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America's Top Model: The Wisconsin Government Accountability Board

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America’s Top Model: The Wisconsin Government Accountability Board

Daniel P. Tokaji*

Introduction	575
I. The Wisconsin Model.....	577
II. The Experience of Wisconsin’s Government Accountability Board.....	586
A. Voter Registration.....	586
B. Early and Absentee Voting	591
C. Voter Identification	593
D. Reporting of Election Results	597
E. Recall Elections	600
Conclusion.....	607

INTRODUCTION

The United States is an outlier among democratic countries when it comes to the institutions charged with running our elections. Most other democratic countries have an independent election authority with some insulation from partisan politics.¹ In the United States, by contrast, partisan election administration² is the near-universal norm among the states. Most states’ chief election

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1. See INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, INTERNATIONAL ELECTORAL STANDARDS: GUIDELINES FOR REVIEWING THE LEGAL FRAMEWORK OF ELECTIONS 37 (2002), available at <http://www.idea.int/publications/ies/index.cfm>; RAPHAEL LÓPEZ-PINTOR, ELECTORAL MANAGEMENT BODIES AS INSTITUTIONS OF GOVERNANCE 12 (2000), available at http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/electoral_systems_andprocesses/electoral-management-bodies-as-institutions-of-governance.html; LOUIS MASSICOTTE ET AL., ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES 83–97 (2004); Olivier Ihl, *Electoral Administration*, in *ENCYCLOPAEDIA OF EUROPEAN ELECTIONS* 87, 87–89 (Yves Déloye & Michael Bruter eds., 2007); see also *infra* notes 60–70 and accompanying text.

2. This Article uses the terms “partisan election administration,” “bipartisan election administration,” and “nonpartisan election administration” to refer to the manner in which chief election authorities are chosen. Thus, “partisan election administration” includes chief election officials who are elected in partisan elections, as well as those who are appointed by party-affiliated elected officials. “Bipartisan election administration” refers to bodies containing representatives from

officials—usually the secretary of state—are elected to office as nominees of their parties, while almost all the remaining states’ chief election authorities are appointed by partisan actors.³ There is greater variation at the local level, but it is common for county and municipal election officials to be party-affiliated as well.⁴ While there have been major changes in U.S. election administration since 2000, the partisanship of those responsible for running elections remains largely unchanged. The United States has some experience with nonpartisan electoral institutions in other contexts, including redistricting and campaign finance, but we have very little experience with nonpartisan election administration at the state level.⁵

There is one conspicuous exception to the partisan character of state election administration: Wisconsin’s Government Accountability Board (GAB). Established by the Wisconsin state legislature in 2007, the GAB has responsibility for election administration, as well as enforcement of campaign finance, ethics, and lobbying laws.⁶ Its members are former judges chosen in a manner that is designed to ensure that they will not favor either major party.⁷ This makes the GAB unique among state election administration bodies in the United States. While there are other examples of putatively nonpartisan state entities responsible for enforcement of campaign finance, lobbying, and ethics rules,⁸ no other state has a chief election administration authority with the same degree of insulation from partisan politics. In our age of hyperpolarized politics—of which Wisconsin has lately been a leading example—it is an open question whether such a nonpartisan institution can function effectively. With heated allegations of voter suppression coming from one side and equally heated allegations of voter fraud from the other, it has become difficult even to discuss the most important election administration

two or more parties. “Nonpartisan election administration” refers to entities or persons selected in a way that is designed to make them independent of partisan politics.

3. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 974 (2005); Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL’Y REV. 125, 131–32 (2009).

4. David C. Kimball, Martha Kropf & Lindsay Battles, *Helping America Vote? Election Administration, Partisanship, and Provisional Voting in the 2004 Election*, 5 ELECTION L.J. 447, 453 (2006); see also David C. Kimball & Martha Kropf, *The Street-Level Bureaucrats of Elections: Selection Methods for Local Election Officials*, 23 REV. POL’Y RES. 1257, 1262 tbl.4 (2006) (showing methods of selection in 4500 local electoral jurisdictions).

5. This Article uses the term “election administration” to refer to nuts-and-bolts mechanics of running elections, including the administration of rules regarding voter registration, voter identification, absentee and early voting, recounts, access to the ballot, and direct democracy. This corresponds to the areas of responsibility delegated to the GAB’s Elections Division under state law. WIS. STAT. § 5.05(2w) (2012). As used in this Article, the term “election administration” does not include other topics such as campaign finance, lobbying, and ethics. As explained later, another division of the GAB (the Ethics and Accountability Division) has responsibilities in these other areas.

6. See *id.* § 5.05(1) (2012) (granting the GAB power to administer laws relating to elections and election campaigns).

7. See *infra* notes 24–26, 28 and accompanying text.

8. See *infra* Table 1.

questions of the day civilly—much less to run elections in a manner that engenders public confidence.⁹

Is there any hope for nonpartisan election administration in an era of intense political polarization?¹⁰ This Article considers this question by examining and assessing the performance of Wisconsin's GAB during its first five years of existence. I conclude that the GAB has been successful in administering elections evenhandedly and that it serves as a worthy model for other states considering alternatives to partisan election administration at the state level. Part I discusses the origins and history of the GAB, putting it in the context of other electoral institutions in the United States, as well as electoral institutions in other democratic countries. Part II discusses the most important election administration issues that have come before the Wisconsin GAB since its creation in 2007. As this discussion reveals, these years have been an exceptionally contentious period of time for Wisconsin. The state has seen fiercely partisan debates over such issues as voter registration and voter identification, errant reporting of election results in a very close state supreme court race, and contentious recall elections of the governor and prominent state legislators. Although the GAB did little to create these controversies, they have tested its nonpartisan structure. The Article concludes by evaluating the GAB's performance during these trying times and considering whether the Wisconsin model should be exported to other states.

I. THE WISCONSIN MODEL

The GAB was created by statute (Act 1) in 2007.¹¹ Through this legislation, the functions of two previously existing boards were unified under the GAB: (1) the State Elections Board, which was responsible for election administration and campaign finance, and (2) the State Ethics Board, which enforced lobbying and ethics rules.¹² The 2007 statute abolished these boards effective 2008, transferring all their functions to the GAB.¹³

The main impetus for creation of the GAB was *not* a perceived need to reform the administration of elections. Instead, it was the view that the preexisting boards “had been too lax in their enforcement of campaign finance, ethics, and

9. See generally RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (2012) (detailing the increase in election-related litigation and allegations of partisanship in election administration).

10. For an enlightening discussion of the causes of political polarization in the United States, see Richard Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 293 (2011).

11. 2007 Wisconsin Act 1, WIS. STAT. § 5.05 (2010).

12. See STEVEN F. HUEFNER, DANIEL P. TOKAJI & EDWARD B. FOLEY, *FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES* 115–17 (2007).

13. *Id.*

lobbying laws.¹⁴ The legislature, as well as good government groups, also thought it advisable to place control over all these subjects under a single entity.¹⁵ Previously, the State Elections Board enforced campaign finance laws while the State Ethics Board enforced ethics and lobbying laws.¹⁶ While election administration was not exactly an afterthought, it was not the primary consideration that motivated the legislature to create the GAB.¹⁷ The bill passed with broad bipartisan support: no Republicans and just two Democrats opposed it.¹⁸

One of the most important changes accomplished by Act 1 was to place responsibility for all these subjects under the control of a nonpartisan rather than a bipartisan body. The State Elections Board, which oversaw election administration until 2008, was a bipartisan board consisting of eight members.¹⁹ One member was appointed by each of the following officials: (1) the chief justice of the state supreme court; (2) the governor; (3) the majority leader of the state senate; (4) the minority leader of the state senate; (5) the speaker of the state assembly; (6) the minority leader of the state assembly; (7) the chair of the Democratic Party; and (8) the chair of the Republican Party.²⁰ In effect, control over the board hinged on the appointees of the governor and chief justice and, at various times, the State Election Board had an effective majority of either Democrats or Republicans. The State Ethics Board consisted of six members,²¹ nominated by the governor with the advice and consent of the state senate.²² Although its members could not be affiliated with a party, this did not provide much of a check on political influence.²³

A critical ingredient of the GAB is the method by which its board members are selected. All six members of the GAB must be former judges.²⁴ The names of potential board members are put forward by a candidate committee, consisting of one court of appeals judge from each of the four districts.²⁵ All members of the

14. *Id.* at 115.

15. *Id.* at 117.

16. *Id.*

17. *Id.*

18. Tom Tolan, *Nonpartisan Government Accountability Board Faces Partisan Charges*, MILWAUKEE J. SENTINEL (June 7, 2011), <http://www.jsonline.com/news/statepolitics/123419369.html>.

19. HUEFNER ET AL., *supra* note 12, at 115.

20. *Id.* Parties were qualified to select a member of the board if they obtained at least ten percent of the vote in the most recent gubernatorial election. WIS. STAT. § 15.61 (repealed 2007). Between 2002 and 2007, the State Elections Board also had a Libertarian Party designate. HUEFNER ET AL., *supra* note 12, at 128 n.23.

21. WIS. STAT. § 15.62 (repealed effective 2008).

22. *Id.* § 15.07(1)(a) (repealed 2007).

23. Christian M. Sande, *Where Perception Meets Reality: The Elusive Goal of Impartial Election Oversight*, 34 WM. MITCHELL L. REV. 729, 746 (2008).

24. WIS. STAT. § 15.60 (2012).

25. *Id.* §§ 5.052, 15.60(2) (2012).

board are nominated by the governor.²⁶ Of the initial six seats on the GAB, three were to be confirmed by the state senate and three by the state assembly on a majority vote.²⁷ Because the state senate was at the time controlled by Democrats and the state assembly by Republicans, this effectively gave each party confirmation power over three members of the original GAB. Subsequent members of the board must, by statute, be confirmed by a two-thirds vote of the state senate²⁸—a provision designed to ensure bipartisan consensus and therefore moderation in the board members actually chosen. All decisions of the board must receive approval from at least four of the six GAB members.²⁹

Board members serve staggered six-year terms, with one member's term expiring each year.³⁰ A total of nine people served on the board between 2007 and 2012.³¹ While GAB members are prohibited from engaging in certain political activities, like being a candidate for office or a member of a party, people who have engaged in political activities in the past are not prohibited from serving on the board.³² Three members of the board sitting in 2013 were previously elected to office as Republicans and one as a Democrat.³³ The others had not been elected to partisan office before joining the board.³⁴ As of August 2013, five of the six members of the GAB were originally appointed by former Democratic Governor Jim Doyle.³⁵ Republican Governor Scott Walker has appointed one additional member and reappointed two of the original members, though none of these appointees has been confirmed to date.³⁶

By statute, the GAB is divided into two divisions: (1) the Ethics and Accountability Division, responsible for enforcement of campaign finance, ethics, and lobbying laws, and (2) the Elections Division, responsible for election

26. *Id.* § 15.07(1)(a)(2) (2012).

27. 2007 Wisconsin Act 1 § 209(4), 2007 Wis. Sess. Laws 1, 26.

28. WIS. STAT. § 15.07(1)(a)(2).

29. *Id.* § 5.05(1e) (2012).

30. *Id.* § 15.06(1)(a) (2012).

31. *See Members of the Government Accountability Board*, GOV'T ACCOUNTABILITY BOARD ST. OF WIS., <http://gab.wi.gov/about/members> (last visited Feb. 16, 2013) (listing six current board members); *Past Members of the Government Accountability Board*, GOV'T ACCOUNTABILITY BOARD ST. OF WIS., <http://gab.wi.gov/about/members/past> (last visited Feb. 16, 2013) (listing three past board members).

32. WIS. STAT. § 15.60 (2012).

33. Tom Tolán, *Walker Appoints Judge to Government Accountability Board*, MILWAUKEE J. SENTINEL, June 17, 2011, at 2B.

34. Tolán, *supra* note 18.

35. *Judge David G. Deininger*, GOV'T ACCOUNTABILITY BOARD ST. OF WIS., <http://gab.wi.gov/about/members/deininger>; *Judge Gerald C. Nichol*, GOV'T ACCOUNTABILITY BOARD ST. OF WIS., <http://gab.wi.gov/about/members/nichol>; *Judge Michael Brennan*, GOV'T ACCOUNTABILITY BOARD ST. OF WIS., <http://gab.wi.gov/about/members/brennan>; *Judge Thomas Barland*, GOV'T ACCOUNTABILITY BOARD ST. OF WIS., <http://gab.wi.gov/about/members/barland>; *Judge Thomas Cane*, GOV'T ACCOUNTABILITY BOARD ST. OF WIS., <http://gab.wi.gov/about/members/cane>.

