107 (1990) (Scalia, J., dissenting).

91. *Id.*

92. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366–67 (1997) (“States’ interest permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system . . .”).

93. Ashutosh Bhagwat, *Patronage and the First Amendment: A Structural Approach*, 56 UNIV. CHI. L. REV. 1369, 1383 (1989) (discussing whether the

4. Elrod-Branti Exception

This line of precedent has created what is known as the *Elrod-Branti* ‘policymaker’ exception, which was criticized early on as too vague and unfollowable.⁹⁴ In the following decade, lower court decisions have resulted in a variety of jobs that are subject to or protected from political patronage practices.⁹⁵ Examples of positions subject to the policymaker exception include most local government attorneys,⁹⁶ political staff and advisors to policymakers,⁹⁷ and directors of municipal administrative agencies.⁹⁸ Examples of positions protected from partisan employment considerations include domestic laborers,⁹⁹ road department employees,¹⁰⁰ general clerical

judiciary has the right to decide patronage matters at all, criticizing Justice Powell’s argument in favor of patronage for lacking empirical foundation, and highlighting Judge Ripple’s dissent in *Rutan* accusing the majority of following their predilections regarding patronage rather than remanding to develop a more complete factual record weighing the costs and benefits of the patronage system).

94. See *Rutan*, 497 U.S. at 92 (Scalia, J., dissenting) (“It is hard to say precisely (or even generally) what that exception means”); *Branti*, 445 U.S. at 525 (Powell, J., dissenting) (arguing the standard to distinguish patronage eligible positions from ineligible was vague and overbroad).

95. Susan Lorde Martin, *A Decade of Branti Decisions: A Government Official’s Guide to Patronage Dismissals*, 39 AM. U. L. REV. 11, 43–46 (1989).

96. *Mummau v. Ranck*, 531 F. Supp. 402, 405 (E.D. Pa. 1982), *aff’d*, 687 F.2d 9 (3d Cir. 1982) (holding district attorney control over subordinate attorney’s absolute/not limited to policymakers); *Ness v. Marshall*, 660 F.2d 517, 522 (3d Cir. 1981) (holding city municipal attorneys’ policymakers).

97. See *Rios v. Colon*, 819 F.2d 319, 326 (1st Cir. 1987) (holding political affiliation requirement appropriate for personal secretary, editing assistant, political advisor positions).

98. *Brown v. Trench*, 787 F.2d 167, 170 (3d Cir. 1986), *aff’d*, 829 F.2d 30 (3d Cir. 1987) (holding assistant director for public information requires shared political belief with county commissioner for effective performance); *Tomczak v. City of Chicago*, 765 F.2d 633, 643 (7th Cir. 1985) (holding party affiliation appropriate requirement for first deputy commissioner of water department); *Eckler v. Cohalan*, 542 F. Supp. 896, 901 (E.D.N.Y. 1982) (holding deputy parks commission to be major political appointment).

99. See *Rios*, 819 F.2d at 326 (1st Cir. 1987) (holding cleaning persons, waiters, a supervisor of domestic services protected from patronage employment practices under the first amendment).

100. *Horton v. Taylor*, 767 F.2d 471, 478 (holding road-graders not subject to the policymaker exception).

workers,¹⁰¹ and even higher level municipal employees and supervisors.¹⁰²

The method used to arrive at these conclusions has varied among the circuits since the Supreme Court has yet to set a definitive test. Some circuits focus more on *Elrod* and how to define whether an employee is a policymaker,¹⁰³ others focus more on *Branti* and whether a position requires common party affiliation for effective performance,¹⁰⁴ while the remaining circuits blend both approaches.¹⁰⁵

Elrod has left courts defining what a policymaking position is by focusing on the responsibilities of the position in question.¹⁰⁶ Specifically, courts look to the responsibilities of the official position, not necessarily the duties performed by the individual in office.¹⁰⁷ This inquiry determines whether the position “resembles a policymaker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement.”¹⁰⁸ Here, an individual’s status as a policymaker exempts the court from weighing personal First Amendment interests with the state’s interest.¹⁰⁹ Circuit courts have identified a variety of indicia to aid in this determination: exemption from civil service, relative pay, budget preparation, level of

101. *Grossart v. Dinaso*, 758 F.2d 1221, 1227 (7th Cir. 1985) (holding bookkeeper a non-policymaking position); *Paradise v. O’Laughlin*, 621 F. Supp. 694, 698 (W.D.N.Y. 1984) (holding county clerk a non-policymaking position).

102. *Crisp v. Bond*, 563 F. Supp. 137, 141 (W.D. Mo. 1982) (holding political affiliation is an inappropriate requirement for assistant director of motor vehicle department); *De Choudens v. Gov’t Dev. Bank*, 801 F.2d 5, 10 (1st Cir. 1986) (holding political affiliation an inappropriate employment consideration for senior vice president of state bank).

103. This method is followed by the Second, Third, Fifth, Seventh and Ninth Circuits. *See Fenlon*, *supra* note 60, at 2312.

104. This method is followed by the Eighth, Tenth, and Eleventh Circuits. *Id.* at 2314.

105. The First, Fourth and Sixth Circuits blend these two approaches. *See infra* notes 123–126 and accompanying text.

106. *Elrod v. Burns*, 427 U.S. 347, 367 (1978) (“The nature of the responsibilities is critical.”).

107. *Mummau v. Ranck*, 531 F. Supp. 402, 405–04 (E.D. Pa. 1982), *aff’d*, 687 F.2d 9 (3d Cir. 1982).

108. *Jimenez Fuentes v. Torres Gatzambide*, 807 F.2d 236, 242 (1st Cir. 1986).

109. *Bardzik v. Cnty. of Orange*, 635 F.3d 1138, 1151 (9th Cir. 2011) (citing *Walker v. City of Lakewood*, 272 F.3d 1114, 1131 (9th Cir. 2001)).

discretion allowed in performance of duties, ability to hire or fire other employees, technical competence or expertise, power to control others, authority to speak on behalf of policymakers, public perception of the position, influence the position may have on governmental programs, the amount of contact with elected officials, and whether the official is responsive to partisan politics and political leaders.¹¹⁰

Also falling into this exception are confidential employees, defined as having “a confidential relationship to the policymaking process . . . or . . . ha[ving] access to confidential documents or other materials that embody policymaking deliberations and determinations.”¹¹¹ These position-specific inquiries define the class of potentially affected positions for these circuits.¹¹²

For a *Branti* centered inquiry, circuits focus on the relationship between the position and partisan interests.¹¹³ Any specific application of the policymaker exception should not depend on the level of responsibility held.¹¹⁴ Rather, it should rely on (i) how important political loyalty is to effective job performance and (ii) how legitimately relevant political loyalty is to the job.¹¹⁵ Courts will focus their analysis on the nature of the specific employee’s duties and responsibilities.¹¹⁶ Questions considered include: whether the position allows for great discretion in the allocation of governmental

110. *Galli v. N.J. Meadowlands Comm’n*, 490 F.3d 265, 271 (3d Cir. 2007); *Butler v. N.Y. State Dep’t of L.*, 211 F.3d 739, 744 (2d Cir. 2000) (citing *Vezzetti v. Pellegrini*, 22 F.3d 483, 486 (2d Cir. 1994)).

111. *Maldonado v. Rodriguez*, 932 F.3d 388, 393 (5th Cir. 2019) (quoting *Wiggins v. Lowndes Cnty.*, 363 F.3d 387, 391 (5th Cir. 2004)) (giving an advisor to policymaker relationship and a private secretary to policymaker relationship as examples).

112. *Barrett v. Thomas*, 649 F.2d 1193, 1201 (5th Cir. 1981) (“The terms ‘confidential’ and ‘policymaker’ illuminate the contours of the employee class that may permissibly be subjected to a political litmus test”)

113. *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 241 (1st Cir. 1986) (“Whether the position at issue, no matter how policy-influencing or confidential it may be, relates to ‘partisan political interests . . . [or] concerns.’” (quoting *Branti v. Finkel*, 445 U.S. 507, 519 (1980))).

114. *Eves v. LePage*, 927 F.3d 575, 584–85 (1st Cir. 2019) (citing *Branti*, 445 U.S. at 518).

115. *Ortiz-Resto v. Rivera-Schatz*, 546 F. Supp. 3d 126, 132 (D.P.R. 2021) (citing *Eves v. LePage*, 927 F.3d 575, 584 (1st Cir. 2019)).

116. *Dickeson v. Quarberg*, 844 F.2d 1435, 1442 (10th Cir. 1988).

resources;¹¹⁷ whether the employee has “meaningful input into decision making concerning the nature and scope of a major . . . program”;¹¹⁸ whether the position allows for input on decisions that may lead to political disagreements;¹¹⁹ whether the employee’s personal or party “goals or programs affect the direction, pace, or quality of governance”;¹²⁰ whether a hiring authority is entitled to expect undivided loyalty;¹²¹ and whether the position is so closely linked to the hiring authority that they function as an alter ego to ensure their policies are implemented.¹²²

The First, Fourth, and Sixth Circuits blend these two analyses. The First and Fourth Circuits follow a hybrid two-step test to determine if a position is subject to the policymaker exception: (1) they use *Branti* determinations as a threshold (is partisan loyalty required for effective performance), and (2) then use *Elrod* to decide whether the position is a policymaking position.¹²³ The First Circuit also lends deference to the legislature’s determination of whether a position is a policymaker.¹²⁴ The Sixth Circuit’s approach blends the *Elrod-Branti* factors with legislative deference by creating four categories of employment that fall under the policymaker exception.¹²⁵ In *McCloud v. Testa*, the Sixth Circuit defined these categories as: (1) positions specifically named in statute with discretionary enforcement powers, elected or appointed; (2) positions holding the same or similar discretionary enforcement powers as category 1 but not named in statute; (3) confidential advisors to

117. *Ray v. Leeds*, 837 F.2d 1542, 1544 (11th Cir. 1988) (holding the ability to deploy resources and implement programs for the needy in the community required political compatibility with the hiring authority).

118. *Brown v. Trench*, 787 F.2d 167, 169–70 (3rd Cir. 1986) (quoting *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981)).

119. *Tomczak v. Chicago*, 765 F.2d 633, 641 (7th Cir. 1985) (regarding “meaningful input into government decisionmaking [sic] on issues where there is room for principled disagreement on goals or their implementation” (quoting *Nekolny*, 652 F.2d at 1170)).

120. *Jimenez Fuentes v. Torres Gatzambide*, 807 F.2d 236, 242 (1st Cir. 1986).

121. *Garza v. Escobar*, 972 F.3d 721, 732 (5th Cir. 2020) (quoting *Stegmaier v. Trammell*, 579 F.2d 1027, 1040 (5th Cir. 1979) (internal quotations omitted)).

