Electoral Sandbagging

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An insidious tactic threatens elections across the United States. Some refer to it as a "bait and switch." Others recognize a form of "election sabotage." While the labels vary, the pattern is the same. First, an election official or other figure of authority consents to an error at an early stage of the election process. The actor then waits to see how the election unfolds. If the election results are favorable, the error slides into irrelevance. If not, that same actor refers back to the earlier error, now with indignity, and insists that it requires a late-stage disruption of the election process. The aim of this maneuver—a maneuver this Article terms "electoral sandbagging"—is to install a favored candidate into office. An effect is to imperil the election process from within.

This Article, the first to identify and examine this pattern, connects it to another phenomenon: sandbagging in the courtroom. There, Justice Scalia defined the practice as "suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later—if the outcome is unfavorable—claiming that the course followed was reversible error." Unsurprisingly, judges have long recognized and denounced this tactic. Sandbagging in the election context warrants even stronger censure. Among other harms, electoral sandbagging fundamentally undermines the fairness of election proceedings and otherwise strikes at the heart of democratic governance. By exposing and contextualizing this growing phenomenon, this Article provides guidance for a path forward. In addition, by demonstrating how electoral sandbagging thrives in the shadows—its perpetuators dependent on dissembling and subterfuge—this Article helps to counteract its effects.

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INTRODUCTION

The United States is facing a threat from what this Article terms "electoral sandbagging." The phenomenon raises important questions of legitimacy, fairness, efficacy, and efficiency. When it appears, the practice necessarily proceeds in multiple stages. First, a figure of authority consents to an error—or even introduces an error—at an early stage of the election process. The actor then waits to see how the process unfolds. If the election results are favorable, the error slides into irrelevance. If not, that same actor, or perhaps allies of that actor, refer back to the earlier error, now with indignity, and insist that it requires a late-stage disruption of the election process. In recent years, analysts have recognized the emergence of this pattern in a range of election-related contexts. In their efforts to describe the practice, they have relied on many colorful phrases: associating the phenomenon with a "booby trap,"[1] a "feedback loop,"[2] a "perpetual motion machine," [3] a "ticking

1. *See, e.g.*, Greg Sargent, Opinion, *Awful New Revelations About Trump and Jan. 6 Show Mike Pence Is No Hero*, WASH. POST (Sept. 14, 2021, 3:57 PM), https://www.washingtonpost.com/opinions/2021/09/14/woodward-costa-pence-jan-6-committee/ [https://perma.cc/LDH8-RW9B].

2. *See, e.g.*, Maggie Astor, *'A Perpetual Motion Machine': How Disinformation Drives Voting Laws*, N.Y. TIMES (May 13, 2021), https://www.nytimes.com/2021/05/13/us/politics/disinformation-voting-laws.html [https://perma.cc/8FKR-ZP59].

3. *Id.*

time bomb,"[4] a "bait and switch,"[5] a form of "election sabotage,"[6] a "bloodless coup dependent upon technical legal arguments,"[7] "sheer chutzpah,"[8] and more.[9] As indicated by the vividity of these overlapping expressions, the pattern stands out. It nevertheless can be difficult to describe.

The descriptive work may come more easily to those well-versed in courtroom procedure. In the litigation context, a pattern of this nature is well known, regularly called out, and heavily criticized. It is "sandbagging," and courts have little patience for it. Justice Scalia captured the essence of the practice when he described sandbagging as "suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later—if the outcome is unfavorable—claiming that the course followed was reversible error."[10] As Scalia's definition makes clear, sandbagging can include not only a strategic failure to object to another's error but also "invited error," where the party actively tries to introduce the mistake at issue.[11]

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4. *See, e.g.*, Andrew Chung & Lawrence Hurley, *Analysis: U.S. Liberals See Dwindling Legal Options to Challenge Voting Curbs*, REUTERS (Aug. 31, 2021, 4:29 AM), https://www.reuters.com/world/us/us-liberals-see-dwindling-legal-options-challenge-voting-curbs-2021-08-31/ [https://perma.cc/K97W-JF44].

5. *See, e.g.*, Laurence H. Tribe, *eroG .v hsuB and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 295 n.513 (2001).

6. *See, e.g.*, Susan Stokes, *Don't Be Misled by Trump's Brazen Election Sabotage*, SEATTLE TIMES (Sept. 25, 2020, 2:41 PM), https://www.seattletimes.com/opinion/dont-be-misled-by-trumps-brazen-election-sabotage/ [https://perma.cc/R4E3-8UNK].

7. *See, e.g.*, Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265 (2022) [hereinafter Hasen, *Identifying and Minimizing*].

8. *See, e.g.*, Ed Kilgore, *Trump Tried to Force DOJ to Back His 2020 Election Coup*, N.Y. MAG. INTEL. (June 15, 2021), https://nymag.com/intelligencer/article/trump-doj-back-election-coup.html [https://perma.cc/M7W3-BTB3].

9. *See, e.g.*, Travis Waldron, Ryan J. Reilly & Paul Blumenthal, *Brad Raffensperger Refused Trump's Attempt to Steal Georgia. Now He's Doomed*, HUFFPOST (Nov. 4, 2021, 5:45 AM), https://www.huffpost.com/entry/brad-raffensperger-trump-2022_n_61816acfe4b059d0bfc386cd [https://perma.cc/QFF7-SHUJ] (a "Catch-22"); Nicole Perlroth, *Election Security Experts Contract Trump's Voting Claims*, N.Y. TIMES (Nov. 16, 2020), https://www.nytimes.com/2020/11/16/business/election-security-letter-trump.html [https://perma.cc/T2JM-MP32] ("a special kind of chutzpah").

10. Freytag v. Comm'r, 501 U.S. 868, 895 (1991) (Scalia, J., concurring in part and concurring in the judgment); *see also, e.g.*, Calderon v. Experian Info. Solutions, Inc., 287 F.R.D. 629, 637 (D. Idaho 2012), *aff'd*, 290 F.R.D. 508 (D. Idaho 2013); Carson v. Hudson, 421 F. App'x 560, 563 (6th Cir. 2011).

11. *See, e.g.*, United States v. Edward J., 224 F.3d 1216, 1222 (10th Cir. 2000) (quoting United States v. Johnson, 183 F.3d 1175, 1178 n.2 (10th Cir. 1999)) ("The invited error doctrine prevents a party from inducing action by a court and later seeking reversal on the ground that the requested action was error."); United States v. Carrasco-Salazar, 494 F.3d 1270, 1272 (10th Cir. 2007) ("Our prior cases make clear that waiver bars a defendant from appealing an invited error."); *In re* Support of C.L.F., 727 N.W.2d 334, 338–39, 344 (Wis. Ct. App. 2006) ("The concept of invited error is closely related to the doctrine of judicial estoppel . . . [.] '[I]t is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation which may be advantageous, and then after the court maintains that position, argue on appeal that the action was error.' . . . '[The waiver] rule prevents attorneys from "sandbagging" errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal.'") (first quoting State v. Gove, 437 N.W.2d 218, 221 (Wis. 1989))); and then quoting Vill. of Trempealeau v. Mikrut, 681 N.W.2d 190, 197 (Wis. 2004)). *See also* Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1501 n.282 (2011) ("[T]he doctrines of estoppel, waiver, and invited error are related ways of avoiding strategic reliance on inconsistent positions. . . . When a party has intentionally waived a known right at an earlier

As a practical matter, "[s]erious doubts exist about the legitimacy of the 'sandbagging problem' in criminal litigation," particularly when defense counsel is outmatched.[12] Yet even those supporting defense counsel—here, against accusations of sandbagging—understand that the potential for a serious problem nevertheless remains.[13] Tellingly, "[s]andbagging in all its forms has been condemned time and again, not least of all by the [U.S.] Supreme Court."[14] Among other negative effects, sandbagging disrupts the work of the judiciary and fundamentally undermines the administration of justice.[15]

Unfortunately, an insidious version of this practice has developed in the field of election law. In several election-related contexts, figures of authority have permitted, encouraged, or even required certain developments to occur. Later, these participants or their allies cite these same developments as evidence of a problem that requires a self-serving solution.[16] Like the scheming trial counsel, these participants choose not to try to rectify errors in a timely manner. Instead, they strategically seek to ensure that the mistakes remain, lying in wait, for possible exploitation. In the context of elections, the goal is not to win a lawsuit but rather to affect who ultimately takes elected office. It is in this sense that the participants have engaged in electoral sandbagging.

Importantly, those engaged in electoral sandbagging do not necessarily limit their arguments to a court of law. Nor do they always limit their arguments to claims consistent with well-established legal principles. Instead, electoral sandbagging can extend at times beyond the courtroom to other forums and other audiences. This form of sandbagging can rely not only on legal arguments but also on quasi-legal arguments, including those that may sound legal in nature but instead are based on distortions of legal rules and legal processes. As a corollary, electoral sandbagging does not necessarily respect the rule of law. It is true that the practice relies on law, which provides the procedural framework through which the practice unfolds.

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stage of litigation, the related doctrine of 'invited error' prevents the party from later complaining of the court's failure to enforce that right.").

12. Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 351 (2006).

13. *Id.*

14. Minemyer v. R-Boc Representatives, Inc., 283 F.R.D. 392, 482 (N.D. Ill. 2012) (citing Stern v. Marshall, 564 U.S. 462 (2011)).

15. *See, e.g.*, Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1037 (9th Cir. 2003) ("To excuse [the appellants] from the well-established rules of waiver would permit the sort of 'sandbagging' that the rules are designed to prevent, while undermining the ideal of judicial economy that the rules are meant to serve."); United States *ex rel.* Scott v. Metro. Health Corp., 375 F. Supp. 2d 626, 643 n.23 (W.D. Mich. 2005), *aff'd sub nom.* Scott v. Metro. Health Corp., 234 F. App'x 341 (6th Cir. 2007) ("Sandbagging is inconsistent with a lawyer's ethical duties and the proper conduct of discovery and its function in the court system."); United States v. Howell, 231 F.3d 615, 622 (9th Cir. 2000) ("[I]t would be fundamentally unfair to permit a litigant to set its case in motion before the magistrate, wait to see which way the wind was blowing, and—having received an unfavorable recommendation—shift gears before the district judge.") (internal quotation marks omitted); *see also* infra Section III.A (discussing normative implications of electoral sandbagging).

16. *See, e.g.*, *infra* notes 56–59 (describing a candidate agreeing to a process during the recount stage; falling behind the count as a result of the recount; and, finally, during the judicial-contest stage, challenging the lawfulness of that same recount process and, as relief, demanding an alteration in the vote count). *See generally infra* Section II.A (describing efforts at electoral sandbagging).

Despite this connection, those engaging in electoral sandbagging sometimes seek to exploit the rule of law by abusing its vulnerabilities or even pursuing its collapse.[17]

So understood, electoral sandbagging threatens to produce an array of negative consequences. At best, the phenomenon promotes perverse incentives, unnecessary errors of election administration, and wasted time and resources. At worst, it threatens election administration at its core by fundamentally undermining the fairness of the proceedings. Electoral sandbagging is, moreover, an elusive problem—one that attacks elections from within. The phenomenon becomes particularly difficult to counteract when it extends beyond the courtroom setting. Nevertheless, viewing these patterns through the lens of sandbagging—a phenomenon that, in the context of litigation, is well recognized and rigorously opposed—provides guidance for a path forward.

This Article seeks to begin this work by identifying and examining the phenomenon of electoral sandbagging before turning to possible responses. It proceeds in three parts. Part I briefly describes the structure of election administration in the United States. This description helps to reveal how, within this framework, sandbagging has the potential to develop and gain traction.

Part II identifies sandbagging attempts that have emerged out of recent election cycles. It explains how participants, seeking to effectuate these attempts, use a range of mechanisms, including those associated with shifting legal rules and argumentation, election mismanagement, and evocation of voter fraud. Part II then explains the overarching goal behind these efforts: to affect who gets seated in office through some combination of tipping elections, overturning elections, and subverting elections. Participants pursuing these overlapping but distinct ends tend to affect elections in different ways. Sandbagging to tip elections, for example, tends to have limited effects, as participants tend to rely on strategies that do not necessary implicate the legitimacy of elections in an expansive way. By contrast, sandbagging to overturn or even subvert elections tends to rely on more perilous tactics, including reliance on sweeping arguments striking at the legitimacy of the electoral process, that potentially affect elections more broadly. Part II concludes by discussing electoral sandbagging's variable record and where this phenomenon may be headed.

Part III considers how this examination of electoral sandbagging may inform next steps. It begins by exploring the normative implications of this practice, taking care to distinguish between the different ends pursued by sandbaggers. It then asks what might be done in response. Viewing these practices through the lens of sandbagging suggests at least three sets of prescriptions relating to framing, forum, and feedback. This Article concludes by discussing the need to incorporate these prescriptions into a broader package of election-related reforms, a project of mounting urgency in the United States.

I. ELECTION ADMINISTRATION AS A FORUM FOR SANDBAGGING

Sandbagging is an opportunistic practice. The opportunities tend to appear when processes are designed in a particular way. More specifically, opportunities

17. *See* Lisa Marshall Manheim, *Election Law and Election Subversion*, 132 YALE L.J.F. 312, 322–29 (2002) [hereinafter Manheim, *Election Laws and Election Subversion*] (defining election subversion).

for sandbagging tend to emerge out of multistage processes with a review structure that allows errors introduced in earlier stages to affect outcomes in later stages. This structure exists in litigation; it also exists in elections.[18] To provide more context for these comparisons, this Part begins by describing the structure of election administration in the United States. It then describes, in more detail, the phenomenon of sandbagging, and how it can align with election procedures, before it identifies and defines the phenomenon of electoral sandbagging.

A. Election Administration in the United States

In the United States, election administration is highly decentralized. This decentralization extends vertically, with local, state, and federal governments working together to design and implement the process. This decentralization also extends horizontally, as a multitude of jurisdictions across the country administers separate election systems simultaneously and in parallel.[19] Within each of these jurisdictions, actors from every branch of government play a part. In addition, non-governmental actors, including candidates, voters, and private litigants, also have legal rights and critical involvement in the process.[20]

To run elections in this complicated manner, jurisdictions collectively empower an enormous number of people to contribute to the proceedings. Among the state actors, most are employed by state and local governments, with a small number of federal actors also involved.[21] This uneven distribution reflects the balance of federalism in election law, where the federal government plays an

18. "Sandbagging" also is a term regularly used in the context of corporate law. In this context, sandbagging refers to a buyer bringing a "claim for misrepresentation [or breach of warranty] post-closing even though the buyer knew the representation was false before closing" Sara Garcia Duran & Sacha Jamal, *Possible Shift in Delaware Law: Buyer's Silence on Sandbagging Is Not Golden*, BUS. L. TODAY, Sept. 2018, at 1. Despite knowing about the warranty's falsity, the buyer chooses to close the purchase and subsequently sue, instead of renegotiating the offer. Charles K. Whitehead, *Sandbagging: Default Rules and Acquisition Agreements*, 46 DEL. J. CORP. L., 1081, 1083 (2011). In response to the threat of sandbagging, some jurisdictions take a more modern, contract-law approach to these claims, allowing buyers to bring suit regardless of their knowledge at closing. Other jurisdictions retain a more tort-like approach, where the buyer must prove reasonable reliance on the relevant representation in order to recover against the seller. Importantly, however, in these jurisdictions, parties are allowed, to varying degrees, to contract around the default rules. An analogous opportunity for negotiation between private parties is not available in the litigation context or the election context. Instead, in the latter contexts, private parties do not control proceedings in the same way. As a related point, other parties—including courts, other litigants, and the electorate at large—are potentially affected in direct ways by the sandbagging decisions of others. As a result of these distinctions, sandbagging in the litigation context, rather than sandbagging in the corporate law context, is the more appropriate comparison for electoral sandbagging, though many of the underlying principles remain essentially the same.

19. *See Election Administration at State and Local Levels*, NAT'L CONF. ST. LEGISLATURES (Feb. 3, 2020), https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx [https://perma.cc/W89D-BU53] ("The result is that no two states administer elections in exactly the same way, and quite a bit of variation exists in election administration even within states.").

20. *See, e.g.*, Lisa Marshall Manheim, *Redistricting Litigation and the Delegation of Democratic Design*, 93 B.U. L. REV. 563, 564–69 (2013) (explaining why it is appropriate, as both a practical and a conceptual matter, to treat a litigant in an election law case as an actor in the electoral process).

21. *See, e.g.*, Lisa Marshall Manheim, *Presidential Control of Elections*, 74 VAND. L. REV. 385, 396–98 (2021).

important, but nevertheless relatively limited, role in election administration.[22] By contrast, state governments (and, via delegation, local governments) play far more central roles. To design, implement, and adjudicate all these election-related processes and rules, American jurisdictions across the country collectively rely on, by some counts, well over a million people.[23]

Among the most important of the actors are members of state legislatures. The U.S. Constitution vests these actors with the primary role in setting the times, places, and manner of federal elections, and it assumes they will play a central role in designing state elections as well.[24] State executive branch officials are similarly essential to election administration. Each state has a "chief election official"—often, a secretary of state—who has supervisory power over elections.[25] These executive branch officials exercise discretion in the course of executing the law, and at various points in the process they are empowered to make critical decisions, often with legally binding effects.[26] At the level of local government, local officials typically take on the "rubber-meets-the-road functions of running an election."[27] County officials, city officials, and other agents of local governments tend to manage, among other things, the "voter registration systems, vote tabulation systems, absentee ballots, vote reports, and the precincts, polling stations, and legions of poll workers necessary to carry out an election."[28] Across this expansive array of actors, many of the most important positions are themselves elected.

As this dynamic helps to confirm, the legions of people charged with election administration are not a uniformly dispassionate and apolitical set of technocratic experts. To be clear, many do fit this description.[29] However, many do not. Within the ranks of those helping to run United States elections—people working in every branch of government, at every level of government, from sea to shining sea—there is enormous diversity, not only in terms of geography and scope of office but also with respect to each individual's experience, education, training, partisanship, and personal background.

Many have criticized this extraordinary complexity.[30] However, the decentralization in election administration does have at least one important benefit:

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22. *See, e.g.*, *id.*

23. ERNEST HAWKINS, CREATING PROFESSIONALISM IN THE FIELD, IN THE FUTURE OF ELECTION ADMINISTRATION 105, 106 (M. Brown, K. Hale & B. A. King eds., 2019), https://link.springer.com/chapter/10.1007%2F978-3-030-18541-1_13 [https://perma.cc/AZB9-B6KC] ("Election administrators nationwide recruit and train well over a million poll workers for Election Day activities.").

24. *See* U.S. Const. art. I, § 4; *see also id.* amend. X.

25. *See Election Administration*, NAT'L CONF. OF ST. LEGISLATURES, *supra* note 19.

26. *Id.*

27. *Id.*; *see also* Richard Briffault, *The Promise and Peril of Local Election Administration*, REGUL. REV. (Sept. 27, 2021), https://www.theregreview.org/2021/09/27/briffault-promise-and-peril-of-local-election-administration/ [https://perma.cc/N7NW-NJGR].