36. *Judge David G. Deininger*, *supra* note 35; *Judge Gerald C. Nichol*, *supra* note 35; *Judge Timothy L. Vocke*, GOV'T ACCOUNTABILITY BOARD ST. OF WIS., <http://gab.wi.gov/about/members/vocke>.

administration.³⁷ It is also statutorily required to employ a legal counsel to “perform legal and administrative functions for the board”³⁸ and to designate a board employee as “the chief election official” of the state.³⁹ Kevin Kennedy has served as the director and legal counsel of the GAB since its inception.⁴⁰ He had previously served for many years as executive director of the State Elections Board.⁴¹ The Ethics and Accountability Division and the Elections Division each have their own division administrator, who reports to the director and legal counsel.⁴² They and all other staff of the GAB, like the board members, are required to refrain from specified political activities.⁴³

The statute creating the GAB gives it various powers and duties with respect to the enforcement of state election administration, campaign finance, lobbying, and ethics laws. Any person who believes there to be a violation of laws within the GAB’s enforcement jurisdiction may file a complaint with the board. Its powers include the investigation of alleged violations (with subpoena power),⁴⁴ the bringing of legal actions to enforce state laws,⁴⁵ the referral of matters involving criminal conduct for prosecution,⁴⁶ and the promulgation of rules interpreting or implementing state election laws.⁴⁷ It may also issue advisory opinions on legal matters within its jurisdiction.⁴⁸ With respect to election administration, the GAB has the power to provide financial assistance to counties and to conduct educational programs for voters.⁴⁹ It is also charged with responsibility for the state voter registration list, and for establishing and enforcing procedures that local jurisdictions must follow in maintaining the list.⁵⁰

Even before the creation of the GAB, Wisconsin’s State Elections Board had a reputation for evenhandedness and professionalism in its administration of election laws.⁵¹ This was true despite the fact that, as noted above, it was controlled by one or the other major party at various times. The GAB’s structure adds a level of insulation from partisan politics greater than what either the Elections Board or the Ethics Board enjoyed before. This is ensured both by the

37. WIS. STAT. §§ 5.05(2s)–5.05(2w) (2012).

38. *Id.* § 5.05(1m) (2012).

39. *Id.* § 5.05(3g) (2012).

40. *Accountability Board Names Chief Counsel*, MILWAUKEE J. SENTINEL, Nov. 6, 2007, at 2B.

41. HUEFNER ET AL., *supra* note 12, at 115.

42. *Id.* at 116.

43. WIS. STAT. § 5.05(2m)(d)–(e) (2012).

44. *Id.* § 5.05(1)(b).

45. *Id.* § 5.05(1)(c).

46. *Id.* § 5.05(2m)(a).

47. *Id.* § 5.05(1)(f).

48. *Id.* § 5.05(6a).

49. *Id.* § 5.05(6a)(11) & (12).

50. *Id.* § 5.05(15).

51. STEVEN F. HUEFNER, NATHAN A. CEMENSKA, DANIEL P. TOKAJI & EDWARD B. FOLEY, FROM REGISTRATION TO RECOUNTS REVISITED 43 (2011). The Elections Board’s staff was required to be nonpartisan. WIS. STAT. § 5.05(4) (2005).

means of appointment—specifically, the requirement of confirmation by a two-thirds supermajority in the state senate⁵²—and by the provision that the governor may only remove members for cause.⁵³ The fact that the GAB is composed of former judges, who are less likely to have an incentive to make decisions with an eye toward securing some future position, also helps provide some insulation to the board's decision making. To be sure, this structure does not guarantee that the GAB's decisions will be free of partisan bias. But it does increase the likelihood of having politically neutral board members while reducing the likelihood that they will cater to either major party.

In this respect, the GAB is unique among state chief election authorities. As summarized in the table below, the predominant mode of selecting state chief election authorities in the United States is through partisan election. This is the manner in which thirty-five states select their chief election official, usually the secretary of state.⁵⁴ In the other states, the state chief election authority—either an individual or a multimember board—is appointed.

Table 1: State Chief Election Authorities

Partisan elected official	Individual		Multimember board		
	Appointed by governor	Appointed by legislature	Bipartisan: One party controls	Bipartisan: Equal no. of Ds and Rs	Nonpartisan
AL, AK, AZ, AR*, CA, CO, CT, GA, ID, IN*, IA, KS, KY*, LA, MA, MI, MN, MS, MO, MT, ME, NE, NH, NV, NM, ND, OH, OR, RI*, SD*, UT, VT, WA, WV, WY	DE, FL, NJ, PA, TX	TN	AR*, HI, KY*, MD, NC, OK, RI*, SC, SD*, VA	IL, IN*, NY	WI

* These states are listed twice because state election administration authority is shared by a partisan secretary of state and a bipartisan board.

52. WIS. STAT. §§ 15.07(1)(a).

53. *Id.* § 17.07(3) (2012).

54. Hasen, *supra* note 3, at 974–76; *see also* CTR. FOR DEMOCRACY & ELECTION MGMT., ELECTION ADMINISTRATION PROFILES OF ALL FIFTY STATES (2009) (explaining oversight of election management in states). The information in the remainder of this paragraph and Table 1 is based on these sources, supplemented by my own review of state laws.

Of the states with an *appointed* chief election authority, six have an *individual* serving as state chief election authority, while fourteen states (including Wisconsin) have a *multiperson board*.⁵⁵ Of the states with an appointed individual, five vest the governor with appointment authority (sometimes subject to legislative confirmation, but not by a supermajority), and the remaining state (Tennessee) gives the state legislature the power to appoint the secretary of state.⁵⁶ Of the fourteen states with appointed boards, ten have a board that is structured (either formally or functionally) so that a majority of members are of one party; the other three have an equal number of Republicans and Democrats. While a board with an equal number of Republicans and Democrats may seem more fair than a partisan secretary of state, that model introduces the problem of gridlock with respect to controversial decisions.⁵⁷

The predominant models of running elections are problematic, given the inherent conflicts of interest they create for state chief election authorities. Specifically, there is a conflict between their obligation to the citizenry to discharge their duties without partisan bias on the one hand, and their incentive to make decisions that benefit their party on the other.⁵⁸ This problem has arisen in several highly publicized elections, including the conduct of Republican Secretaries of State Katherine Harris and Ken Blackwell during the 2000 Florida and 2004 Ohio presidential elections, respectively, the conduct of Democratic Secretaries of State Mark Ritchie of Minnesota and Jennifer Brunner of Ohio in 2008, and Ohio's Republican Secretary of State Jon Husted in 2012. In all these cases, the state's chief election official has been criticized by leaders of the other major party for acting in a partisan manner.⁵⁹ Partisan motivation is inherently difficult to

55. The careful reader will note that the sum of states with elected and appointed chief election authorities exceeds fifty. That is because, in five states (Arkansas, Indiana, Kentucky, Rhode Island, South Dakota) an appointed board shares election administration responsibility with the elected secretary of state. In South Dakota, the elected secretary of state is a member of the board and the other six members are appointed.

56. TENN. CONST. art III, § 17. Tennessee's chief administrative election official is actually the state coordinator of elections, who is chosen by the appointed secretary of state. TENN. CODE ANN. § 2-11-201 (2012). Tennessee also has a State Election Commission, consisting of seven members, *id.* § 2-11-101, selected by the state legislature. *Id.* § 2-11-104. I have not listed it as a "board" state, however, because its primary duties are to appoint and remove local election commissioners. See *About the State Election Committee*, TENN. DEPARTMENT OF ST. ELECTIONS, <http://www.tn.gov/sos/election/statecom.htm> (last visited Mar. 10, 2013).

57. The gridlock is particularly evident in the inaction of Illinois's bipartisan Board of Elections. When asked to describe the board, one longtime participant in Illinois politics said "[they don't] try to get too far out in front of anything." David C. Kimball, *Illinois: Ending the Gridlock, in* ELECTION REFORM: POLITICS AND POLICY 190, 194 (Daniel J. Palazzolo & James W. Ceaser eds., 2005); see also HUEFNER ET AL., *supra* note 12, at 63.

58. See generally Daniel P. Tokaji, *Lowenstein Contra Lowenstein: Conflicts of Interest in Election Administration*, 9 ELECTION L.J. 421 (2010) (arguing that conflicts of interest are a central problem in American election administration).

59. *Id.* at 432; Massimo Calabresi, *The Powerful Official Behind Ohio's Vote*, TIME SWAMPLAND, (Nov. 6, 2012), <http://swampland.time.com/2012/11/06/jon-husted-the-most-powerful-man-in-the->

prove, of course, but critics of these chief election officials have pointed to decisions that seem likely to benefit the official's own party.

Wisconsin is the only state with a truly nonpartisan board structure. It is unique among the states in requiring supermajority confirmation of new commissioners, so as to insulate board members from partisan pressures. This does not guarantee decision making that is blind to partisan effects, but it provides a greater level of protection against partisan decision making than the structure of any other state.

Although Wisconsin's structure is unique among its fellow states, independent election management authorities are the norm in the democratic world.⁶⁰ In fact, independent election administration is widely viewed as essential to the integrity of the democratic process.⁶¹ The primary rationale for insulating election management bodies from partisan politics is to guard against conflicts of interest that might distort their decision making. As the influential European Commission for Democracy Through Law (also known as the Venice Commission) has explained: "Only transparency, impartiality and *independence from politically motivated manipulation* will ensure proper administration of the election process, from the preelection period to the end of the processing of results."⁶² The International Institute for Democracy and Electoral Assistance has likewise identified an "autonomous and impartial" electoral management body as an internationally recognized standard for fair elections.⁶³

The most common means by which other countries insulate election management from partisan politics is by having an *independent electoral commission*.⁶⁴ Australia,⁶⁵ Canada,⁶⁶ and India⁶⁷ are among the countries with such a commission. In other countries, election administration is delegated to a government

ohio-vote; see also Samuel Issacharoff & Richard H. Pildes, *Epilogue: Bush v. Gore and the Constitutional Right to Vote 4* (New York University Public Law and Legal Theory Working Paper No. 381, 2013) (discussing litigation surrounding 2012 election in Ohio).

60. I have discussed other countries' election management structures in greater length in Tokaji, *supra* note 3, at 137–42, and Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 120–25 (2010).

61. See LÓPEZ-PINTOR, *supra* note 1, at 12.

62. Eur. Comm'n for Democracy Through Law, *Code of Good Practice in Electoral Matters*, at 26, Opinion No. 190/2002 (Oct. 18, 2002) (emphasis added), available at [http://www.venice.coe.int/WebForms/documents/?pdf=CDL\(2002\)139-e](http://www.venice.coe.int/WebForms/documents/?pdf=CDL(2002)139-e).

63. INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, *supra* note 1, at 37.

64. LÓPEZ-PINTOR, *supra* note 1, at 11; see also MASSICOTTE ET AL., *supra* note 1, at 83–97; Ihl, *supra* note 1, at 87–89. The discussion in the text relies mostly on López-Pintor's categorization. LÓPEZ-PINTOR, *supra* note 1, at 21–26.

65. LÓPEZ-PINTOR, *supra* note 1, at 146; MASSICOTTE ET AL., *supra* note 1, at 99–101.

66. MASSICOTTE ET AL., *supra* note 1, at 99–101; Frank Emmert et al., *Trouble Counting Votes? Comparing Voting Mechanisms in the United States and Selected Other Countries*, 41 CREIGHTON L. REV. 3, 8–9 (2007).