122. *Terry v. Cook*, 866 F.2d 373, 378 (11th Cir. 1989).

123. Susan Lorde Martin, *Patronage Employment: Limiting Litigation*, 49 SAN DIEGO L. REV. 669, 681 (2012).

124. *Jimenez Fuentes*, 807 F.2d at 246.

125. *Fenlon*, *supra* note 60, at 2317.

individuals in categories 1 or 2 on how to exercise their power or who control the lines of communication from the office; and (4) positions filled by balancing out political party representation.¹²⁶

Since the Supreme Court has not set a definitive test, Part II will examine each approach and evaluate relevant factors related to the position of election administrator to determine whether election administration officials are subject to the policymaker exception. This investigation is necessary to determine whether partisan affiliation is a factor that may be considered in establishment and composition provisions for election administration.

II: Application

To evaluate the constitutionality of bipartisanship requirements in multimember election administration bodies, this analysis is broken into two steps. First, Section II.A discusses whether partisan loyalty is an appropriate requirement for election administrative officials in multimember bodies. This analysis will determine whether partisan affiliation is an appropriate consideration for governmental employment in election administration. Secondly, Section II.B discusses whether the statutory language of the provisions establishing partisan composition and appointment structures constitute an infringement on the associational freedoms of non-major party affiliated individuals. This analysis is accomplished by examining the statutory language of all nineteen states that employ a multimember election administration structure, focusing on major party provisions employed in both composition and appointment structures.

A. Is Partisan Loyalty Required for Effective Performance of Election Administrative Duties?

The Sixth Circuit considered whether county level election administrators were protected from partisan patronage practices in *Peterson v. Dean*.¹²⁷ Several county level election administrators in Tennessee brought suit when they were terminated because of their party affiliation after an electoral change in controlling party.¹²⁸ To

126. 97 F.3d 1536 at 1557–58.

127. 777 F.3d 334 (6th Cir. 2015).

128. *Id.* at 339.

determine if this role fell into one of the four *McCloud* categories,¹²⁹ the court focused on whether the position was political in nature and the level of discretionary authority.¹³⁰ In examining the duties of a county election administrator, the court found this title was a category 2 position and likened them to advisors for election commissioners who wielded large amounts of discretionary power, holding political affiliation a permissible consideration for election administrators.¹³¹ The Ninth Circuit considered a similar question in *Soelter v. King County*.¹³² Here, a former county Manager of Records and Elections filed suit after she was dismissed on partisan grounds.¹³³ The Ninth Circuit focused on *Elrod* factors and examined the powers and responsibilities of the position to determine if she was a policymaker.¹³⁴ It found this was a policymaking position because although statutorily limited, she maintained substantial discretion in determining how elections were conducted¹³⁵ and the legislative intent was for the position to be considered a policymaker.¹³⁶

More recently, the Sixth Circuit considered whether statutory partisanship requirements for the Ohio Elections Commission (OEC) infringed upon a minor party affiliated individuals' freedom to associate in *Libertarian Party of Ohio v. Wilhem*.¹³⁷ Most similar to the argument in *Carney*, here petitioner brought suit for categorical exclusion from consideration for appointment to the commission because of his membership in a minor party.¹³⁸ The Sixth Circuit concluded that OEC positions fall under category 4 of *McCloud* because the statutory scheme required equal representation from the

129. The Sixth Circuit created the *McCloud* categories to determine if a position falls into the policymaker exception: (1) positions specifically named in statute with discretionary enforcement powers, elected or appointed; (2) positions holding the same or similar discretionary enforcement powers as category 1 but not named in statute; (3) confidential advisors to individuals in category 1 or 2 on how to exercise their power or who control the lines of communication from the office; and (4) positions filled by balancing out political party representation. See *supra* Section I.C.4.

130. *Peterson*, 777 F.3d at 346.

131. *Id.* at 350.

132. 931 F.Supp. 741 (W.D. Wash. 1996), *aff'd*, 132 F.3d 40 (9th Cir. 1997).

133. *Id.* at 742.

134. *Id.* at 744–45.

135. *Id.* at 746.

136. *Id.* at 747.

137. 988 F.3d 274 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 427 (2021).

138. *Id.* at 277–78.

two major parties, therefore partisanship was an appropriate consideration.¹³⁹

The decision in *Wilhem* is not dispositive of the inquiry of this Note for several reasons. First, the Ohio Elections Commission, while similar in title to the structures investigated in this Note, is structured differently than the structures investigated here.¹⁴⁰ Ohio places all administrative/rulemaking duties with one state leader and their office, the Ohio Secretary of State, while placing all enforcement/adjudication/campaign finance duties with an ethics board, the Ohio Elections Commission.¹⁴¹ Additionally, the Sixth Circuit relied on Circuit specific precedent (*McCloud* and *Peterson*) in applying the *Elrod-Branti* exception; however, that does not mean that other Circuits would come to the same conclusions since the Supreme Court has yet to define a specific and workable standard to apply the policymaker exception.

There is no federal standard regarding the duties and responsibilities of election administrators. With each state allocating varying levels of discretion, authority and enforcement power, it is likely that this determination would have to be analyzed for each state separately. To narrow the scope of this inquiry, this Note addresses whether each different circuit's approach to applying the *Elrod-Branti* exception would consider whether Category Three state statutes containing major party provisions were subject to the *Elrod-Branti* exception.¹⁴²

If the Supreme Court were to follow the approach of the Second, Third, Fifth, Seventh, and Ninth Circuits and rely more heavily on *Elrod* factors,¹⁴³ they would likely find election administration officials subject to the policymaker exception because these board members wield enormous power to shape how elections are run, how voters are registered, and how election law is enforced.¹⁴⁴ If the Supreme Court were to follow the lead of the Eighth, Tenth, and Eleventh Circuits and rely more heavily on *Branti*

139. *Id.* at 282.

140. This Note focuses its investigation on multimember boards with either solely administrative/rulemaking duties, or one singular board that undertakes all election administration duties. *See supra* Section 1.A; *supra* Section II.B.

141. *See Election Administration at State and Local Levels, supra* note 24.

142. *See supra* Section II.B.3.

143. *See supra* Section I.C.4.

144. *See, e.g.,* IND. CODE § 3-6-4.1-14 (governing conduct of elections, supervising local administration officers, adopting emergency rules).

factors, then the real question is whether partisan loyalty is required for effective job performance.¹⁴⁵ Category Three election administrators are inherently political in nature and have meaningful input into deciding the scope of major programs. In addition, their decisions could leave plenty of room for disagreement over programmatic goals and expenditures.¹⁴⁶ It is equally possible that a court here could find election administration officials subject to the exception as well.

Digging deeper into *Branti* justifications for the exception, is an appointing governor entitled to expect “undivided loyalty” from election administrators?¹⁴⁷ Is the position of an election administration official so closely linked to the governor that they function as an alter ego of the governor to ensure partisan policy implementation?¹⁴⁸ The simple answer is no. By their very nature, major party and bipartisan requirements in election administration require the governor to not only appoint members loyal to her own partisan affiliation, but also appoint members with the opposite party affiliation. If the purpose of applying the policymaker exception is to allow hiring authorities to implement their policy goals through appointment of loyal party members,¹⁴⁹ how is that purpose served at all by requiring the appointment of an ideological adversary? These complications should remove major party and bipartisan requirements in election administration from patronage exceptions. Therefore, it is also equally possible that the Eighth, Tenth, and Eleventh Circuits that focus on *Branti* factors may find that these provisions and employees are not subject to the *Elrod-Branti* exception. Since the First and Fourth Circuits two-part test uses *Branti* factors as a threshold inquiry, the policymaker exception may

145. *Branti v. Finkel*, 445 U.S. 507, 518 (1980).

146. *See, e.g.*, MD. CODE ANN., ELEC. LAW § 2-102 (West 2022) (Board powers and duties include supervising conduct of elections, adopting regulations, canvassing and certifying election results, and ensuring election law compliance); N.Y. ELEC. LAW § 3-102 (2022) (stating that Board powers and duties include promulgating rules for election campaign practices and campaign financing practices).

147. *Garza v. Escobar*, 972 F.3d 721, 732 (5th Cir. 2020) (quoting *Stegmaier v. Trammell*, 579 F.2d 1027, 1040 (5th Cir. 1979)).

148. *See Terry v. Cook*, 866 F.2d 373, 378 (11th Cir. 1989) (analyzing whether, following *Branti*, certain positions function as alter egos of the official in question).

149. *Elrod v. Burns*, 427 U.S. 347, 367 (1976).

also fail to apply to election administrators on multimember boards in those courts as well.

B. Examination of State Constitutional/Statutory Election Administration Text

This Note focuses on the constitutionality of bipartisan requirements in multimember boards/commissions for election administration. To narrow the scope of this inquiry, this Note will investigate the constitutional or statutory provisions of two categories of states, focusing on the latter. The first category is the sixteen states that have consolidated both administrative/rulemaking duties and enforcement/adjudication/campaign finance duties into a single multimember board or commission.¹⁵⁰ The second category is the three states that have created two separate multimember boards or commissions—one to undertake all enforcement / adjudication / campaign finance duties, the other to undertake all administrative/rulemaking duties.¹⁵¹ This investigation will seek to determine if they have party affiliation requirements and evaluate whether the language would constitute an infringement of the political associational freedoms of non-major-party-affiliated individuals by categorical exclusion.

These state provisions fall into three categories: (1) statutory language that is comprehensive enough to not categorically exclude non-major party affiliates, (2) statutory language that contains partisan nomination requirements but not composition requirements, and (3) statutory language that contains major party composition provisions. There are also three states that fall outside of these categories because they either explicitly reject partisan composition structures,¹⁵² are ambiguous and could fit into more than one category,¹⁵³ or are facially unconstitutional.¹⁵⁴

The purpose and function of election administration officials is not just to run elections, but to keep US democracy alive in free and fair elections.¹⁵⁵ The presence of independents and other political

150. *See supra* note (for these sixteen states).

151. *See supra* note 23 (for these three states).

152. *See supra* Section II.B.4.a.

153. *See supra* Section II.B.4.b.

154. *See supra* Section II.B.4.c.