28. Stephen Ansolabehere & Nathaniel Persily, *Measuring Election System Performance*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 445, 448 (2010).

29. Among local officials, the overall trend across the country over the last few decades has been toward increased professionalism. This trend has plenty of exceptions, and it may be changing. *Election Administration*, NAT'L CONF. ST. LEGISLATURES, *supra* note 19; *see also infra* Section II.C.2.

30. *See, e.g.*, JAKE GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS 24–27 (2022) (arguing that institutional decentralization undermines the American electoral process).

it helps to protect against problems introduced by isolated actors.[31] By dividing power and vesting it in so many different people, this multitiered system of election administration typically can overcome, at least at a system-wide level, the incompetence or bad faith of individual contributors. If a single poll worker, for example, misrepresents the law to a set of prospective voters, that error may very well introduce errors into the election results. The misrepresentation might also, in effect, disenfranchise that set of voters, which is a serious and often irreparable harm. Nevertheless, even those problems are unlikely to undermine the efficacy of the election as a whole. The effects are likely to be confined—a natural consequence of decentralization. Even if the effects are broader, other actors often can help to mitigate the harm. A secretary of state, for example, might alter guidance in response to a rash of mistakes by poll workers. Or a judge might order a targeted remedy to compensate for errors. None of this works perfectly; "errors occur in every election."[32] But, overall, in modern U.S. history, this complex, decentralized system for election administration has worked to prevent actors from undermining the process from within.

Simmering under the highly dynamic surface, however, remains a disturbing reality: there is no way to guarantee the good faith of every participant. To the contrary, each person who is empowered to contribute to election proceedings might try to undermine those same proceedings. The range of possibilities is vast. Perhaps a participant attempts to undermine the proceedings in a relatively minor way—for example, by remaining silent when a disfavored voter unnecessarily accepts a provisional ballot rather than a regular one, even when the participant knows that provisional ballots tend to be more vulnerable to later challenge.[33] Or perhaps the actor attempts to do so in a profound manner—for example, by altering election rules in a manner that arguably is permissible under the law while anticipating an opportunity, later down the line, to point to those same changes as grounds for rejecting results that are not favorable to the actor's allies.[34] Strategies like these have a bootstrapping quality. Participants attempt to undermine the process by exploiting problems perpetuated by those same participants. It is this set of tactics that may be conceptualized as "sandbagging."

B. Sandbagging in U.S. Law

As a metaphor, the concept of sandbagging has evolved over time. Originally, it implicated a long, narrow bag filled with sand—a sandbag—that could be concealed by someone with nefarious intentions. Once the victim let down his

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31. *See, e.g.*, *Election Administration*, NAT'L CONF. ST. LEGISLATURES, *supra* note 19 (listing some advantages and disadvantages of decentralized complexity, including that "[t]he dispersed responsibility for running elections also makes it extremely difficult, if not impossible, to rig U.S. elections at the national level").

32. *In re* Sheehan v. Franken, No. 62-CV-09-56, 2009 WL 981934 (Minn. Dist. Ct. 2009). In the interest of disclosure, I note that I participated in this litigation as an attorney.

33. *Cf.* PROVISIONAL VOTING: FAIL-SAFE VOTING OR TRAPDOOR TO DISENFRANCHISEMENT?, ADVANCEMENT PROJECT (2008), [https://perma.cc/WM7U-K2Y3] (arguing that states interpret the Help America Vote Act (HAVA) differently, "leading to the arguably unlawful rejection of provisional ballots and inconsistent rules across the country").

34. *See infra* Section II.A.1.

guard, the sandbagger could attack with the hidden instrument. Over time, "to sandbag" began meaning more generally "to attack from behind; treat duplicitously by feigning friendship or weakness," to lull "into a false sense of security and then tak[e] advantage," or even more broadly as to "ambush."[35] It has been used in innumerable contexts, including in the legal context, for generations.[36] At a high level of generality, sandbagging relies on someone's willingness to take advantage of others' reasonable expectations and trust. Accordingly, it is a tactic that potentially poses problems in any system that relies in some way on candor and shared norms, which includes all areas of law.

As suggested by *Black's Law Dictionary*, the concept is noted frequently in the context of trial proceedings.[37] In that context, sandbagging often manifests in "the practice or an instance of a trial lawyer's remaining cagily silent when a possible error occurs at trial, with the hope of preserving an issue for appeal if the court does not correct the problem."[38] Particularly audacious forms of sandbagging occur when a lawyer not only declines to object but also intentionally introduces the error in question.[39]

Appeals courts have little patience for such conduct.[40] In part, this impatience reflects courts' understanding of the deep vulnerability that sandbagging seeks to exploit. When someone entrusted to help direct legal proceedings—here, a lawyer, as an officer of the court—instead undermines those same proceedings, courts worry that the conduct may prevent the legal system from reaching what otherwise might be considered an objectively correct result. Imagine lawyers strategically

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35. WILLIAM SAFIRE, SAFIRE'S NEW POLITICAL DICTIONARY 641 (Rev. Subsequent ed. 1993); *Sandbagging*, TAEGAN GODDARD'S POLITICAL DICTIONARY, https://politicaldictionary.com/words/sandbagging/ [https://perma.cc/8FAF-QNPY] (last visited Feb. 22, 2022).

36. *Sandbag*, OXFORD ENGLISH DICTIONARY (2019); *sandbag*, MERRIAM WEBSTER UNABRIDGED DICTIONARY, https://www.merriam-webster.com/dictionary/sandbag [https://perma.cc/M2BJ-T474] (last visited Feb. 2, 2022); Aleksandra Miziolek & Dimitrios Angelakos, *From Poker to the World of Mergers and Acquisitions*, 92 MICH. B.J. 30, 30 (2013); *sandbagger*, A DICTIONARY OF AMERICAN POLITICS (1924); *sandbag*, THE NEW UNIVERSITIES DICTIONARY (1925); *sandbag*, THE NEW AMERICAN ENCYCLOPEDIC DICTIONARY (1907); *sandbag*, GREEN'S DICTIONARY OF SLANG (2011); Charles K. Whitehead, *Sandbagging: Default Rules and Acquisition Agreements*, 36 DEL. J. CORP. L. 1081, 1083 n.4 (2011); *sandbag*, THE CENTURY DICTIONARY (1914); *sandbag*, THE OXFORD DICTIONARY OF MODERN SLANG (2013); *sandbag*, THE NEW PARTRIDGE DICTIONARY OF SLANG AND UNCONVENTIONAL ENGLISH (2013). Many of these references portray sandbagging in a negative light, though some are more neutral. To illustrate, one reference describes a poker player sandbagging another by betting low initially, even with a good hand, with a plan to raise the stakes in later rounds. Miziolek & Angelakos, *supra*. Another describes a chess player intentionally losing games to get a lower ranking in order to enter a lower-ranked tournament and more easily win prize money. *What is a Sandbagger?*, CHESS.COM (last updated Jan. 12, 2012), https://support.chess.com/article/208-what-is-a-sandbagger [https://perma.cc/386B-HVH3]. Yet another involves the idea of football players trying "to score low on their baseline cognitive assessments so they won't look so impaired after a concussion and can go back in the game." Kathryn L. Higgins, Robert L. Denney & Arthur Maerlender, *Sandbagging on the Immediate Post-Concussion Assessment and Cognitive Testing (ImPACT) in a High School Athlete Population*, 32 ARCHIVES OF CLINICAL NEUROPSYCHOLOGY, 259 (Dec. 19, 2016), https://academic.oup.com/acn/article/32/3/259/2720606 [https://perma.cc/PY7G-X5FL].

37. *See also supra* note 18 and accompanying text (discussing "sandbagging" as a term used in the context of corporate law).

38. *Sandbagging*, BLACK'S LAW DICTIONARY (11th ed. 2019).

39. *See supra* note 11 and accompanying text (discussing invited error).

40. *See infra* note 165–171 and accompanying text (discussing laches and related doctrines).

introducing reversable errors and, in the case of a loss, pursuing appeals on that same basis. At a minimum, this tactic leads to delay, which can be costly in multiple senses. To that end, at a certain point, it becomes prohibitively expensive for plaintiffs to continue to prosecute even substantively meritorious claims. Sandbagging also threatens wider harm. By taking advantage of others' reliance on a lawyer to object when appropriate—and refrain from sneaking in errors on purpose—sandbagging may chip away at the perceived legitimacy of the broader system empowering that lawyer in the first place. As a result of these concerns, courts try to ensure that participants engaging in sandbagging cannot benefit from the practice.[41] To do otherwise risks creating fundamentally perverse incentives and, at an extreme, threatens to collapse the system from within.

C. Where Election Administration and Sandbagging Converge: Electoral Sandbagging

Despite concerns surrounding sandbagging, scholars and courts have remained relatively silent with respect to a form of this practice that appears in another, overlapping context: election law. As discussed above, election administration in the United States relies on a wide range of participants to function. Each election cycle finds the vast majority of these participants discharging their responsibilities in a straightforward and good-faith manner. On occasion, however, a small fraction of participants engages in a type of tactic that may appear familiar in its manipulative circularity. With respect to some facet of election administration, this small handful of participants cite election-related developments—*developments they and their allies perpetuated*—as evidence of a problem that later requires a self-serving solution. It is this type of tactic that this Article refers to as "electoral sandbagging."

A review of the scholarly literature reveals no sustained examination of this phenomenon.[42] The term "sandbagging" does appear in a small number of election-related court decisions. These appearances are telling; judges likely are primed to recognize the phenomenon from other cases. One example comes from the U.S. Court of Appeals for the Ninth Circuit. To provide context for its reference to

41. *See id.*

42. Only a few commentators have used the term sandbagging, even in passing, in the context of elections. *See, e.g.*, Michael Klise, Local 82, Furniture Moving Drivers v. Crowley*: A Restatement of Institutional Power Under Titles I and IV of the LMRDA*, 34 CATH. U. L. REV. 181, 226 (1984) (discussing how one of the policies behind the court's interpretation of section 403 of the Labor-Management Reporting and Disclosure Act was to discourage union members' sandbagging by waiting to see if they had lost an election before filing suit); Angela Kennedy, *Sustainable Constitutional Growth? The "Right to Farm" and Missouri's Review of Constitutional Amendments*, 81 MO. L. REV. 205, 223 (2016) (arguing that postelection ballot title challenges open the door to sandbagging by a "disgruntled voter . . . attempt[ing] to overturn any measure when it doesn't go his or her way"); Tribe, *eroG .v hsuB and Its Disguises*, *supra* note 5, at 304 (describing how there was "no sandbagging" by the Supreme Court in failing "to treat the equal protection challenge that they rejected with the same seriousness that they accorded the equal protection challenge that they later accepted"). A growing body of literature addresses related phenomena, including election subversion. *See generally* Manheim, *Election Law and Election Subversion*, *supra* note 17, at 322–329 (discussing this literature). Viewing these practices through the lens of sandbagging provides additional context for this scholarship, underscores the threats posed by some of the implicated practices and offers additional direction and nuance to suggestions for reform. *See generally infra* Part III (discussing the normative and prescriptive implications of electoral sandbagging).

sandbagging, the court quoted a passage from another decision that describes sandbagging but does not itself use the term. That passage reads:

> Courts have imposed a duty on parties having grievances based on election laws to bring their complaints forward for pre-election adjudication when possible. They have reasoned that failure to require pre-election adjudication would "permit, if not encourage, parties who could raise a claim 'to lay by and gamble upon receiving a favorable decision of the electorate' and then, upon losing, seek to undo the ballot results in a court action."[43]

This is quintessential sandbagging, and the Ninth Circuit recognized it as such. As the panel confirmed, "[C]ourts have been wary [in such a context] lest the granting of post-election relief encourage sandbagging on the part of wily plaintiff."[44]

The courts' opposition to sandbagging, whether in the election context or otherwise, helps to confirm the concerns that the tactic raises. Yet sandbagging in the context of elections can extend beyond the judicial frame. It can emerge, in other words, not only as a part of ongoing litigation but also in a range of ways before a range of audiences—perhaps a legislative body,[45] or an executive official,[46] or even the public.[47] Sandbagging in contemporary election cycles also takes on many forms. Sometimes the practice relies on a single participant. Other times, it relies on multiple participants, working together. Sometimes it is subtle, and sometimes it is brazen. A study of these seemingly disparate manifestations nevertheless reveals the same pattern: election participants perpetuating errors they later cite in support of self-serving solutions.

In characterizing this pattern as electoral sandbagging, this Article relies on a broad definition: any instance of a figure of authority perpetuating an error in election administration with a willingness to exploit that same error later, if necessary, to undermine disfavored election results. This definition of sandbagging means to implicate not only objective errors in election administration but also conduct that might be perceived or argued to be in error. As for the phrase "perpetuating an error," it refers, in this context, both to the active introduction of an error as well as to a knowing failure to object to an error or otherwise to push back in a manner appropriate for that authority figure's position.

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43. Hendon v. N.C. State Bd. of Elections, 710 F.2d 177, 182 (4th Cir. 1983).

44. Soules v. Kauaians for Nukolii Campaign Comm., 849 F.2d 1176, 1180 (9th Cir. 1988). For cases adopting similar language, *see, e.g.*, St. Thomas-St. John Bd. of Elections v. Daniel, 49 V.I. 322, 331 (2007); Golden v. Gov't of the Virgin Is., No. 1:05-CV-00005RLFGWC, 2005 WL 6106401, at *5 (D.V.I. Mar. 1, 2005); McKinney v. Super. Ct., 124 Cal. App. 4th 951, 960, 21 Cal. Rptr. 3d 773, 779 (2004). More frequently, courts recognize, with disapproval, the phenomenon of sandbagging but do not use the term itself. *See, e.g.*, Nader v. Keith, 385 F.3d 729, 736 (7th Cir. 2004).

45. *See infra* notes 55–57 and accompanying text (discussing dispute between Rita Hart and Mariannette Miller-Meeks). *See generally* Lisa Marshall Manheim, *Judging Congressional Elections*, 51 GA. L. REV. 359 (2017).

46. *See, e.g.*, OFF. OF SEC'Y OF ST. JOCELYN BENSON, MICHIGAN'S ELECTIONS SYSTEM STRUCTURE OVERVIEW (2021) (describing the roles of local election officials in Michigan, some of which involve certifying election results, canvassing elections, and holding hearings on recall petitions).

47. *See infra* note 176 and accompanying text (discussing one illustration of efforts to persuade the public).

One important point to recognize is that this phenomenon of sandbagging does not encompass each and every inconsistency in a participant's legal arguments. Instead, sandbagging occurs only when a participant perpetuates an error (or, at least, perpetuates a development that later is argued to be an error) at an early stage before later changing their minds. If the participant tries *but fails* to perpetuate the error in question, the subsequent conduct will not constitute sandbagging, even if the participant later changes position on that same issue. Stated otherwise, the participant must prevail on the relevant point in the earlier proceedings. Recognizing this distinction helps to differentiate between electoral sandbagging—whether inside or outside a courtroom—and what is analogous to standard litigation tactics. This distinction also makes sense conceptually. If a participant is not successful in perpetuating an earlier error, that participant has not managed to manipulate the relevant proceedings in the same way.[48]

Still, this definition includes more than just what might be thought of as *premeditated sandbagging*, where the sandbagger initially perpetuates the error with the goal of later exploiting it. It also includes *opportunistic sandbagging*, where a sandbagger may not initially have perpetuated an error with sandbagging in mind but nevertheless decides to employ the technique when the opportunity presents itself.

The definition also encompasses what might be thought of as *inchoate sandbagging*. Inchoate sandbagging occurs when a sandbagger is prepared to rely on the earlier error to affect election results but has not yet done so. It likewise occurs when a sandbagger decides, after waiting, that sandbagging is simply not necessary because the election results are favorable. Inchoate sandbagging exists in contrast to *executed sandbagging*, which occurs when the sandbagger actually follows through and attempts to affect election results through reliance on a previously perpetuated error. Sometimes, executed sandbagging is successful (i.e., the sandbagger is rewarded for the effort); sometimes it is not. This Article's references to sandbagging encompass both executed and inchoate sandbagging, even though it is impossible, as a practical matter, to look inside the minds of participants or otherwise identify all manifestations of the phenomenon.[49]

Perhaps most controversially, this definition is willing to characterize activity as sandbagging even when it requires treating discrete participants working in a coordinated fashion as though they are a unified actor. Imagine, for example, that a candidate encourages a secretary of state to perpetuate an error early in the election process, anticipating that the error might later allow that candidate, perhaps through litigation, to unsettle election results that turn out to be unfavorable. If the secretary of state follows through with the plan and the candidate takes advantage, the actors have engaged in sandbagging. They have engaged in sandbagging even though neither actor, in this scenario, could have completed the practice alone. In the election law space, party affiliation often undergirds this sort of connection between participants.

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48. *See infra* Section III.A (discussing normative implications of electoral sandbagging).

49. As suggested above, identifying each instance of sandbagging would require, among other things, determining the intentions of actors even when they have not acted on those intentions. Despite the practical impediments to identifying all forms of sandbagging—including inchoate sandbagging—it can still be examined on a conceptual level.

Figuring out where to draw this line—where to recognize actors as working together versus working independently—is not an easy task. Still, the law has developed precedents that may be relevant to this difficult analytical work. Principles of privity provide one model. If a candidate has challenged some facet of election administration in state court, for example, a judge will not necessarily be willing to consider the same claim if it is later brought by nominally unrelated voters in federal court. Instead, if the voters "are merely acting as the pawns of the candidate in order to give him a second bite at the apple," the federal court will treat the candidate and the voters as being "in privity" and, as a result, dismiss the federal claim under principles of res judicata.[50]

The doctrine of unclean hands provides another model for thinking about how one could, in this context, attribute the conduct of one actor to another. It is the flexibility of this doctrine that potentially allows it to accommodate this sort of inquiry. According to the U.S. Supreme Court,

> [t]he governing principle [of the doctrine of unclean hands] is "that whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy."[51]

If a participant in an election works with others to collectively engage in sandbagging, that conduct might be understood to trigger this concept of unclean hands.

Still, this Article does not propose a hard-and-fast rule for when separate actors should be considered collectively for purposes of recognizing sandbagging. Instead, it recognizes that sandbagging can occur even when it is effected not by a single actor but instead by multiple actors working together.

As the preceding discussion reveals, this Article adopts an expansive definition for sandbagging. It is appropriate to adopt this broad definition because the technique is, at a fundamental level, a shape-shifter. It seeks to take advantage of a process in unexpected and counterintuitive ways. And regardless of its precise manifestation, the same troubling dynamic appears. The people responsible for administering a system seek to be rewarded for undermining that same system. More

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50. Bert v. New York City Bd. of Elections, No. CV-06-4789(CPS), 2006 WL 2583741, at *4–5 (E.D.N.Y. Sept. 7, 2006). To some extent, courts have recognized the need for this sort of conflation when identifying sandbagging attempts. Imagine, for example, that a candidate participating in a recount proceeding introduces an error, which a petitioner pounces on in a later election contest. Even if the petitioner is technically distinct from the candidate—perhaps it is a voter, for example, bringing a lawsuit nominally on his own behalf—a court generally will apply equitable principles in a manner that recognizes the connection between the actors and, accordingly, refuse to reward the sandbagging.

51. Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 244–45 (1933); *see also* T. Leigh Anenson, *Treating Equity like Law: A Post-Merger Justification of Unclean Hands*, 45 AM. BUS. L.J. 455, 460 (2008) ("Any and all misfeasance that smacks of injustice may constitute unclean hands. Actions that lack a proper equitable nature need not be illegal; actions that are 'inequitable,' 'unconscionable,' or deriving from a 'bad motive' will do. . . . Courts apply unclean hands, however, only where the inequitable act has a connection to the matter in controversy."). *But see id.* (maintaining that unclean hands generally is not recognized in the context of questions of law versus questions of equity).

specifically, in this context, the people responsible for administering elections seek to be rewarded for undermining elections.

II. SANDBAGGING IN CONTEMPORARY ELECTION CYCLES

Recent election cycles reveal a diversity of sandbagging attempts. In effectuating these attempts, election participants exploit a multitude of mechanisms in the hopes of affecting an election, whether by tipping, overturning, or even subverting the results. Some participants also have a secondary goal: to undermine the legitimacy of the election and, by extension, the legitimacy of the candidate who was just elected. In recent cycles, these attempts at sandbagging have had a variable track record. On the one hand, sandbagging efforts routinely failed to affect election results. On the other hand, these attempts likely have contributed to the perceived delegitimization of the process. Going forward, moreover, the integrity of election results may be more vulnerable to these efforts. This Part explores these overlapping qualities of sandbagging in recent election cycles by examining sandbagging tactics, sandbagging goals, and sandbagging's variable record.

A. Sandbagging Tactics

Participants willing to engage in sandbagging cannot simply snap their fingers and affect election results; instead, they need to rely on a mechanism that is grounded, at least in a superficial way, in legal principles.[52] Outside of this tether, the range of possible mechanisms is potentially as wide as the participants are creative. In recent cycles, prominent attempts at sandbagging have manifested through the shifting of legal rules and argumentation, the mismanagement of elections, and the evocation of voter fraud. These mechanisms are not mutually exclusive—at times a single sandbagging attempt will rely on multiple tactics—and, collectively, this list of mechanisms is far from exhaustive. Nevertheless, these mechanisms are illustrative. The following discussion addresses each in turn.

1. Sandbagging Through Shifting Legal Rules and Argumentation

Election participants will, at times, attempt sandbagging through exploitation of shifting legal rules and argumentation. Participants typically pursue this tactic by changing their legal positions in significant ways throughout the process. This form of sandbagging tracks most closely the sandbagging recognized in the litigation context—and indeed, this form of electoral sandbagging often manifests in judicial proceedings.

Still, in the election context, the opportunities for this form of sandbagging may be more expansive than in the litigation context. This distinction is due, in part, to the numerous stages comprising an election. Election day is the most significant transition point, but it is not the only one. Instead, official processes begin months prior to election day, and postelection processes typically include multiple, discrete phases, including an initial count of the votes received, a canvassing process to help correct tabulation errors, an administrative recount process, and finally an

52. *See* Manheim, *Election Law and Election Subversion*, *supra* note 17, at 326 (explaining how elections cannot exist outside of a law-based framework).

opportunity for judicial resolution of an election contest.[53] At that point, a final set of acts—normally considered ministerial—confirms the result.[54] Throughout these multistep processes, opportunities arise for candidates and other stakeholders to insist that rules be applied one way or another, only to insist otherwise at a later stage.

Opportunities for electoral sandbagging arise from these multistage processes comprising an election. Allegations of attempted sandbagging through shifting legal argumentation emerged, for example, from a close election between Rita Hart and Mariannette Miller-Meeks for Iowa's Second Congressional District. In November 2020, a state board certified Miller-Meeks as the winner of the general election. The margins were extraordinarily tight: after the original canvass, Miller-Meeks was ahead by fewer than fifty votes and after the recount, by only six.[55] In response, Hart contested the election results. But she did not do so in a court of law. Instead, Hart brought her claims before the U.S. House of Representatives where she argued that the recount was not lawful because county recount boards had different methods of reviewing the ballots.[56]

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53. *See generally, e.g.*, NAT'L ASS'N SEC'Y ST., SUMMARY: STATE ELECTION CANVASSING TIMEFRAMES AND RECOUNT THRESHOLDS (NASS, 2020).

54. Before a member of Congress is seated, for example, a state official such as the state's secretary of state signs a certificate of election before a final step occurs within each House of Congress, which retains the power to judge the elections of its own members. *See* 2 U.S.C. § 1(a)–(b) (mandating that "[i]t shall be the duty of the executive of the State from which any Senator has been chosen to certify his election, under the seal of the State" and that these certificates "shall be countersigned by the secretary of state of the State"); *see also* U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members."). For many state legislators to be seated, for example, state law requires that they receive a certificate of election from the state's governor and then be seated by a vote of that same legislative body. *See e.g.,* NEV. REV. STAT. ANN. § 218A.210 (West 2011) ("A person who is elected to office as a Legislator is entitled to receive a certificate of election from the Governor."); N.V. CONST. art. IV, § 6 ("Each House shall judge of the qualifications, elections and returns of its own members [and] choose its own officers."). For congressional elections, a state actor issues a certificate of election and then a final step occurs within each House of Congress, which retains the power to judge the elections of its own members. *See e.g.*, NEV. REV. STAT. ANN. § 293.395 (West) (stating that for "Representatives of Congress," "[t]he Governor shall issue certificates of election to and commission the persons having the highest number of votes"); U.S.C.A. CONST. art. I § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members."). For presidential elections, the state issues a certificate of election for presidential electors, who vote as part of the Electoral College, and then a final step occurs during a Joint Session of Congress, which formally counts the Electoral College vote. *See e.g.*, HAW. REV. STAT. ANN. § 14-24 (West 2020) (mandating that the governor shall "communicate . . . certificates of persons elected as presidential electors"); U.S. CONST. amend. XII ("The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates [prepared by presidential electors containing a list of persons voted for and tallies of votes each person received] and the votes shall then be counted.").

55. Zachary Oren Smith & Brianne Pfannenstiel, *Iowa Certifies Republican Marianette Miller-Meeks Won Iowa's 2nd Congressional District Seat — by 6 Votes*, DES MOINES REG. (Nov. 30, 2020, 8:29 PM), https://www.desmoinesregister.com/story/news/politics/2020/11/30/iowa-panel-certifies-2nd-congresssional-district-2020-election-results/6464892002/ [https://perma.cc/33TA-GFZ3].

56. *See* Notice of Contest Regarding the Election for Representative in the One Hundred Seventeenth Congress from Iowa's Second Congressional District at 3, Hart v. Miller-Meeks (House of Representatives filed Dec. 22, 2020), https://cha.house.gov/sites/evo-subsites/democrats-cha.house.gov/files/documents/committee_docs/Notice%20Of%20Contest%20Hart%20v%20Miller-Meeks.pdf [https://perma.cc/LK7L-DCGV].

Miller-Meeks construed this tactic as sandbagging and called it out. More specifically, Miller-Meeks argued that Hart herself had created the inconsistency by allowing her recount board designees to advocate for different recount procedures in different counties.[57] For example, in Republican-leaning counties that favored Miller-Meeks, Hart's representatives either pushed for or agreed to a machine recount. But in Democratic-leaning counties that favored Hart, Hart's representatives pushed for recounts of all ballots by hand. While Hart's efforts narrowed the gap separating her totals from Miller-Meeks's, the strategy failed to overcome it, and once the recount ended with Miller-Meeks still in the lead, Hart pivoted.[58] Before the U.S. House of Representatives, Hart did not defend this inconsistent treatment. Instead, Hart argued the opposite: that, *in light of* this inconsistent treatment, the results of the recount had to be rejected altogether. This pattern, as alleged by Miller-Meeks, is familiar. It is a form of sandbagging.

The sandbagging that Hart allegedly attempted helps to illustrate, among other things, how complicated this tactic can become in the context of elections. Though it tracks a pattern that might occur at trial and on appeal, all the relevant events in the Miller-Meeks-Hart dispute occurred outside of a court. Instead, the developments took place before two separate governments (namely, the state recount board and the U.S. House of Representatives). Ultimately, the House did not resolve Hart's claims. Hart withdrew her challenge before the House had reached a decision.[59]

A similar pattern unfolded years earlier, during a high-profile election dispute between Norm Coleman and Al Franken.[60] The two candidates were running for a U.S. Senate seat out of Minnesota. The morning after Election Day, it appeared that Coleman had a lead of fewer than one thousand votes out of nearly three million cast.[61] In response, the candidates began arguing over a range of legal issues, including how to handle ballots that, due to damage, could not be read by voting machines. Under Minnesota law, a damaged ballot requires that officials create a

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57. *See* Motion to Dismiss Notice of Contest Regarding the Election for Representative in the 117th Congress from the Second Congressional District of Iowa at 12, Hart v. Miller-Meeks (House of Representatives filed Jan. 21, 2021), https://cha.house.gov/sites/evo-subsites/cha.house.gov/files/documents/motion%20to%20dismiss_ready.pdf [https://perma.cc/V27V-B2NM].

58. *See* Stephen Gruber-Miller, *Lucas County Hand Recount Leaves Margin Unchanged in Iowa's 2nd Congressional District Race*, DES MOINES REG. (Nov. 13, 2020), https://www.desmoinesregister.com/story/news/politics/2020/11/13/lucas-county-iowa-hand-recount-election-results-confirms-mariannette-miller-meeks-leads-rita-hart/6253696002/ [https://perma.cc/NMT9-MRDP].

59. *See* Contestant's Notice of Withdrawal of Notice of Contest at 1, Hart v. Miller-Meeks (House of Representatives filed March 31, 2021), https://cha.house.gov/sites/evo-subsites/democrats-cha.house.gov/files/contestant%27s%20notice%20of%20withdrawal%20of%20notice%20of%20contest%208%20april%202021.pdf [https://perma.cc/7CS9-M3EK]; Kendall Karson, *Democrat Rita Hart Ends Election Challenge in Close Iowa House Race*, ABC NEWS (March 21, 2020 4:25 PM), https://abcnews.go.com/Politics/democrat-rita-hart-ends-election-challenge-close-iowa/story?id=76796759 [https://perma.cc/5BD2-WHLT].

60. In the interest of disclosure, I note that I participated in this litigation as an attorney.

61. Edward B. Foley, *The Lake Wobegone Recount: Minnesota's Disputed 2008 U.S. Senate Election*, 10 ELECT. L.J. 129, 133 (2011).

duplicate ballot and run that duplicate ballot through the machine—all while keeping the originals carefully labeled and segregated to prevent double counting.[62]

Coleman's team agreed to a set of procedures, including a so-called "Rule 9," to govern this process during the recount stage. However, during the recount, Coleman lost his apparent lead, and Franken eventually was declared the winner. In an effort to unwind that result, Coleman and his team argued, in a subsequent judicial contest, that Rule 9 was unlawful and might have led to double counting. This was an attempt at sandbagging. Tellingly, the court rejected this pivot. Citing laches, the court explained:

> Contestants agreed to the adoption of Rule 9 . . . before the hand recount started. . . . Contestants insisted on the strict application of Rule 9. . . . Any argument that Contestants did not realize that Rule 9 might lead to possible "double counting" of ballots has been waived by their conduct and delay in raising this issue.[63]

This reversal was hardly the only one affecting the proceedings in the Franken-Coleman dispute, which took place over the course of many months. However, not every reversal constitutes attempted sandbagging.[64] To that end, consider how frequently the candidates in the Franken-Coleman race changed positions throughout the initial counts and canvasses, the recount phase, and the judicial contest. The author of a comprehensive study of these proceedings appropriately suggested that this dynamic should be expected in close, contested elections:

> One cannot fault Franken for reversing his legal position on [an] issue between the recount and the judicial contest (or for Coleman doing the same, only in the opposite direction). Candidates want to win, and their lawyers will try to make whatever arguments might increase their chances of winning at each stage of the dispute. [For example, a] candidate who is behind will attempt to harvest more ballots through invocation of the "substantial compliance" standard. Conversely, the candidate who is ahead will assert the "strict compliance" standard in the opposite effort to limit the counting of additional ballots. Consequently, when Franken was behind, he made one argument; once he pulled ahead, he switched to the opposite argument. Coleman did exactly the same. The important point is that the institutions that adjudicate these disputes should be structured in such a way to withstand the pressures that the candidates will exert in their efforts to win.[65]

Many of these shifts in legal argumentation did not constitute sandbagging. As noted above, sandbagging requires the participant to perpetuate an error (or development later argued to be in error) at an early stage of the process; it is not enough to try but fail to introduce the error in question.[66] On this front, most of

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62. MINN. R. 8230.1850 (2023).

63. *In re* Sheehan v. Franken, No. 62-CV-09-56, 2009 WL 981934 (Minn. Dist. Ct. Apr. 13, 2009).

64. *See supra* note 48 and accompanying text.

65. Foley, *supra* note 61.

66. *See supra* note 48 and accompanying text.

the reversals in the Franken-Coleman proceedings did not correspond to legal developments previously perpetuated by the same participant.

Still, attempts at sandbagging, including those associated with Rule 9, did affect the proceedings. Moreover, the parties' willingness to change position so frequently likely signals a willingness by political actors to sandbag—and especially a willingness to engage in opportunistic sandbagging—when it is likely to serve their desired ends.

An ultimately unsuccessful set of attempts at sandbagging also emerged from the 2020 elections, where participants attempted to rely on the so-called "independent state legislature" (ISL) theory in an effort to exploit shifting legal rules and argumentation.[67] This theory maintains that state actors violate the U.S. Constitution when, in the context of federal elections, they override the will of state legislatures. At its core, this principle introduces another opportunity for sandbagging. Imagine that a state's secretary of state, charged with election administration, alters the rules for an upcoming election. The alteration may be a reasonable or even necessary response to changed circumstances (such as a rapidly unfolding pandemic or other emergency). It may, moreover, be quite possible to read the change as consistent with preexisting election law rules and delegations of authority, even if there are non-frivolous arguments to the contrary. The state's own supreme court may even order or approve the change. In this scenario, one option for a participant willing to sandbag is to accept—or even encourage—the change. Then, if that participant's preferred candidate loses the election, an argument lies in wait. The sandbagging party can try to argue that the altered election rules violated the ISL theory and claim that the election cannot stand.[68]

In the 2020 election cycle, losing candidates—including the incumbent president—and their allies jumped on this theory in an effort to unsettle election results. The stage had been set, dramatically, prior to the election, when concerns over the pandemic grew and jurisdictions became pressured to adjust their normal election procedures. The changes they implemented were extensive, and they emerged from a combination of legislative, executive, and judicial action. Some of these changes were highly contested; others received little pushback.[69]

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67. As discussed below, the U.S. Supreme Court rejected the conceptual basis for this theory in June 2023, well after the conclusion of the 2020 elections, in *Moore v. Harper*, 600 U.S. 1 (2023). *See infra* note 80 and accompanying text. For more on the underlying theory, see Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1 (2021) (explaining the theoretical bases behind the idea that the U.S. Constitution grants the authority to regulate federal elections to state legislatures in a manner that constrains other state actors). *See also* U.S. CONST. art. 1, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."); U.S. CONST. art. 2, § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.").

68. It is true that, theoretically, either side, having lost, could make an argument based on the ISL theory in an attempt at unsettling the results. In practice, however, only a candidate aligned with the party in control of the relevant state legislature is likely to attempt such a strategy.

69. Quinn Scanlan, *Here's How States Have Changed the Rules Around Voting Amid the Coronavirus Pandemic*, ABCNews (Sept. 22, 2020, 5:57 PM), https://abcnews.go.com/Politics/states-changed-rules-voting-amid-coronavirus-pandemic/story?id=72309089 [https://perma.cc/ZK67-GL67]; UW CENTER FOR AN INFORMED PUBLIC, DIGITAL FORENSIC RESEARCH LAB, GRAPHIKA, &

However, it was not until Election Day was imminent—or, even more so, after Election Day already had passed—that some participants began insisting that the changes necessitated a rejection of the election results. Consistent with this trend, then-President Trump and his allies filed a rash of cases based on some variation of the ISL theory and demanded that the election results be frozen or overturned.[70] In December 2020, the State of Texas filed a particularly audacious lawsuit directly in the U.S. Supreme Court based on a similar theory.[71] In short order, scores of prominent Republicans—including members of the U.S. House of Representatives, state attorneys general, and the President himself—filed briefs and motions in support.[72] Years later, the former President continued to advance this same theory.[73]

In response, the courts rejected these lawsuits. At times the courts did so without mentioning laches or otherwise alluding to the sandbagging quality affecting many of the claims. This omission reflects the reality that the underlying legal theories were flawed for multiple, independent reasons. Tellingly, however, at least one lawsuit triggered an explicit discussion of sandbagging.

In a case out of the Third Circuit, a group of scholars filed an amicus brief demanding the rejection of the plaintiffs' ISL claims given that, among other flaws, plaintiffs had "failed to seek any of the available remedies until it became apparent

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STANFORD INTERNET OBSERVATORY, THE LONG FUSE: MISINFORMATION AND THE 2020 ELECTION 51, https://purl.stanford.edu/tr171zs0069 [https://perma.cc/E4NM-RD4F].

70. *See, e.g.*, Verified Complaint for Emergency Injunctive and Declaratory Relief, Trump v. Kemp, 511 F. Supp. 3d 1325 (filed Dec. 31, 2020); Petition for Extraordinary Writs & Declaratory Relief, Johnson v. Benson (filed Nov. 26, 2020). *See generally* Rosalind S. Helderman & Elise Viebeck, *"The Last Wall": How Dozens of Judges Across the Political Spectrum Rejected Trump's Efforts to Overturn the Election*, WASH. POST (Dec. 12, 2020, 2:12 PM), https://www.washingtonpost.com/politics/judges-trump electionlawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8_story.html [https://perma.cc/CT8A-YT8E] ("In a remarkable show of near-unanimity across the nation's judiciary, at least 86 judges—ranging from jurists serving at the lowest levels of state court systems to members of the United States Supreme Court—rejected at least one post-election lawsuit filed by Trump or his supporters, a *Washington Post* review of court filings found.").

71. *See* Motion for Leave to File Bill of Complaint, Texas v. Pennsylvania (filed Dec. 7, 2020). *See generally* Lisa Marshall Manheim, *Texas Can't Block Votes Cast in Other States. Absurdly, It's Trying*, WASH. POST (Dec. 9, 2020, 11:59 PM), https://www.washingtonpost.com/outlook/2020/12/09/texas-supreme-court-election-lawsuit/ [https://perma.cc/LN57-JHKY].