67. David Gilmartin, *One Day's Sultan: T.N. Sesban and Indian Democracy*, 43 CONTRIBUTIONS TO INDIAN SOC. 247, 250 (2009) (describing India's electoral commission).

ministry which, though not formally independent of the ruling party, enjoys considerable practical insulation from partisan politics by virtue of having a strong core of professional civil servants. This is the case in several Western European countries, including Belgium, Denmark, and Sweden.⁶⁸ Still other countries disperse authority among different components of the national government. An example is the French system, in which a government ministry and judges share responsibility.⁶⁹ Such divided authority tends to assure fair election administration by providing a relatively impartial check on government power. While the United States is not completely alone in delegating authority to partisan elected officials at the state level, we are at the far end of the spectrum in the partisanship of our election administration system.⁷⁰

Compounding the challenges inherent in the partisan administration of elections at the state level is the extreme decentralization of the U.S. system. Most of the authority for running elections lies with state election officials, and the thousands of county and municipal officials scattered across the country. In contrast to virtually all other democratic countries, we lack an entity within the national government that has power over election administration. It is true that the Help America Vote Act of 2002 (HAVA) created the Election Assistance Commission (EAC), a four-member bipartisan board charged with overseeing some of its requirements.⁷¹ But from the beginning, this entity was designed to have as little power as possible.⁷² In the first several years of its existence, the EAC was plagued by multiple problems that hindered its effectiveness, including the late appointment of commissioners, inadequate funding, a lack of regulatory authority, partisan stalemate, failure to release information, and excessive deference to state and local election officials.⁷³ As of 2013, the EAC was without a single sitting commissioner and some have called for it to be eliminated entirely.⁷⁴ Although federal courts have come to police election administration more aggressively in the years since 2000,⁷⁵ most of the authority still lies with state and local officials.

Election administration in the United States thus remains mostly a matter of state law and local practice. The means by which local election officials are chosen, as well as their degree of professionalization, varies dramatically from state to state—and sometimes within a particular state. While all states have election laws

68. LÓPEZ-PINTOR, *supra* note 1, at 59.

69. See Tokaji, *supra* note 60, at 121 (citing LÓPEZ-PINTOR, *supra* note 1, at 22, 60–61).

70. Tokaji, *supra* note 3, at 127.

71. See *id.* at 130.

72. See Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424, 428 (2004) (describing the EAC as an agency “designed to have as little regulatory power as possible”).

73. Tokaji, *supra* note 3, at 135–36.

74. Amanda Becker, *The Phantom Commission*, ROLL CALL, Nov. 1, 2012, at 1.

75. See Daniel P. Tokaji & Owen Wolfe, Baker, Bush, and Ballot Boards: *The Federalization of Election Administration*, 62 CASE. W. RES. L. REV. 969, 969–71 (2012).

and a state chief election authority, much of the on-the-ground work of running elections rests with officials at the county or municipal level. Roughly two-thirds of local jurisdictions elect those charged with running their elections, with party-affiliated officials in almost half of local jurisdictions.⁷⁶ According to one study, forty-six percent of local jurisdictions have party-affiliated election authorities, while fourteen percent had bipartisan and twenty-nine percent had nonpartisan local election authorities.⁷⁷

The United States is therefore unusual in the degree of decentralization of its election administration system as well as its partisanship. In contrast to most other countries, partisan election administration is the near-universal norm at the state level and is common at the local level. We are also highly decentralized, more so than any other democratic country. This is evident both at the top of our system, in the absence of a national entity with real power over election administration, and at the bottom, in the wide variation among the thousands of local officials with day-to-day responsibility for running our elections.

Although Wisconsin's state-level election management institution is unique, the state is not immune from the problems that accompany the highly decentralized system for running elections in the United States. In fact, Wisconsin's problems are especially serious in some respects. In particular, the degree of decentralization in Wisconsin is extremely high—even by the hyperdecentralized standard of the United States. In most states, local authority for running elections rests primarily at the county level. In Wisconsin and a few other states, however, most authority for running elections rests at the municipal level—that is, in cities, towns, and villages—although county officials also play an important role in counting votes, as we shall see.⁷⁸ County clerks in Milwaukee are elected, while municipal clerks may either be elected or appointed.⁷⁹ There are 1851 municipalities in Wisconsin, ranging in size from tiny towns with just a few voters to the City of Milwaukee with hundreds of thousands of voters.⁸⁰

Despite its high degree of decentralization, Wisconsin also has some features that are hospitable to the evenhanded administration of elections. In particular, it has a strong good government tradition, stretching at least as far back as the Progressive Era of the early twentieth century.⁸¹ The state has relatively high voter

76. Kimball et al., *supra* note 4, at 453.

77. Kimball & Kropf, *supra* note 4, at 1261 tbl.1.

78. For a discussion of Waukesha County Clerk Kathy Nickolaus, see TIMOTHY R. VERHOFF, SPECIAL INVESTIGATION REPORT IN THE MATTER OF WAUKESHA COUNTY CLERK KATHY NICKOLAUS, WIS. GOV'T ACCOUNTABILITY BD. CASE #2011-04, at 2 (2011), available at http://gab.wi.gov/sites/default/files/news/65/waukesha_independent_investigation_final_report_pd_71534.pdf. See also *infra* notes 176, 181–90 and accompanying text.

79. HUEFNER ET AL., *supra* note 12, at 113–14.

80. HUEFNER ET AL., *supra* note 51, at 39; HUEFNER ET AL., *supra* note 12, at 111.

81. HUEFNER ET AL., *supra* note 12, at 111.

turnout and its election officials have generally enjoyed a good reputation for professionalism.⁸²

All these features of Wisconsin's election system distinguish it from all other states. Of course, *every* state has its own unique election ecosystem.⁸³ For this reason, it is important to resist overly simplistic comparisons among states. At the same time, the fact that Wisconsin's state election authority is so different from those of other states makes it particularly worthy of careful study—including consideration of whether this nonpartisan model should be exported elsewhere.

II. THE EXPERIENCE OF WISCONSIN'S GOVERNMENT ACCOUNTABILITY BOARD

The first five years of the GAB's existence were an especially tumultuous period in Wisconsin politics. Despite its traditionally civil political climate, Wisconsin has not been immune from the intense polarization that increasingly grips the country. In fact, it has been a leading example of this polarization. This atmosphere presents major challenges for an independent board charged with fairly administering state laws governing the political process. This Part addresses five of the most significant election administration issues that the GAB confronted between its establishment in 2007 and 2012. In examining its performance in these areas, my objective is to consider how effectively it has performed its role of administering electoral rules fairly. This is an inherently subjective inquiry, of course, as reasonable observers may differ in their assessments of that question. That said, my overall judgment is that the GAB has been very effective in doing the job it was created to do.⁸⁴

A. Voter Registration

In its first three years of existence, the GAB faced major challenges—including a lawsuit filed by the state attorney general—having to do with its statewide registration database.⁸⁵ Some background on changes in the way that voter registration is handled, both in Wisconsin and nationally, is necessary to understand this issue.

Until 2006, Wisconsin was one of two states that did not require voter

82. *Id.* But see JAMES K. CONANT, WISCONSIN POLITICS AND GOVERNMENT: AMERICA'S LABORATORY OF DEMOCRACY 83–90 (2006) (discussing Wisconsin's tradition of professionalism in government, but noting more instances of discord and alleged corruption in the 1980s and 1990s).

83. See generally HUEFNER ET AL., *supra* note 12 (examining the different election ecosystems in Ohio, Illinois, Michigan, Wisconsin, and Minnesota).

84. The accounts that follow are based upon publicly available information including court filings, GAB memos, complaints filed with the GAB, and in some cases press reports.

85. Van Hollen v. Gov't Accountability Bd., No. 08-CV-4085, (Wis. Ct. App. Oct. 23, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/vanhollen-order-10-23-08.pdf>.

registration for all voters.⁸⁶ Under state law, Wisconsin municipalities with fewer than 5000 people were not required to have voter registration.⁸⁷ Only 312 of the state's 1851 municipalities actually had voter registration,⁸⁸ although approximately three-quarters of voters lived in jurisdictions where voter registration was required.⁸⁹ As in most other states, registration lists were kept at the local, and not the state, level. Under section 303 of HAVA, Wisconsin was required to create a statewide voter registration database for the first time.⁹⁰ The basic idea was to move lists from the local level to the state level, ensuring consistency and making it easier to keep track of voters when they moved from one jurisdiction to another within a state. HAVA's statewide voter registration database mandate was originally scheduled to become effective in 2004, but the statute allowed states to extend their deadline until 2006.⁹¹ Like most of the states, Wisconsin availed itself of this extension.⁹²

Even before the GAB existed, the process of creating a statewide registration database was fraught with difficulty. This was due in part to the large number of local electoral jurisdictions in Wisconsin and the fact that most of them had no voter registration at all before 2006, but it was also attributable to technical problems. The State Election Board contracted with Accenture to create the software for its Statewide Voter Registration System (SVRS), allocating \$27.5 million in federal HAVA funds for this purpose.⁹³ The transition did not go smoothly. Among the problems with the new system were slow speeds in entering data, associated high costs for local election officials, data entry errors, problems in generating walk lists for candidates, and difficulties in "matching" voters against the statewide registration list.⁹⁴ This occasioned a great deal of frustration on the part of election officials, much of it directed toward Accenture.⁹⁵ As a result of these technical problems, Wisconsin's HAVA database was not fully functional until August 2008.⁹⁶

The "matching" requirement is what ultimately led to litigation against the

86. The other was North Dakota, which still does not have voter registration. *Qualifications for Voting in North Dakota*, N.D. SECRETARY OF STATE, <http://www.nd.gov/sos/electvote/voting/voter-qualifi.html> (last visited Feb. 10, 2013).

87. HUEFNER ET AL., *supra* note 12, at 113, 124.

88. *Id.*

89. *Id.* at 113.

90. 42 U.S.C. § 15483(a)(1) (2006).

91. *Id.* § 15483(d).

92. Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1216 (2005).

93. HUEFNER ET AL., *supra* note 12, at 123.

94. *Id.*

95. *Id.* at 123–24.

96. SARAH WHITT, ST. OF WIS. GOV'T ACCOUNTABILITY BD., A STATISTICAL ANALYSIS OF HAVA CHECKS IN WISCONSIN AUGUST 6, 2008 THROUGH JANUARY 4, 2009, at 2 (2009), available at http://www.gab.wi.gov/sites/default/files/publication/65/statistical_analysis_hava_checks_01_09_pdf_10016.pdf.

GAB, brought by the Republican state attorney general.⁹⁷ In addition to mandating the creation of statewide voter registration databases, section 303 of HAVA includes the following requirement:

The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.⁹⁸

The notion behind this requirement was that comparing the information in new statewide registration lists against the information in state motor vehicle records would ensure accuracy. Yet HAVA was not very clear on how this matching was to be done, or on the consequences of a failed match.⁹⁹

As a result, there was great variation among states in how they conducted HAVA matches and what the consequences of a failed match were.¹⁰⁰ Some states required an exact match, while others only required a partial or substantial match.¹⁰¹ In terms of consequences, the typical practice is not to prevent people from voting due solely to a failed match, but instead to require that voters provide non-photographic means of confirming their information.¹⁰² The concern with requiring an exact match or disqualifying voters whose information does not match is that a nonmatch may be due to some administrative error. Specifically, errors may appear in databases for a variety of reasons that have nothing to do with fraud or eligibility such as typographic errors, transposed names, marriage, transposed fields (e.g., Yao Ming rather than Ming Yao), double names (e.g., Billy Bob [first name] Thornton [last name] rather than Billy [first] Bob [middle] Thornton [last]), hyphenated names (e.g., Gabriel Garcia Marquez rather than Gabriel Garcia-Marquez), and omitted information. They may be due to data-entry errors that have nothing to do with voter eligibility.¹⁰³ A large number of nonmatches occur when comparing voter registration databases with other

97. See *Van Hollen v. Gov't Accountability Bd.*, No. 08-CV-4085, at *8 (Wis. Ct. App. Oct. 23, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/VanHollen-Order-10-23-08.pdf>.

98. 42 U.S.C. § 15483(a)(5)(B)(I) (2006).

99. See Daniel P. Tokaji, *Voter Registration and Institutional Reform: Lessons from a Historic Election*, 3 HARV. L. & POLY REV. ONLINE 1, 6 (Jan. 22, 2009), http://www.hlpronline.com/Tokaji_HLPR_012209.pdf.