155. Many states expressly safeguard free and fair elections in their constitutions. *See, e.g.*, ARIZ. CONST. art. II, § 21 (“All elections shall be free and

minorities on election boards would help balance the partisan tug of war within election administration.¹⁵⁶ If the election administration was meant to reflect the partisan goals, ideologies, and political will of the party in power, then the election administration would lie completely in the hands of a partisan body such as the legislature.¹⁵⁷ The reason it is removed to the executive is based on the basic idea of separation of powers.¹⁵⁸ The executive branch is tasked with enforcement and administration of laws,¹⁵⁹ while the legislature is tasked with creating and promulgating laws.¹⁶⁰ This separation helps insulate the electoral process from such whims as parties in power could create laws that disparately disenfranchise voters of all

equal"); ARK. CONST. art. III, § 2 ("Elections shall be free and equal"); CAL. CONST. art. IV, § 1.5 ("the Founding Fathers established a system of representative government based upon free, fair, and competitive elections"); COLO. CONST. art. II, § 5 ("All elections shall be free and open"); DEL. CONST. art. I, § 3 ("All elections shall be free and equal"); ILL. CONST. art. III, § 3 ("All elections shall be free and equal"); IND. CONST. art. 2, § 1 ("All elections shall be free and equal"); KY. CONST § 6 ("All elections shall be free and equal"); MASS. CONST. pt.1, art. IX ("All elections ought to be free"); MO. CONST. art. I, § 25 ("That all elections shall be free and open"); MONT. CONST. art. II, § 13 ("All elections shall be free and open"); N.H. CONST. pt. 1, art. 11 ("elections are to be free"); N.M. CONST. art. II § 8 ("All elections shall be free and open"); OKLA. CONST. art. 3, §5 ("All elections shall be free and equal"); ORE. CONST. art. II, § 1 ("All elections shall be free and equal"); PA. CONST. art. 1, § 5 ("Elections shall be free and equal"); S.C. CONST. art. I, § 5 ("All elections shall be free and open"); S.D. CONST. art. VII, § 1 ("Elections shall be free and equal"); TENN. CONST art. I, § 5 ("elections shall be free and equal"); WASH. CONST. art. I, § 19 ("Elections shall be free and equal"); WYO. CONST. art. 1; § 27 ("Elections shall be open, free and equal").

156. See *Sweezy v. New Hampshire*, 354 U.S. 234, 251 (1957) ("History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought . . . the absence of such voices would be a symptom of grave illness in our society.").

157. See *The Future of Highly Partisan Election Administration*, DEMOCRACY DOCKET (Jul. 8, 2021), <https://www.democracydocket.com/news/the-future-of-highly-partisan-election-administration/> [<https://perma.cc/KF74-MNH6>] ("['L]egislative seizure' of election powers could have sweeping consequences—including allowing elected lawmakers to overturn the will of voters and determine their own preferred winners of elections.").

158. Dan Dalhoff, *Bowsher v. Synar: Separation of Powers, the Removal of Officers, and the Administrative State*, 47 LA. L. REV. 617, 619–21 (1987) (explaining the history of the theory of separation of powers in government).

159. U.S. CONST. art. II, § 1 ("The executive power shall be vested in a President of the United States of America.").

160. U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States.").

opposing political ideologies to retain power, eroding democracy.¹⁶¹ Free and fair elections must be kept free and fair.

1. Category One: States with Likely Constitutional Statutes

Category One states are Georgia,¹⁶² Hawaii,¹⁶³ South Carolina,¹⁶⁴ West Virginia¹⁶⁵ and Wisconsin. In each of these statutes

161. In 2021, at least 19 states have enacted 34 laws that restrict the right to vote; examples include limiting access to absentee ballots, harsher ID requirements, limiting early voting hours, reducing polling places, and expanding purges of registered voter rolls. *Voting Laws Roundup: December 2021*, BRENNAN CTR. FOR JUST. (Dec. 21, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021> [<https://perma.cc/DU2D-T9PN>].

162. Georgia elections are administered by a five-member state board of elections, led by the Secretary of State as a non-voting member. The relevant statutory provision states: “(a) There is created a state board to be known as the State Election Board, to be composed of [1] a chairperson elected by the General Assembly [as a whole], [2] an elector to be elected by a majority vote of the Senate of the General Assembly . . .” as well as “[3] an elector to be elected by a majority vote of the House of Representatives of the General Assembly . . ., and [4 & 5] *a member of each political party* to be nominated and appointed in the manner provided in this Code section. GA. CODE ANN. § 21-2-30 ((a), (a)(2), (d) (emphasis added). The statute also provides that “[n] person while a member of the General Assembly shall serve as a member of the board (2) The chairperson of the board shall be nonpartisan (d) The Secretary of State shall be an ex officio nonvoting member of the board.” *Id.* The language here is not rooted in a binary party requirement; however, it only allows for two additional members by party affiliation in its current structure. This language is inclusive enough to potentially cover third party, unaffiliated, or independent representatives but has set no criteria by which an additional party would be granted representation. It is difficult to say how many people are potentially affected by such language because in Georgia, voters do not register for a party, they either are a registered voter or are not and can choose which primary to participate in. *Independent Voters and Party Affiliations in Georgia*, THE GEORGIA VOTER GUIDE (2022), <https://faq.georgiavoter.guide/en/article/independent-voters-and-party-affiliations-in-georgia> [<https://perma.cc/78G9-598Q>]. Overall, this language is more inclusive since it does not categorically exclude all members outside the binary, but it does not include criteria for third party representation.

163. Hawaii’s elections are administered by a nine-member elections commission. ABOUT US, STATE OF HAW. OFF. OF ELECTIONS, <https://elections.hawaii.gov/about-us/boards-and-commissions/elections-commission/> [<https://perma.cc/73DY-LZRB>]. Hawaii’s constitution does not have a provision regarding election administration. The relevant statutory provision regarding composition of the elections commission states that the president of the senate shall select two elections commission members; the speaker of the house of

there are either limited partisan composition requirements or there are provisions that would allow for the inclusion of additional members representing parties outside of the two major parties. Wisconsin's statutory text is the most comprehensive of the Category One states.

representatives shall select two elections commission members; the senators belonging to *a party or parties* different from the president of the senate shall designate one senator to select two elections commission members; and the representatives belonging to *a party or parties* different from the speaker of the house of representatives shall designate one representative to select two elections commission members. HAW. REV. STAT. § 11-7(a) (1-5) (2019). Here the statute uses partisan structures to detail who may select commission members, but it fails to dictate partisan requirements of the commission itself. Since the statute allows for the inclusion of parties outside the major parties to be part of the selection process and potentially be appointed, this statute would also likely pass constitutional scrutiny.

164. The South Carolina State Election Commission consists of five members appointed by the governor. ABOUT THE SEC, S.C. ELECTION COMM'N, <https://www.sevotes.gov/about-sec> [<https://perma.cc/79TT-NAHN>]. There is no provision in the South Carolina Constitution about the election commission. The relevant statutory provision regarding the composition of the commission states that the "State Election Commission [shall be] composed of five members, at least one of whom shall be a member of the majority political party represented in the General Assembly and at least one of whom shall be a member of the largest minority political party represented in the General Assembly." S.C. CODE ANN. § 7-3-10 (2022). This statute contains neither a political balance provision nor a major party requirement. While the partisan affiliation of two board members is statutorily dictated, the other three members can be comprised of any combination of major or non-major party affiliates. This provision would likely pass constitutional scrutiny.

165. West Virginia elections are administered by the West Virginia State Election Commission. There are no provisions in the West Virginia Constitution regarding the commission. The commission consists of "the Secretary of State, and four persons appointed by the Governor, by and with the advice and consent of the Senate." W. VA. CODE § 3-1A-1 (2010). The only partisan requirement of board composition is "[n]ot more than two members appointed by the governor shall be members of the same political party." W. VA. CODE § 3-1A-2 (2022). Here the commissioners act more as advisors to the Secretary of State who is the chief election officer. W. VA. CODE § 3-1A-6 (2008). While there is a political balance provision, there are no partisan composition requirements, so 26.92% of registered voters (as of December 2021) in West Virginia are not categorically excluded from consideration. W. VA. SEC'Y OF STATE, WEST VIRGINIA VOTER REGISTRATION AS OF DECEMBER 31, 2021, <https://sos.wv.gov/elections/Documents/VoterRegistrationTotals/2021/Dec2021.pdf> [<https://perma.cc/4W9F-64ZS>]. This statute would likely survive constitutional scrutiny.

The Wisconsin Elections Commission is generally a six-member board, of which four members are appointed by the legislature and two are appointed by the governor.¹⁶⁶ Interestingly, the statutory provision details the composition and appointment process for the six members, but also 15.61 § (1)(a)(6) contains a provision allowing for additional members from non-major parties if they meet certain criteria:

(1) (a) There is created an elections commission consisting of the following members who shall serve for 5-year terms:

1. One member appointed by the senate majority leader.
2. One member appointed by the senate minority leader.
3. One member appointed by the speaker of the assembly.
4. One member appointed by the assembly minority leader.
5. Two members who formerly served as county or municipal clerks and who are nominated by the governor . . . [t]he legislative leadership of the 2 major political parties that received the largest number of votes for president shall prepare a list of 3 individuals such that each major political party has prepared one list. The governor shall choose one nominee from each list.
6. For each political party, *other than the 2 major political parties*, qualifying for a separate [primary] ballot [whose party received at least 1% of the total votes cast in the last election] or whose candidate for governor received at least 10 percent of the vote in the most recent gubernatorial election, one member, nominated by the governor from a list of 3 individuals selected by the chief officer of that political party, and with the advice and consent of a majority of the members of the senate confirmed.¹⁶⁷

166. *About the Wisconsin Elections Commission*, WIS. ELECTIONS COMM'N, <https://elections.wi.gov/about> [<https://perma.cc/6DB5-EXR7>].

167. WIS. STAT. § 15.61(1)(a)(1)–(6) (2017) (emphasis added).

This is the most comprehensively inclusive statutory language that has partisan composition and nomination requirements. It allows for the inclusion of non-major party affiliates while providing concrete standards for additional party inclusion. These standards may reasonably place a burden on non-major parties, like ballot access election laws that have been upheld,¹⁶⁸ because it is not categorical exclusion.

The statutory provisions in Category One states would likely not infringe on the political associational rights of non-major party affiliated individuals. As such, they would likely pass constitutional scrutiny.

2. Category Two: States with Partisan Nomination Requirements

Category Two states are Arkansas,¹⁶⁹ Kentucky,¹⁷⁰ and possibly Oklahoma (depending upon which interpretation of its

168. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 360 (1997) (upholding state ban on fusion candidates as not severely burdensome because they can still vote for their candidate of choice, just not under their party name).

169. Arkansas uses a combination of a chief election officer and a commission for its election administration. *About Us*, ARK. STATE BD. OF ELECTION COMM'RS, <https://www.arkansas.gov/sbec/about-us/> [<https://perma.cc/3NZA-Y4A7>]. The constitution does not have a provision regarding election administration. The relevant Arkansas statutory provision guiding the composition of the State Board of Election Commissioners states that it shall be composed of seven people, including the Secretary of State. The chairs of the state Democratic Party and the state Republican Party shall each designate one person, and the President Pro Tempore of the Senate and the Speaker of the House of Representatives shall each choose one person. Lastly, the Governor will choose two people, one of whom shall be a country clerk, and one of whom shall have served for at least three years as a county election commissioner. ARK. CODE ANN. §7-4-101(a)(1)–(6) (2021). This statute simply sets forth who is able to choose representatives, leaving them equally free to choose anyone of any party affiliation. While it is unlikely that anyone would choose a representative outside their own party, this statute does not strictly dictate partisan composition of the commission.