72. *See, e.g.*, Motion of Donald J. Trump, President of the United States, to Intervene in His Personal Capacity as Candidate for Re-election, Proposed Bill of Complaint in Intervention, and Brief in Support of Motion to Intervene, Texas v. Pennsylvania (filed Dec. 9, 2020); Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* of U.S. Representative Mike Johnson and 125 Other Members of the U.S. House of Representatives in Support of Plaintiff's Motion for Leave to File a Bill of Complaint and Motion for a Preliminary Injunction, Texas v. Pennsylvania (filed Dec. 10, 2020); Motion for Leave to File an *Amicus* Brief for the State of Arizona and Mark Brnovich, Arizona Attorney General, Texas v. Pennsylvania (filed Dec. 9, 2020); Brief of State of Missouri and 16 Other States as *Amici Curiae* in Support of Plaintiff's Motion for Leave to File Bill of Complaint, Texas v. Pennsylvania (filed Dec. 9, 2020). *See generally* Texas v. Pennsylvania, SCOTUSblog, https://www.scotusblog.com/case-files/cases/texas-v-pennsylvania/ [https://perma.cc/U5NU-AG59] (last visited Aug. 27, 2023) (landing page for briefs and other documents).

73. Donald Trump, Opinion, *President Trump Responds on Pennsylvania's 2020 Election*, WSJ OPINION (Oct. 27, 2021), https://www.wsj.com/articles/president-donald-trump-2020-election-fraud-pennsylvania-ballots-11635280347 [https://perma.cc/PG8T-4AQ2].

that [Joe] Biden was the popular-vote winner." [74] Indeed, the amici went so far as to use the term "sandbagging" to describe the plaintiffs' overarching litigation strategy and spent much of the brief focused on the role that therefore should be played by laches and its related doctrines.[75] In a decision rejecting the plaintiffs' claims, the court criticized plaintiffs in a narrower context on similar grounds. More specifically, the court rebuked plaintiffs for insisting on the legal significance of one date (the certification vote) before later disregarding the importance of that date in an effort to seek additional relief. The court recognized the sandbagging pattern: "Having repeatedly stressed the certification deadline, the Campaign cannot now pivot and object that the District Court abused its discretion by holding the Campaign to that very deadline."[76]

It is true that in the run-up to the 2020 elections, some of the elections' participants consistently objected—both prior to the election and after—to the alteration of election rules. Regardless of whether these objections were legally meritorious, that conduct did not constitute sandbagging. Yet not all of those seeking relief were so consistent. As flagged by amici in the Third Circuit case, some participants advanced this theory in a coherent and formal way only after it was too late to unwind the changes.

Some participants took this sandbagging approach, moreover, even though their allies had been the ones to alter the election rules in the first place. One example came out of Wisconsin. In August 2020, a bipartisan election commission offered detailed guidance regarding absentee ballot drop boxes. It issued this guidance to local election officials, who in turn sought to implement the changes.[77] The commission issued this guidance unanimously, with the endorsement of the Republican commissioners, and it appears to have triggered no serious ISL-related objection at the time it was issued.[78] And yet, after the election, prominent Republicans challenged the election results based on the ISL theory and, in so doing, identified this specific guidance document in support of their claim.[79]

Going forward, attempts to sandbag through reliance on arguments associated with the ISL theory face a significant, new hurdle: the decision by the U.S. Supreme Court in June 2023 to reject the conceptual basis of the ISL theory in favor of a far more constrained understanding of the Elections Clause.[80] Despite this development, the precedent set in 2020 reveals a willingness by election participants

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74. Brief of Amici Curiae Erwin Chemerinsky, Marin K. Levy, Leah Litman, Portia Pedro, & Rick Swedloff in Support of Appellees and Urging Affirmance, Donald J. Trump for President, Inc. v. Sec'y of Pa., 973 F.3d 177 (filed Nov. 24, 2020).

75. *Id.*

76. Donald J. Trump for President, Inc. v. Sec'y of Pa., No. 20-3371, 830 F. App'x 377 (3d Cir. 2020).

77. Memorandum from Meagan Wolfe & Richard Rydecki, Wisconsin Elections Comm'n, to All Wisconsin Election Officials on Absentee Ballot Drop Box Information (Aug. 19, 2020), https://www.supremecourt.gov/opinions/URLs_Cited/OT2020/20A66/20A66-6.pdf [https://perma.cc/MVB4-YJLU].

78. *See* email from Kristin Glover to Lisa Marshall Manheim (Nov. 3, 2021) (on file with author).

79. *See* Motion for Leave to File Bill of Complaint, Texas v. Pa. (filed Dec. 7, 2020); *see also id.* (identifying the decisions of other Republican officials, such as those of Brad Raffensperger, in support of challenge to election results).

80. *See* Moore v. Harper, 600 U.S. 1 (2023).

to pursue strategies of this nature, even when they implicate novel and unsettled theories of law.

2. Sandbagging Through Election Mismanagement

A second mechanism for sandbagging involves election management—or, stated more appropriately, election mismanagement. To this end, a participant wary of an unfavorable election result might seek ways to effect, induce, acquiesce in, or otherwise perpetuate some breakdown in the process of that election. In the alternative, the participant may perpetuate some development that only *appears* to constitute mismanagement. Either way, if the participant is successful, they might later point to this set of problems in an effort to alter unfavorable election results. In this way, election mismanagement—whether actual or perceived—might be capable of providing a hook for sandbagging.

Recent developments out of Pennsylvania help to illustrate this dynamic. By October 2020, it became clear that the state would be receiving a huge influx of mail-in ballots—a number far exceeding what the state was accustomed to receiving.[81] Counting these ballots would take time.[82] Accordingly, concerns began to grow that voters would feel confused by the delay in the state's announcement of a winner after Election Day.[83] Some voters might even conclude that the delay evinced a problem with the counting process and, accordingly, question the validity of the results.[84] These concerns became heightened as the election drew closer. Among other developments, then-President Trump had begun, by that time, a concerted disinformation campaign to convince voters that fraud, or some other form of mistake or malfeasance, could be the only explanation for delays in

81. Marc Levy & Maryclaire Dale, *More Than 3M in Pennsylvania Apply for Mail-in Ballots*, AP NEWS (Oct. 27, 2020, 5:51 PM), https://apnews.com/article/election-2020-pennsylvania-elections-voting-2020-presidential-elections-b1fe12514c3a736ec33f84e4ce7e4161 [https://perma.cc/K8GK-9DWP]; Annie McCormick & Bob Brooks, *Nearly 1.5 Million Pennsylvanians Have Already Cast Ballots Ahead of Election*, 6 ABC ACTION NEWS (Oct. 24, 2020), https://6abc.com/vote-pa-2020-election-mail-in-ballot-voting-pennsylvania/7283354/ [https://perma.cc/7XKE-RP6K]; Rachel Looker, *Pennsylvania Mail-in Ballot Count Was 'Just All Hands on Deck*,*'* NAT'L ASS'N COUNTIES NEWS (Nov. 23, 2020), https://www.naco.org/articles/pennsylvania-mail-ballot-count-was-just-all-hands-deck [https://perma.cc/FD9N-9XMF].

82. Brian Slodysko, *Explainer: Why AP Called Pennsylvania for Biden,* AP NEWS (Nov. 7, 2020, 10:31 AM), https://apnews.com/article/ap-called-pennsylvania-joe-biden-why-f7dba7b31bd21ec2819a7ac9d2b028d3 [https://perma.cc/BCU5-3G6Q].

83. Jonathan Lai & Jessica Calefati, *There's a Lot of Noise Around Pennsylvania's Election. These People Are Keeping Their Focus on Counting Votes*, PHILA. INQUIRER (Nov. 5, 2020), https://www.inquirer.com/politics/election/pennsylvania-2020-election-officials-count-mail-ballots-20201104.html [https://perma.cc/3WW9-9EH3].

84. Michael Finnegan, *'A Really Destructive Scenario': Pennsylvania Could Hold Up Outcome of Presidential Election*, L.A. TIMES (Oct. 14, 2020, 5:00 AM), https://www.latimes.com/politics/story/2020-10-14/philadelphia-pennsylvania-presidential-election-mail-ballots [https://perma.cc/W2RX-KDH7].

counting,[85] and he called on his allies in the Republican Party to help reinforce this narrative.[86]

In response to the escalating tensions, "[m]any if not most Pennsylvania counties wanted to begin opening and preparing mail-in ballots for counting in advance of Election Day."[87] This advance preparation is routine in many states, including in states that regularly receive a large number of mail-in ballots.[88] Preparing ballots in this way allows the count to proceed in a rapid fashion on Election Day, without any clear downside.[89] Pennsylvania's Republican-controlled legislature, however, refused to let county officials begin this process prior to Election Day.[90] In addition, some county officials affiliated with the Republican Party went so far as to exercise their discretion in ways that achieved the opposite result (that is, in ways that delayed the mail-in vote count even further).[91]

Observers began to suspect sandbagging and criticized the tactic in concept if not in name. The *Pittsburg Post-Gazette*, for example, announced several days before the election that the pattern "fuels suspicion that some Republican-controlled counties in Pennsylvania will drag their feet in counting mail-ins, possibly with the goal of enabling Trump to claim victory."[92] Two days after the election, the editorial board of the *Philadelphia Inquirer* ran an opinion piece insisting that Pennsylvania Republicans be "[b]lamed" for the delayed results.[93] In support, the newspaper noted that Republican-affiliated officials were the ones both taking steps to "guarantee[] no result on Election Night" and facilitating efforts to "dismiss votes not processed [that same day]."[94] Once again, this dynamic is familiar. It is a form of sandbagging.

A similar pattern appeared to be in play prior to the 2022 elections, when election officials across dozens of jurisdictions began tackling "what many

85. Marianna Spring, *'Stop the Steal': The Deep Roots of Trump's 'Voter Fraud' Strategy*, BBC NEWS (Nov. 23, 2020), https://www.bbc.com/news/blogs-trending-55009950 [https://perma.cc/UJQ9-7E5V].

86. *See, e.g.*, Nick Corasaniti & Danny Hakim, *Facing Gap in Pennsylvania, Trump Camp Tries to Make Voting Harder*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/2020/10/29/us/elections/trump-pennsylvania-voter-suppression.html [https://perma.cc/3Y4V-8HEB].

87. David Wenner, *Some Pa. Counties Will Delay Counting Mail-in Votes, Potentially Fueling Challenges*, PITT. POST GAZETTE (Oct. 29, 2020, 9:41 AM), https://www.post-gazette.com/news/politics-nation/2020/10/29/Pennsylvania-counties-delay-ballot-counting-votes-court-challenges-election/stories/202010290127 [https://perma.cc/5FKT-89D7].

88. *Voting Outside the Polling Place Table 16: When Absentee/Mail Ballot Processing and Counting Can Begin*, NAT'L CONF. ST. LEGISLATURES (Oct. 1, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-16-when-absentee-mail-ballot-processing-and-counting-can-begin.aspx [https://perma.cc/R6SL-9X45].

89. *Id.*

90. Brian X. McCrone, *Why Can't Mail-In Ballots Be Counted Ahead of Election Day in Pa.? Politics in Harrisburg*, NBC PHILA. (Sep. 24, 2020), https://www.nbcphiladelphia.com/news/politics/decision-2020/why-cant-mail-in-ballots-be-counted-ahead-of-election-day-in-pa-politics-in-harrisburg/2543334/ [https://perma.cc/M29W-XTMU].

91. Wenner, *supra* note 87.

92. *Id.*

93. Ed. Bd., Opinion, *Blame Pennsylvania Republicans for Delayed Results in Keystone State*, PHILA. INQUIRER (Nov. 5, 2020), https://www.inquirer.com/opinion/editorials/philadelphia-pennsylvania-votes-ballots-counting-republicans-stop-20201105.html [https://perma.cc/F2TF-YM66].

94. *Id.*

describ[ed] as an unprecedented wave of public records requests."[95] These requests forced officials away from the routine preparatory work of elections during a difficult time: right when they needed to, for example, "finalize polling locations, mail out absentee ballots and prepare for early voting in October."[96] The volume and nature of these requests, coupled with other contextual details, led some election officials to believe that the requesting parties were attempting to induce a breakdown in the system precisely for the purpose of exploiting that breakdown later. In the words of one report,

> [Many election administrators] believe that those organizing the effort are not out for information but rather are trying to cause chaos as their fall crunch[]time approaches, making it more difficult to run smooth elections and giving critics new openings to attack the integrity of election administration in the United States.[97]

The 2022 elections proceeded, by and large, without serious breakdowns in the electoral process.[98] As a result, even if these public record requests were intended to set the stage for sandbagging, the effort appears to have failed. Bombarding election offices with busywork is, nevertheless, consistent with an effort at sandbagging.

The opportunities for legislators, election officials, or others to try to take advantage of this approach—sandbagging through election mismanagement—are too numerous to catalogue.[99] These actors might stop election workers from engaging in commonsense preparations, for example, as participants did in Pennsylvania in 2020 and again in 2022.[100] They might otherwise induce delay.[101]

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95. Amy Gardner & Patrick Marley, *Trump Backers Flood Election Offices with Requests as 2022 Vote Nears*, WASH. POST (Sept. 11, 2022, 5:54 PM), https://www.washingtonpost.com/nation/2022/09/11/trump-election-deniers-voting/ [https://perma.cc/L46F-QCEZ].

96. *Id.*

97. *Id.*

98. Shannon Bond, Miles Park & Huo Jingnan, *Election Officials Feared the Worst. Here's Why Baseless Claims Haven't Fueled Chaos*, NPR (Nov. 14, 2022, 3:51 PM), https://www.npr.org/2022/11/14/1136537352/2022-election-how-voting-went-misinformation [https://perma.cc/P6BW-M8DJ].

99. *See* Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 246 (2019).

100. *See* Lawrence Norden & Derek Tisler, *Why Does It Take So Long to Count Mail Ballots in Key States? Blame Legislatures*, BRENNAN CTR. FOR JUST. (Nov. 7, 2022), https://www.brennancenter.org/our-work/analysis-opinion/why-does-it-take-so-long-count-mail-ballots-key-states-blame-legislatures [https://perma.cc/A53C-NVB8]; The Editorial Board, Opinion, *More Pennsylvania Election Follies*, WALL ST. J. (July 17, 2022, 6:27 PM), https://www.wsj.com/articles/more-pennsylvania-election-follies-voters-election-results-ballot-zuckerberg-zuckerbucks-winner-11658068089?mod=opinion_major_pos3 [https://perma.cc/3CBH-VLLB]; *see also* Clara Hendrickson, *Michigan Election Officials Demanded Change After 2020. Their Calls So Far Have Gone Unmet*, DETROIT FREE PRESS (Aug. 23, 2022, 4:53 AM), https://www.freep.com/in-depth/news/politics/elections/2022/08/23/michigan-election-laws-untouched-august-primary/7864065001/ [https://perma.cc/ZTU2-P82N].

101. *See, e.g.*, Heidi Przybyla, *GOP Activists and Candidates Set Stage to Claim Elections They Lose Are Stolen*, POLITICO (Nov. 7, 2022, 11:01 PM), https://www.politico.com/news/2022/11/07/gop-activists-election-stolen-00065593?nname=playbook&nid=0000014f-1646-d88f-a1cf-5f46b7bd0000&nrid=0000014e-f109-dd93-ad7f-f90d0def0000&nlid=630318 [https://perma.cc/6NNZ-7BUD] (accusing participants of citing vote-counting delays as evidence of malfeasance while, at the same time, "encouraging voters to do the very things likely to cause vote-counting delays").

They might exploit transparency rules in ways that undermine election preparations.[102] They might allow or create opportunities for security breaches.[103] They might affirmatively block funding for the election infrastructure and personnel necessary to competently run elections.[104] They might rely on voting technology that is confusing without sufficiently explaining it to the public or might even choose to contribute to the confusion.[105]

These sorts of decisions—whether associated with direct mismanagement, strategic acquiescence to others' mismanagement, or an effort to induce a breakdown in management—have little technocratic benefit and instead predictably lead to breakdowns in the process or other complications. These decisions might lead, for example, to bottlenecks in vote counting, lapses in election security, polling sites that are overwhelmed, voting machines that display what may appear to be errors, problematic ballots, and more.

Yet, to reiterate, for the perpetuators of these problems, there is an upside. If it is helpful to do so, they can later point to those complications to bolster their case that an election should be overturned. Participants might seek this drastic relief by petitioning a court or, perhaps, by petitioning another authority, such as an elected body charged with judging the legitimacy of elections.[106]

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102. *See supra* notes 95–97 and accompanying text.

103. *See, e.g.*, Nick Corasaniti, *G.O.P. Election Reviews Create a New Kind of Security Threat*, N.Y. TIMES (Oct. 27, 2021), https://www.nytimes.com/2021/09/01/us/politics/gop-us-election-security.html [https://perma.cc/86DC-B7KH]; Emma Brown, *An Elections Supervisor Embraced Conspiracy Theories. Officials Say She Has Become an Insider Threat*, WASH. POST (Sept. 26, 2021, 10:53 AM), https://www.washingtonpost.com/investigations/an-elections-supervisor-embraced-conspiracy-theories-officials-say-she-has-become-an-insider-threat/2021/09/26/ee60812e-1a17-11ec-a99a-5fea2b2da34b_story.html [https://perma.cc/7T9S-P57A]; Ines Kagubare, *Trump's 2020 Outrage Drives Fear of 'Insider' Election Threat*, THE HILL (July 14, 2022, 5:15 AM), https://thehill.com/policy/cybersecurity/3558259-trumps-2020-outrage-drives-fear-of-insider-election-threats/ [https://perma.cc/G5VW-KXFU].

104. *Cf.* STATES UNITED DEMOCRACY CTR., PROTECT DEMOCRACY & LAW FORWARD, A DEMOCRACY CRISIS IN THE MAKING: HOW STATE LEGISLATURES ARE POLITICIZING, CRIMINALIZING, AND INTERFERING WITH ELECTION ADMINISTRATION 26 (2021) [hereinafter A DEMOCRACY CRISIS IN THE MAKING] (describing "Bans on Efforts by Local Officials to Supplement Their Budgets"); Bryan Warner, *State Budget Fails NC Voters, Shortchanges Elections Funding*, COMMON CAUSE (July 1, 2022, 4:01 PM), https://www.commoncause.org/north-carolina/press-release/state-budget-fails-nc-voters-shortchanges-elections-funding/ [https://perma.cc/ZQY4-QQQB] (alleging that lawmakers in North Carolina slashed the budget for the State Board of Elections for "no good reason").

105. *Cf.* Casey McDermott, *Protector of N.H. Primary Claims 'You Can't Hack This Pencil,' But Worries Persist*, WBUR News (Jan. 28, 2020, 4:38 PM), https://www.wbur.org/news/2020/01/28/new-hampshire-cybersecurity-primary-election-voter-fraud [https://perma.cc/878K-XAU7]; Miles O'Brien, *What Election Officials Think About Paper Ballots and Voting Machines*, PBS News Hour (Oct. 14, 2020, 6:35 PM), https://www.pbs.org/newshour/show/what-election-officials-think-about-paper-ballots-and-voting-machines [https://perma.cc/52SG-Y4ZP].

106. *See supra* notes 53–54 and accompanying text. Participants might even seek this relief by appealing to the public at large. Given that the public is not empowered by law to resolve these sorts of claims, this sort of appeal seems intended to elicit extralegal relief and, accordingly, implicates not only the overturning of an election, but the subversion of an election. *See infra* notes 152–162 and accompanying text.