100. See Nathan Cemenska & Sarah Cherry, *Key Questions for Key States: Executive Summary*, ELECTION L. @ MORITZ 10–12 (Sept. 3, 2008), <http://moritzlaw.osu.edu/electionlaw/projects/maps2008/50QsforExecutiveSummarywithlinks.pdf>.

101. *Id.* at 10–11.

102. *Id.* at 11.

103. Justin Levitt et al., *Making the List: Database Matching and Verification Processes for Voter Registration*, BRENNAN CENTER FOR JUST. 4 (Mar. 24, 2006), http://www.brennancenter.org/dynamic/subpages/download_file_49479.pdf.

databases for reasons that have nothing to do with voter eligibility. Prior to the 2008 election, the GAB found that over one in five new voters (twenty-two percent) had information in the voter registration database that did not match motor vehicle records.¹⁰⁴

Wisconsin Attorney General J.B. Van Hollen's lawsuit against the GAB arose from the board's decision to allow nonmatched voters to cast a regular ballot.¹⁰⁵ Its rationale was that many voters in this category were actually eligible voters who had been voting for years, and should not be denied a regular ballot due to a possible administrative error.¹⁰⁶ Van Hollen, a Republican, disagreed with the GAB's decision. While the complaint in *Van Hollen v. Government Accountability Board*¹⁰⁷ was not very precise on the relief being sought, it alleged that the failure to "remove ineligible voters and to conduct or require HAVA checks" could result in tens of thousands of people being allowed to vote despite discrepancies that "may, in fact, provide evidence that they are not eligible to vote."¹⁰⁸ A state circuit court dismissed the case a few weeks later, concluding that there was no legal requirement that a voter be matched as a precondition to voting.¹⁰⁹ This legal conclusion was correct, as neither HAVA nor Wisconsin law required that nonmatched voters either be removed from voting lists or required to cast a provisional ballot. Section 303 instead imposes a requirement that state election authorities enter into agreements for database matching with their state motor vehicle authority, saying nothing about any consequence on voters if the match fails.

While this ended the litigation, the reliability of the GAB's matching protocol remained an open question. After the 2008 election, the GAB attempted to determine the reliability of its matching protocol by examining the nonmatch rates

104. Patrick Marley, *Voter Registration Information Often Doesn't Match Driver Records*, MILWAUKEE J. SENTINEL, Aug. 28, 2008, at 1B.

105. SARAH WHITT, ST. OF WIS. GOV'T ACCOUNTABILITY BD., FINAL REPORT OF THE RETROACTIVE HAVA CHECK PROJECT 2 (2010), available at http://gab.wi.gov/sites/default/files/publication/69/final_report_of_the_retroactive_hava_check_pdf_19864.pdf.

106. ST. OF WIS. GOV'T ACCOUNTABILITY BD., GOVERNMENT ACCOUNTABILITY BOARD'S PROTOCOL: RETROACTIVE HAVA CHECKS OF VOTER RECORDS 5 (2009), available at http://gab.wi.gov/sites/default/files/publication/69/final_report_of_the_retroactive_hava_check_pdf_19864.pdf (Appendix 1).

107. Documents from this case may be found at *Van Hollen v. Government Accountability Board*, ELECTION L. @ MORITZ, <http://moritzlaw.osu.edu/electionlaw/litigation/vanhollenv.gab.php> (last visited Feb. 3, 2013).

108. Petition for Writ of Mandamus at 12, *Van Hollen v. Gov't Accountability Bd.*, No. 08-CV-4085 (Wis. Ct. App. Sept. 10, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/VanHollen-Complaint.pdf>. The author joined an amicus brief in opposition to the petition.

109. *Van Hollen v. Gov't Accountability Bd.*, No. 08-cv-004085, at *18 (Wis. Ct. App. Oct. 23, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/VanHollen-Order-10-23-08.pdf>.

of those who registered between 2006 and 2008.¹¹⁰ The GAB uncovered a large number of problems when conducting HAVA checks.¹¹¹ According to a report prepared by the GAB, twelve percent resulted in a nonmatch.¹¹² Thus, if nonmatched voters had been required to cast provisional ballots in the November 2008 election, then between 18,000 and 24,000 voters would have been subjected to this requirement—seventy-eight times the number of provisional ballots cast in the previous election.¹¹³ Such a high number of provisional ballots, in a state that has traditionally cast few provisional ballots, would be expected to have caused considerable administrative headaches for election officials, poll workers, and voters alike. Thus, with the benefit of hindsight, it is evident that the GAB made the right call in not requiring nonmatched voters to cast a provisional ballot. At the same time, the GAB's post-2008 study revealed serious problems with Wisconsin's matching procedure—though ones shared with other states, which had similar difficulties implementing the matching requirement of HAVA.

In the end, the GAB wound up following a process designed to remove from the list those who are not residing at their registered address, while avoiding the removal of eligible voters. To comply with HAVA's mandate consistent with state law, the GAB sent two separate mailings to nonmatched voters, in an effort to ascertain whether they are really living at the address at which they are registered. In 2009, its initial mailing went out to 87,000 voters who were flagged in checks for non-matches,¹¹⁴ telling voters that their registration information did not match. For those whose letter was returned as undeliverable, the GAB sent out a second letter stating that the GAB has reliable information that the registrant no longer resides at the address under which he is registered, and giving the registrant thirty days to respond or be inactivated in the voter rolls.¹¹⁵ Those who did not respond or who again had their letters returned as undeliverable were deactivated. The GAB had statutory authority to do so pursuant to a state statute.¹¹⁶ In the end, some 8000 voters were inactivated following this process.¹¹⁷

110. WHITT, *supra* note 96, at ii.

111. *See id.*

112. *Id.*

113. *Id.*

114. WHITT, *supra* note 105, at 3.

115. ST. OF WIS. GOV'T ACCOUNTABILITY BD., 30 DAY NOTICE LETTER TO RETROACTIVE HAVA CHECK UNDELIVERABLES FREQUENTLY ASKED QUESTIONS (2010), available at http://gab.wi.gov/sites/default/files/memo/20/retro_hava_30_day_notice_faqs_final_10_11_10_pdf_15767.pdf.

116. Upon receipt of reliable information that a registered elector has changed his or her residence to a location outside of the municipality, the municipal clerk or board of election commissioners shall notify the elector by mailing a notice by 1st class mail to the elector's registration address stating the source of the information. . . . If the elector no longer resides in the municipality or fails to apply for continuation of registration within 30 days of the date the notice is mailed, the clerk or board of election commissioners shall change the elector's registration from eligible to ineligible status.

WIS. STAT. § 6.50(3) (2010).

117. Memorandum from Kevin J. Kennedy, Dir. & Gen. Counsel, Wis. Gov't Accountability Bd., to Members of the Gov't Accountability Bd. 5 (Dec. 13, 2010), available at <http://gab.wi.gov/>

According to the GAB, there was no evidence anyone on the list attempted to vote fraudulently in 2010.¹¹⁸ In some other states, the deactivation of voters in this way might be problematic. But the existence of Election Day registration in Wisconsin tends to mitigate this difficulty.¹¹⁹ Even if a voter is wrongly omitted from the rolls, he or she can still go to the polling place on Election Day, re-register, and cast a ballot that will count.

Maintenance of voter registration lists is an issue fraught with partisan tension, with Republicans generally urging aggressive purging of lists to prevent fraud, and Democrats urging a more cautious approach to avoid disenfranchising eligible voters. While the issue of HAVA matching has been a troublesome one for Wisconsin and other states, the GAB appears to have found a reasonable solution, handling the problems that emerged in a studied and careful way. In 2008, it wisely resisted the call for nonmatched voters to be omitted from the lists or compelled to cast a provisional ballot; but in 2010, it implemented a process that complies with HAVA's matching requirement, while avoiding unnecessary burdens on eligible voters.

B. Early and Absentee Voting

Early and absentee voting has been the subject of heated debate throughout the United States in recent years. The 2008 Obama campaign made extensive use of early voting in several key states, a tactic that was seen as helpful in improving turnout among the Democratic base. In 2011, after Republicans swept into the legislature and governor's office in a number of states, they enacted legislation to limit early voting in a handful of states, including swing states Ohio¹²⁰ and Florida¹²¹—much to the dismay of Democrats and voting rights activists.

Wisconsin's consideration of early voting was less charged with partisan acrimony than that of other states. Since 2000, Wisconsin has long allowed voters to cast absentee ballots at their municipal clerk's office before Election Day without an excuse.¹²² While in-person absentee voting is similar to early voting (some might say functionally identical), voters are technically casting an absentee ballot. As with mail-in absentee ballots, the voter fills out an application at the

sites/default/files/event/74/12_13_14_2010open_session_all_docs_with_agenda_pdf_14491.pdf (PDF pages 38–46).

118. *More Than 12,000 Voters Ineligible to Cast Ballots*, MILWAUKEE J. SENTINEL (Oct. 28, 2010), <http://www.jsonline.com/news/wisconsin/106088073.html>.

119. Wisconsin is exempt from the requirements of the National Voter Registration Act, including those which relate to list maintenance, because it has Election Day Registration. 42 U.S.C. § 1973gg-2(b)(2) (2006).

120. H.B. 194, 129th Gen. Assem. (Oh. 2011) (repealed Sub. S.B. 295, 129th Gen. Assem. (Oh. 2012)).

121. 2011 Fla. Laws 40.

122. 1999 Wisconsin Act 182 § 90m, WIS. STAT. § 6.85 (2000), *amended by* 2011 Wisconsin Act 23 § 55.

clerk's office and is then given an absentee ballot. After marking the ballot, the voter places it in an envelope that is not tabulated until Election Day, rather than using an electronic voting machine or feeding the ballot through a scanner as would be done on Election Day.¹²³ Like many other states, Wisconsin has seen a sharp increase in the percentage of people voting by absentee ballot in recent years, going from around six percent in 2000 to twelve percent in 2004 to twenty-one percent in 2008.¹²⁴ The large number of absentee voters in the 2008 election led some to question whether it would make sense to move to a "true" early voting system, in which voters would cast ballots electronically or through a tabulating machine, just as on Election Day.¹²⁵ Some local election officials complained of the administrative burdens associated with processing large numbers of ballots in the days immediately prior to Election Day.¹²⁶

These concerns led the GAB to undertake a study of early voting, considering both changes the GAB might make itself as well as ones that would require statutory amendments. The GAB's staff proceeded in a methodical fashion, examining the experience of other states as well as academic studies of early voting. It also conducted "listening sessions" with local election officials, academics, and members of the public.¹²⁷ In the face of strong resistance from municipal clerks,¹²⁸ GAB staff ultimately recommended an option that stopped short of full-scale early voting, citing costs and Wisconsin voters' relatively high level of satisfaction with the existing process,¹²⁹ as well as possible confusion among voters.¹³⁰ Instead, GAB staff recommended a more streamlined version of in-person absentee voting,¹³¹ which would include: (1) allowing people to vote in multiple satellite locations (not just the clerk's office),¹³² (2) keeping the hours for in-person absentee voting flexible,¹³³ (3) allowing a simplified application process for in-person absentee voting,¹³⁴ (4) changing the start date for in-person absentee voting from thirty to twenty days before Election Day,¹³⁵ and (5) retaining the end

123. ADAM HARVELL & EDWARD EDNEY, ST. OF WIS. GOV'T ACCOUNTABILITY BD., AN EXAMINATION OF EARLY VOTING IN WISCONSIN 2 (2009), available at http://gab.wi.gov/sites/default/files/publication/65/early_voting_report_final_pdf_25757.pdf.

124. *Id.* at 1.

125. *Id.*

126. See Peter Maller, *Clerks Brace for Voting Crowds Officials Expect a Long, Grueling Election Day*, MILWAUKEE J. SENTINEL, Nov. 2, 2004, at 5B.

127. HARVELL & EDNEY, *supra* note 123, at 4–5.

128. *Panel Recommends Against Early Voting*, MILWAUKEE J. SENTINEL (Dec. 16, 2009), <http://www.jsonline.com/news/wisconsin/79400042.html>.

129. HARVELL & EDNEY, *supra* note 123, at 18.

130. *Id.* at 21.

131. *Id.* at 19–21.

132. *Id.* at 20.