170. Elections in Kentucky are administered by the state board of elections, headed by the Secretary of State as a nonvoting member, and eight members appointed by the governor. *About Us*, COMMONWEALTH OF KY. STATE BD. OF ELECTIONS, <https://elect.ky.gov/About-Us/Pages/State-Board-of-Elections.aspx> [<https://perma.cc/4KYT-FZCR>]. There is no provision in the state's constitution regarding the state board of elections. The statutory provision concerning composition of the board states:

ambiguous statute is chosen)¹⁷¹. While these statutes do not categorically exclude non-major party affiliates by placing requirements on board composition, they do exclude them by limiting the parties that are able to nominate candidates. This is better than a complete exclusion because the two major parties are technically free to nominate individuals of any party affiliation. In practice, however, these function the same as a major party provision because it is highly unlikely that the parties nominate an individual not affiliated with their party, even though they could. Nonetheless, these provisions are constitutionally ambiguous because as the Court found in *Kusper v. Pontikes*, categorical exclusion from the nomination process can also infringe on associational rights.¹⁷² Therefore,

-
- (2) The board shall consist of the following:
- (a) The Secretary of State, who shall be an ex officio, nonvoting member, and who shall also serve as the chief election official for the Commonwealth;
 - (b) Two (2) members appointed by the Governor as provided in subsection (6) of this section;
 - (c) Six (6) voting members appointed by the Governor as provided in subsection (5) of this section; and
 - (d) An executive director . . . who may vote only to break a tie regarding selection of the chair of the board
- (5) Two (2) members shall be appointed by the Governor from a separate list of at least five (5) names submitted by the state central executive committee *of each of the two (2) political parties that polled the largest vote in the last preceding election for state officials*.
- (6) Two (2) members shall be appointed by the Governor from a separate list of at least four (4) names submitted by the Kentucky County Clerk's Association *of each of the two (2) political parties that polled the largest vote in the last preceding regular election for state officials*. Each of the two (2) members appointed under this subsection shall be former county clerks and shall be voting members.

KY. REV. STAT. ANN. §117.015(2)(a)–(d), (5), (6) (2022) (emphasis added). Here again, the nomination of board members is limited to the two parties, but does not set partisan requirements for board composition. While it is unlikely that any of the five names provided by either party would include one of the 9.6% of non-major party affiliated voters (as of April 2022), they are still not necessarily excluded from consideration for membership. *See Voter Registration Statistics – April 2022*, KY. ASS'N OF CNTYS., <https://www.kaco.org/articles/voter-registration-statistics-april-2022/> [<https://perma.cc/42SL-QY9R>] (45.4% Democrat, 44.9% Republican, 9.6% Non-Major Party).

171. *See supra* Section II.B.4.b.

172. *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) (“By preventing the appellee from participating at all in Democratic primary elections during the [23

Category Two states may infringe on the associational freedoms of non-major party voters for exclusion from the nomination process.

3. Category Three: States with Partisan Composition Requirements

Category Three states are Delaware,¹⁷³ Illinois,¹⁷⁴ Indiana,¹⁷⁵ Maryland,¹⁷⁶ Michigan,¹⁷⁷ New York,¹⁷⁸ North Carolina,¹⁷⁹

month] statutory period, the Illinois statute deprived her of any voice in choosing the party's candidates, and thus substantially abridged her ability to associate freely with the party of her choice.”).

173. In Delaware, elections are administered by the state board of elections consisting of eleven members. DEL. CODE ANN. tit. 15 § 202(a) (2015). There is no provision in the Delaware Constitution regarding the state board of elections. Ten members of the board of elections are “appointed by the Governor from the 2 principal political parties” from lists submitted by the state chair of the party. DEL. CODE ANN. tit. 15 § 202(d) (2015). This is a major party provision. Principal political party is defined as “the 2 political parties which have the highest total voter registration in this State.” DEL. CODE ANN. tit. 15 § 101(18) (2019). As of February 2022, 24.82% of all registered voters were non-major party affiliated, and thereby categorically excluded from consideration. STATE OF DEL. DEPT OF ELECTIONS, VOTER REGISTRATION TOTALS BY POLITICAL PARTY, https://elections.delaware.gov/reports/regtotals/2022/vrt_PP20220201.pdf [<https://perma.cc/CXG6-3SS8>] (47.65% Democrat, 27.54% Republican, 24.82% Non-Major Party.).

174. Elections in Illinois are administered by an eight-member state board of elections. *Board Members*, ILL. STATE BD. OF ELECTIONS, <https://www.elections.il.gov/AboutTheBoard/BoardMembers.aspx> [<https://perma.cc/QT9B-VYFB>]. Article III of the Illinois Constitution establishes the state board of elections but leaves composition of the board to the state legislature. ILL. CONST. art. III, § 5. The statutory provision regarding composition of the state board of elections states the following: “The State Board of Elections shall consist of 8 members . . .” it also provides that “[o]f the 4 members from each area of required residence, 2 shall be affiliated with the same political party as the Governor, and 2 shall be affiliated with the political party whose nominee for Governor in the most recent general election received the second highest number of votes.” 10 ILL. COMP. STAT. 5/1-A-2 (emphasis added). Though this language allows for the possibility for a party that is not Democrat or Republican to be represented, it still bars any party from representation in election administration that fails to meet the exalted status of second most votes. It is difficult to determine how many voters are affected by this lack of representation because voters in Illinois do not register with a political party. ILLINOIS: VOTER REGISTRATION, STATE LAW RESOURCE, at 3 <https://bolderadvocacy.org/wp-content/uploads/2021/03/Illinois-Voter-Registration-1.29.21.pdf> [<https://perma.cc/9M7Z-3DJ7>]. This has the same effect as the major party provision in *Carney* that is potentially viewed by the Supreme Court with suspicion.

175. The Indiana Election Commission is a four-member board that administers Indiana's elections, *Election Commission*, SEC'Y OF STATE: ELECTION

DIVISION, <https://www.in.gov/sos/elections/election-commission/> [<https://perma.cc/H3TJ-EYJ5>], with the Secretary of State as the chief election official. IND. CODE § 3-6-3.7-1. It is not governed by any provision of the Indiana Constitution. The relevant statutory provision for composition states: “(a) The commission consists of four (4) individuals appointed by the governor. . . . (c) Each member of the commission *must be a member of a major political party of the state*. Not more than two (2) members of the commission may be a member of the same political party.” IND. CODE § 3-6-4.1-2 (emphasis added). The Indiana statute contains both a major party provision and a political balance requirement. Indiana code defines a major political party as “either of the two (2) parties whose nominees received the highest and second highest numbers of votes statewide for secretary of state in the last election.” IND. CODE § 3-5-2-30. This provision necessarily excludes all other party/independent affiliated voters from consideration for participation in Indiana’s election commission, but since party affiliation is not recorded in the state voter registration system, it is difficult to predict how many voters are affected. 2020 INDIANA VOTER REGISTRATION GUIDEBOOK, INDIANA ELECTION DIVISION, at 12, <https://www.in.gov/sos/elections/files/2020-Voter-Registration-Guidebook.MOVEDPRIMARY.pdf> [<https://perma.cc/929C-4ZKU>].

176. The Maryland state board of elections consists of five members. ABOUT SBE, MARYLAND STATE BOARD OF ELECTIONS, <https://elections.maryland.gov/about/index.html> [<https://perma.cc/7LXF-S3NV>]. The state constitution does not have a provision about the state board of elections. The relevant statutory text states: that “(a) There is a State Board of Elections consisting of five members” Additionally, each board member “*shall be a member of one of the principal political parties*. (2) A person may not be appointed to the State Board if the appointment will result in the State Board having more than three or fewer than two members of the same principal political party.” MD. CODE ANN. ELEC. LAW § 2-101(a), (e) (1-2) (emphasis added). Maryland’s statute contains both a major party provision and a bare majority provision. Under Maryland Election Law, the majority party is defined as “the political party to which the incumbent Governor belongs, if the incumbent Governor is a member of a principal political party.” If the Governor does not belong to either of the two principal parties, “‘majority party’ means the principal political party whose candidate for Governor received the highest number of votes of any party candidate at the last preceding general election.” Principal minority party refers to “the principal political party whose candidate for Governor received the second highest number of votes of any party candidate at the last preceding general election.” Lastly, principal political parties are defined as “the majority party and the principal minority party.” MD. CODE ANN. ELEC. LAW §1-101((dd), (jj), (kk)). This statute excludes all non-major party voters from representation, which constitutes 21.32% of all registered voters in Maryland as of November 2021. See NOVEMBER 2021 MONTHLY VOTER REGISTRATION ACTIVITY REPORTS, MARYLAND STATE BOARD OF ELECTIONS, https://elections.maryland.gov/pdf/vrar/2021_11.pdf [<https://perma.cc/F2PY-BXRC>] (54.60% Democratic, 24.08% Republican, 21.32% Non-Major Party).

177. The Michigan State Board of Canvassers consists of four members and was established in 1850. *Board of State Canvassers: History and Duties*, MICH. SEC’Y OF STATE, <https://www.michigan.gov/sos/elections/bsc> [<https://perma.cc/3SSN-HF2B>]. Michigan’s Constitution requires that board members may not be a

candidate for political office or an inspector of elections. MICH. CONST. art. II, § 7. It also specifies that a majority of the board may not be members of the same political party. *Id.* The relevant statutory provision states: “[T]he board of state canvassers consists of the 4 members appointed by the governor by and with the advice and consent of the senate. The board of state canvassers shall consist of 2 members *from each major political party . . .*” MICH. COMP. LAWS § 168.22(3) (*emphasis added*). The statute thus contains a major party provision. Elsewhere in this chapter, a major political party is defined as “each of the 2 political parties whose candidate for the office of secretary of state received the highest and second highest number of votes at the immediately preceding general election in which a secretary of state was elected.” MICH. COMP. LAWS §168.16. This partisan affiliation requirement excludes any non-major party affiliated individuals from consideration for nomination to the state canvassers board. However, it is difficult to determine the impact of this restriction because voters in Michigan do not register with a specific party. *State of Michigan Voter Registration Application*, OFFICE OF SEC’Y OF STATE JOCELYN BENSON, https://www.michigan.gov/documents/MIVoterRegistration_97046_7.pdf [<https://perma.cc/T2H4-ATDT>] (voter registration form showing no place to register with a party).

