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ELECTION LAW LOCALISM IN THE TIME OF COVID-19*Richard Briffault*

In just a few short months, the COVID-19 pandemic has already provoked multiple election law disputes. These have tended to track the same normative and policy conflicts that have marked election law for years, particularly the tension between strict adherence to preexisting rules and the willingness to stretch or relax those rules in order to deal with emergency conditions, and the overlapping debate over whether the primary threat to the integrity of the electoral system is fraud or the legal and administrative obstacles to voting during a pandemic. A third, but much less discussed, strand in the emerging COVID-19 election law jurisprudence is the role of local elections officers, often in conflict with state officials, in protecting the right to vote. Tracking the state-local conflicts that have marked the governmental response to the pandemic generally—as well as the red state/blue city disputes over a host of hot-button issues over the last decade—local election law officials in a number of states have sought to find some play in the election-law joints in order to make it possible for voters in their jurisdictions to vote safely in pandemic conditions, while state officials have pushed back, insisting that these county registrars, clerks, or recorders are acting beyond their authority and in violation of state law.

These conflicts—and there could be more as the fall general election approaches and local officials struggle to meet the needs of their constituents—serve to underscore the pervasive role of local officials, who are either locally elected or appointed by locally elected officials, in administering election law and actually running our elections. Moreover, these conflicts suggest that although local administration is usually treated as a weakness of the system and a source of unfortunate, if not unconstitutional, lack of uniformity because of its potential for the disparate treatment of voters in different places, it can also be a source of strength. Local officials may be especially sensitive to the distinctive needs and conditions of their constituencies. This has been particularly true for those from populous urban and suburban counties, who have often had to deal with inadequate funding, large turnout, crowded polling places and long lines on election days. These are the same populous centers which have been particularly hard-hit by COVID-19. Consequently, local election officials from these communities may be especially mindful of the need for mechanisms that reduce Election Day crowding, with its attendant public health threat to poll workers, voters, and their families, and of the realities of accommodating the surge in vote-by-mail. Although, as the cases to date suggest, local struggles to expand alternatives to Election Day voting are unlikely to prevail in the face of determined state-level opposition, these local initiatives are important in continuing to publicly and officially express the need for accommodating election rules to the exigencies of COVID-19 in urban areas. They may also directly accomplish positive changes, either by finding flexibility in the law or by persuading higher level officials to embrace their efforts to protect the right to vote.

One early instance of COVID-19-era local-state election law conflict came in March 2020 in Maricopa County—Arizona’s most populous county (and the fourth most populous county in the United States), and the home of Phoenix, the state’s largest city. On March 13th, with the COVID-19 pandemic rapidly emerging as a national crisis and the state’s presidential primary just four days away, Maricopa County Recorder Adrian Fontes announced that he would mail early ballots and a postage-paid return envelope to every registered voter in the county. As he explained, “we’re doing this . . . to make sure that every eligible voter can safely fill out a ballot, put it in the envelope and maintain appropriate social distance by just popping in and dropping it off at any of the polling locations that will be open on Tuesday.” Arizona law provides for the mailing of ballots to all voters who have asked to be placed on the “permanent early voting list,” but in sending ballots to *all* registered voters in the county, Fontes went beyond state law. Fontes acknowledged this, but did not see it as a fatal obstacle: “There is no explicit authority in law for this and there’s also no prohibition in law.”

This was not the first time the county recorder had treated state election law as a floor but not a ceiling of local efforts to facilitate voting. In 2018, Fontes opened up five “emergency voting centers” in the period between the end of early voting and Election Day to enable voters to cast their ballots if, as state law provided, they anticipated that due to “unforeseen circumstances” they would be unable to vote on Election Day. Although some Republicans asserted his interpretation of “unforeseen circumstances” was more liberal than the law intended, he defended his action, saying “the intent of the law is to make sure people who want to vote can vote. All I’m trying to do is let people vote.” Although Fontes was able to implement his action to facilitate voting in 2018,¹ his effort to respond to COVID-19 was immediately blocked by the Republican state attorney general who obtained an injunction premised on the theory that the Arizona law authorizing the county recorder to mail ballots to electors who “make a verbal or signed request to the county recorder” by eleven days before the election was a ceiling, not a floor, that prohibited the recorder from sending a ballot to anyone who did not so request. The Maricopa County Superior Court agreed and enjoined Fontes’s action.