133. *Id.*

134. *Id.*

135. *Id.* at 19–20.

date for in-person absentee voting of Monday, the day before Election Day, at 5:00 p.m.¹³⁶

In the end, the GAB adopted all of its staff's recommendations but the last one.¹³⁷ Instead of retaining the preexisting deadline for in-person absentee voting, the GAB recommended that the legislature move up the deadline to 5:00 p.m. or the close of business (whichever is later) on the *Friday* before Election Day.¹³⁸ This was framed as a recommendation because its implementation required statutory change. The rationale for the earlier deadline was that allowing in-person absentee voting to proceed through the day before the election put too much strain on local election officials, who were required to witness, seal, and sort absentee ballots. This made it difficult for them to complete the other tasks for which they were responsible in the immediate run-up to Election Day. The state adopted this recommendation through legislation enacted in 2011, which moved up the deadline for in-person absentee voting from the day before Election Day to the Friday before Election Day.¹³⁹

Reasonable minds can certainly disagree over whether moving up the deadline for in-person absentee voting was a wise policy choice. There is undoubtedly some tension between administrative costs for election officials on the one hand and voter convenience on the other. It cannot reasonably be disputed, however, that the GAB and its staff analyzed the question in a careful and methodical way, taking into consideration the costs and benefits of this and other proposed changes to early and absentee voting in Wisconsin. The same, unfortunately, cannot be said for the state legislature. The change in the deadline for early voting was adopted on a party line vote,¹⁴⁰ as part of the same legislation that included the highly controversial photo ID requirement, which is discussed below. Still, the GAB's consideration of the issue represents precisely the sort of studied approach to the question of early voting that one would hope for from a nonpartisan election administration body.

C. Voter Identification

In the years since HAVA's enactment, no election administration topic has been more contentious than voter identification. HAVA adopted a limited ID requirement, applicable only to first-time voters who registered by mail. The

136. *Id.* at 20.

137. *See* ST. OF WIS. GOV'T ACCOUNTABILITY BD., OPEN SESSION MINUTES 9–10 (2009), available at http://gab.wi.gov/sites/default/files/event/2009_12_17_gab_open_session_minutes_pdf_97306.pdf.

138. *Id.*

139. 2011 Wisconsin Act 23 § 57, WIS. STAT. § 6.86(1)(b) (2010).

140. *See Detailed Results of Wis. Assembly Vote on AB 7*, WIS. LEGIS. DOCUMENTS (May 11, 2011), <http://legis.wisconsin.gov/2011/data/votes/av0330.pdf>; *Detailed Results of Wis. Senate Vote on AB 7*, WIS. LEGIS. DOCUMENTS (May 19, 2011), <http://legis.wisconsin.gov/2011/data/votes/sv0192.pdf>.

statute did not require those voters to produce photo identification; it also allowed documentary identification such as a bank statement, utility bill, or government document with the voter's name and address.¹⁴¹ Since HAVA's enactment, a number of states have gone further, requiring some or all voters to present government-issued *photo* identification in order to have their votes counted.¹⁴² Georgia, Indiana, and Missouri were the first to impose such a requirement in 2005 and 2006. While Missouri's state supreme court struck down that state's law, the U.S. Supreme Court upheld Indiana's photo ID requirement in *Crawford v. Marion County Elections Board*,¹⁴³ and Georgia's law survived legal challenges in federal and state courts.¹⁴⁴

Given the intense partisan debate surrounding voter ID, it is no surprise that this issue has provided the most severe test of the GAB's nonpartisanship. Since the 2010 general election, several additional states have adopted or toughened voter ID laws.¹⁴⁵ Wisconsin is among them, adopting a strict government-issued photo ID law in 2011,¹⁴⁶ which has since been enjoined by state courts.¹⁴⁷ The GAB provided information to the state legislature when the bill was under consideration and recommended some changes,¹⁴⁸ though it did not take a position for or against the bill.¹⁴⁹ The implementation of the voter ID statute nevertheless precipitated what is probably the most serious threat to the GAB's independence.

141. See *The Rules on Registering to Vote*, MILWAUKEE J. SENTINEL, Feb. 15, 2004, at 6Z.

142. For a list of state identification requirements, see *Voter ID: State Requirements*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx> (last visited Feb. 2, 2013).

143. *Crawford v. Marion Cnty. Elections Bd.*, 553 U.S. 181, 188–89 (2008).

144. See *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1345 (11th Cir. 2009); *Perdue v. Lake*, 647 S.E.2d 6, 7–8 (Ga. 2007).

145. See *Voter ID: 2011 Legislation*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id-2011-legislation.aspx> (last updated Jan. 26, 2012) (listing action on all state voter ID bills in 2011); *Voter ID: 2012 Legislation*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id-2012-legislation.aspx> (last updated Jan. 10, 2013) (listing action on all state voter ID bills in 2012); see also *Voter Identification Requirements*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx> (last updated Feb. 14, 2013) (featuring an interactive map which lists general voter ID requirement in all U.S. states).

146. 2011 Wisconsin Act 23 §§ 1, 45 (adding WIS. STAT. § 5.02(6m) (2011) and amending § 6.79(2)(a) (2010)).

147. *Milwaukee Branch of the NAACP v. Walker*, No. 11-CV-5492 (Wis. Cir. Ct. 2012), *appeal docketed*, No. 2012AP1652 (Wis. Ct. App. July 23, 2012); *League of Women Voters v. Walker*, No. 11-CV-4669 (Wis. Cir. Ct. 2012), *appeal docketed*, No. 2012AP584 (Wis. Ct. App. Mar. 3, 2012).

148. Kevin J. Kennedy, Dir. & Gen. Counsel, Wis. Gov't Accountability Bd., Remarks Presented to Wis. Senate Comm. on Transp. & Elections (Jan. 26, 2011), *available at* http://gab.wi.gov/sites/default/files/publication/65/kennedy_senate_committee_testimony_1_26_11_pdf_12141.pdf; see also *Core Principles of Voter Photo ID*, GOV'T ACCOUNTABILITY BOARD ST. OF WIS., <http://gab.wi.gov/node/1588> (last visited Feb. 2, 2013).

149. Letter from Kevin J. Kennedy, Dir. & Gen. Counsel, Wis. Gov't Accountability Bd., to Members of Wis. State Legislature 1 (Jan. 12, 2011) (on file with author).

Wisconsin's voter ID statute (2011 Wisconsin Act 23) sets forth an exclusive list of the documents that constitute acceptable photo identification.¹⁵⁰ Among the documents on that list is a student ID card from an accredited college or university, which expires not more than two years after its date of issuance.¹⁵¹ In implementing this requirement, the GAB made two decisions that aroused opposition from some of the Republican supporters of the ID law. The first concerned the statute's requirement that student IDs have an expiration date less than two years from their date of issuance to be acceptable.¹⁵² Most college IDs lack such an expiration date, but the GAB voted unanimously to allow colleges to affix stickers on existing college IDs so that they could be used to vote.¹⁵³ The second GAB decision that aroused Republican opposition concerned the use of ID cards from technical colleges. The GAB initially concluded that technical college IDs could *not* be used, but later reversed itself.¹⁵⁴ Based on a textualist interpretation of "college," the term used in the statute, the GAB concluded that IDs from technical colleges fall within the scope of an acceptable ID.¹⁵⁵ The GAB reached this conclusion despite the fact that there was a failed attempt to include specifically technical colleges during the legislative debate over the voter ID bill.¹⁵⁶ Notwithstanding this legislative history, the board believed that the plain meaning of the statute required acceptance of technical college IDs.¹⁵⁷

The existence of such a disagreement would not, by itself, constitute a threat to the GAB's independence. The problem in the case of photo IDs stemmed from another statute that was adopted in 2011, pertaining to state rulemaking (2011 Wisconsin Act 21). This statute requires that proposed rules be approved not only by the body with policymaking authority over the topic *but also by the governor*.¹⁵⁸

150. WIS. STAT. § 5.02(6m) (2012).

151. Specifically, the statute provides that acceptable ID includes:

An unexpired identification card issued by a university or college in this state that is accredited, as defined in s. 39.30(1)(d), that contains the date of issuance and signature of the individual to whom it is issued and that contains an expiration date indicating that the card expires no later than 2 years after the date of issuance if the individual establishes that he or she is enrolled as a student at the university or college on the date that the card is presented.

WIS. STAT. § 5.02(6m)(f).

152. Memorandum from Kevin J. Kennedy, Dir. & Gen. Counsel, Wis. Gov't Accountability Bd., to Members of the Wis. Gov't Accountability Bd. 4–5 (Sept. 12, 2011), *available at* http://gab.wi.gov/sites/default/files/event/74/open_session_all_with_agenda_september_2011_pdf_17118.pdf (PDF pages 34–39).

153. *Id.*

154. Patrick Marley, *Elections Board Reverses Itself on Tech School IDs at Polls*, MILWAUKEE J. SENTINEL, Nov. 9, 2011, at 1B.

155. Kevin J. Kennedy, Dir. & Gen. Counsel, Wis. Gov't Accountability Bd., Written Remarks for the Joint Comm. on Review of Admin. Rules 3 (Nov. 15, 2011), *available at* http://gab.wi.gov/sites/default/files/publication/137/kevin_kennedy_jcrar_testimony_11_15_11_pdf_16716.pdf.

156. Memorandum from Kevin J. Kennedy, *supra* note 152, at 2.

157. *Id.*

158. WIS. STAT. § 227.135(2) (2012).

The GAB has statutory authority to promulgate rules for the purpose of interpreting or implementing state election administration statutes.¹⁵⁹ Under previous law, the agency alone had the power to promulgate a rule within its jurisdiction but, as a result of the 2011 statute, gubernatorial approval must also be obtained.¹⁶⁰

Although the GAB's decisions with respect to stickers and technical college IDs were not initially made in the form of a rule, a legislative committee (the Joint Committee for Review of Administrative Rules or JCRAR)¹⁶¹ has the power to require state agencies to promulgate rules addressing the content of administrative decisions in appropriate circumstances. Specifically, JCRAR may direct an agency to promulgate an emergency rule if it determines that "a statement of policy or an interpretation of a statute meets the definition of a rule."¹⁶² In the case of the GAB's ID policies, the committee voted six to four along party lines—with all Republicans supporting and all Democrats opposing—to force the board to write administrative rules embodying their policies relating to technical college IDs and stickers.¹⁶³ The upshot of the legislative committee's action was to require that Republican Governor Scott Walker approve the GAB's interpretation of the ID requirement before it could take effect. In addition, this process would have delayed the effective date of the ID policy approved by the GAB by approximately two months.¹⁶⁴

In the end, the controversy over the forms of acceptable ID was rendered moot (at least temporarily) by the decisions of two lower state courts enjoining Wisconsin's ID law in its entirety on state constitutional grounds.¹⁶⁵ Still, this episode is an ominous sign for those concerned about whether an independent election administration agency can function effectively when considering a contentious issue in an intensely partisan legislative environment. Due to the 2011 changes to Wisconsin's rulemaking process, a legislative committee may effectively require gubernatorial approval for the GAB's interpretation and implementation

159. *Id.* § 5.05(1)(f) (2012).

160. 2011 Wisconsin Act 21 § 4, WIS. STAT. § 227.135(2) (2012).

161. Wisconsin law vests the JCRAR with oversight responsibility over agency rulemaking. *See* WIS. STAT. § 227.19(4) (2012).

162. WIS. STAT. § 227.26(2)(b) (2012).

163. Patrick Marley, *Election Panel Told to Write Rule on Technical College ID Use*, MILWAUKEE J. SENTINEL (Nov. 15, 2011), <http://www.jsonline.com/news/statepolitics/election-panel-told-to-write-rule-on-technical-college-id-use-3132ikn-133904558.html>.

164. Memorandum from Kevin J. Kennedy, Dir. & Gen. Counsel, Wis. Gov't. Accountability Bd., to Members of the Gov't. Accountability Bd. 2–3 (Dec. 13, 2011), *available at* http://gab.wi.gov/sites/default/files/event/74/12_13_11_open_agenda_and_board_materials_pdf_67032.pdf (PDF pages 75–84).