178. New York’s elections are administered by a state board of elections that consists of four commissioners. *About Us*, NEW YORK STATE BOARD OF ELECTIONS, <https://www.elections.ny.gov/AboutSBOE.html> [<https://perma.cc/Y6B7-SVWT>]. New York has constitutional and statutory provisions about the board of elections. The constitutional provision states: “All laws . . . affecting [those] charged with the duty of qualifying voters, or of distributing ballots to voters, or of receiving, recording or counting votes at elections, *shall secure equal representation of the two political parties which, at the general election . . . cast the highest and [second] highest number of votes.*” N.Y. CONST. art. II, §8 (*emphasis added*). This provision of the New York Constitution contains a major party provision and a political balance provision. Additional statutory provisions clarify the method of appointment and partisan composition to the board: “[T]he ‘state board of elections’, composed of four commissioners appointed by the governor: two commissioners, one each from among not fewer than two persons recommended by the chairman of the state committee of *each of the major political parties . . .*” The other two commissioners are to be appointed “upon the joint recommendation of the legislative leaders, *of one major political party*, in each house of the legislature and one upon the joint recommendation of the legislative leaders, *of the other major political party*, in each house of the legislature.” N.Y. ELEC. LAW § 3-100 (1) (*emphasis added*). These provisions categorically exclude all non-major party voters which consist of 27.94% of all registered voters in New York as of November 2021. *See* ENROLLMENT BY COUNTY: 11/01/2021, N.Y. STATE BD. OF ELECTIONS, <https://www.elections.ny.gov/EnrollmentCounty.html> [<https://perma.cc/PSC4-L88U>]. (50.47% Democratic, 23.59% Republican, 27.94% Non-Major Party).

179. The North Carolina state board of elections is a five-member board that administers North Carolina’s elections. *About*, N.C. STATE BOARD OF ELECTIONS, <https://www.ncsbe.gov/about> [<https://perma.cc/JVE8-LJ33>]. The constitution of North Carolina does not have a provision regarding the state board of elections. The relevant statutory provision states that “The State Board of

Tennessee,¹⁸⁰ Virginia,¹⁸¹ and possibly Oklahoma depending on statutory interpretation.¹⁸² These statutes explicitly exclude non-major party affiliates through major party composition provisions.

Elections shall consist of five registered voters,” with the Governor appointing “[n]ot more than three members of the State Board shall be members of the same political party.” The Governor appoints “members from a list of nominees submitted to the Governor by the State party chair of each of the two political parties having the highest number of registered affiliates as reflected by the latest registration statistics published by the State Board.” Importantly, “[e]ach party chair shall submit a list of four nominees who are affiliated with that political party. No person may serve more than two consecutive four-year terms.” N.C. GEN. STAT. § 163-19 (b) (2019) (emphasis added). This statute contains both a major party requirement and a political balance requirement. As such this excludes 34.98% of total registered voters in North Carolina from eligibility to serve as a state election administration official as of January 2022. See *Voter Registration Statistics: Reporting Period 01/01/2022*, N.C. STATE BD. OF ELECTIONS, <https://vt.ncsbe.gov/RegStat/Results/?date=01%2F01%2F2022> [https://perma.cc/THK9-BRV8] (34.68% Democrat, 30.34% Republican, 34.98% Non-Major Party).

180. The Tennessee State Election Commission consists of seven members elected by the Tennessee General Assembly. *Tennessee State Election Commission*, TENN. SEC’Y OF STATE, <https://sos.tn.gov/elections/guides/tennessee-state-election-commission> [https://perma.cc/W6MX-K3KT]. There is no provision in the Tennessee Constitution regarding the election commission. By statute, the political composition of the board states that “four members of the commission shall be members of the majority party, and three members of the commission shall be members of the minority party.” TENN. CODE ANN. § 2-11-103 (2011). Majority party is defined as “the political party whose members hold the largest number of seats in the combined houses of the general assembly.” TENN. CODE ANN. § 2-1-104(a)(11) (2016). Minority party is defined as “the political party whose members hold the second largest number of seats in the combined houses of the general assembly.” TENN. CODE ANN. § 2-1-104(a)(12) (2016). This provision includes both a bare majority requirement and a major party requirement. It would eliminate from consideration for position on the commission any non-major party affiliated individuals, however it is difficult to determine how many non-major party voters exist in Tennessee because political party is not included on the voter registration form, *Tennessee Mail-In Application for Voter Registration*, TENN. SEC’Y OF STATE, <https://sos.tn.gov/elections/services/register-to-vote-paper-form-mail-in-or-hand-deliver> [https://perma.cc/8Z4Z-ULJ7], and voter registration lists are only available to limited persons solely for political purposes. TENN. CODE ANN. §2-2-138(b)(1) (2014).

181. The Virginia state board of elections is an agency that consists of five members. *About Us*, VA. DEP’T OF ELECTIONS, <https://www.elections.virginia.gov/contact-us/about.html> [https://perma.cc/M2JF-25KC]. In the Virginia Constitution, there is a provision about electoral boards at the county and local level, but not at the state level. The statutory provision describes the political composition of the board: “representation shall be given to each of the political

In Delaware, Maryland, New York, North Carolina, and Oklahoma there is also a defined impact. In Delaware, 24.8% (187,189 individuals)¹⁸³ of all registered voters affiliate either with a non-major party or with no party at all. In Maryland this is a total of 21.32% (876,838 individuals);¹⁸⁴ in New York, 27.94% (3,740,599 individuals);¹⁸⁵ in North Carolina, 34.98% (2,516,906 individuals);¹⁸⁶ and in Oklahoma, 17.94% (397,622 individuals).¹⁸⁷ In applying the *Anderson-Burdick* test to evaluate whether election laws infringe too greatly upon constitutionally-protected rights, a court must weigh the

parties having the highest and next highest number of votes . . . for Governor at the last preceding gubernatorial election. Three Board members shall be of the political party that cast the highest number of votes for Governor at that election.” VA. CODE ANN. § 24.2-102 (2021) (emphasis added). Virginia’s statute has a bare majority requirement and a major party requirement. This categorically excludes all non-major party affiliated individuals from consideration for appointment to the board. In Virginia, voters do not register with a party so it is difficult to determine the impact on Virginian voters. *Voter Forms: Virginia Voter Registration Application*, VA. DEPT OF ELECTIONS, [https://www.elections.virginia.gov/media/formswarehouse/veris-voter-registration/applications/VA-NVRA-1-Voter-Registration-Application-rev-4_1-\(1\).pdf](https://www.elections.virginia.gov/media/formswarehouse/veris-voter-registration/applications/VA-NVRA-1-Voter-Registration-Application-rev-4_1-(1).pdf) [<https://perma.cc/995U-SHFK>].

182. See *infra* Section II.B.4.b.

183. See *Voter Registration Totals By Political Party*, STATE OF DEL., <https://elections.delaware.gov/services/candidate/regtotls.shtml> [<https://perma.cc/5SZ7-LNB6>] (last visited Feb. 2022) (on file with the *Columbia Human Rights Law Review*) 47.65% Democrat, 27.54% Republican, 24.82% Non-Major Party. Report does not specify active vs. inactive voters.

184. See *Voter Registration Activity Report November 2021*, MD. STATE BD. OF ELECTIONS, https://elections.maryland.gov/pdf/vrar/2021_11.pdf [<https://perma.cc/5CVU-3RTA>] (54.60% Democratic, 24.08% Republican, 21.32% Non-Major Party active voters).

185. See *Enrollment by County: 11/01/2021*, N.Y. STATE BD. OF ELECTIONS, <https://www.elections.ny.gov/EnrollmentCounty.html> (on file with the *Columbia Human Rights Law Review*) (50.47% Democratic, 23.59% Republican, 27.94% Non-Major Party voters, both active and inactive).

186. See *Voter Registration Statistics: Reporting Period 01/01/2022*, N.C. STATE BD. OF ELECTIONS, <https://vt.ncsbe.gov/RegStat/Results/?date=01%2F01%2F2022> (last visited October 2022) (on file with the *Columbia Human Rights Law Review*) (34.68% Democratic, 30.34% Republican, 34.98% Non-Major Party. Report does not specify active vs. inactive voters).

187. See *2021 Month-End Voter Registration Reports: Voter Registration by County – December 2021*, OKLA. STATE ELECTION BD., <https://oklahoma.gov/content/dam/ok/en/elections/voter-registration-statistics/2021-vr-statistics/vrstats-county-december-2021.pdf> [<https://perma.cc/VEM5-9L2A>] (50.60% Republican, 31.46% Democratic, 17.94% Non-Major Party. Report does not specify active vs. inactive voters).

character and magnitude of the burden imposed against the state interest that justifies the burden.¹⁸⁸

Here the character of the intrusion is significant. It is not merely an inconvenience, or a mild burden like the ballot access restrictions at issue in *Timmons v. Twin Cities Area New Party*.¹⁸⁹ This is a complete and total exclusion similar to the primary access restrictions in *Kusper v. Pontikes*.¹⁹⁰ Additionally, the magnitude of the burden is large. In these five states alone, these restrictions categorically exclude over 7.7 million people. This is not an insignificant portion of the population impacted by not having their voice and interests protected in election administration; thus, the character and magnitude of the burden is severe.

This analysis becomes more difficult to make in Illinois, Indiana, Michigan, Tennessee, and Virginia. The statutory language of these states' provisions does not differ from those in Delaware, Maryland, New York, North Carolina, and Oklahoma in that they also contain explicit partisan composition requirements, but the analysis changes because voters in these states do not register for a political party.¹⁹¹ This makes it more difficult to evaluate the

188. See *supra* Section I.C.1.

189. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 360, 369–370 (1997) (upholding state ban on fusion candidates as not severely burdensome because they can still vote for their candidate of choice, just not under their party name).

190. *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) (“By preventing the appellee from participating at all in Democratic primary elections during the [23 month] statutory period, the Illinois statute deprived her of any voice in choosing the party’s candidates, and thus substantially abridged her ability to associate effectively with the party of her choice.”).

191. *Illinois: Voter Registration, State Law Resource*, BOLDER ADVOCACY (Jan. 29, 2021), <https://bolderadvocacy.org/wp-content/uploads/2021/03/Illinois-Voter-Registration-1.29.21.pdf> [<https://perma.cc/D26K-TS48>]; *2020 Indiana Voter Registration Guidebook*, IND. ELECTION DIVISION, <https://www.in.gov/sos/elections/files/2020-Voter-Registration-Guidebook.MOVEDPRIMARY.pdf> [<https://perma.cc/MM8K-CGC4>]; *State of Michigan Voter Registration Application*, OFFICE OF SEC’Y OF STATE JOCELYN BENSON, https://www.michigan.gov/documents/MIVoterRegistration_97046_7.pdf [<https://perma.cc/MM8K-CGC4>]; *Tennessee Mail-In Application for Voter Registration*, TENN. SEC. OF STATE, https://sos-prod.tnsosgovfiles.com/s3fs-public/document/ss-3010_1.pdf?VersionId=NASWbVvb2dRNg4ZUe2unnbFwusHjA6Mn [<https://perma.cc/JYY4-SNSY>]; *Virginia Voter Registration Application*, VA. DEPT OF ELECTIONS, [https://www.elections.virginia.gov/media/formswarehouse/veris-voter-registration/applications/VA-NVRA-1-Voter-Registration-Application-rev-4_1-\(1\).pdf](https://www.elections.virginia.gov/media/formswarehouse/veris-voter-registration/applications/VA-NVRA-1-Voter-Registration-Application-rev-4_1-(1).pdf) [<https://perma.cc/JJ64-Q75Z>].

magnitude of the burden placed on non-major party affiliates in these states, but it does not change the fact that at an individual level, the statutes still deny them the opportunity to participate because of their political affiliation (or lack thereof). Furthermore, Justice Brennan recognized in *Rutan* that denial of opportunity of a state job is a serious deprivation.¹⁹² These burdens must be weighed against state interest in partisan requirement structures.