A more substantial, and potentially more consequential, dispute between local election officials and the state broke out in Texas when a group of voters and the Texas Democratic Party brought a state court action against the Travis County clerk in *In re State of Texas*. Analogous to Maricopa County, Travis County is the home of Austin and is the fifth most populous county in the state. The voters sought a declaration that the widespread community transmission of COVID-19 without a vaccine or herd immunity meant that every voter had a disability entitling them to vote by mail. The plaintiffs cited the provision of the state election law enabling a voter to obtain a mail-in ballot if the voter has a “physical condition that prevents the voter from appearing at the polling place on election day without a likelihood . . . of

¹ The Republican state legislature, however, subsequently adopted a new law tightening up on the ability of voters to use the emergency voting option.

injuring the voter’s health,” as well as an injunction directing state and local officials to comply with this reading of “disability.” In April 2020, the Travis County District Court agreed, directing both the county and the state to accept absentee ballot applications and absentee ballots from all voters who claimed disability due to their lack of immunity to COVID-19 for the July 14 run-off election and all subsequent elections in 2020. The state immediately appealed. Travis County did not. Indeed, Travis County was joined by four other counties—including Harris County (Houston) and Dallas County, the two most populous counties in the state—in defending the District Court’s order.

The state’s appeal won it an automatic stay. Moreover, while the appeal was pending, the state’s Republican attorney general Ken Paxton issued a “guidance letter” rejecting the Travis County court’s interpretation of the mail-in ballot law, directing county election officials to disregard it, and threatening “third parties” with criminal penalties if they “advise voters to apply for a ballot by mail for reasons not authorized by the Election Code, including fear of contracting COVID-19 without an accompanying qualifying disability.” On May 14th, the Texas Court of Appeals granted plaintiffs an emergency motion reinstating the trial court’s temporary injunction. The attorney general then went to the state supreme court asking for a writ of mandamus compelling county election officials to comply with the attorney general’s restrictive definition of “disability.”

On May 20th, the Texas Supreme Court unanimously agreed with the attorney general that under the Texas Election Code, lack of immunity to COVID-19 is not a “disability,”² but it rejected the attorney general’s request for a writ of mandamus. The court’s opinion—complemented by the three concurring opinions—has two striking features. First, the court gave considerable attention to the statements by county election officers and elected officials in support of the district court’s reading of disability, as well as to their efforts to promote vote-by-mail and to obtain additional funding to handle the influx of mail-in ballots. Although this was intended to justify the court’s conclusion that the county officials had not “gone rogue” and would abide by the court’s decision so that a writ of mandamus was not in order, the discussion underscored the degree to which local election officials can voice the concerns of local voters. As the court noted, the Harris County clerk explained that “[e]lection officials . . . have advised [voters] to vote by mail if they do not have

² Although the court was unanimous in concluding that lack of immunity to COVID-19 is not a “disability” under the Election Code, it divided in its reasoning. Seven members of the court, in an opinion by Chief Justice Hecht, concluded that the lack of immunity was not a “physical condition” within the meaning of the phrase “physical condition that prevents the voter from appearing at the polling place on election day without a likelihood . . . of injuring the voter’s health.” In their view, a physical condition would have to be “an abnormal or at least distinguishing state of being” and lack of immunity to COVID-19 is not an abnormal or distinguishing condition. The two justices concurring in the judgment determined that lack of immunity is a physical condition but that the plaintiffs had not proven that the lack of immunity created a “likelihood” that all voters would injure their health by voting.

immunity to a highly contagious disease that is likely to injure their health.” The Harris County district attorney urged that “Harris County wishes to increase the ratio of VBM as a practical not a partisan matter because doing so will enable less crowded conditions during in-person voting and thus better social distancing.” Similarly, the court explained that the Dallas County Commissioners Court—the county’s governing body—had passed “a resolution stating that due to the threat of COVID-19, any voter who wanted a mail-in ballot could check the box indicating a disability.” Although the court was not persuaded by the arguments advanced by these urban county representatives, it was willing to give voice to their concerns.