3. Sandbagging Through Evocation of Voter Fraud

Another form of sandbagging is associated with claims of fraudulent voting or other election-related criminal activities. Political strategies relying on allegations of voter fraud—whether those allegations are advanced sincerely, disingenuously, or otherwise—have a long history in the United States.[107] To that end, political operatives have for years incorporated these sorts of allegations into a circular sort of logic intended to advance their own agendas. These operatives allege criminal activity (typically, voter fraud) without underlying evidence of an actual problem, and then, later, in support of some proposed relief or reform, allude to their own earlier allegations. Sometimes they go a step further and simply cite the *perception* of voter fraud—a perception that their own previous allegations had, of course, helped to perpetuate.[108] Observers attempting to describe this dynamic have relied on a number of colorful metaphors, including by describing it as an effort to "create the fear of fraud out of vapors and then cut down on people's votes because of the fog you've created."[109]

Particularly when used to attack election results, this tactic implicates another familiar metaphor: sandbagging. A figure of authority perpetuates an error (here, relating to the extent to which voter fraud in fact poses a threat to election administration) with a willingness to exploit that same error later, if necessary, to undermine disfavored election results.[110]

The 2020 elections again provided a vivid and extreme illustration. Even before Election Day, numerous actors fueled a myth of fraudulent voting. The most prominent of these actors was then-President Trump, who had a platform as vast as his tactics were brazen. To consider one of innumerable examples, in August 2020 Trump announced to supporters, with no basis in fact, that "[t]he only way we're going to lose this election is if the election is rigged."[111] Consistent with this fallacy, for years Trump lodged unsubstantiated allegations of voter fraud, ordered subordinates to develop strategies for driving this narrative, pressured political allies to echo his claims, and more.[112]

The outcome of this story is well known. With this groundwork laid, Trump lost the 2020 election but refused to concede. Instead, in a concerted effort to overturn the election results, he exploited the misperceptions about voter fraud that

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107. *See* Manheim & Porter, *The Elephant in the Room*, *supra* note 99, at 214 n.8 and accompanying text. *See generally* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2009).

108. *See, e.g.*, Manheim & Porter, *The Elephant in the Room*, *supra* note 99, at 236 n.121 and accompanying text; *see also infra* note 123 and accompanying text (describing an additional example).

109. Astor, *'A Perpetual Motion Machine*,*' supra* note 2 (internal quotation marks omitted).

110. As discussed below, a similar dynamic exists outside of contested elections, but instead in the policy sphere, where advocates of restricting voting measures engage in the following maneuver: first, perpetuate fears of voter fraud without any evidence of a significant problem; and second, point back to those same fears to justify their desired restrictions. *See infra* notes 120–129 and accompanying text.

111. Greg Sargent, Opinion, *Trump Just Repeated His Ugliest Claim About the Election. Why Isn't It Bigger News?*, WASH. POST (Sep. 15, 2020, 10:46 AM), https://www.washingtonpost.com/opinions/2020/09/15/trump-just-repeated-his-ugliest-claim-about-election-why-isnt-it-bigger-news/ [https://perma.cc/HA5D-7SV9].

112. *See, e.g.*, Manheim & Porter, *The Elephant in the Room*, *supra* note 99, at 234.

already dominated the public discourse—misperceptions he had helped to invent and amplify.[113] These efforts reached many audiences, including the courts, where Trump-affiliated plaintiffs filed dozens of lawsuits based on overlapping theories.[114] Other audiences included county canvassing boards, state canvassing boards, high-level executive officials in state governments, high-level executive officials in the federal government, members of state legislatures, members of Congress, the Vice President, and the public at large.[115] Though these efforts ultimately did not succeed in overturning the election, it was not for lack of trying. Moreover, the efforts had other effects, including the creation of what one scholar has called a "Republican orthodoxy of a stolen 2020 election," which existed notwithstanding the "utter lack of reliable evidence [in support]"[116] and which surely contributed to the delegitimization of the 2020 elections in the eyes of many.[117]

Despite Trump's prominence, he was far from alone in engaging in sandbagging centered around allegations of voter fraud. Other participants include a high-ranking member of the Wisconsin state government. In the leadup to the 2020 elections, Robert Spindell served as one of six members on the Wisconsin Elections Commission. Even before Election Day, Spindell advanced unsubstantiated theories regarding the threat of voter fraud.[118] Once Trump lost the election, Spindell doubled down on those theories, including by speaking at a rally in which he implied, falsely, that voter fraud had affected the Wisconsin result. At that same rally, Spindell "stood by as speakers spread conspiracy theories about election fraud and COVID-19, compared the 2020 presidential election to Pearl Harbor and advocated for the violent overthrow of the government."[119] A week later, Spindell joined nine others in claiming to act as electors for Wisconsin and, based on that premise, purported to cast Electoral College votes for Donald Trump. The group recorded this activity and conveyed the documentation to federal and state officials as though it reflected true Electoral College votes.[120] Unsubstantiated

113. *See, e.g.*, *supra* notes 85–86 and accompanying text (identifying some of these efforts).

114. *See* JOHN DANFORTH, BENJAMIN GINSBERG, THOMAS B. GRIFFITH, DAVID HOPPE, J. MICHAEL LUTTIG, MICHAEL W. MCCONNELL, THEODORE B. OLSON & GORDON H. SMITH, LOST, NOT STOLEN: THE CONSERVATIVE CASE THAT TRUMP LOST AND BIDEN WON THE 2020 PRESIDENTIAL ELECTION 3–6 (2022), https://lostnotstolen.org [https://perma.cc/KR9K-SQCW] (cataloging litigation).

115. *See* STAFF OF H. SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 4–5 (2nd Sess. 2022).

116. Hasen, *Identifying and Minimizing*, *supra* note 7, at 18.

117. *See, e.g.*, *infra* note 182 and accompanying text.

118. *See, e.g.*, Mitch Smith & Michael Wines, *In Closely Divided Wisconsin, the Battle for Votes Is Already Underway*, N.Y. TIMES (Jan. 14, 2020), https://www.nytimes.com/2020/01/14/us/wisconsin-voter-purge.html [https://perma.cc/LB5E-B2GX].

119. Henry Redman, *Spindell Reappointed to Wisconsin Elections Commission*, WIS. EXAM'R (Apr. 29, 2020, 12:27 PM), https://wisconsinexaminer.com/brief/spindell-reappointed-to-wisconsin-elections-commission/ [https://perma.cc/7LDB-3TU4]; *see also* Hannah Rabinowitz & Marshall Cohen, *Wisconsin GOP Election Commissioner Praised Right-Wing Provocateur Who Promoted Voter Fraud Conspiracies*, CNN (Nov. 21, 2020, 10:58 AM), https://www.cnn.com/2020/11/21/politics/wisconsin-election-official-conspiracy-theory/index.html [https://perma.cc/5VJH-X6GA]; Henry Redman, *Election Official Stands by at Rally as Speakers Spread Conspiracies, Promote Political Violence*, WIS. EXAM'R (Dec. 18, 2020, 7:00 AM), https://wisconsinexaminer.com/2020/12/08/spindell-conspiracies-political-violence/ [https://perma.cc/D347-PD9A].

120. Smith & Wines, *supra* note 118.

concerns over voter fraud—bolstered by sandbagging—were offered as the justification for these developments. Through this effort, Spindell tried, unsuccessfully, to overturn the 2020 presidential election results in Wisconsin.

Spindell continued with this approach the following year. In April 2021, the majority leader of the Wisconsin Senate reappointed Spindell to another term on the Wisconsin Elections Commission, this time for five years.[121] In that capacity, Spindell recently spoke to a reporter about a controversial "audit" of the 2020 elections taking place in the state.[122] According to that reporter:

> [Spindell], a supporter of the audit, told me public concerns about the election's legitimacy mean more reviews are necessary. He pointed to a Marquette Law School poll that found 71 percent of Wisconsin Republicans aren't confident the state's election results were accurate.
>
> "The question is more than is this concern legitimate or not. The issue is *a huge number of people think there's a problem with the election*," [Spindell] said. "It seems to me we should try to do something to solve that."[123]

It was, of course, the work of Spindell and his allies that had created these unfounded concerns in the first place.

A similar pattern manifested elsewhere. Loren Culp, for example, ran for governor in Washington State in 2020 and lost by over ten percentage points. "[E]ven as the first results came in," Culp "began to echo claims made by then President Donald Trump that the election was rife with fraud."[124] He filed a corresponding lawsuit, which he could not substantiate and therefore had to abandon.[125] In 2021, Culp decided to run for Congress on a platform largely driven by these same circular allegations of voter fraud.[126]

This list goes on: among the further examples during the 2020 cycle were "Adam Laxalt, running for the U.S. Senate seat in Nevada, and Larry Elder, who ran unsuccessfully in the recall election against California's Democratic governor Gavin Newsom, [who] without evidence . . . raised claims of stolen elections preemptively, in Elder's case before polls had even closed."[127] This pattern appeared

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121. Henry Redman, *Spindell Reappointed to Wisconsin Elections Commission*, WIS. EXAM'R (Apr. 29, 2020, 12:27 PM), https://wisconsinexaminer.com/brief/spindell-reappointed-to-wisconsin-elections-commission/ [https://perma.cc/7LDB-3TU4].

122. Joseph Marks, *The Cybersecurity 202: Election Officials Are Pushing Back Against Partisan Audits Launched By Trump Allies*, WASH. POST (Aug. 18, 2021, 7:28 AM), https://www.washingtonpost.com/politics/2021/08/18/cybersecurity-202-election-officials-are-pushing-back-against-partisan-audits-launched-by-trump-allies/ [https://perma.cc/Y9LG-HXYC].

123. *Id.* (emphasis added).

124. Nick Bowman, *Amid Run for Congress, Loren Culp Continues to Push Election Fraud Narrative*, MYNORTHWEST (Aug. 11, 2020, 11:39 AM), https://mynorthwest.com/3081856/loren-culp-continues-electon-fraud-claims-2021/ [https://perma.cc/7X7G-DBH2].

125. Jim Brunner & Joseph O'Sullivan, *Former Gubernational Candidate Loren Culp Drops Election Fraud Lawsuit After Washington State Threatens Legal Sanctions*, SEATTLE TIMES (Jan. 15 2021, 10:23 PM), https://www.seattletimes.com/seattle-news/politics/former-gubernatorial-candidate-loren-culp-drops-election-fraud-lawsuit-after-washington-state-threatens-legal-sanctions/ [https://perma.cc/2AUJ-Y2VN].

126. *Id.*

127. Hasen, *Identifying and Minimizing*, *supra* note 7, at 16.

to weaken somewhat during the 2022 cycle, when losing candidates largely conceded defeat, even when they were seemingly primed to resist unfavorable election results based on unsubstantiated concerns about voter fraud.[128]

Still, a strategic evocation of voter fraud has dominated United States politics for generations.[129] In recent decades, participants have relied on tactics similar to those used in the sandbagging context in efforts to impose restrictive voting reforms.[130] These participants have, to this end, perpetuated a distorted perception of voter fraud in order to later take advantage of that same distorted perception. It is true that these proponents only rarely acknowledge that these concerns over voter fraud largely are pretextual, and surely some sincerely believe that voter fraud is a far more significant problem than it actually is.[131] Regardless, emerging from this position is an incentive to bootstrap. If advocates for restrictive measures can convince the public, accurately or not, that voter fraud is a threat, they can later cite not only the purported threat itself, but the *perception* of this threat, for measures purportedly designed to deter the alleged problem.[132] They can, in other words, create a "feedback loop" or "'perpetual motion machine'" to help bolster their cause.[133] And so they have. Particularly effective waves of advocacy came after the 2008 presidential election of Barack Obama and again after the 2020 defeat of Donald Trump.[134] Bolstering these restrictive reforms, as usual, were unsubstantiated allegations of voter fraud, advanced by the same people pushing

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128. Heidi Przybyla, *Trump's Election Conspiracy Boosters Largely Accept Their Own Defeats*, POLITICO (Nov. 13, 2022, 8:27 PM), https://www.politico.com/news/2022/11/13/trump-election-deniers-accept-2022-results-00066626 [https://perma.cc/K4F4-8YCA]. *But see* Sam Levine, *Election Denier Kari Lake Refuses to Concede Arizona Governor Race She Lost*, GUARDIAN (Nov. 17, 2022, 12:45 PM), https://www.theguardian.com/us-news/2022/nov/17/kari-lake-refuse-concede-arizona-governor-election-republican [https://perma.cc/6HCP-QWR5].

129. *See generally* KEYSSAR, THE RIGHT TO VOTE, *supra* note 107. *See also, e.g.*, *id.* at 263–69 (discussing this history's relevance to the Help America Vote Act of 2002).

130. *See* Manheim & Porter, *The Elephant in the Room*, *supra* note 99, at 235 n.121 and accompanying text.

131. *See* Lisa Marshall Manheim, *Cracks in the Foundation*, 100 B.U. L. REV. ONLINE 268 n.12 (2020) and accompanying text; *see also* Manheim & Porter, *The Elephant in the Room*, *supra* note 99, at 244 ("[M]ainstream political discourse continues to resist brazen attacks on a universal conception of voting.").

132. *See* Manheim & Porter, *The Elephant in the Room*, *supra* note 99, at 214–15; *see also id.* at 228–29 (discussing *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008)).

133. Astor, *'A Perpetual Motion Machine*,*' supra* note 2. There is somewhat of a parallel in the world of campaign finance, where reformers argue that spending leads to corruption, and then cite the perception of corruption as justification for restrictive spending rules. Despite this overlap, the resulting dynamic does not closely parallel that implicated in the context of alleged voter fraud, in part due to conflicting arguments over the definition of "corruption" and in part due to the Supreme Court's aggressive application of the First Amendment in response to campaign finance regulation. *Cf.* Adam Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1599–1619 (2011) (discussing appearance-based justifications for government decisions in the context of campaign finance).

134. *See* Manheim & Porter, *The Elephant in the Room*, *supra* note 99, at 232; Nathaniel Rakich & Elena Mejía, *Texas's New Law Is the Climax of a Record-Shattering Year for Voting Restrictions*, FIVETHIRTYEIGHT (Sept. 8, 2021, 6:00 AM), https://fivethirtyeight.com/features/texass-new-law-is-the-climax-of-a-record-shattering-year-for-voting-restrictions/ [https://perma.cc/9CS9-LUFP]; *see also Voting Laws Roundup: October 2021*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021 [https://perma.cc/P5B8-5RPN].

for restrictive reforms.[135] A report by CNN, substantiating this connection, described a quality reminiscent of sandbagging:

> The state legislative efforts are bolstered by a coordinated, behind-the-scenes push by conservative groups to raise millions to support restrictive voting laws, spread unproven claims about voter fraud and fund sham audits of election results. All of which, election experts say, will make it easier the next time to overturn close results, and puts the future of free and fair elections in jeopardy . . . . All told, experts and activists say, many of the new election laws share the quality of having been put forth as the solution to a nonexistent problem—widespread voter fraud—manufactured by Trump and the GOP.[136]

Many others have described this dynamic in similarly circular terms.[137] This pattern—the strategic use of voter-fraud allegations to bolster restrictive voting measures—is almost certain to continue through future election cycles. This prediction reflects both the strategy's long history and the fever pitch it recently reached after the 2020 elections.

In short, the United States in recent years has suffered a rash of sandbagging attempts intended to affect elections. These efforts often seek to exploit some combination of shifting legal rules and argumentation, mismanagement of elections, and evocation of voter fraud. Other techniques also may be poised to emerge.[138]

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135. Nathaniel Rakich & Elena Mejía, supra note 134 (referring to these reforms as "the policy byproduct of former President Donald Trump's unfounded claims that the 2020 election was fraudulent").

136. Rob Kuznia, Bob Ortega & Casey Tolan, *In the Wake of Trump's Attack on Democracy, Election Officials Fear for the Future of American Elections*, CNN (Sept. 13, 2021, 7:30 AM), https://www.cnn.com/2021/09/12/politics/trump-2020-future-presidential-elections-invs/index.html [https://perma.cc/CU96-AYEJ].

137. Astor, *'A Perpetual Motion Machine,' supra* note 2 ("After former President Donald J. Trump undermined public confidence in elections, Republican lawmakers are defending voting restrictions by citing a lack of public confidence."); Daniel Nichanian (@Taniel), TWITTER (Jan. 12, 2021, 11:13 AM), https://mobile.twitter.com/Taniel/status/1349071956457488385 [https://perma.cc/Z3GR-3DRP] (referring, as a reporter, to this tactic as a "sleight of hands" and explaining that it has become "so ubiquitous" across the country that it has become difficult to catalogue it all); *see generally* Daniel Nichanian (@Taniel), TWITTER (Nov. 29, 2020, 8:10 AM), https://mobile.twitter.com/Taniel/status/1333080821423595525 [https://perma.cc/FDC9-XGEQ]; *see also* Ari Berman & Nick Surgery, *Leaked Video: Dark Money Group Brags About Writing GOP Voter Suppression Bills Across the Country*, MOTHER JONES (May 13, 2021), https://www.motherjones.com/politics/2021/05/heritage-foundation-dark-money-voter-suppression-laws/ [https://perma.cc/5M4K-4KYS] (alluding to the concerted nature of these efforts by, for example, referring to "deep-pocked conservative groups" that are both "raising the specter of voting fraud" and offering "model legislation too so it has that grassroots, from-the-bottom-up type of vibe").

138. For example, a president could encourage—or at least fail to act to prevent—foreign interference in elections before later claiming that foreign interference requires rejection of the election results. *Cf.* Manheim, *Presidential Control*, *supra* note 21, at 454 (discussing the 2020 elections). Allegations of a creative form of sandbagging also surfaced, decades ago, during the postelection dispute between George W. Bush and Al Gore. Critics accused the U.S. Supreme Court of pulling a "bait and switch" on the Florida courts by declining to articulate its position on the Equal Protection Clause claims until it was too late (at least, according to the Court) to implement a remedy. *See, e.g.*, Michael C. Dorf, Commentary, *Supreme Court Pulled a Bait and Switch*, L.A. TIMES, Dec. 14, 2000, at B11. *But see* Tribe, *eroG .v hsuB and Its Disguises*, *supra* note 5, at 304 n.513 (refuting this account).

Regardless of the precise mechanism used, these efforts share the same central goal: to affect election results. As the next Section explains, this goal manifests in meaningfully different ways.

B. Sandbagging Goals

The overarching goal of electoral sandbagging is to affect election results. This objective can be broken down further. First, there exists *sandbagging to tip elections*. Here, participants use sandbagging in an attempt to force the resolution of a truly close election in one direction. While the impact of these efforts on a discrete race can be stark, the effects otherwise tend to be limited. Second, there exists *sandbagging to overturn elections*. Here, participants use sandbagging to try to compel the wholesale rejection of election results after a preferred candidate loses. The effects of this second form of sandbagging tends to be broader, in part because overturning an election is a "breathtaking" form of relief.[139] Third, there exists *sandbagging to subvert elections*. In this scenario, participants use sandbagging as part of a broader effort to exploit a breakdown in the rule of law to install a losing candidate into office. The effects of this form of sandbagging—both in discrete races and across the field of election administration more generally—have the potential to be staggering. Further complicating these analyses is the possibility of sandbaggers also pursuing a secondary goal: undermining the legitimacy of the election and, by extension, the legitimacy of the candidate just elected.