A state may argue as its justification for such burdens that these statutes promote stability of the electoral system¹⁹³ or electoral fairness.¹⁹⁴ However, Justice Brennan found Scalia's claim in *Rutan*—promotion of the two-party system to maintain strength of political parties and to stabilize the electoral system¹⁹⁵—unpersuasive, and scholars have criticized it as an overstated nexus.¹⁹⁶ If promoting electoral fairness is the stated compelling interest, why would only major parties be represented? Individual political opinions vary greatly, even within the same party, and a board that provided equal opportunity for representation of diverse political interests would arguably be fairer in the electoral process.

These kinds of arguments have justified many other reasonable election laws, but here, it is not reasonable to categorically exclude and disregard the interests of such a large portion of voters in the state. As the number of affected individuals grows, the greater the responsibility to protect their constitutionally protected rights.¹⁹⁷ As a counterargument, equity of opportunity exists in these statutory provisions for any party to reach the exalted status of a major party. Constitutionality requires only equity of opportunity, not equity of outcome.¹⁹⁸ While this argument has some sway, it does not consider

192. *Rutan v. Republican Party*, 497 U.S. 62, 77 (1990).

193. *See, e.g., EU v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 226 (1989) (arguing stability of its political systems and preserving the integrity of the electoral process are compelling state interests).

194. *See, e.g., Gill v. State*, 933 F. Supp. 151, 156 (D.R.I. 1996) (“The provisions ensure fairness by providing for a bipartisan board.”).

195. *Rutan v. Republican Party*, 497 U.S. 62, 107 (1990) (Scalia J. dissenting).

196. Brian LoPorto, *The Constitution and Political Patronage: Supreme Court Jurisprudence and the Balancing of First Amendment Freedoms*, 13 PACE L. REV. 87, 104 (1993).

197. *Illinois State Emp. Union v Lewis*, 473 F.2d 561, 576 (7th Cir. 1972).

198. *Libertarian Party of Ohio v. Wilhem*, 988 F.3d 274, 283 (6th Cir. 2021).

that providing the two largest parties the power to set election rules incentivizes self-dealing, as elections determine which two parties remain in political power. These restrictions on membership in election administration bodies serve partisan interests in decreasing competition in elections and the interests weighed must be state interests, not party interests.¹⁹⁹ While *Timmons* established that states may enact rules that tend to favor a two-party system, they cannot completely eliminate competition of ideas and protections for non-major party affiliated voters.²⁰⁰

Additionally, two-party restrictions such as these are not narrowly tailored even if they did provide for some legitimate state interest, because less restrictive means exist to ensure that no one party dominates the board, such as political balance or bare majority provisions. These less restrictive means “have been shown to help achieve ideological diversity.”²⁰¹ Of course, one party may comprise one half of a commission, but a minor party affiliated individual that shares a majority of viewpoints with the more abundant party would create an ideological majority without a partisan majority. However, political interest and ideology can vary drastically even within the same party. Even non-affiliated independents usually ideologically lean more towards one end of the political spectrum than the other.²⁰² While this could be a legitimate concern, at least balance requirements don’t infringe on non-major party affiliated voters’ right to freely associate, unlike the statutory provisions for Category Three states.

4. States that Fall Outside the Three Categories

a. Rhode Island

Rhode Island’s state board of elections consists of seven members.²⁰³ The state constitution does not contain a provision

199. *Elrod v. Burns*, 427 U.S. 347, 363 (1976) (“In the instant case, care must be taken not to confuse the interest of partisan organizations with governmental interests.”).

200. *See supra* Section I.C.

201. *Carney v. Adams*, 141 U.S. 493, 503 (2020) (Sotomayor, J. concurring).

202. *Political Independents: Who They Are, What They Think*, PEW RSCH. CTR. (Mar. 14, 2019), <https://www.pewresearch.org/politics/2019/03/14/political-independents-who-they-are-what-they-think/> [https://perma.cc/TQ3N-YXFB].

203. *About Us*, STATE OF R.I. BD. OF ELECTIONS, <https://elections.ri.gov/about/index.php#staff-directory> [https://perma.cc/H3VW-8UBB].

regarding the board of elections. The relevant Rhode Island statute of the board states an intent that “all qualified electors of the state, regardless of their political identification or the lack of it, will be eligible to serve.”²⁰⁴ To fairly enable this intent, each member serves a term of nine years, with the term of each member staggered, creating a vacancy for appointment by the governor every two years.²⁰⁵ Additionally, each member of the board upon appointment must swear an oath to “faithfully and impartially administer the duties of his or her office without regard to partisan or political considerations.”²⁰⁶ This provision contains neither a political balance requirement nor a major party requirement. Instead, it requires an oath of complete nonpartisanship. This statute differs from the other eighteen state statutes analyzed. It aims to ensure diversity on the board of elections through relatively long terms of service on the board, staggered so that no one singular governor could ideologically pack the board with loyal party members. Out of the nineteen states examined, only Rhode Island focused intensely on apolitical election administration. This statute would not infringe on non-major party affiliated individuals’ freedom to associate.

b. Oklahoma

Oklahoma is discussed in detail on its own because it could fall into either Category Two or Category Three. Oklahoma has a state board of elections consisting of three members (with two alternates), established in the Oklahoma Constitution.²⁰⁷ The constitutional provision creates the board and states that “[n]ot more than a majority of the members of said Board shall be selected from the same political party.”²⁰⁸ The relevant statutory provision regarding board member party affiliation states:

[T]he state central committee of the political party having the largest number of registered voters . . . and the state central committee of the political party having the second largest number of registered voters . . . shall [each] submit to the Governor a list of

204. Elections, 17 R.I. GEN. LAWS § 17-7-1.

205. Elections, 17 R.I. GEN. LAWS § 17-7-3.

206. Elections, 17 R.I. GEN. LAWS § 17-7-4.

207. *State Election Board Secretary and Members*, OKLA. STATE ELECTION BD., <https://oklahoma.gov/elections/about-us/secretary-and-board.html> [<https://perma.cc/DF8N-PVLB>].

208. OKLA. CONST. art. III, § 2.

ten (10) nominees for membership on the State Election Board. The Governor shall be confined to the lists of names submitted by each party and shall appoint two (2) members and one (1) alternate member of the State Election Board from one political party and one (1) member and one (1) alternate member of the State Election Board from the other political party²⁰⁹

This statute contains a bare majority provision. Whether it contains a major party provision is ambiguous. Here the words “shall appoint two members . . . from one political party and one member . . . from the other political party” could be read to have more than one meaning.

On the one hand, application of linguistic canons of construction (namely, the rule of the last antecedent)²¹⁰ would mean that “from the one political party” would modify the word member. It suggests that two individuals appointed to the state election board *must be members* of one political party and that one individual appointed to the state election board *must be a member* of the *other* political party. If this is the correct statutory interpretation, this statute becomes constitutionally questionable because it requires that the only individuals eligible for membership to the state board are members of either of the two major parties, and would necessarily exclude from consideration any non-major party affiliated individual, which constitutes 17.94% of all registered voters in Oklahoma as of December 2021.²¹¹ If this is the correct interpretation, then Oklahoma would fall into Category Three. Category Three state statutes are likely unconstitutional,²¹² which would mean that this statute is also likely unconstitutional.

209. OKLA. STAT. tit. 26 § 2-101.1 (2011) (emphasis added).

210. See *Lockhart v. United States*, 577 U.S. 347, 351 (2016) (“When this Court has interpreted statutes that include a list of terms or phrases followed by a limiting clause, we have typically applied . . . the ‘rule of the last antecedent.’” Additionally, this rule instructs “that ‘a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.’”).

211. See OKLAHOMA STATE ELECTION BOARD, 2021 MONTH-END VOTER REGISTRATION REPORTS: VOTER REGISTRATION BY COUNTY—DECEMBER 2021 (Dec. 2021), <https://oklahoma.gov/content/dam/ok/en/elections/voter-registration-statistics/2021-vr-statistics/vrstats-county-december-2021.pdf> [<https://perma.cc/59NA-3JF7>] (50.6% Republican, 31.46% Democrat, 17.94% Non-Major Party).

212. See *supra* notes 172–201 and accompanying text.

On the other hand, when using substantive canons of construction and reading the sentence in its full context, “member” may simply mean member of the board. Given that the governor is limited in his appointment selection to the two lists provided from each political party, then two *members of the board* would be appointed from one party list, and one *member of the board* would be appointed from the other party list. If this is the correct statutory interpretation, the statute only dictates *who may nominate* individuals for appointment, not partisan requirements for board membership. It would not categorically exclude non-major party individuals from consideration for membership on the board because each political party is technically free to nominate individuals from any party on their list. Following the canon of constitutional avoidance,²¹³ if this question were to be posed before a court of law, a judge may interpret this statute with this meaning as it is less likely to pose an issue of constitutional concern. If this is the correct interpretation, then Oklahoma would fall into Category Two, and may be unconstitutional.

c. South Dakota

The South Dakota state board of elections consists of a seven-member team headed by the secretary of state.²¹⁴ There is no provision in the constitution of South Dakota regarding the board of elections. The relevant statutory provision states:

There is created a State Board of Elections to be composed of seven members, one of whom shall be the secretary of state who is chairman. Two of the members shall be county auditors appointed by the Speaker of the House of Representatives from a list of nominees supplied by the county auditors meeting at the South Dakota Association of County Officials. *The auditors appointed by the Speaker of the House of Representatives shall be of different political party registration. . . .* One member of the board shall be appointed by each of the following officers: *the*

213. See, e.g., *Bond v. United States*, 572 U.S. 844, 869 (2014) (Scalia, J. concurrence) (after the Court has concluded that the text of a statute is ambiguous, “we should adopt a construction that avoids ‘grave and doubtful constitutional questions.’”).

214. *State Board of Elections*, S.D. SEC’Y OF STATE, <https://sdsos.gov/about-the-office/board-of-elections/default.aspx> [<https://perma.cc/89B4-AJNY>].