165. *See* Milwaukee Branch of the NAACP v. Walker, No. 11-CV-5492 (Wis. Cir. Ct. 2012), *appeal docketed*, No. 2012AP1652 (Wis. Ct. App. July 23, 2012); League of Women Voters v. Walker, No. 11-CV-4669 (Wis. Cir. Ct. 2012), *appeal docketed*, No. 2012AP584 (Wis. Ct. App. Mar. 3, 2012).

of state election administration law.¹⁶⁶ This leaves considerable room for mischief by elected officials intent on tampering with the GAB's decisions and undermining its mission of administering elections without partisan bias.

D. Reporting of Election Results

The most embarrassing election administration episode to occur during the GAB's tenure was the misreporting of election results during an extremely close state supreme court contest in 2011. Close elections have engendered heated legal debates in the modern era of election administration, from Florida's 2000 presidential election to Washington's 2004 gubernatorial election to Minnesota's 2008 U.S. Senate election. The problems in Wisconsin's 2011 election were attributable to mistakes by a local election official. The GAB's handling of this dispute provides evidence of its capacity to function effectively in the incendiary environment that tends to accompany razor-close elections. It thus provides a window into how Wisconsin's state and local election infrastructure would perform in the event of a higher profile postelection dispute. It also demonstrates the testy relationship that can exist between the nonpartisan GAB and party-affiliated election officials at the county level.¹⁶⁷

On April 5, 2011, Wisconsin Supreme Court Justice David Prosser faced Assistant Attorney General JoAnne Kloppenberg in a general election for a seat on the state supreme court. Although Wisconsin Supreme Court elections are technically nonpartisan in that candidates do not run as nominees of their party, Prosser is a former Republican state legislator while Kloppenberg is a Democrat.¹⁶⁸ And despite its nominally nonpartisan status, the Wisconsin Supreme Court has been riven by rancorous and highly publicized ideological conflicts, which have sometimes gotten ugly.¹⁶⁹ Justice Prosser has been a protagonist in these dramas. He reportedly called the court's liberal Chief Justice Shirley Abramson a "total bitch" and threatened to "destroy" her.¹⁷⁰ Later, a confrontation involving Justice Prosser reportedly turned physical, with fellow Justice Ann Walsh Bradley alleging that he attempted to choke her the day before the court was to issue its split decision upholding a controversial statute limiting

166. See *supra* p. 595–96.

167. County clerks (the chief election official at the county level) are elected as nominees of their parties. As noted above, *municipal* election officials are mainly responsible for running elections at the local level in Wisconsin, in contrast to most other states where this authority rests at the *county* level. But county officials do have important responsibilities in connection with some elections, including responsibility for reporting results and handling postelection proceedings. HUEFNER ET AL., *supra* note 12, at 114.

168. HASEN, *supra* note 9, at 2.

169. Patrick Marley, *Supreme Court Tensions Boil Over: Prosser Says He Was Goaded into Insulting Chief Justice*, MILWAUKEE J. SENTINEL (Mar. 19, 2011), <http://www.jsonline.com/news/statepolitics/118310479.html>.

170. *Id.*

public-sector employees' collective bargaining rights.¹⁷¹ Although this incident occurred after the Prosser-Kloppenber election, it is indicative of the high level of hostility among the Wisconsin Supreme Court's justices.

The April 2011 contest had strong partisan overtones, occurring in the wake of the collective bargaining bill which had recently been passed—and which would come before the court two months later. In fact, some observers viewed this election as a referendum on the collective bargaining reforms, which had been enacted by the state's Republican legislature and championed by Republican Governor Scott Walker.¹⁷²

Immediately following the April 5, 2011 election, Kloppenberg led Prosser by just 204 votes out of approximately 1.5 million cast, with all precincts reporting.¹⁷³ These unofficial results caused Kloppenberg to declare victory. Unfortunately for her, however, more than 14,000 votes from the City of Brookfield had been omitted from the vote totals provided by Kathy Nickolaus, the elected clerk of heavily Republican Waukesha County. The missing votes were not revealed until two days after the election, when Ms. Nickolaus called a press conference announcing that she had mistakenly omitted these votes, 10,859 of which were for Justice Prosser—many more than enough votes to swing the result in his favor.¹⁷⁴ Ms. Nickolaus initially attributed the errant reporting of results to problems with “the saving of the data,” while also saying that she was not certain of the exact cause.¹⁷⁵ Given that this error involved ballots that were outcome determinative, it provoked a great deal of consternation, especially from Kloppenberg supporters.¹⁷⁶ Exacerbating the appearance of impropriety were Nickolaus's ties to Republican political circles. Before being elected Waukesha County clerk, she had been employed for thirteen years by the State Assembly Republicans, serving as a data analyst and computer specialist.¹⁷⁷

The GAB immediately began an investigation, sending a team of GAB employees to Waukesha County to investigate. In the meantime, Kloppenberg requested a statewide recount, which ultimately showed Justice Prosser to have won by just over 7000 votes.¹⁷⁸ The same day the recount was requested, Kloppenberg's campaign manager filed a complaint with the GAB, alleging that Nickolaus had violated state election laws, and questioning her explanation of the

171. Crocker Stephenson, Cary Spivak & Patrick Marley, *Justices' Feud Gets Physical: Prosser, Bradley Clashed on Eve of Union Ruling*, MILWAUKEE J. SENTINEL, June 26, 2011, at 1A.

172. HASEN, *supra* note 9, at 2–3.

173. VERHOFF, *supra* note 78, at 2.

174. *Id.* at 3.

175. *Id.*

176. Dave Umhoefer, *Kloppenber Overplays Election Quirks*, MILWAUKEE J. SENTINEL, Apr. 29, 2011, at 2A.

177. VERHOFF, *supra* note 78, at 4.

178. *Id.* at 5.

reason for the initial discrepancy.¹⁷⁹ This led the GAB to unanimously authorize an independent investigation into the Waukesha County results and, specifically, into whether Nickolaus had violated state election law.¹⁸⁰

The GAB conducted a thorough investigation of the circumstances surrounding the lost-then-found votes in Waukesha County. This investigation led to a lengthy report, concluding that the likely cause was the failure to upload Brookfield's results into the county's database.¹⁸¹ The GAB's review team believed that the alternative explanation that Nickolaus had provided on election night was "not possible."¹⁸² The GAB itself ultimately concluded that Nickolaus had violated a state law requiring the posting of all election returns on election night,¹⁸³ but also that the violation was not intentional.¹⁸⁴ It directed Waukesha County to develop specified procedures for future elections to avoid similar problems in the future.¹⁸⁵

What insights does this incident shed on the GAB? As embarrassing as the incident was for the State of Wisconsin, it was through no fault of the GAB. The problem, instead, was a local election official insufficiently careful in uploading election results. In a state with 72 counties and 1851 municipalities, each with its own clerk, there will inevitably be some who are quite competent and others who are less so. Once the incident occurred, the GAB acted in an exemplary fashion. It promptly sent staff to investigate, and they appear to have left no stone unturned in trying to get to the root of the problem—analyzing election returns, reviewing election documentation, interviewing Ms. Nickolaus, and scrutinizing the database used by the county.¹⁸⁶ Its investigatory process was transparent and the full report of its results was released to the public. The GAB's executive director identified several areas in which further guidance from the board would be beneficial, including the posting of election results on election night, the handling of materials, and the correction of errors.¹⁸⁷ The board subsequently provided guidance in each of these areas. The incident was thus used as a means by which to improve administrative practices, not only in Waukesha County but throughout

179. *Id.*

180. *Id.* at 6.

181. Memorandum from Kevin J. Kennedy, Dir. & Gen. Counsel, Wis. Govt. Accountability Bd., to Members of the Wis. Gov't Accountability Bd. 9 (Sep. 12, 2011), *available at* http://gab.wi.gov/sites/default/files/news/65/gab_staff_review_report_9_12_11_pdf_17498.pdf.

182. *Id.*

183. WIS. STAT. § 111.84(2) (2010).

184. Joanne Kloppenburg for Justice Campaign, No. 2011-GAB-04, at *2 (Wis. Gov't Accountability Bd., Sept. 12, 2011) (findings and order), *available at* http://gab.wi.gov/sites/default/files/news/65/findings_and_order_signed_pdf_75621.pdf.

185. *Id.* at 2–3; *see also* Letter from Thomas H. Barland, Chairperson, Wis. Gov't Accountability Bd., to Kathy Nickolaus (Sept. 12, 2012), *available at* http://gab.wi.gov/sites/default/files/news/65/corr_to_clerk_nickolaus_9_12_11_signed_pdf_18120.pdf.

186. Kennedy, *supra* note 149, at 2.

187. Kennedy, *supra* note 155, at 10.

the state. Whatever flaws in election administration are revealed by this incident, they cannot fairly be laid at the GAB's feet.

The same cannot be said of Kathy Nickolaus. The following year, she declined to run for reelection after another snafu in reporting election results. In April 2012, the reporting of results on election night was severely delayed, due to problems in uploading results from memory packs into Waukesha County's system.¹⁸⁸ This required Nickolaus's staff to manually enter results for every candidate in every contest and compare them to voting machine tapes before posting the results. The GAB intervened and negotiated a solution with Waukesha County officials, under which municipal clerks would report election results directly into a new system created by the GAB.¹⁸⁹ In addition, the Waukesha County executive reached an agreement with Nickolaus, under which she gave up her election night duties, handing them off to the county's deputy clerk.¹⁹⁰ At long last, Waukesha County voters—and for that matter voters across the state—could breathe a sigh of relief.

E. Recall Elections

Wisconsin's election administration system was sorely tested by a series of recall elections that took place in 2011 and 2012. Altogether, there were recall elections for thirteen members of the state legislature, the governor, and lieutenant governor in 2011 and 2012. These recall elections not only challenged the administrative capacity of the GAB, due to the large number of petition signatures it was required to review, but also its status as a fair and impartial actor.

The recall petitions were a direct result of the efforts of new Republican Governor Scott Walker and the Republican majority in both houses of the state legislature to limit public-sector employees' collective bargaining rights. In early 2011, Wisconsin became a hotbed of activity for liberal and conservative activists alike, as the state legislature debated the Wisconsin Budget Repair Bill.¹⁹¹ The bill triggered a walkout by all fourteen Democratic members of the State Senate, who fled the state for Illinois in order to delay the bill's passage.¹⁹² Even before the bill's passage, statements of intent to initiate a recall were filed with respect to all

188. Laurel Walker, *More Election Night Problems in Waukesha*, MILWAUKEE J. SENTINEL (Apr. 4, 2012), <http://www.jsonline.com/news/waukesha/more-election-night-problems-in-waukesha-il4sbmm-146106695.html>.

189. Press Release, Wis. Gov't Accountability Bd., G.A.B. Statement Regarding New Waukesha Cnty. Election Night Reporting Procedures 1–2 (Apr. 24, 2012), available at http://gab.wi.gov/sites/default/files/news/65/nr_gab_statement_on_waukesha_county_election_night_11192.pdf.

190. Laurel Walker, *Under Pressure, Clerk Hands off Election Duties: Facing Potential Call for Resignation, Nickolaus Relinquishes Power to Deputy*, MILWAUKEE J. SENTINEL, Apr. 6, 2012, at 1A.

191. The bill was ultimately enacted into law as 2011 Wisconsin Act 10.

192. Bill Glauber, *In Illinois, Wisconsin Senate Democrats Vow Unity*, MILWAUKEE J. SENTINEL (Feb. 20, 2011), <http://www.jsonline.com/news/statepolitics/116581183.html>.

sixteen state senators (eight Democrats and eight Republicans) eligible for recall, and pursued as to three Democrats (Dave Hansen, Jim Holperin, and Robert Wirsch) and six Republicans (Robert Cowles, Alberta Darling, Sheila Harsdorf, Randy Hopper, Daniel Kapanke, and Luther Olsen). With Republicans enjoying a nineteen to fourteen majority in the State Senate, control of that body would hinge on the outcome of the recall elections.