Within each of these categories, the basic sandbagging pattern is similar. Yet, as discussed in more detail below, for those seeking to counteract the practice, each form of sandbagging poses its own concerns and challenges.

i. Sandbagging to Tip Elections. In a close election, participants might use sandbagging to try to tip the result. To understand how these attempts can unfold, it is helpful to consider what it means for an election to be close.

The so-called prayer of election administrators—some variation of "Lord, please let the winner win in a landslide"—reflects a reality about very tight elections: determining a winner can be difficult, messy, and dependent on a wide range of variables. If an election is close enough, the determination of the winner very well may depend on exercises of administrative discretion that otherwise would seem unremarkable; on legal determinations that otherwise would seem minor; on the effects of errors that otherwise would seem innocuous; and other seemingly trivial factors. In light of these vagrancies, elections that truly are very close, in a sense, lack a clear "winner." Instead, the margin between the candidates is so small that it would be reasonable for either candidate to be declared victorious. Ultimately, the eventual winner can depend less on mechanical vote counting and more on how the post-Election Day legal process unfolds. Partially because of this indeterminacy—and the incentives it offers to challenge close contests—the last two decades have seen a dramatic rise in the frequency of postelection disputes.[140]

The controversies discussed above, out of Iowa (between Hart and Miller-Meeks) and Minnesota (between Franken and Coleman) provide two examples.

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139. Donald J. Trump for President, Inc. v. Sec'y of Pa., No. 20-3371, 830 F. App'x. 377 (3d Cir. 2020).

140. *See* Derek T. Mueller, *Reducing Election Litigation*, 90 FORDHAM L. REV. 561 (2021).

These same precedents also illustrate how sandbagging attempts can sneak into the process. Such efforts might be expected in truly close elections. Candidates have an extraordinary incentive to find mechanisms—here, mechanisms consistent with law—to shift discrete sets of ballots from one category to another. Resolution of these otherwise minor legal disputes may determine the eventual winner. The multiphase structure of post-Election Day legal processes provides further temptation, as it repeatedly gives candidates the chance to test the effects of a decision before deciding, in a subsequent round, whether to change their minds on the point in question.

While possibly outcome-determinative in a discrete race, this form of sandbagging—sandbagging to tip elections—otherwise tends to have limited effects. It typically affects only one election result: an election that is so close that, in a sense, there is no clear winner. These effects also are limited insofar as they tend not to have direct and sweeping consequences for election law more broadly. The sandbagging might be premised on a legal dispute over, for example, the finer points of recount procedure, or how a state should handle a relatively small collection of absentee ballots.[141] Resolution of these sorts of questions are important, and they can affect other elections going forward. However, they generally do not implicate such profound stakes that they call into question the fundamental legitimacy of elections.

This form of sandbagging also tends to be straightforward to counteract. The relevant adjudicator—whether a court, a legislative body, or someone else—typically can reject arguments premised on sandbagging. The court responded in this way, for example, with respect to the Rule 9 argument in the Franken-Coleman dispute,[142] and it is possible that the House of Representatives would have done the same in the dispute out of Iowa had Hart not withdrawn her challenge.

In short, sandbagging to tip elections may be highly consequential in a given election. But, without more, it tends not to affect election law in a dramatic fashion on a systematic level.

ii. Sandbagging to Overturn Elections. Some participants engage in sandbagging in an attempt to undo election results that are not close at all.

To effectively block a candidate from taking office, this second type of sandbagging cannot merely shift a few votes from one candidate's column to another. Rather, the sandbagging must trigger a far more drastic remedy: the wholesale rejection of the Election Day vote. Normally, this remedy is followed by a new election, though on occasion the requested remedy is to install the apparently losing candidate directly into office.[143] Either way, these manifestations of sandbagging have the same intended goal: to overturn elections.

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141. *See supra* notes 55–60 and accompanying text.

142. *See supra* notes 58–60 and accompanying text.

143. *See, e.g.*, Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994) (holding that an apparent losing candidate can be certified by the court as the winner if the court finds that but for wrongdoing, that candidate would have won the election); *cf.* Donald J. Trump for President, Inc. v. Sec'y of Pa., 830 F. App'x 377 (3d Cir. 2020) (noting that the plaintiffs sought "breathtaking relief: barring the Commonwealth from certifying its results or else declaring the election results defective and ordering the Pennsylvania General Assembly, not the voters, to choose Pennsylvania's presidential electors"). *See generally* Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265 (2007) (discussing

As an example, in *Soules v. Kauaians for Nukolii Campaign Committee*, plaintiffs challenged a special initiative election as, among other things, violating the Equal Protection Clause of the U.S. Constitution.[144] The plaintiffs did not raise this objection prior to the election; instead, they allowed the process to go forward. Once they saw the election results, they filed their claim. As a remedy, they sought the wholesale invalidation of the election.[145] In another case, *St. Thomas-St. John Board of Elections v. Daniel*,[146] the plaintiff, "by his own admissions at trial, became aware of his ballot claim one week before the election, yet chose to forgo a pre-election challenge and waited to see how the electorate would vote."[147] As a remedy, he sought a reversal of the election results.[148] While these two examples involve judicial proceedings, sandbaggers also can attempt to overturn an election through appeal to nonjudicial forums, including Congress, state legislative bodies, or others.[149]

The effects of this form of sandbagging—sandbagging to overturn elections—are potentially more sweeping than those associated with sandbagging to tip elections. At the outset, overturning an election is itself a highly significant development. These effects are also significant because to justify the overturning of an election, the alleged defect must be fundamental; the law typically will not allow an election to be overturned as a result of minor errors.[150] As a result, this form of sandbagging often implicates the delegitimization of the entire election process.

Still, an attempt to overturn an election can be, in some circumstances, consistent with law. Such an attempt is not consistent with law, however, when it also constitutes an attempt to subvert an election.

iii. Sandbagging to Subvert Elections. The most ominous goal advanced by sandbagging is the goal of subverting elections. This Article uses the term "election subversion" to refer to the exploitation of a breakdown in the rule of law in order to install a candidate into elected office.[151]

So defined, electoral sandbagging does not necessarily implicate election subversion. The contestants in the Coleman-Franken dispute, for example, were not inducing or relying on a breakdown of the rule of law when they argued for one

existing remedies for election wrongdoing, including recounts, adjustments to vote totals, new elections, criminal penalties or fines, and other injunctive relief).

144. Soules v. Kauaians for Nukolii Campaign Comm., 849 F.2d 1176 (9th Cir. 1988).

145. *Id.* at 1179. Ultimately, the court rejected the plaintiffs' claims, citing concerns over their sandbagging quality. *Id.* at 1180–81.

146. St. Thomas-St. John Bd. of Elections v. Daniel, 49 V.I. 322, 340 (2007).

147. *Id.* at 338.

148. *Id.* at 327–28. Ultimately, the court again rejected the plaintiff's claims, again citing concerns over their sandbagging quality. *Id.* at 331–32.

149. *See supra* notes 53–54 and accompanying text. More ominously, participants might seek this relief by appealing to other elected officials or to the public at large—i.e., toward audiences that normally are not expected (and legally are not empowered) to resolve these sorts of claims. These latter appeals seem designed to elicit extralegal relief, whether through the delegitimization of the election results or a more dramatic disregard of the rule of law, and accordingly, they implicate not only the overturning of an election but the subversion of an election. *See infra* notes 152–162 and accompanying text.

150. *See supra* notes 139 & 143 and accompanying text.

151. *See* Manheim, *Election Law and Election Subversion*, *supra* note 17, at 322–29 (defining election subversion).

treatment of ballots during the recount stage and another treatment during the election contest.[152] Nor was the plaintiff in the *Daniel* case hoping to exploit such a breakdown when he sought to overturn an election he had lost, even though he had failed to raise his objection in a timely manner at an earlier stage of the election process.[153] These attempts at sandbagging assumed the supremacy of the rule of law, and they sought relief within that framework.

Often, however, an attempt at sandbagging includes a willingness to exploit a breakdown of preexisting legal rules to achieve a desired outcome. Indeed, at times, an attempt at electoral sandbagging has no practical chance of success *without* a breakdown in the rule of law. In that circumstance, the participants engaging in sandbagging seek to overturn an election through subversion.

This description captures a significant amount of activity surrounding the 2020 elections. As discussed above, participants of that election relied on several techniques—including shifting legal rules and argumentation, mismanagement of elections, and evocation of voter fraud—to argue that the November elections should be overturned.[154] But some went even further. These participants advanced those same arguments, based on those same theories, and also maintained that the law should bend to allow a losing candidate to take office.[155] In this sense, in the 2020 election cycle, the primary difference between sandbagging to overturn elections, versus sandbagging to subvert elections, boiled down to how far participants were willing to go.

In practice, how could this subversive sandbagging strategy possibly play out? Scholars, journalists, activists, and others have attempted to brainstorm scenarios.[156] Several scenarios require little imagination, as they were telegraphed during the 2020 election cycle. The most dramatic was on display on January 6, 2021, when a mob supporting the losing presidential candidate breached the U.S. Capitol Building in a brazenly unlawful attempt to disrupt the counting of electoral votes.[157] Another emerged out of leaked audio recordings demonstrating that Trump had tried to pressure state election officials into illegally manipulating vote totals.[158] Yet another involved a poorly organized but nevertheless concerted effort, grounded in false and disingenuous claims of malfeasance, to convince state legislatures to disregard

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152. *See supra* notes 60–60 and accompanying text.

153. *See supra* notes 146–148 and accompanying text.

154. *See supra* Section II.A.

155. *See also* Manheim, *Election Law and Election Subversion*, *supra* note 17, at 318–29.

156. Hasen, *Identifying and Minimizing*, *supra* note 7; Barton Gellman, *How Trump Could Attempt a Coup*, ATLANTIC (Nov. 2, 2020), https://www.theatlantic.com/politics/archive/2020/11/how-trump-could-attempt-coup/616954/ [https://perma.cc/FXU4-3CH7]; Barton Gellman, *Trump's Next Coup Has Already Begun*, ATLANTIC (Dec. 9, 2021, 3:21 PM), https://www.theatlantic.com/magazine/archive/2022/01/january-6-insurrection-trump-coup-2024-election/620843/ [https://perma.cc/J43C-2VM2]; Steven Levitsky & Daniel Ziblatt, *The Biggest Threat to Democracy Is the GOP Stealing the Next Election*, ATLANTIC (July 9, 2021), https://www.theatlantic.com/ideas/archive/2021/07/democracy-could-die-2024/619390/ [https://perma.cc/75D3-ZKPX]; *cf.* Manheim, *Election Law and Election Subversion*, *supra* note 17 (discussing scholarly responses to the threat of election subversion).

157. Jim Rutenberg, et al., *77 Days: Trump's Campaign to Subvert the Election*, N.Y. Times (June 14, 2022), https://www.nytimes.com/2021/01/31/us/trump-election-lie.html [https://perma.cc/ZCD3-XYQS].

158. *Id.*

the winner of the popular vote and assign the state's electoral votes to another candidate.[159] Other strategies were not on display in 2020 but nevertheless have inspired concern. These hypothetical scenarios include the use of law enforcement personnel to interfere with voting—for example, sending federal officials to seize ballots in precincts where the electorate tends not to vote for the preferred candidate—or other, even more creative means.[160] Some of these proposed or attempted scenarios exist on the borderline between what is lawful and what is not lawful, and therefore reasonable minds can disagree whether the effort, if attempted, would constitute election subversion. However, many of the scenarios are clearly illegal.[161]

The potential effects of this form of sandbagging are staggering, as reflected in the definition of election subversion: the exploitation of a breakdown in the rule of law to install a candidate into elected office. As I have suggested in a prior work, with respect to this sort of conduct, "the stakes are high, perhaps even existential, given the possibility that election law may effectively collapse if elections can be subverted."[162] Also of great significance are the potential secondary effects of sandbagging to subvert elections: delegitimization of the election process and election winners.

Collectively, the goals of electoral sandbagging—and the effects emanating from each of these approaches—help to confirm the significance of the practice. This observation leads, in turn, to the question of how successful sandbagging attempts have been in the past, as well as how likely they are to be in the future.

C. Sandbagging's Variable Record

Those attempting to engage in sandbagging use a multitude of mechanisms, and they do so for a range of overlapping ends: to tip, overturn, or even subvert elections in order to install a preferred candidate into office. Some also employ these means for a secondary reason, which is to delegitimize elections and their winners. On the whole, these efforts have not been successful; my research has not uncovered a clear illustration of electoral sandbagging dictating the winner of a modern election. Recent attempts at electoral sandbagging nevertheless are significant for at least two reasons. First, these increasingly aggressive efforts may, in the near future, manage to achieve their desired end and actually tip, overturn, or subvert an election. Second, even if they do not achieve such a dramatic result, they are likely to achieve what recent attempts already have achieved: some degree of delegitimization in the eyes of the electorate. This discussion explains these

159. *Id.*

160. Barton Gellman, *How Trump*, *supra* note 156; *see also* Matthew S. Swartz, *Jan. 6 Panel Is Investigating a Trump Administration Plan to Seize Voting Machines*, NPR (Jan. 23, 2022, 8:09 PM), https://www.npr.org/2022/01/23/1075219215/jan-6-panel-is-investigating-a-trump-administration-plan-to-seize-voting-machine [https://perma.cc/8GFH-MF9C].

161. As discussed above, in the 2020 election cycle, attempts at sandbagging relied on a range of mechanisms, including shifting legal rules and argumentation (where those seeking to subvert an election were the ones to effect or, at least, to fail to object to those shifts); election mismanagement (where those seeking to subvert an election were the ones to permit or even trigger that mismanagement); and reference to perceptions of voter fraud (where those seeking to subvert an election were the ones inducing erroneous perceptions of fraud). *See supra* Section II.A.

162. Manheim, *Election Law and Election Subversion*, *supra* note 17, at 316.

conclusions by tracing sandbagging's variable record. It begins by considering how sandbagging has fared in the courts. It then turns to other forums. In so doing, it also examines the secondary consequences of sandbagging, including with respect to the legitimacy of elections. This discussion concludes by explaining why the threats posed by the most dangerous form of sandbagging—sandbagging to subvert elections—may be on the rise.

1. Sandbagging in the Past

When participants attempt to employ electoral sandbagging in the courts, judges tend to be quick to reject the efforts. This trend is particularly evident outside the context of an extraordinarily close election. In this context, courts often categorically refuse to consider such an argument on the merits.

Courts that expressly characterize a litigant's tactics as "sandbagging" almost certainly will take this highly dismissive approach. Accordingly, the court decisions identified in Part I all rejected the challenger's claims out of hand.[163] In *Soules v. Kauaians for Nukolii Campaign Committee*, for example, the Court of Appeals for the Ninth Circuit insisted that the decision was straightforward in light of the plaintiffs' failure to raise the claim prior to the election.[164] The court's explanation provides a helpful summary of the prevailing doctrine:

> [I]n order to create an appropriate incentive for parties to bring challenges to state election procedures when the defects are most easily cured, we have held that "[t]he law imposes a duty on parties having grievances based on discriminatory practices to bring their complaints forward for preelection adjudication."

In this case, the district court correctly decided that appellants were barred from obtaining an invalidation of the special election even if they could make out a constitutional violation. We agree with the district court's assessment that the record in this case contains no genuine issue of material fact on the two questions critical to the application of laches to this case: 1) whether appellants knew the basis of their alleged equal protection claim sufficiently in advance of the election that they had ample opportunity to seek preelection relief; and 2) whether appellants have advanced an adequate explanation for their failure to seek preelection relief.[165]

In *St. Thomas-St. John Board of Elections v. Daniel*,[166] also discussed above, the Supreme Court of the Virgin Islands applied laches in a similar manner. Like the *Soules* court, the *Daniel* court insisted that the relevant analysis was straightforward: given that the plaintiff failed to raise his claim before the election, "he [wa]s barred from the equitable relief of overturning the election results."[167] These courts join many others in refusing even to consider the merits of a challenge when litigants

163. *See supra* Section I.C.
164. Soules v. Kauaians for Nukolii Campaign Comm., 849 F.2d 1176 (9th Cir. 1988).
165. *Id.* at 1180–82 (citations, footnotes, and internal quotation marks removed).
166. St. Thomas-St. John Bd. of Elections v. Daniel, 49 V.I. 322, 340 (2007).
167. *Id.* at 338.

have engaged in sandbagging. A related principle emanating from the federal courts—often referred to as the *Purcell* principle—arguably operates in tandem.[168]

Electoral sandbagging is similarly unlikely to persuade a court when it relies on the self-referential arguments that participants often make in the context of alleged voter fraud.[169] Courts have set rules and procedures for addressing fraud allegations. Those processes require, at a minimum, that claimants submit persuasive evidence rather than bootstrapped arguments, bare allegations, or references to others' perceptions.[170] Accordingly, courts considering a request to overturn an election will not defer to unsubstantiated allegations of fraud or allow a claimant to rely on the mere perception of fraud. Courts across the country illustrated this point after the 2020 elections, when they dismissed scores of lawsuits attempting to overturn elections.[171]

In short, well-functioning courts tend to have the capacity and the motivation to resist attempts at electoral sandbagging.[172] Accordingly, when a participant attempts a sandbagging tactic in a court—relying on this technique to convince a judge to alter election results—these efforts typically fail.

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168. *See* Purcell v. Gonzalez, 549 U.S. 1, 5 (2006); *see also* Crookston v. Johnson, 841 F.3d 396, 398 (6th Cir. 2016):

> When an election is "imminen[t]" and when there is "inadequate time to resolve [] factual disputes" and legal disputes, courts will generally decline to grant an injunction to alter a State's established election procedures. *See* Purcell v. Gonzalez, 549 U.S. 1, 5–6 (2006) (per curiam). That is especially true when a plaintiff has unreasonably delayed bringing his claim, as Crookston most assuredly has. . . . Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so.

(some citations omitted).

169. *See* Section II.A.3.

170. *See, e.g.*, Kelly v. Commonwealth, 240 A.3d 1255, 1259 (Pa. 2020) (Wecht, J., concurring), *cert. denied sub nom.* Kelly v. Pennsylvania, 141 S. Ct. 1449 (2021) ("Extraordinary claims demand extraordinary proof."); King v. Whitmer, 556 F. Supp. 3d 680, 731(E.D. Mich. 2021) ("Once it appeared that their preferred political candidate's grasp on the presidency was slipping away, Plaintiffs' counsel helped mold the predetermined narrative about election fraud by lodging this federal lawsuit based on evidence that they actively refused to investigate or question with the requisite level of professional skepticism—and this refusal was to ensure that the evidence conformed with the predetermined narrative (a narrative that has had dangerous and violent consequences). Plaintiffs' counsel's politically motivated accusations, allegations, and gamesmanship may be protected by the First Amendment when posted on Twitter, shared on Telegram, or repeated on television. The nation's courts, however, are reserved for hearing legitimate causes of action."); *id.* at 719 ("[A] document containing the lengthy musings of one dog-walker after encountering a 'smiling, laughing' couple delivering bags of unidentified items in no way serves as evidence that state laws were violated or that [voter] fraud occurred."); O'Neill v. Perez, 639 So. 2d 765, 766 (La. Ct. App.), *writ denied sub nom.* 641 So. 2d 205 (La. 1994) ("[W]e hold that before a new election can be ordered, a statistical showing is not sufficient. Such evidence must be coupled with proof of fraud, illegality, machine tampering or impropriety of some kind."); *cf.* Donald J. Trump for President, Inc. v. Sec'y of Pa., 830 F. App'x 377, 390 (3d Cir. 2021) ("Without compelling evidence of massive fraud, not even alleged here, we can hardly grant [the relief requested by plaintiffs].").