*democratic leader of the Senate, the democratic leader of the House of Representatives, the republican leader of the Senate and the republican leader of the House of Representatives.*²¹⁵

This statute is unique in that it specifically calls for Democratic and Republican partisan affiliation for four of the six appointed positions going beyond a major party requirement. For the other two, the only specification is that the individuals belong to different parties. An independent or non-major party affiliated person technically could occupy one of the two auditor positions, but in practice this is not likely. As of January 2022, 24.98%²¹⁶ of active registered voters in South Dakota are categorically excluded from eligibility to serve in four out of six positions in the South Dakota State Election Board. The other two positions require a person to also be an auditor to be eligible, so a non-major party affiliated voter may be included there, but it is a much more limited pool of candidates. This statute is facially unconstitutional. In *United Public Workers v. Mitchell*,²¹⁷ the Court observed that “Congress may not enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office”²¹⁸ The statute here is much the same. In requiring Democratic and Republican participation, it is effectively requiring that no other party have the ability to participate, precluding the board makeup from flexing to a future where a different party eclipses either of the specified parties. This statute fails the unconstitutional conditions doctrine because the 143,859²¹⁹ registered voters in South Dakota who are not affiliated with either the Republican or Democratic party will never be able to occupy one of these positions, requiring an infringement on their freedom to associate in order to participate.

215. S.D. CODIFIED LAWS § 12-1-5 (1989) (emphasis added).

216. See S.D. SEC’Y OF STATE, STATEWIDE REPORT BY COUNTY – JANUARY 3, 2022 (2022), <https://sdsos.gov/elections-voting/assets/StatewideVotersbyCounty20220103.pdf> [<https://perma.cc/FBJ4-TRKF>] [*hereinafter* S.D. 2022 Voter Report]. (48.50% Republican, 26.52% Democratic, 24.98% Non-Major Party)

217. *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

218. *Id.* at 100 (internal quotations omitted).

219. See S.D. 2022 Voter Report, *supra* note 216. (279,331 Republican, 152,709 Democratic, 143,859 Non-Major Party).

III: Solutions

This section seeks to propose various solutions to these election administration issues. While this Note addresses specific issues in states with multimember election boards, these proposed solutions seek to remedy broader issues in election administration, not only those suffered by these particular states. To solve many of the ills associated with election administration, this Note advocates for independent nonpartisan election administration.

Partisan loyalty is a quality to be avoided in election administration rather than encouraged.²²⁰ While requirements of nonpartisanship are not determinative of the policymaker exception,²²¹ they still leave open concerns of self-dealing and should not be tied to partisan interests.²²² Even though it would be

220. See Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL'Y REV. 125, 132 (2009) (advocating for nonpartisan election administration); See generally STATES UNITED DEMOCRACY CENTER, PROTECT DEMOCRACY & LAW FORWARD, A DEMOCRACY CRISIS IN THE MAKING: HOW STATE LEGISLATURES ARE POLITICIZING, CRIMINALIZING, AND INTERFERING WITH ELECTION ADMINISTRATION 8 (Apr. 22, 2021) (discussing the concerning trend for increased partisan influence and interference in election administration and the terrible consequences such intrusions would have on U.S. democratic systems if they are to be implemented. Examples of these intrusions include a partisan seizure of control over election results, the shift of executive authority to the legislature, the stripping of local authority in favor of micromanagement by state legislatures, and the imposition of criminal and civil penalties for election decisions.) [hereinafter A DEMOCRACY CRISIS].

221. *Soelter v. King County*, 931 F. Supp. 741, 747 (W.D. Wash. 1996).

222. Daniel P. Tokaji, *America's Top Model: The Wisconsin Government Accountability Board*, 3 U.C. IRVINE L. REV. 575, 581 (2013). [hereinafter Tokaji, *America's Top Model*] Even more concerning influences of partisan politics on the electoral process are external pressures such as: partisan state legislatures overriding election administration officials in launching illegitimate reviews of election results (Jonathan Bydlak et al., *Partisan Election Review Efforts in Five States*, BRENNAN CTR. FOR JUST. (July 8, 2021), <https://www.brennancenter.org/our-work/research-reports/partisan-election-review-efforts-five-states> [<https://perma.cc/WEN7-5GCG>]); physical threats to election workers (Charles Stewart III, *Administering Elections in a Hyper-Partisan Era*, MIT POL. SCI. (Oct. 21, 2021), <https://polisci.mit.edu/news/2021/administering-elections-hyper-partisan-era> [<https://perma.cc/4GCP-X8C2>]; *Election Officials Under Attack: How to Protect Administrators and Safeguard Democracy*, BRENNAN CTR. FOR JUST. (June 16, 2021), <https://www.brennancenter.org/our-work/policy-solutions/election-officials-under-attack> [<https://perma.cc/G2LP-WYCM>]); residential pressure to “find 11,780 votes” in Georgia (Jeff Amy, *Georgia Official: Trump Call to ‘Find’ Votes was a Threat*, ASSOC. PRESS (Nov. 2, 2021), <https://apnews.com/article/donald-trump-joe-biden-arts-and-entertainment-elections-georgia->

inappropriate for election administration professionals to use their power to skew elections results in favor of one party over the other,²²³ partisan election officials and legislatures frequently engage in behaviors that tend to favor one party over the other and further partisan goals.²²⁴ If the state interest to be advanced that justifies major party provisions is to ensure honest elections,²²⁵ wouldn't that interest be best served by promoting diversity of thought and partisan representation in election administration?

The majority of states investigated here present at least some level of constitutional concern. As such, widespread statutory reform is required. South Dakota's statute is facially unconstitutional²²⁶ and should be amended immediately. Additionally, the statutory language of Category Three states, Delaware,²²⁷ Illinois,²²⁸ Indiana,²²⁹ Maryland,²³⁰ Michigan,²³¹ New York,²³² North Carolina,²³³ possibly

2b27f4c92919556bf6548117648693b7 [https://perma.cc/YUB5-88V9]; bills that shift election administrative duties from the executive branch to partisan legislative bodies (*See* A DEMOCRACY CRISIS, *supra* note 220, at 10–17 (discussing trend by exploring proposed legislation in 16 states); and even attempts by state legislatures to “hijack the process for certifying election results and choose a winner that does not correspond with the popular vote” (*Id.* at 8; *see, e.g.*, H.B. 2596 55th Leg., 2nd Sess. (Ariz. 2022) (requiring legislature hold special session to review election processes and accept or reject election results.)); *see also* Will Wilder et al., *The Election Sabotage Scheme and How Congress Can Stop It*, BRENNAN CTR. FOR JUST. (Nov. 8, 2021), <https://www.brennancenter.org/our-work/research-reports/election-sabotage-scheme-and-how-congress-can-stop-it> [https://perma.cc/7DR5-37TD] (discussing ways to combat this trend).

223. *Peterson v. Dean*, 777 F.3d 334, 348 (6th Cir. 2015).

224. *See* Aaron Blake, *The GOP's Increasingly Blunt Argument: It Needs Voting Restrictions to Win*, THE WASH. POST (June 14, 2021), <https://www.washingtonpost.com/politics/2021/06/14/gops-increasingly-blunt-argument-it-needs-voting-restrictions-win/> [https://perma.cc/9MST-GTJU.] (noting Republicans efforts to increase voting restorations to help their party win elections).

225. *See* *Vintson v. Anton*, 786 F.2d 1023, 1025 (11th Cir. 1986) (arguing that requiring bipartisanship is an effective means of preventing fraud and ensuring honest elections).

226. *See supra* Section II.B.4.c.

227. *See supra* note 173.

228. *See supra* note 174.

229. *See supra* note 175.

230. *See supra* note 176.

231. *See supra* note 177.

232. *See supra* note 178.

233. *See supra* note 179.

Oklahoma,²³⁴ Tennessee,²³⁵ and Virginia,²³⁶ likely pose infringements the on political association freedom of non-major party affiliated voters. As such, these states also need to review and revise their statutes and constitutional provisions to amend these major party requirements.

The only nonpartisan statute examined here was Rhode Island.²³⁷ As such, this Note recommends that these offending states use the Rhode Island statute as a model for reform. Alternatively, if states resist moving to completely independent nonpartisan administration, then they should amend statutes to include more comprehensive and inclusive language so as to avoid categorically excluding all non-major party affiliates and use Wisconsin²³⁸ as a model law.

The constitutional concerns regarding the statutory language of Category Two states Arkansas,²³⁹ Kentucky,²⁴⁰ and possibly Oklahoma²⁴¹ are less harsh and more ambiguous because the statutes do not categorically exclude non-major party affiliated individuals from consideration for nomination but still exclude all non-major party affiliated individuals from the ability to nominate individuals to state election boards. While there is less of a clear First Amendment infringement, these states should still reform these statutes to be either more nonpartisan or more inclusive as a best practice to avoid potential constitutional issues.

For change on a larger scale, the United States should overhaul the current state of election administration.²⁴² American

234. *See supra* Section II.B.4.b.

235. *See supra* note 180.

236. *See supra* note 181.

237. *See supra* Section II.B.4.a.

238. *See supra* Section II.B.1.

239. *See supra* note 169.

240. *See supra* note 170.

241. *See supra* Section II.B.4.b.

242. Election administration has been left functionally to the states, but the Supremacy Clause, U.S. CONST. art. IV., and the Supremacy Clause, U.S. CONST. art. I, § 4, cl. 1., endow Congress with the power to supersede state control over elections and pass federal election laws. Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997, 1059 (2021).

elections are unique in the world for their decentralization.²⁴³ One internationally recognized electoral standard is the establishment of an autonomous and impartial election management body.²⁴⁴ The US already has a robust mechanism in the administrative state and should follow the majority of global democracies and establish an independent federal election administration structure, focusing on standardization, independence, impartiality, integrity, and transparency.²⁴⁵ Some may argue that the creation of such an institution by the federal government would violate the tenants of federalism by stripping states of these powers. While this argument may have merit, the current situation in election administration is dire and calls for a bold and innovative response.

This nonpartisan agency would function like the SEC and other independent agencies. Officials would be appointed by the President with advice and consent of the Senate and insulated from presidential influence by for-cause removal protections.²⁴⁶ Commissioners and appointees should not be selected based on party recommendation, but should be academics, election law practitioners, scholars, and former members of the judiciary with the goal of seeing beyond the poison of partisan politics. In order to further insulate uncouth presidential pressure, the term length of each official should be at least eight years and the appointment of each official should be staggered so that one president may not appoint more than two

243. See Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 120 (2010) (“In both its decentralization and its partisanship, American democracy is distinctive.”).