Second, and more strikingly, in declining the attorney general’s request for a writ of mandamus, the justices may have left some room for a broader COVID-19-influenced reading of “disability” than the attorney general was willing to recognize. The court explained that it would not issue the writ because there was no evidence that the county election officers would not follow the Election Code once the meaning of “disability” was definitively determined by the court. But in rejecting the request for a writ, the court also confirmed the position of the county election officers, namely, that they had no duty to probe a voter’s disability claim. And the court agreed that “a voter can take into consideration aspects of his health and his health history that are physical conditions in deciding whether, under the circumstances, to apply to vote by mail because of disability.” So, although general lack of immunity to COVID-19 is not a disability, lack of immunity for a voter with a compromised immune system or other physical condition making her more susceptible to the virus or to a more serious case if infected might qualify. Or at least a voter might so conclude. And the local election officer would have no obligation—or authority—to challenge the voter. As the court emphasized, state law “placed in the hands of the voter the determination of whether in-person voting will cause a likelihood of injury due to a physical condition.”

Five justices in three concurring opinions went beyond the majority opinion of the court in emphasizing the final authority of the voter to determine whether, due to the pandemic, she is entitled to vote by mail. Justices Guzman, Lehrmann, and Busby stated: “whether a voter is eligible to vote by mail ultimately depends on the voter’s own assessment of his or her individual health status.” Justice Boyd concluded that “[t]he law leaves it to the voters to make that determination”—whether “the person’s physical condition create[s] a probability that voting in person will injure the person’s health”—“for themselves.” And Justice Bland underscored “the plain text of the Election Code makes clear that it is the voter—not an election official—who determines whether a ‘physical condition’ will cause a ‘likelihood’ that voting in person will injure the voter’s health. . . . Thus, under the Election Code, an election official may neither dictate that a voter without immunity is disabled, *nor dictate the opposite conclusion*” (emphasis added).

In re State of Texas is an unsatisfactory decision. In rejecting the positions of both the attorney general and the counties, it has left voters uncertain of their rights, and both voting rights advocates and administrators uncertain what they can tell voters. Its ultimate significance to Texas voters is uncertain given the pending

challenge to Texas’s restrictive approach to mail-in voting in federal court. However, it highlights the role that local officials in the populous urban and suburban areas most hard-hit by COVID-19 can play in attempting to protect the rights of their voters.

In the days since the Texas Supreme Court’s decision, local election officials in urban areas have continued working to ensure their constituents will be able to vote despite the public health threat posed by the pandemic. This does not necessarily involve the head-to-head conflicts with state officials seen in Arizona and Texas, but continues to reflect the special issues of running an election during a pandemic experienced by large urban and suburban counties. For example, in the week before Pennsylvania’s June 2 primary—rescheduled due to COVID-19 from the original April 28 date—election officials in two counties, Montgomery and Bucks (the second and third most populous counties in the state), went to court to seek an extension of the deadline for voters to return their absentee ballots. The officials cited the unprecedented flood of absentee ballot applications attributable to the pandemic, which delayed the ability of the counties to process and respond to valid applications, as well as a design flaw in the online absentee ballot application system.³ And in Nevada, the registrar of voters in Clark County (the state’s most populous county and the home of Las Vegas), said he would go beyond the state’s plan to send absentee ballots for the state’s June 9 primary to all *active* registered voters by sending ballots to *inactive* as well as active registered voters.⁴

As President Obama’s Commission on Election Administration noted at the outset of its 2014 report, “[t]he United States runs its elections unlike any other country in the world. Responsibility for elections is entrusted to local officials in approximately 8,000 different jurisdictions.” This has been true throughout American history, and although “[t]he power and discretion wielded by local staff has been trimmed by state and federal law since 2000, . . . local authority remains substantial.” The local role is greatest in matters classically considered housekeeping—registering voters; processing absentee ballot applications; locating and managing polling places and vote centers; selecting, operating and maintaining voting technology; designing ballots; hiring and training poll workers; checking names against registration lists and checking IDs. These are the matters that determine the quality of the voting experience. As the local actions just discussed indicate, these matters are not purely ministerial, but can involve active—and disputed—interpretations of state law.

³ Pennsylvania Governor Tom Wolf subsequently issued an executive order extending the deadline for returning mail ballots for Montgomery and five other urban counties, but not Bucks. He attributed it to the presence of widespread civil disturbances, not the pandemic, in those counties.