171. *See* DANFORTH ET AL., *supra* note 114, at 3–6 (cataloging litigation).

172. Relevant, but nevertheless beyond the scope of this paper, is the question of what might transpire when courts have been corrupted or otherwise are not well functioning. *Cf.* Manheim, *Election Law and Election Subversion*, *supra* note 17, at 343–44.

Sandbaggers have had similarly little success in affecting election results through appeals to nonjudicial audiences. Trump's scattershot approach during and after the 2020 elections targeted audiences that included both houses of Congress as well as various state legislative bodies.[173] Audiences also included state executive officials, such as county canvassing board members charged with certifying vote totals and top state executives (such as governors or secretaries of state) charged with signing off on election certificates.[174] Audiences even included federal actors, including the Vice President of the United States and officers at the Department of Justice.[175] Yet another audience, of course, was the public at large.[176] Ultimately, these recent attempts at sandbagging failed to convince any of these audiences to formally overturn an election—perhaps in large part because none of these

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173. *See* STAFF OF H. SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 296–300, 114–18 (2nd Sess. 2022); *see also* Rachael Bade, Josh Dawsey & Tom Hamburger, *Trump Pressures Congressional Republicans to Help in His Fight to Overturn the Election*, WASH. POST (Dec. 10, 2020, 10:00 AM), https://www.washingtonpost.com/politics/trump-republicans-biden-election/2020/12/09/abd596ea-3a4e-11eb-9276-ae0ca72729be_story.html [https://perma.cc/U43D-2URE]; Kyle Cheney, *Trump Calls on GOP State Legislatures to Overturn Election Results*, POLITICO (Nov. 21, 2020, 10:21 PM), https://www.politico.com/news/2020/11/21/trump-state-legislatures-overturn-election-results-439031 [https://perma.cc/7FQY-UBMA].

174. *See* STAFF OF H. SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 41–48, 276–91 (2nd Sess. 2022); *see also* Maggie Haberman, Jim Rutenberg, Nick Corasaniti & Reid J. Epstein, *Trump Targets Michigan in His Ploy to Subvert the Election*, N.Y. TIMES (July 8, 2021), https://www.nytimes.com/2020/11/19/us/politics/trump-michigan-election.html [https://perma.cc/MQF2-LBNB] (describing pressure on canvassing board officials); Amy Gardner, Colby Itkowitz & Josh Dawsey, *Trump Calls Georgia Governor to Pressure Him for Help Overturning Biden's Win in the State*, WASH. POST (Dec. 5, 2020, 8:37 PM), https://www.washingtonpost.com/politics/trump-kemp-call-georgia/2020/12/05/fd8d677c-3721-11eb-8d38-6aea1adb3839_story.html [https://perma.cc/488R-782C] (describing pressure on state governor); Amy Gardner, *'I Just Want to Find 11,780 Votes': In Extraordinary Hour-Long Call, Trump Pressures Georgia Secretary of State to Recalculate the Vote in His Favor*, WASH. POST (Jan. 3, 2021, 9:59 PM), https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555_story.html [https://perma.cc/AE6N-WAHH] (describing pressure on state secretary of state); Marshall Cohen, Jason Morris, Amara Walker & Wesley Bruer, *Georgia's GOP Governor and Secretary of State Certify Biden Win , Quashing Trump's Longshot Attempt to Overturn Results*, CNN (Nov. 20, 2020, 10:26 PM), https://www.cnn.com/2020/11/20/politics/georgia-certify-secretary-of-state-raffensperger/index.html [https://perma.cc/8VDH-6NF6].

175. *See* STAFF OF H. SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 48–54, 427–30 (2nd Sess. 2022); *see also* Ariella Phillips, *READ: Trump Lawyer's Memo on Six-Step Plan for Pence to Overturn Election*, CNN (Sept. 21, 2020, 8:20 AM), https://www.cnn.com/2021/09/21/politics/read-eastman-memo/index.html [https://perma.cc/EU6P-653L]; Katie Benner, *Report Cites New Details of Trump Pressure on Justice Dept. Over Election*, N.Y. TIMES (Nov. 6, 2021), https://www.nytimes.com/2021/10/06/us/politics/trump-election-fraud-report.html [https://perma.cc/N2B6-WSVV].

176. *See* STAFF OF H. SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 201–03, 213 (2nd Sess. 2022); *see also, e.g.*, Marissa J. Lang, *Jan. 6 Protests Multiply As Trump Continues to Call Supporters to Washington*, WASH. POST (Dec. 30, 2020, 7:35 PM), https://www.washingtonpost.com/local/trump-january6-dc-protest/2020/12/30/1773b19c-4acc-11eb-839a-cf4ba7b7c48c_story.html [https://perma.cc/QZ3H-VJLG]. *See generally* Adam Serwer, *Trump's Plans for a Coup Are Now Public*, THE ATLANTIC (Sept. 23, 2021), https://www.theatlantic.com/ideas/archive/2021/09/five-ways-donald-trump-tried-coup/620157/ [https://perma.cc/WC53-QE3F].

audiences had the ability, under law, to invalidate the election results based on the theories advanced and therefore would have had to engage in election subversion.[177]

Still, recently, these nonjudicial audiences have not responded with the same categorical rejection of sandbagging tactics as have the courts. During the 2020 election cycle, for example, scores of prominent Republican officials joined a high-profile lawsuit seeking to interrupt the proceedings governing the presidential election, for example, and nearly 150 members of Congress refused to formalize the results in that same race.[178]

What is more, this form of sandbagging can have a secondary effect: delegitimization. For some, the delegitimizing effect may be accidental; for others, it may be desired. Regardless of intention, even when attempts at sandbagging fail to overturn (or subvert) an election, they may work to undermine the perceived legitimacy of that election and, by extension, the incoming official.

Again, the 2020 election cycle provides an illustration. In these elections, sandbagging-through-mismanagement did not result in any overturned elections. These efforts nevertheless may have contributed to the perceived delegitimization of those same elections and the people elected pursuant to those elections.[179] This secondary effect may be triggered due to the nature of the sandbagging argument. The sandbaggers' desired remedy (here, an overturned or even subverted election) typically can be justified only by a profound flaw in the process—an illegitimacy that has infected the election beyond saving. There is a logical correlation between a purported justification of that nature and the delegitimization of an election more generally. Consequently, this form of sandbagging threatens to impose broader consequences—ripple effects that implicate the legitimacy of the entire election process—than when a sandbagger is simply seeking to tip a close election. On a similar note, these broad attempts at sandbagging are more likely to have crosscutting effects on important election law doctrines.[180] They may, in addition, be more difficult to counteract.[181]

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177. Manheim, *Election Law and Election Subversion*, *supra* note 17, at 323–24; *see generally* Danforth ET AL., *supra* note 114, at 3–6.

178. Jenny Gross & Luke Broadwater, *Here Are the Republicans Who Objected to Certifying the Election Results*, N.Y. TIMES (Jan. 8, 2021), https://www.nytimes.com/2021/01/07/us/politics/republicans-against-certification.html [https://perma.cc/QHB8-XPFE].

179. *See, e.g.*, Eliza Griswold, *Trump's Battle to Undermine the Vote in Pennsylvania*, THE NEW YORKER (Nov. 27, 2020), https://www.newyorker.com/news/us-journal/trumps-battle-to-undermine-the-vote-in-pennsylvania [https://perma.cc/KK7Z-Z66F].

180. Legislative and judicial responses to sandbagging efforts associated with purported voter fraud, for example, can have effects that extend far beyond the purported problem. *See supra* notes 125–133 and accompanying text.

181. It is the potential for delegitimization that, in a sense, can make sandbagging more difficult to counteract. Particularly when the sandbagging attempt affects an election broadly—when it rests on allegations of compromised security, for example, rather than narrow arguments about ballot design or whether to count a relatively small number of absentee ballots—pressure can mount on an adjudicator to consider the claim on the merits. Moreover, these forms of sandbagging are not necessarily advanced by a single litigant, appearing before a series of formally constituted tribunals, as is often the case in the context of an election contest after a very close election. Instead, these forms of sandbagging may rely on a combination of actors—some formally appointed to positions of authority in election administration and some working outside the system as informal political operatives—and they may be directed at a similarly diverse group, including the public at large. The overall effect is an attempt at sandbagging that can be difficult to summarily dismiss.

Overall, what this examination reveals is a varied set of consequences associated with efforts to affect election results through sandbagging. In recent years, these efforts have not, ultimately, installed an otherwise defeated candidate into office. Yet the efforts may have had a collateral effect, whether intentional or otherwise, of calling into question the legitimacy of the election process more broadly.

2. Sandbagging in the Future

Sandbagging efforts—and their potential to affect elections—may be on the rise. Sandbagging to subvert elections, accordingly, may pose an increasingly serious threat to the democratic process. To that end, commentators have detailed how participants from the 2020 cycle may be preparing for a more sophisticated replay of subversive strategies in coming years. Patterns of sandbagging frequently dominate these predictions.[182]

It is difficult for lawyers to understand and analyze these sorts of efforts. The difficulty arises in part because this particular strategy—using electoral sandbagging to achieve election subversion—straddles an uncomfortable line for those whose expertise lies in legal analysis. On the one hand, the strategy purports to rely on legal principles and it incorporates legal arguments. On the other hand, the strategy is, on a fundamental level, inconsistent with the rule of law.[183] Its proponents' (often incessant) references to legal frameworks are, in a sense, pretextual; they provide little more than a legitimating veneer for what in substance amounts to an extralegal seizure of power.[184]

Ultimately, however, central to these subversive efforts is the exploitation of preexisting legal frameworks. Therefore, the efforts require attention by legal experts.[185] The need to study this phenomenon is particularly acute because, as noted, the threat posed by this form of subversion appears to be growing, as suggested by at least three overlapping developments.

Possibly increased toleration of subversive sandbagging tactics. First, candidates may be increasingly willing to advocate for the subversion of elections and to do so through sandbagging tactics. Voters, in turn, may be increasingly willing to tolerate

182. In the view of one commentator, for example, participants in the 2024 elections might "attempt[] to create so much distrust in the electoral process that in the case of a semi-close election, the default 'solution' will be for the (Republican) state legislatures to take over the process and decide the winner." Heather Parton, *Now the GOP Has a Coup Plan — and Steve Bannon's Ready to Put Boots on the Ground*, SALON (Oct. 4, 2021, 9:50 AM), https://www.salon.com/2021/10/04/now-the-has-a-coup-plan—and-steve-bannons-ready-to-put-boots-on-the-ground/ [https://perma.cc/AJ85-Z9HU]. *See also id.* ("Having lost over and over again in court, Trump and his team have switched to their Plan B, which, as longtime Democratic strategist Chris Marshall spelled out in detail in Salon on Thursday, is to delay the certification of the vote in certain states and try to get Republican legislatures to assign electors to vote for Donald Trump instead of the actual winner, Joe Biden. This is based on the theory that if they can create enough chaos around the election results, Republican loyalists will rise to the occasion and 'save democracy' from the Democrats, who are allegedly stealing the election.").

183. Manheim, *Election Law and Election Subversion*, *supra* note 17, at 318.

184. *Id.* at 313.

185. *Id.* at 314.

such maneuvers. While the results of the 2022 elections suggest this tolerance has its limits, a strong undercurrent remains.[186]

A prominent signal of this first development is the influence that Donald Trump—who encouraged sandbagging tactics in increasingly dramatic ways beginning in 2016 and extending through 2020 and beyond—still appeared to have over the Republican party even after losing the 2020 election.[187] For some Trump allies, this influence extended to a willingness to mimic the former President by promoting and then seeking to exploit "false allegations of cheating" in elections.[188] More generally, the precedent set in the 2020 elections provides a stunning illustration of how many prominent elected officials may be willing to tolerate, enable, or employ sandbagging, even when the intended result of many of its proponents is the subversion of an election.[189]

Another indication of an increasing tolerance for sandbagging tactics, albeit one degree removed from the candidates themselves, is public polling suggesting that many voters are both deeply distrustful of opposition parties and waning in their support for the electoral process. For example, a recent poll of both Biden and Trump voters found that over half in each group "strongly agree" with the statement "I have come to view elected officials from the [opposition party] as presenting a clear and present danger to American democracy."[190] Other responses

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186. *See* FiveThirtyEight Staff, *60 Percent of Americans Will Have An Election Denier On The Ballot This Fall*, FIVETHIRTYEIGHT (updated Nov. 8, 2022, 12:10 PM), https://projects.fivethirtyeight.com/republicans-trump-election-fraud/ [https://perma.cc/3F98-QKYE]; Sam Levine, *'This Movement Was Rejected': Republican Election Deniers Lose Key StateRraces*, GUARDIAN (Nov. 15, 2022, 11:36), https://www.theguardian.com/us-news/2022/nov/15/republican-election-deniers-lose-midterm-elections [https://perma.cc/TD6N-7F2C]; Karen Yourish, Danielle Ivory, Weiyi Cai & Ashley Wu, *See Which 2020 Election Deniers and Skeptics Won and Lost in the Midterm Elections*, N.Y. TIMES (Nov. 10, 2022, 6:30 PM), https://www.nytimes.com/interactive/2022/11/09/us/politics/election-misinformation-midterms-results.html [https://perma.cc/GUG8-CG5D].

187. *See, e.g.*, Ashley Parker, *As Trump Hints at 2024 Comeback, Democracy Advocates Fear a 'Worst-Case Scenario' for the Country*, WASH. POST (Sept. 28, 2021, 9:29 AM), https://www.washingtonpost.com/politics/as-trump-hints-at-2024-comeback-democracy-advocates-fear-a-worst-case-scenario-for-the-country/2021/09/28/ee357558-1a47-11ec-914a-99d701398e5a_story.html [https://perma.cc/S3KQ-392Q]; Sam Levine, *Trump Seeking to Elevate Republicans Who Refuse to Accept Biden Victory*, GUARDIAN (Oct. 4, 2021, 4:00 AM), https://www.theguardian.com/us-news/2021/oct/04/trump-republicans-2024-election [https://perma.cc/BY66-FHJ2]; Kuznia, Ortega & Tolan, *In the Wake of Trump's Attack*, *supra* note 136; A DEMOCRACY CRISIS IN THE MAKING, *supra* note 104. *But see* Andrew Feinberg, *Growing Number of Republicans View Trump Unfavourably and Want New Leadership for GOP, Poll Finds*, INDEPENDENT (Dec. 2, 2022, 20:41), https://www.independent.co.uk/news/world/americas/us-politics/donald-trump-ron-desantis-midterms-2024-b2237784.html [https://perma.cc/G6CC-FW4V].

188. Rick Hasen, *"False Election Claims in California Reveal a New Normal for G.O.P.,"* ELECTION L. BLOG (Sept. 12, 2021, 2:51 PM), https://electionlawblog.org/?p=124532 [https://perma.cc/TU7Y-V8EP] (referring to this phenomenon as a "New Normal" for the GOP). *But see* Zoha Qamar, *Election Denialism Lives On, Even as Candidates Who Support It Concede*, FIVETHIRTYEIGHT (Nov. 18, 2022, 6:00 AM), https://fivethirtyeight.com/features/election-denialism-lives-on-even-as-candidates-who-support-it-concede/ [https://perma.cc/7RZH-AUJZ].

189. *See supra* notes 170, 171 and accompanying text.

190. Larry J. Sabato, Kyle Kondik & J. Miles Coleman, *New Initiative Explores Deep, Persistent Divides Between Biden and Trump Votes*, UVA CTR. FOR POL. (Sept. 30, 2021), https://centerforpolitics.org/crystalball/articles/new-initiative-explores-deep-persistent-divides-between-biden-and-trump-voters/ [https://perma.cc/M283-EV2S].

in the poll indicate that "[m]any Trump and Biden voters believe the deck is stacked against them, and their commitment to democracy is wavering."[191] As a related matter, fidelity to the myth of a stolen 2020 presidential election appeared, in the runup to the 2022 elections, to amount to a litmus test for some Republican candidates and voters.[192] Early polling after the 2022 elections suggests this position may have lost strength, at least among some fraction of Republican voters.[193] Still, the overall trends suggest that a tolerance for subversive tactics, including through sandbagging, may be on the rise.

Replacement of officials able and willing to resist sandbagging tactics. A second development suggesting that the threat of subversive sandbagging may be increasing involves efforts to undermine and replace the "thin line of civil servants" who successfully resisted attempts to subvert the 2020 elections.[194] This very large number of election officials—some high-profile, most not—refused to enable attempts to subvert the elections. In so doing, these officials helped to ensure it was legally impossible, as well as logistically impracticable, for the losing candidates to take (or stay in) elected office.[195]

One prominent example came in Brad Raffensperger, the Secretary of State of Georgia. In 2020, Trump and his allies exerted heavy pressure on Raffensperger, a Republican, in an effort to convince him to cite falsely concocted claims of voter fraud and other election malfeasance and, on that basis, unlawfully change vote totals in the presidential election.[196] Raffensperger's refusal to do so dramatically undercut the President's effort at subversion. Tellingly, Trump and his allies in the Republican party aggressively sought to ensure that Raffensperger would lose in his

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191. *Id.*

192. Ned Foley, *How Best to End "Electoral McCarthyism"?*, ELECTION L. BLOG (Sept. 13, 2021, 8:49 AM), https://electionlawblog.org/?p=124540 [https://perma.cc/3Y27-7DSZ] (alluding to the "increasing rise and spread of this kind of electoral McCarthyism"); *see also* Shane Goldmacher, *What Liz Cheney's Lopsided Loss Says About the State of the G.O.P.*, N.Y. TIMES (Aug. 17, 2022), https://www.nytimes.com/2022/08/17/us/politics/liz-cheney-republicans.html [https://perma.cc/WMQ8-ZK5V] ("I can't tell you the number of times somebody said, 'You don't have to believe the election is stolen, the important thing isn't *believing* it, it's saying it'. . . . That is what a Republican is supposed to do right now.").

193. *See* PUBLIC HAS MODEST EXPECTATIONS FOR WASHINGTON'S RETURN TO DIVIDED GOVERNMENT, PEW RESEARCH CTR. (2022), https://www.pewresearch.org/politics/2022/12/01/public-has-modest-expectations-for-washingtons-return-to-divided-government/ [https://perma.cc/ALC2-UJ46]; Zoha Qamar, *Election Denialism Lives On, Even as Candidates Who Support It Concede*, FIVETHIRTYEIGHT (Nov. 18, 2022, 6:00 AM), https://fivethirtyeight.com/features/election-denialism-lives-on-even-as-candidates-who-support-it-concede/ [https://perma.cc/X9SQ-Q3DZ] ("Republicans aren't a monolith, and the share of distrust wavers across subgroups, such as gender.").