244. See INT’L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, INTERNATIONAL STANDARDS: GUIDELINES FOR REVIEWING THE LEGAL FRAMEWORK OF ELECTIONS 37 (2002), <https://www.idea.int/sites/default/files/publications/international-electoral-standards-guidelines-for-reviewing-the-legal-framework-of-elections.pdf> [<https://perma.cc/G7W7-5242>] (recommending that electoral management bodies should be required to “operate in a manner that ensures the independent and impartial administration of elections”).

245. See *generally* INT’L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, ELECTORAL MANAGEMENT DESIGN (Helena Catt et al. eds., Revised ed. 2014) <https://www.idea.int/sites/default/files/publications/electoral-management-design-2014.pdf> [<https://perma.cc/7LLN-EK32>] (providing guidance on building a credible and legitimate electoral structure through an electoral management body).

246. See Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 462 (2008) (explaining that agency independence is safeguarded, in part, by for-cause limits on removal of officials by the president).

members during each term in office.²⁴⁷ Some scholars would argue that presidential influence could still be asserted in the form of promotion of gridlock or failure to nominate candidates for positions.²⁴⁸ However, issues like this could be mitigated by Congress when first creating the statute by including temporary appointment procedures by the remaining board members until appropriate presidential nomination and confirmation could occur. The amount of potential presidential influence over an independent federal agency is directly tied to how carefully the statute is constructed.²⁴⁹ Careful statutory construction can overcome such anticipated attempts to influence.

In creating this agency, Congress should bestow powers to issue rules and regulations to aid this agency in implementing free and fair elections. Once Congress delegates the power of election administration to this new agency, the authority of local legislatures to enact discriminatory election regulations would be stripped, and instead decisions of election regulation would be deferred to agency expertise. Agency suboffices should exist regionally, in each state, down to each county to ensure that diversity of needs and resources are accounted for. Appointment to these boards should follow a similar executive appointment with advice and consent of both houses of Congress. Local election commission officials would still exist, not in a governance role, but merely as an advocate to ensure that local election needs are understood, ensure that local initiatives are on the ballot, or when necessary, hold local elections separately from federal elections (which already happens anyway). The officials would also be vital in staffing and the running of poll sites. While this Note only scratches the surface and provides a basic sketch for independent nonpartisan election administration goals, this topic has been widely

247. Similar to the appointment structure seen in Rhode Island's board of elections. See R.I. GEN. LAWS § 17-7-3(a) (2007) (laying out a system of staggered, originally fourteen-year but now nine-year, terms).

248. Lisa Marshall Manheim, *Presidential Control of Elections*, 74 VAND. L. REV. 385, 388–89 (2021) (discussing methods of Presidential control over independent agencies).

249. *Id.* at 406 (explaining that the amount of executive influence that a president can exert over an agency depends greatly on how Congress structures the grant of power).

discussed in legal academia and a more detailed analysis is beyond the scope.²⁵⁰

So far there has only been one experiment into an independent nonpartisan election administration structure in the United States, even though it is the norm in the democratic world.²⁵¹ From 2007 until 2015, Wisconsin elections were governed by the Government Accountability Board comprised of six nonpartisan former judges who served six-year staggered terms in order to insulate the process of election administration from partisan politics.²⁵² While this method of election governance would not completely guarantee freedom of partisan bias, it would reduce the likelihood of partisan influence and concerns around self-dealing.²⁵³ In 2015 the Government Accountability Board elections division was disbanded and replaced by the current system of election administration in Wisconsin among accusations of partisan investigations.²⁵⁴ However,

250. For more in depth comprehensive discussion about nonpartisan election administration reform see: Richard Hansen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH & LEE L. REV. 937 (2005) (advocating for registration reform, a transition to nonpartisan election administration, and pre-election judicial review of election administration problems where possible); Richard Hansen, *Election Administration Reform and the New Institutionalism*, 98 CAL. L. REV. 1075 (2010) (arguing that a system of ranking states based on several election-administration-based criteria would be better than nothing but “is no panacea”); Richard Hansen, *Foxes, Henhouses, and Commissions: Assessing the Nonpartisan Model in Election Administration, Redistricting, and Campaign Finance*, 3 U.C. IRVINE L. REV. 467 (2013) (introducing a symposium issue of a law review on nonpartisan election administration, redistricting, and campaign finance; raising several questions relevant to the topic and briefly summarizing several articles in the symposium issue); Tokaji, *America’s Top Model*, *supra* note 222, at 583 (describing Wisconsin’s Government Accountability Board as “a truly nonpartisan board structure”); Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POLY REV. 125 (2009) (arguing that “the focus of attention should shift from the rules governing elections to the institutions responsible for running them”).

251. Tokaji, *America’s Top Model*, *supra* note 222, at 583; *see also* Frank Emmert, *Trouble Counting Votes? Comparing Voting Mechanisms in the United States and Selected other Countries*, 41 CREIGHTON L. REV. 3, 8–10 (2007) (describing Canada’s nonpartisan and centralized agency responsible for elections and Germany’s uniform rules for national elections, implemented by an independent official).

252. WIS. STAT. § 15.60 (2012).

253. Tokaji, *America’s Top Model*, *supra* note 222, at 581.

254. Keith Ewing, *Once a Symbol of Bipartisanship, Government Accountability Board Targeted for Overhaul: Republicans Back Bill to Split GAP*

this agency was not an experiment gone wrong, but rather it was a fledgling election administration structure that was dismantled too soon.

While this Note argues these reforms are of the utmost importance to safeguard US elections, the likelihood of widescale Federal reform of election administration to ensure independent, nonpartisan election administration is bleak. For the past decade, federal protections for individual voting rights have diminished significantly. For example, the Supreme Court in *Shelby County v. Holder*²⁵⁵ and *Brnovich v. Democratic National Committee*²⁵⁶ gutted the primary remedies to redress racial voting discrimination in the Voting Rights Act of 1965 that protected individuals right to access the polls and the ability to cast a meaningful ballot.²⁵⁷ Furthermore, legislative attempts to restore these enforcement mechanisms through the John Lewis Voting Rights Act of 2021 passed through the House of Representatives but failed to pass the Senate.²⁵⁸ This trend towards further partisan control in election law in general, and by

into two Commissions, WIS. PUB. RADIO (Oct. 13, 2015), <https://www.wpr.org/once-symbol-bipartisanship-government-accountability-board-targeted-overhaul> [<https://perma.cc/8PKE-J2WE>].

255. *Shelby County v. Holder*, 570 U.S. 529 (2013) (striking down § 4(b) of the Voting Rights Act of 1965, which provided for selection of which states would be subject to § 5's requirement of federal approval to change certain voting procedures, thus vastly diminishing, if not functionally eliminating, § 5's prohibition of "any voting law that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States, on account of race, color, or language minority status, to elect their preferred candidates of choice" (quotation marks omitted)).

256. *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021) (stating that "the degree to which a voting rule departs from what was standard practice when §2 was amended in 1982 is a relevant consideration" in determining whether a rule violates § 2(b) of the Voting Rights Act of 1965, which prohibits voting processes "not equally open to participation by members of . . . protected group[s] in that . . . members [of those groups] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" (emphasis and quotation marks omitted)).

257. For further discussion of trends in election law and the impact of the loss of federal voting protections, see Erica Laroux, *Voting Rights Suspended Under the Guise of Federalism and Voter Fraud in the Wake of Shelby and Brnovich*, 49 S.U.L. REV. 441 (2022).

258. Nicholas Reimann, *John Lewis Voting Rights Act Fails To Pass Senate*, FORBES (Nov. 3, 2021), <https://www.forbes.com/sites/nicholasreimann/2021/11/03/john-lewis-voting-rights-act-fails-to-pass-senate/?sh=6d76cc3cb3d2> [<https://perma.cc/5ZUU-GVP6>].

extension election administration, is alarming with the rise of conservative support for the independent legislature theory which could remove judicial oversight of partisan legislative actions in election law.²⁵⁹ It is more important now than ever before to remove partisan politics from election administration.

CONCLUSION

Until the Supreme Court defines a workable standard to apply the *Elrod-Branti* exception, the issue of partisanship requirements in multimember election administrative bodies is an inquiry that has been left to the Circuits to decipher. However, in most Circuits the statutory language creating these bodies likely creates an infringement on the associational freedoms of non-major party voters. These states should work to amend their election administration statutes and structures to avoid this constitutional concern.

However, these are topical solutions for a systemic problem. Partisan election administration structures and laws that support the Democrat-Republican duopoly in the U.S. are a danger to the survival of democracy in the United States.²⁶⁰ The impact such structures and partisan requirements have on the public at large affect the free

259. See Ethan Herenstein & Thomas Wolf, *The “Independent State Legislature Theory” Explained*, BRENNAN CTR. FOR JUST. (June 6, 2022), <https://www.brennancenter.org/our-work/research-reports/independent-state-legislature-theory-explained> [<https://perma.cc/G53Z-9GCL>] (“The independent state legislature theory is a reading of the Constitution . . . that would give state legislatures wide authority to . . . pass voter suppression laws. It has even been used as political cover to try to overturn elections”); Debra Cassens Weiss, *Independent State Legislature Theory in Spotlight as SCOTUS Refuses to Hear Map Disputes*, ABAJOURNAL, (Mar. 8, 2022), <https://www.abajournal.com/news/article/independent-state-legislature-theory-in-spotlight-as-scotus-refuses-to-hear-map-disputes> [<https://perma.cc/VKA3-R84B>] (“Kavanaugh . . . Alito . . . Thomas . . . and . . . Gorsuch . . . indicated their support for the doctrine”).

260. See Bennett J. Matelson, *Tilting the Electoral Playing Field: The Problem of Subjectivity in Presidential Election Law*, 69 N.Y.U. L. REV. 1238, 1243 (1994) (“diversity and competition in the market place of ideas . . . is an important value in our constitutional system”); Miles Parks, *Partisan Election Officials are ‘Inherently Unfair’ but Probably Here to Stay*, NPR (Nov. 29, 2018), <https://www.npr.org/2018/11/29/671524134/partisan-election-officials-are-inherently-unfair-but-probably-here-to-stay> [<https://perma.cc/263A-95NC>] (“It’s a matter of democratic legitimacy . . . [d]o we have a democracy . . . worthy of our confidence when there’s the perception . . . [or] reality that election officials are running elections in a way designed to favor themselves and their party?”).

political choice of Americans and trod on First Amendment protections of any non-major party affiliated voters.²⁶¹ As such, the US should follow the rest of the democratic world and develop an independent nonpartisan federal election administration structure. Free and fair elections must be protected.

261. *Illinois State Employees Union, etc. v Lewis*, 473 F. 2d 561, 576 (7th Cir. 1972) (“[T]he free political choice of millions of public servants is inhibited or manipulated by the selective award of public benefits. While the patronage system is defended in the name of democratic tradition, its paternalistic impact on the political process is actually at war with the deeper traditions of democracy embodied in the First Amendment.”).