⁴ In Nevada, a registered voter is considered inactive when “a piece of election mail sent to the voter must have been returned as undeliverable and the voter must have failed to respond to a mailer asking the voter to confirm their voter registration information.”

The local role in elections has been controversial. The Florida 2000 presidential election—with the locally-designed “butterfly ballot” and the inconsistent treatment, intracounty and intercounty, of the “intent of the voter” standard for assessing disputed ballots—highlighted the failures of the local role in administration.⁵ Other critics have pointed to the local role in diluting minority votes or burdening the enforcement of federal voting protections. The very lack of uniformity in the conditions and circumstances of voting resulting from extensive state delegation of the responsibility for election administration to local governments with significantly different resources has led to claims of a denial of equal protection when, for example, the voting machinery in use in one county has been shown to have a higher error rate than the machinery used elsewhere in the state.⁶ Much of the thrust of election administration reform in the two decades since *Bush v. Gore* has focused on reducing interlocal disparities and increasing the state role.

However, local governments have also been a force in expanding the right to vote. According to political scientist Alec Ewald, “[l]ocal administration of U.S. elections has sometimes been a vector of inclusion in American voting, a pathway along which the franchise expanded.” Historically, some local governments reduced or eliminated barriers to the franchise long before their states, and extended the suffrage to women before their state governments or the ratification of the Nineteenth Amendment. And although their formal power to determine the qualifications for the vote may have been limited to municipal elections, local administrative actions may have had the effect of extending the franchise more broadly. With property assessed and compliance with property ownership requirements determined at the local level in late eighteenth- and early nineteenth-century America, local officials regularly enfranchised residents ineligible under state law. “Inclusionary local practices acted as a kind of solvent, working hand in hand with changing ideological views to undercut the property qualification.” And then, as now, much of the pressure to loosen state requirements came in urban areas. Some local governments continue to take the lead in broadening the franchise, by extending it to noncitizens or people under eighteen, and in implementing new methods of aggregating votes, such as ranked choice voting, although these innovations are more carefully limited to elections for local office.

Local administration also continues to have an impact on the implementation of state election laws for state and federal elections. Although formally subservient to their states, county election officials have resisted state purge laws and state-directed cutbacks in early voting, or have taken a relatively lenient approach to the

⁵ But see Richard C. Schragger’s eloquent defense of the local role in the Florida election dispute.

⁶ See, e.g., *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006). But cf. *Wexler v. Anderson*, 452 F.3d 1226 (11th Cir. 2006) (rejecting a constitutional challenge to different manual recount procedures in counties using different voting machinery). See also Richard L. Hasen’s limited defense of an interlocal lack of uniformity in voting rules as an appropriate response to differences in voting conditions, such as the size of the voting population.

enforcement of state-enacted voter ID requirements. Sometimes the efforts of election officials in some communities to extend early voting opportunities put effective pressure on state officials to extend early voting state-wide. Populous urban and suburban counties, facing the greatest stress at their election day polling places, have especially taken the lead in supporting early voting and other alternatives to election day voting. As this pandemic election cycle continues and the November general election looms, local election officials, particularly in the counties most hit by COVID-19, will bear the brunt of the efforts necessary to keep voting machinery sanitary; to find and design polling places structured to accommodate social distancing; to recruit poll workers; and to enable their staffs to handle the inevitable surge in requests to vote by mail. They may also want to take a role—via public appeals, administrative interpretation, or bringing or supporting litigation—in adapting state laws to their particular local circumstances. Although some state governments may be supportive, some conflict seems almost inevitable.

This local role presents a challenge to election law. At a time when many efforts to protect the franchise are denounced by the president or his supporters as illegal or promoting election fraud, local actions that treat state law as a floor and not a ceiling, that proceed from a liberal reading of state requirements, or that result in different rules in different parts of a state may trigger further charges of illegality or fraud or may simply generate confusion. It would be better if the states were consistently committed to protecting the franchise and adapting it to pandemic conditions. But when they are not, local election officials, as representatives of their communities and the public servants directly responsible for making an election happen, have a stake and should have a voice in pointing out what needs to be done to have a safe, fair, and democratically legitimate election.

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