Under Wisconsin law, a recall is available for all state legislators as well as for members of the executive branch.¹⁹³ It may be initiated by any citizen over eighteen who resides in the relevant district, by filing a registration statement including a statement of the intent to circulate a recall petition.¹⁹⁴ For the recall to go before voters, the petition requires signatures from twenty-five percent of those who voted in the district in the last gubernatorial election.¹⁹⁵ There is a sixty-day period within which to collect signatures, running from registration of the intent to recall.¹⁹⁶ State law also prescribes circumstances under which a signature may not be counted, which include the failure to include the date, a date outside the sixty day period, nonresidence in the jurisdiction, and the signatory not being of the requisite age.¹⁹⁷ To sign, one must be a “qualified elector” but not necessarily registered when one signs.¹⁹⁸ Officeholders subject to a recall are the only ones permitted to challenge petitions; they have ten days to file a challenge and the burden of proof is on them.¹⁹⁹ The GAB is charged with administration of the recall process for state officials, including the verification of petitions and determination of the dates for recall elections in accordance with state law.²⁰⁰ It has thirty-one days to determine the sufficiency of petitions and rule on their sufficiency or insufficiency,²⁰¹ at which time the recall election is scheduled for Tuesday six weeks later.²⁰² That determination is in turn appealable by the officeholder or petitioner.²⁰³ In Wisconsin, officeholders subject to recall run in a contested election against candidates from other parties, who are selected through a primary if there is more than one seeking to run from that party.²⁰⁴

The GAB’s handling of the 2011 state senatorial recalls led to complaints by both Democrats and Republicans, mostly alleging that the board was not acting quickly enough to certify the recalls and order elections. Republican complaints about the timing of recalls received the most attention. The board set the recall

193. WIS. STAT. § 9.10(1)(a) (2012).

194. *Id.* § 9.10(2)(d).

195. *Id.* § 9.10(1)(b).

196. *Id.* § 9.10(2)(d).

197. *Id.* § 9.10(2)(e).

198. *See* WIS. ADMIN. CODE GAB § 2.05(15)(e) (2012).

199. WIS. STAT. §§ 9.10(2)(g), 9.10(3)(b) (2012).

200. *Id.* § 5.05(2w).

201. *Id.* § 9.10(3)(b).

202. *Id.*

203. *Id.* § 9.10(3)(bm).

204. *Id.* § 9.10(3)(e).

election date for the six Republican senators a week before the date for recall of the three Democratic senators.²⁰⁵ The recall petitions against all nine state senators were filed in April 2011, and all nine officeholders filed timely challenges to the sufficiency of the signatures against them.²⁰⁶ The GAB scheduled hearings on all nine challenges for late May 2011.²⁰⁷ It certified the recall elections for the six Republican senators on June 3,²⁰⁸ but delayed decision on the Democratic

205. As it happened, the recall election for one of the Democratic senators (Hansen) wound up taking place before the eight other recall elections, because Hansen's Republican opponent (David VanderLeest) did not face a primary in his bid to oppose Hansen. There was another potential Republican candidate, John Nygren, but the GAB found him to lack the requisite number of qualifying signatures to get on the primary ballot. As a result, VanderLeest was unopposed and no Republican primary was necessary.

206. See Written Challenge of Senator Robert Cowles, *In re* Petition to Recall Senator Robert Cowles of the 2nd Senate Dist., WGAB ID 0600011 (May 6, 2011), available at <http://gab.wi.gov/sites/default/files/Sen%20Cowles%20Challenge%20to%20Recall%20Petition.pdf>; Written Challenge of Senator Alberta Darling, *In re* Petition to Recall Senator Alberta Darling of the 8th Senate Dist., WGAB ID 0600009 (May 5, 2011), available at <http://gab.wi.gov/sites/default/files/Written%20Challenge%20of%20Sen.%20Alberta%20Darling.pdf>; Verified Challenge of Senator David N. Hansen, *In re* Petition to Recall Senator Dave Hansen of the 30th Senate Dist., WGAB ID 0600006 (May 5, 2011), available at <http://gab.wi.gov/sites/default/files/Verified%20Challenge%20of%20Sen.%20David%20Hansen.pdf>; Written Challenge of Senator Sheila Harsdorf, *In re* Petition to Recall Senator Sheila Harsdorf of the 10th Senate Dist., WGAB ID 0600015 (Apr. 28, 2011), available at <http://gab.wi.gov/sites/default/files/Sen%20Harsdorf%20Challenge%20to%20Recall%20Petition.pdf>; Verified Challenge of Senator Jim Holperin, *In re* Petition to Recall Senator Jim Holperin of the 12th Senate Dist., WGAB ID 0600004 (May 5, 2011), available at <http://gab.wi.gov/sites/default/files/Verified%20Challenge%20of%20Sen.%20Jim%20Holperin.pdf>; Written Challenge of Senator Randy Hopper, *In re* Petition to Recall Senator Randy Hopper of the 18th Senate Dist., WGAB ID 0600012 (Apr. 21, 2011), available at <http://gab.wi.gov/sites/default/files/Senator%20Hopper%20Challenges%20to%20Petition.pdf>; Written Challenge of Senator Daniel E. Kapanke, *In re* Petition to Recall Senator Dan Kapanke of the 32nd Senate Dist., WGAB ID 0600016 (Apr. 15, 2011), available at <http://gab.wi.gov/sites/default/files/Sen%20Kapanke%20Challenges%20to%20Recall%20Petition.pdf>; Written Challenge of Senator Luther Olsen, *In re* Petition to Recall Senator Luther Olsen of the 14th Senate Dist., WGAB ID 0600010 (Apr. 28, 2011), available at http://gab.wi.gov/sites/default/files/Sen%20Olsen%20Challenges%20to%20Petition_0.pdf; Verified Challenge of Senator Robert Wirsch, *In re* Petition to Recall Senator Robert Wirsch of the 22nd Senate Dist., WGAB ID 0600005 (May 5, 2011), available at <http://gab.wi.gov/sites/default/files/Verified%20Challenge%20of%20Sen.%20Robert%20Wirsch.pdf>.

207. Memorandum from Kevin J. Kennedy, Dir & Gen. Counsel, Wis. Gov't Accountability Bd. & Nathaniel E. Robinson, Elections Div. Adm'r, Wis. Gov't Accountability Bd., to Members of the Wis. Gov't Accountability Bd. 1 (May 23, 2011), available at http://gab.wi.gov/sites/default/files/event/74/may_23_board_materials_10979.pdf (PDF pages 1–15).

208. KEVIN. J. KENNEDY, ST. OF WIS. GOV'T ACCOUNTABILITY BD., CERTIFICATE OF SUFFICIENCY AND ORDER IN THE MATTER OF THE RECALL OF SENATOR ROBERT COWLES, SECOND STATE SENATE DISTRICT (2011), available at <http://gab.wi.gov/sites/default/files/certificate%20suffcncy%20cowles%206.3.11.pdf>; KEVIN. J. KENNEDY, ST. OF WIS. GOV'T ACCOUNTABILITY BD., CERTIFICATE OF SUFFICIENCY AND ORDER IN THE MATTER OF THE RECALL OF SENATOR ALBERTA DARLING, EIGHTH STATE SENATE DISTRICT (2011), available at <http://gab.wi.gov/sites/default/files/certificate%20suffcncy%20darling%206.3.11.pdf>; KEVIN. J. KENNEDY, ST. OF WIS. GOV'T ACCOUNTABILITY BD., CERTIFICATE OF SUFFICIENCY AND ORDER IN THE MATTER OF THE RECALL OF SENATOR SHEILA HARSDFORF, TENTH STATE SENATE DISTRICT (2011), available at <http://gab.wi.gov/sites/default/files/certificate%20suffcncy%20harsdorf%206.3.11.pdf>; KEVIN. J. KENNEDY, ST. OF WIS. GOV'T ACCOUNTABILITY BD.,

senators' challenges.²⁰⁹ The GAB found the petitions to recall all three Democratic senators sufficient on June 10, 2011, a week after it had made the same determination with respect to the recall of the six Republican senators, and set their recall for a week after that of the Republican senators.²¹⁰

The GAB's reason for delaying the certification of the recall of the Democratic senators—and thus the date on which the recall could take place—was that, while the Republican senators' challenges involved a straightforward legal question, the Democratic senators' challenges raised factually complex questions.²¹¹ Specifically, the Democrats' challenges rested on over 200 affidavits alleging fraudulent petition signatures, which required the board to review more than 200,000 signatures.²¹² This led the GAB to seek an extension of the statutory schedule for reviewing the recall petitions against Democratic senators, claiming that the unanticipated complexities that these petitions entailed provided good cause for an extension.²¹³ Republicans cried foul, believing that the delay was harmful to the Republican senators subject to recall and beneficial to the Democratic senators. Republicans alleged that the board was “partisan” and biased in favor of Democrats by virtue of the fact that all six members of the

CERTIFICATE OF SUFFICIENCY AND ORDER IN THE MATTER OF THE RECALL OF SENATOR RANDY HOPPER, EIGHTEENTH STATE SENATE DISTRICT (2011), *available at* <http://gab.wi.gov/sites/default/files/certificate%20suffency%20hopper%206.3.11.pdf>; KEVIN J. KENNEDY, ST. OF WIS. GOV'T ACCOUNTABILITY BD., CERTIFICATE OF SUFFICIENCY AND ORDER IN THE MATTER OF THE RECALL OF SENATOR DAN KAPANKE, THIRTY-SECOND STATE SENATE DISTRICT (2011), *available at* <http://gab.wi.gov/sites/default/files/certificate%20suffency%20kapanke%206.3.11.pdf>; KEVIN J. KENNEDY, ST. OF WIS. GOV'T ACCOUNTABILITY BD., CERTIFICATE OF SUFFICIENCY AND ORDER IN THE MATTER OF THE RECALL OF SENATOR LUTHER OLSEN, FOURTEENTH STATE SENATE DISTRICT (2011), *available at* http://gab.wi.gov/sites/default/files/certificate%20suffency%20olsen%206.3_0.pdf.

209. Patrick Marley, *Review of Democrats' Recalls Extended a Week*, MILWAUKEE J. SENTINEL, June 4, 2011, at 1B.

210. KEVIN J. KENNEDY, ST. OF WIS. GOV'T ACCOUNTABILITY BD., CERTIFICATE OF SUFFICIENCY AND ORDER IN THE MATTER OF THE RECALL OF SENATOR DAVE HANSEN, THIRTIETH STATE SENATE DISTRICT (2011), *available at* <http://gab.wi.gov/sites/default/files/certificate%20suffency%20hansen%206%2010%2011.pdf>; KEVIN J. KENNEDY, ST. OF WIS. GOV'T ACCOUNTABILITY BD., CERTIFICATE OF SUFFICIENCY AND ORDER IN THE MATTER OF THE RECALL OF SENATOR JIM HOLPERIN, TWELFTH STATE SENATE DISTRICT (2011) *available at* http://gab.wi.gov/sites/default/files/certificate%20suffency%20holperin%206.10.11_0.pdf; KEVIN J. KENNEDY, ST. OF WIS. GOV'T ACCOUNTABILITY BD., CERTIFICATE OF SUFFICIENCY AND ORDER IN THE MATTER OF THE RECALL OF SENATOR ROBERT WIRCH, TWENTY-SECOND STATE SENATE DISTRICT (2011) *available at* <http://gab.wi.gov/sites/default/files/certificate%20suffency%20wirch%206%2010%2011.pdf>; *see also* Tom Tolan et al., *Recall Elections Set for 3 Democratic Senators*, MILWAUKEE J. SENTINEL, June 9, 2011, at 1A.

211. Marley, *supra* note 209.

212. *Id.*

213. Notice of Motion and Motion for Additional Extension of Time to Meet Deadlines for Good Cause Shown Under Wis. Stat. § 9.10(3)(b) at 8–13, *Petitions to Recall Senators Dan Kapanke, Randy Hopper, Luther Olsen, Dave Hansen, Sheila Harsdorf, Alberta Darling, Jim Holperin, Robert Wirch, & Robert Cowles*, No. 11-CV-1660 (Wis. Cir. Ct. June 1, 2011).

GAB were appointed by former Democratic Governor Jim Doyle.²¹⁴ This criticism overlooked the fact that three of the GAB's original six members were confirmed by the Republican-controlled state assembly and that three members of the board were former Republican elected officials.²¹⁵ It also ignored the fact that the Democrats' challenge was more factually complicated than that of the Republicans, which concerned a relatively simple dispute over the sufficiency of the original registration statement,²¹⁶ and that Democrats as well as Republicans complained about the speed of certification. While the delay may have tarnished the GAB's standing as a nonpartisan institution in the eyes of some Republicans, it had good reasons for delaying its determination of sufficiency as to the three Democratic candidates.

Ultimately, a state court judge granted the GAB the extension it sought,²¹⁷ and, after a nine-hour hearing, the Democrats' challenges to the recall petitions were rejected.²¹⁸ The courts subsequently upheld the GAB's determination that the recall petitions were sufficient as to both the Republican and Democratic senators.²¹⁹ Two of the six recalls of Republican senators ultimately succeeded, while all three recalls of Democratic senators failed.²²⁰ When the 2011 recall elections were done, Republicans maintained a one-vote majority in the state senate.²²¹

In 2012, recalls of Governor Scott Walker, Lieutenant Governor Rebecca

214. Tolan, *supra* note 18.

215. *Id.*

216. Specifically, the Republican senators alleged that the original statement of intent to seek a recall was insufficient, because it was filed by petitioners who failed to file the requisite registration statement.

217. Marley, *supra* note 209; Press Release, Wis. Gov't Accountability Bd., Recall Status Update: Extensions Granted, Recalls Proceed (June 3, 2011), *available at* <http://www.gab.wi.gov/node/1891>.

218. *See* ST. OF WIS. GOV'T ACCOUNTABILITY BD., OPEN SESSION MINUTES 1-5 (June 8, 2011), *available at* http://gab.wi.gov/sites/default/files/event/74/memo_board_hansen_holperin_wirch_challenges_circul_21109.pdf; *see also* Tolan et al., *supra* note 210.

219. ST. OF WIS. GOV'T ACCOUNTABILITY BD., STATEMENT REGARDING DISMISSAL OF RECALL LAWSUITS (July 8, 2011), *available at* <http://gab.wi.gov/node/1939>.

Within 7 days after an official makes a final determination of sufficiency or insufficiency of a recall petition under par. (b), the petitioner or the officer against whom the recall petition is filed may file a petition for a writ of mandamus or prohibition with the circuit court for the county where the recall petition is offered for filing. Upon filing of such a petition, the only matter before the court shall be whether the recall petition is sufficient. The court may stay the effect of the official's order while the petition is under advisement and may order the official to revise the election schedule contained in the order if a revised schedule is necessitated by judicial review. Whenever the recall petitioner files a petition under this paragraph, the officer against whom the recall petition is filed shall be a party to the proceeding. The court shall give the matter precedence over other matters not accorded similar precedence by law.

WIS. STAT. § 9.10(bm) (2012).

220. Tom Tolan et al., *Wirch, 2 Democrats Fend Off Recall Challenges: GOP Retains 17-16 Majority, Will Control Capitol Agenda*, MILWAUKEE J. SENTINEL, Aug. 17, 2011, at 1A.

221. *Id.*

Kleefish, and four additional Republican state senators (Scott Fitzgerald, Terry Moulton, Pam Galloway, and Van Wanggard) were attempted. Because the governor and lieutenant governor are statewide offices, the twenty-five percent signature threshold is based upon the statewide gubernatorial vote, making the number of signatures required several orders of magnitude greater than that for state senators.²²²

The most serious challenge to the GAB's actions during the course of these recalls concerned the process that it was required to follow in vetting petition signatures. As set forth above, the statute governing Wisconsin's recall process sets forth grounds on which a petition signature should be rejected. Those grounds do not specifically include duplicative signatures or fictitious names.²²³ In response to an inquiry from the Walker campaign, the GAB took the position that it was not obligated to vet petition signatures for duplicates or ascertain whether a fictitious name had been used. Instead, the GAB maintained that the responsibility for challenging invalid signatures rested with the officeholder.²²⁴

The GAB's position on verification prompted Walker to file a lawsuit in Waukesha County Circuit Court, alleging that the GAB was failing to comply with its statutory responsibilities by failing to check for duplicative signatures and fictitious names.²²⁵ Walker's filing of this lawsuit in a GOP stronghold was no accident. In fact, just the previous year, the Republican legislature had enacted a statute to allow plaintiffs to choose the venue in lawsuits of this nature. Specifically, a 2011 statute allowed lawsuits in which the state is the sole defendant to be filed in the county of plaintiff's choice rather than in Dane County, the location of the state capital Madison.²²⁶ This enabled Walker to file suit in a county where he was more likely to find an ideologically hospitable judge.

Although the GAB protested that implementing a more rigorous verification procedures would cost upwards of \$94,000 and take up to eight extra weeks, the circuit court judge agreed with Walker's position, concluding that the GAB's process violated state law, and ordered the GAB to take reasonable steps to: (1) identify and strike duplicative names; (2) identify and strike fictitious names; and (3) identify and strike names where GAB could not determine that the signatory is

222. Over 540,208 valid signatures were required to recall the governor and lieutenant governor, *Recall Election Information*, GOV'T ACCOUNTABILITY BOARD ST. OF WIS., <http://gab.wi.gov/elections-voting/recall> (last visited Feb. 2, 2013), compared to between 14,958 and 16,742 for state senators subjected to recall elections in 2012, *id.*, and 13,537 and 20,343 for the state senators who were subjected to recall elections in 2011. *About the 2011 State Senate Recalls*, GOV'T ACCOUNTABILITY BOARD ST. OF WIS., <http://gab.wi.gov/elections-voting/recall/2011-senate> (last visited Feb. 2, 2013).

223. See WIS. STAT. § 9.10(2)(c) (2010).

224. Complaint at 4, *Friends of Scott Walker, Inc. v. Wis. Gov't Accountability Bd.*, No. 11-CV-4195 (Wis. Cir. Ct. Dec. 15, 2011), available at http://www.wisgop.org/sites/default/files/RPW_COMPLAINT_GAB.pdf.

225. *Id.* at 1–2.

226. 2011 Wisconsin Act 61, WIS. STAT. § 801.50(3) (2010).

a qualified elector, including where addresses could not be determined.²²⁷ The circuit court judge made this decision despite the lack of an explicit statutory requirement that the GAB check for duplicates and fictitious names, and despite the fact that the statute expressly places the burden of disqualifying signatures on the officeholder. The circuit court's decision was later reversed on other grounds.²²⁸ Nevertheless, the GAB chose to abide by the judge's order by adopting a more rigorous procedure for verifying signatures.²²⁹ While the petitions to recall the governor and lieutenant governor eventually were found to have qualified, the more rigorous procedure required the GAB to seek a thirty-day extension of the period for verification,²³⁰ which was later extended an additional eleven days.²³¹ The extra time appears to have worked to Walker's advantage, giving him extra time to raise money in opposition to the recall effort.²³² Ultimately, the governor and lieutenant governor survived the recall, but one of the four Republican legislators was successfully recalled, handing control of the state senate back to Democrats in July 2012.²³³

It is difficult to imagine a more toxic political environment than the one surrounding the legislative fight over collective bargaining and the subsequent recall efforts. This type of environment would test the capacity of any state election authority—partisan, bipartisan, or nonpartisan. The GAB did not emerge from this episode completely unscathed. Although it is difficult to gauge the degree of damage, there can be no question that some voters, Republicans especially, have less confidence in the GAB than they did before. That said, there is no good reason to question the GAB's impartiality. Throughout the recall process, it did as well as could be expected to conscientiously implement the law amid challenging circumstances. It even declined to challenge a questionable

227. *Friends of Scott Walker, Inc. v. Wis. Gov't Accountability Bd.*, No. 11-CV-4195, at *2 (Wis. Cir. Ct. Jan. 5, 2012) (order and declaration); *see also id.* at *2 (order and transcript of hearing).

228. Specifically, the court of appeal found that the circuit court erred in denying intervention to the committees to recall the governor, therefore requiring invalidation of orders made after the erroneous denial of intervention. *Friends of Scott Walker v. Brennan*, 812 N.W.2d 540 (Wis. Ct. App. Feb. 3, 2012) (unpublished table decision), *available at* <https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=77752>.

229. *See* Letter from Kevin J. Kennedy, Dir. & Gen. Counsel, Wis. Gov't Accountability Bd., to Members of Wis. State Senate & Assembly 1–2 (Feb. 23, 2012), *available at* http://gab.wi.gov/sites/default/files/publication/65/legislative_recall_letter_2_23_12_pdf_90643.pdf.

230. Patrick Marley, *Judge Doubles Time GAB Has to Review Recall Signatures*, MILWAUKEE J. SENTINEL (Jan 25, 2012), <http://www.jsonline.com/news/statepolitics/judge-doubles-time-gab-has-to-review-recall-signatures-nr3ujij-138053373.html>.

231. Dee J. Hall, *Judge OKs Petition Review Extension, June 5 Recall Election*, WIS. STATE J. (Mar. 15, 2012), http://host.madison.com/news/local/govt-and-politics/elections/judge-oks-petition-review-extension-june-recall-election/article_67963f84-6de3-11e1-9969-0019bb2963f4.html.

232. Steven Walters, Op-Ed., *Questions in Government-by-Recall*, MILWAUKEE J. SENTINEL (May 5, 2012), <http://www.jsonline.com/news/opinion/questions-in-governmentbyrecall-kb57psm-150305475.html>.

233. Patrick Marley, *Democrats Officially Take Over in Senate*, MILWAUKEE J. SENTINEL, July 18, 2012, at 3B.

circuit court decision imposing duties on the GAB that went beyond those imposed by the statute. In sum, the GAB performed admirably under extremely difficult circumstances.

CONCLUSION

Wisconsin's GAB is unique among state election authorities in the United States. It is a genuinely nonpartisan institution, in an era of fierce and acrimonious partisan competition. Although the state legislature almost unanimously approved its creation, some members of that body undoubtedly now regret their vote. The GAB has made decisions unpopular with elected officials in both parties. On the subject of voter registration, the GAB initially adopted a position that displeased some Republicans, but later adopted a fairly aggressive list maintenance policy that some Democrats and voting rights advocates disagree with.²³⁴ It has also opposed widespread implementation of early voting, another reform generally favored by Democrats. In the implementation of the state's voter identification law, the GAB adopted a position that angered some Republicans. On the other hand, it might be accused of failing to have acted aggressively enough in taking action against the Waukesha County clerk, who was aligned with Republicans. Finally, in its handling of the recall, the GAB made decisions unfavorable to both Democratic and Republican officeholders, although it has taken more heat from the right side of the aisle.

Taken as a whole, the GAB's decisions in the area of election administration have not favored either major party. Both have at times been satisfied and at times dissatisfied by the GAB's actions. But in the end, that sort of balance should not be the guiding star by which its work is evaluated. Instead, the question is whether it has fairly and evenhandedly interpreted and implemented the elections laws it is charged with implementing. In that respect, the GAB has performed splendidly. While some might reasonably disagree with some of its decisions on the merits, its decision-making process has been meticulous, careful, balanced, and judicious. The GAB thus serves as a worthy model for the remaining forty-nine states, all of which still have partisan or bipartisan chief election authorities—despite the emerging international consensus that independence from partisan politics is essential to proper election administration.

What remains to be seen is whether a nonpartisan model like GAB can succeed in the long term, given our hyperpolarized political climate which shows no sign of abating. Already, the GAB has seen some attempts to undermine its authority, most notably by requiring that its rules implementing voter ID receive

234. See Letter from Robert F. Bauer, Gen. Counsel, Obama for Am., to Kevin J. Kennedy, Dir. & Gen. Counsel, Wis. Gov't Accountability Bd. 3 (Aug. 25, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/VanHollen-Motion-9-16-08.pdf> (exhibit A) (referring to the "Ping" letter process relating to undeliverable mailings authorized under section 6.32 of the Wisconsin Statutes as being "exceptionally aggressive").

the approval of the governor. This is worrisome, given the importance of insulating election authorities from partisan pressure. On the other hand, the GAB was successful in resisting partisan pressures during its first five years. Although the board is sure to face more attacks from partisans in the future, its ability to maintain its independence in the face of contentious policy debates may ultimately generate public support for the institution, providing a strong disincentive for elected officials to interfere with its decision making.

The GAB's experience therefore provides a ray of hope for those of us who believe that the United States should move away from its partisan system of election administration, which has proven so problematic in the years since the 2000 election. The conflicts of interest inherent in the dominant U.S. model make it unsuitable for a country that aspires to be the standard-bearer for democracy around the world. Those looking for an alternative should consider Wisconsin's model.