194. Kuznia, Ortega & Tolan, *In the Wake of Trump's Attack*, *supra* note 136.

195. Hasen, *Identifying and Minimizing*, *supra* note 7, at 10; *see also* Molly Ball, *The Secret History of the Shadow Campaign That Saved the 2020 Election*, TIME (Feb. 4, 2021, 5:40 AM), https://time.com/5936036/secret-2020-election-campaign/ [https://perma.cc/Y2N6-GGCS]; *cf.* Natalie Adona, Paul Gronke, Paul Manson & Sarah Cole, *Stewards of Democracy: The Views of American Local Election Officials*, DEMOCRACY FUND (June 26, 2019), https://democracyfund.org/idea/stewards-of-democracy-the-views-of-american-local-election-officials/ [https://perma.cc/UL57-LFAQ].

196. Michael D. Shear & Stephanie Saul, *Trump, in Taped Call, Pressured Georgia Official to 'Find' Votes to Overturn Election*, N.Y. TIMES (May 26, 2021), https://www.nytimes.com/2021/01/03/us/politics/trump-raffensperger-call-georgia.html [https://perma.cc/3UFE-8SPF]. Raffensperger was far from alone. *See* Hasen, *Identifying and Minimizing*, *supra* note 7.

upcoming primary,[197] pushing an alternate candidate who made clear both his allegiance to Trump as a politician as well as his tolerance for Trump's subversive approach to election administration.[198] Raffensperger ultimately was able to resist Trump's effort at retaliation, winning both his primary and reelection campaigns. Yet Raffensperger represents just one example of many. "Across the country, conspiracist candidates [ran] for election administration jobs, from secretary of state on down,"[199] and while their overall performance in the 2022 election was weaker than anticipated, particularly in battleground states, some did win.[200]

At the same time, an increasing number of knowledgeable experts and others who might be capable of serving as a buffer against these pressures have been departing from their positions. This "exodus" is due to a range of overlapping factors, including fatigue, fear, censure by their own political party, or, for those subject to election, uncertainty as to whether they can achieve reelection in such a climate.[201] Those departures open "the door to adding more political actors—less professional, more political actors—into the election space,"[202] with predictably problematic consequences.[203] Much of this churn is occurring at the local level,

197. David Siders & Zach Montellaro, *'He's Toast': GOP Leaves Raffensperger Twisting in the Wind*, POLITICO (Mar. 28, 2021, 7:00 AM), https://www.politico.com/news/2021/03/28/georgia-secretary-of-state-gop-478251 [https://perma.cc/2TCQ-AQE3]; *see also* Josh Marcus, *Trump's Latest Georgia Election Challenge Is a 'Set-up for Insanity Defence', Says CNN Pundit*, INDEPENDENT (Sept. 21, 2021, 5:55 AM), https://www.independent.co.uk/news/world/americas/us-politics/trump-letter-georgia-election-insanity-b1923579.html [https://perma.cc/7RMD-GL4U].

198. Russell Berman, *Trump's Revenge Begins in Georgia*, ATLANTIC (July 12, 2021), https://www.theatlantic.com/politics/archive/2021/07/trumps-revenge-brad-raffensperger-georgia/619407/ [https://perma.cc/G424-U3ED].

199. Editorial Board, Opinion, *A Weird Story Out of Colorado Shows the Dangers U.S. Democracy Faces*, WASH. POST (Aug. 21, 2021, 8:00 AM), https://www.washingtonpost.com/opinions/2021/08/21/weird-story-out-colorado-shows-dangers-us-democracy-faces/ [https://perma.cc/PWV3-2HK6]; *see also* Barton Gellman, *America's Second-Worst Scenario*, ATLANTIC (Jan. 17, 2021, 7:18 PM), https://www.theatlantic.com/politics/archive/2021/01/how-close-did-us-come-successful-coup/617709/ [https://perma.cc/G4CS-RHBJ].

200. Karen Yourish, Danielle Ivory, Weiyi Cai & Ashley Wu, *See Which Deniers and Skeptics Won and Lost in the Midterm Elections*, N.Y. TIMES (Nov. 10, 2022, 6:30 PM), https://www.nytimes.com/interactive/2022/11/09/us/politics/election-misinformation-midterms-results.html [https://perma.cc/28U7-Z3LG]; *see also Election Conspiracists Claim Some Races for Local Offices*, MYNORTHWEST (Nov. 18, 2022, 2:52 PM), https://mynorthwest.com/3722444/election-conspiracists-claim-some-races-for-local-offices/ [https://perma.cc/BYJ3-9H6L].

201. Tom Hamburger, Rosalind S. Helderman & Amy Gardner, *'We Are in Harm's Way': Election Officials Fear for Their Personal Safety Amid Torrent of False Claims About Voting*, WASH. POST (Aug. 11, 2021, 2:59 PM [hereinafter Hamburger et al., *Personal Threats*]), https://www.washingtonpost.com/politics/election-officials-threats/2021/08/11/bb2cf002-f9ed-11eb-9c0e-97e29906a970_story.html [https://perma.cc/CX5G-H98R]; Hasen, *Identifying and Minimizing*, *supra* note 7, at 266 ("Those Republican election officials who stood up to President Trump in 2020 and saved the United States from a potential constitutional and political crisis have been censured, stripped of power, and challenged for office by those embracing the 'Big Lie.'"); Tom Hamburger, *'We Are in Harm's Way': Election Officials Fear for Their Personal Safety Amid Torrent of False Claims About Voting*, WASH. POST (Aug. 11, 2021, 2:59 PM), https://www.washingtonpost.com/politics/election-officials-threats/2021/08/11/bb2cf002-f9ed-11eb-9c0e-97e29906a970_story.html [https://perma.cc/H3A6-XHZP].

202. Kuznia et al., *supra* note 136.

203. *Id.* (quoting Matthew Masterson, a former senior cybersecurity adviser with the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency); *see also, e.g.*, Nick Corasaniti, *G.O.P. Election Reviews Create a New Kind of Security Threat*, N.Y. TIMES (Sept. 1,

where officials make consequential decisions over elections and vote counting and where, for the most part, the line of resistance to subversion held strong during the 2020 elections.[204] In part, these developments are by design; prominent strategists such as Steve Bannon have promoted this so-called "precinct strategy" in light of their dissatisfaction with the 2020 election results.[205] In short, future election cycles are likely to suffer the consequences of having fewer officials in positions of power who are able and willing to resist sandbagging tactics.

Legal changes that may more readily reward subversive sandbagging tactics. A third reason to suspect a rising threat of subversion-through-sandbagging involves changes to underlying legal frameworks.[206] After the 2020 elections, multiple jurisdictions revised laws that previously served as buffers against attempts at subversion. Georgia, for example, enacted laws that place more power over election administration in the hands of highly partisan actors.[207] Other reforms, including those in other states, have included not just stripping power from less political experts and technocrats but also imposing new rules and penalties potentially directed at those who remain.[208]

Meanwhile, with respect to laws that may, in theory, help to protect civil servants, some jurisdictions have failed to rigorously investigate and prosecute violations of those laws. This dereliction has occurred even where violators intended to intimidate election officials or otherwise interfere with the elections process.[209]

In sum, the sweeping effort at subversion that emerged during the 2020 election cycle—an effort in which prominent participants engaged in various sandbagging tactics intended to subvert elections—may not be a one-off phenomenon. To the contrary, a similar pattern may emerge in future cycles. Either way, this precedent potentially sets the stage for a range of sandbagging attempts—as well as the delegitimization effects that accompany them—to gain traction in the future.

2021, updated Oct. 27, 2021), https://www.nytimes.com/2021/09/01/us/politics/gop-us-election-security.html [https://perma.cc/T25B-P4AX].

204. Isaac Arnsdorf, Doug Bock Clark, Alexandra Berzon & Anjeanette Damon, *Heeding Steve Bannon's Call, Election Deniers Organize to Seize Control of the GOP—and Reshape America's Elections*, PROPUBLICA (Sept. 2, 2021, 5:00 AM), https://www.propublica.org/article/heeding-steve-bannons-call-election-deniers-organize-to-seize-control-of-the-gop-and-reshape-americas-elections [https://perma.cc/H54E-DQY8].

205. *Id.*; *see also* Sam Levine, *Trump Seeking to Elevate Republicans Who Refuse to Accept Biden Victory*, GUARDIAN (Oct. 4, 2021, 4:00), https://www.theguardian.com/us-news/2021/oct/04/trump-republicans-2024-election [https://perma.cc/S9B9-ULNP].

206. *See, e.g.*, Maya King, *The Election Gambit That's Sending Georgia Democrats Into a Frenzy*, POLITICO (Sept. 2, 2021, 4:30 AM), https://www.politico.com/news/2021/09/02/georgia-democrats-election-gambit-508681?nname=playbook&nid=0000014f-1646-d88f-a1cf-5f46b7bd0000&nrid=0000014e-f109-dd93-ad7f-f90d0def0000&nlid=630318 [https://perma.cc/RSG3-W4F5].

207. *Id.*

208. *See* Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1349–55 (discussing power-shifting legislation, sham audits, and criminalizing election administration).

209. *See* Linda So & Jason Szep, *Special Report: Terrorized U.S. Election Workers Get Little Help from Law Enforcement*, REUTERS (Sept. 8, 2021, 5:46 PM), https://www.reuters.com/legal/government/terrorized-us-election-workers-get-little-help-law-enforcement-2021-09-08/ [https://perma.cc/LKD7-8J8J]; Hamburger et al., *Personal Threats*, *supra* note 201.

III. THE COSTS OF ELECTORAL SANDBAGGING AND POTENTIAL REMEDIES

The threat of electoral sandbagging is a subtle but pervasive presence in American elections. As this Article has revealed, its recent manifestations have extended beyond efforts simply to tip elections and into efforts to overturn or even subvert elections. This pattern triggers concern—for good reason. As discussed below, sandbagging in the electoral context raises concerns analogous to those implicated in the litigation context. It also raises additional threats that are unique to the electoral process. Figuring out how to deter and otherwise resist this conduct is, accordingly, an important task. To that end, this Part begins in Section A with a discussion of the normative implications of electoral sandbagging. Unsurprisingly, it concludes that the phenomenon is deeply problematic. This Part concludes by asking, in Section B, what participants in the process might do to counteract this pernicious practice.

A. The Normative Implications of Electoral Sandbagging

Criticism of sandbagging—at least, in the litigation context—centers around four basic themes: efficiency, efficacy, fairness, and legitimacy. Critics have explained how sandbagging in the courtroom threatens to undermine each of these important qualities. When sandbagging occurs in the electoral context, it raises analogous concerns. It also raises additional concerns due to the nature of the methods used, as well as its intended target.

At the outset, sandbagging raises efficiency concerns.[210] When a participant in the process perpetuates an error for strategic reasons, that decision makes it harder for others to correct the error in a timely manner. Particularly when sandbagging forces the process to begin again—whether in the form of a new trial or a new election—the practice creates major inefficiencies.[211]

Sandbagging also raises efficacy concerns. Errors are more likely to affect the process, and possibly the results, when actors seek to perpetuate those errors rather than avoid or correct them.[212] Moreover, there is no way to exactly replicate an earlier process, just later in time and minus a few errors. If a trial is held a second time, for example, conditions inevitably will change. Perhaps evidence will spoil; perhaps a plaintiff will run out of money to pay for lawyers. Likewise, if an election is held a second time, conditions inevitably will change. The Supreme Court recently has gone so far as to suggest that it "fundamentally alters the nature of the election" if a court simply extends "the date by which ballots may be cast by voters . . . for an additional six days after the scheduled election day."[213]

Sandbagging also raises concerns over fairness.[214] Tellingly, a common definition of the verb "sandbag"—used in the colloquial sense, not in the context

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210. *See, e.g.*, United States v. Pielago, 135 F.3d 703, 709 (11th Cir. 1998); *In re* Asbestos Litig., CV N13C-06-169 ASB, 2014 WL 7150472 (Del. Super. Ct. Dec. 4, 2014); Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1037 (9th Cir. 2003).

211. *Pielago*, 135 F.3d at 709.

212. *See, e.g.*, United States v. Hodge, 902 F.3d 420, 429 (4th Cir. 2018) (confirming importance of "bring[ing] issues to the court's attention"); *Pielago*, 135 F.3d at 709.

213. Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020).

214. *See, e.g.*, United States v. Howell, 231 F.3d 615, 622 (9th Cir. 2000) ("[I]t would be fundamentally unfair to permit a litigant to set its case in motion before the magistrate, wait to see

of the law—is "to treat unfairly."[215] Partially, the concerns over fairness overlap with those associated with efficacy. It is not fair if errors in the election—particularly errors beyond the control of voters—deprive those participants of their preferred outcome. And partially, the concern over fairness reflects the reality that aggressive sandbagging, left unchecked, produces one of two outcomes. Either the sandbagging paralyzes the process, as both sides engage in it in response to any disfavored outcome, or it benefits only the side willing and able to engage in the practice. And at times, only one side will, as a practical matter, be able to benefit from sandbagging. If, for example, the remedy for an overturned election is to allow a state legislature to appoint its preferred slate of electors, sandbagging is a viable strategy only for whichever candidate is preferred by the legislature. This result bakes a "heads I win, tails you lose" dynamic into the election process. Such a dynamic is contemptuous of voter preference and fundamentally undermines a central purpose of elections.

The concerns over fairness, in turn, funnel into broader concerns over legitimacy. If the process is unfair, the result is more likely to be unfair and, in this sense, illegitimate. Moreover, to the extent observers recognize this unfairness as infecting the system, that recognition likely undermines the perceived legitimacy of the process.[216] All these concerns hold in the litigation context as well as the electoral context.

Moreover, as problematic as sandbagging is in the context of litigation, there are reasons to believe it may be even more harmful in the context of elections. Part of the concern relates to the methods used. As discussed above, when participants in elections try to use sandbagging to overturn or even subvert election results, the methods tend to implicate the legitimacy of the entire election process. This sweeping effect is not coincidental; it instead often follows simply as a matter of logic. This is because the arguments undergirding sandbagging must correlate with allegations of errors so profound as to justify a "'drastic if not staggering' remedy": the rejection of results from an election that already produced a clear winner.[217] For the intended remedy to be so extreme, the corresponding objection also must be extreme. Importantly, this approach may affect an election's legitimacy even if, ultimately, the party advancing the argument does not obtain the relief sought. In this sense, electoral sandbagging may be even more harmful than sandbagging that occurs strictly in the context of litigation.

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which way the wind was blowing, and—having received an unfavorable recommendation—shift gears before the district judge.") (internal quotation marks omitted); Bailey v. State, 440 A.2d 997, 1002–03 (Del. 1982); Forrest v. State, 721 A.2d 1271, 1281 (Del. 1999); DeShields v. State, 534 A.2d 630, 645 (Del. 1987); Baker v. State, 985 A.2d 389, *3 (Del. 2009) (stating that sandbagging offends "due process and fundamental fairness").

215. *Sandbag*, MERRIAM-WEBSTER (2020), https://www.merriam-webster.com/dictionary/sandbag [https://perma.cc/CZA3-LGP4].

216. *See, e.g.*, Knight v. State, 267 So. 3d 38, 47 (Fla. Dist. Ct. App. 2018), aff'd on other grounds, 286 So. 3d 147 (Fla. 2019) (expressing concern about preserving the legitimacy of the justice system in stating that the court would not "promote . . . 'deliberate sandbagging'" and had to "protect against tactical manipulation of the legal system"); United States *ex rel.* Scott v. Metro. Health Corp., 375 F. Supp. 2d 626, 643 n.23 (W.D. Mich. 2005), *aff'd sub nom.* Scott v. Metro. Health Corp., 234 F. App'x 341 (6th Cir. 2007) ("Sandbagging is inconsistent with a lawyer's ethical duties and the proper conduct of discovery and its function in the court system.").

217. Soules v. Kauaians for Nukolii Camp. Comm., 849 F.2d 1176, 1180 (9th Cir. 1988).

Another indication of the depth of this harm may be easy to recognize, but it nevertheless warrants mention: namely, electoral sandbagging potentially may be used to subvert an election. A tactic that seeks to install a losing candidate into office through the induction of or reliance on a breakdown on the rule of law is a dangerous tool indeed.

Finally, it is important to acknowledge that the target of electoral sandbagging is, of course, elections. These processes affect not only the rights and interests of candidates running for office but the rights and interests of voters and society at large. In short, electoral sandbagging is deeply problematic. Yet, as discussed above, elections in the United States may be increasingly vulnerable to this practice. Accordingly, the stakes are high.

B. Ways to Resist and Deter Electoral Sandbagging

Particularly in light of the 2020 elections and their aftermath, any forward-looking discussion of election law in the United States must acknowledge the multiple overlapping threats facing the country's democratic process. These threats include, among others, the possibility of election subversion; the individual and cumulative effects of restrictive voting measures; the corrosive consequences of disinformation on the process and on its perceived legitimacy; the implications of minoritarian rule; and the fragility of the rule of law. This growing list also includes a phenomenon that both grows out of and contributes to these other pathologies. That phenomenon is, as discussed, electoral sandbagging.

Any measures intended to counteract the phenomenon of electoral sandbagging should be considered in this broader frame. In part, the need for a broader frame reflects the interlocking nature of the various pathologies. And in part, it reflects the reality that while resisting electoral sandbagging may be necessary to ensure the health of American elections, it is not sufficient. Consider, for example, the use of sandbagging to subvert elections. Of course, it is important to find ways to eliminate a tool that could be used for this purpose. However, election subversion through alternate means also poses a profound threat.[218]

Elected officials, administrators, scholars, journalists, activists, and others have attempted to meet this challenge through urgent conversations and proposals focused on election reform.[219] This Article has identified and examined electoral sandbagging in an effort to provide further context for these discussions. It also seeks to extend these discussions by offering three overarching observations regarding how the problem of electoral sandbagging might inform broader efforts at election reform. These prescriptions are centered around framing, forum, and feedback.

Framing. At the outset, there may be value simply in identifying electoral sandbagging for what it is and calling it out as such. In the English language, the term "sandbagging" has rhetorical force, which helps to explain why it is used in so many contexts and, in particular, why it is used so frequently when the speaker is attempting to frame another's conduct in a negative light. It may be helpful to have

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218. *See* Hasen, *Identifying and Minimizing*, *supra* note 7, at 282. Of the many scenarios discussed in these works, only a subset rely on sandbagging tactics.

219. *See generally* Manheim, *Election Law and Election Subversion*, *supra* note 17.

a familiar and accessible term to capture the essence—and offensiveness—of a very complicated set of behaviors, which takes place within such an intricate system of election administration.

The value of this framing also reflects, in part, the role that public perceptions and expectations play in securing free and fair elections and ensuring the lawful transfer of power. As revealed in the days and weeks after the 2020 elections, these public perceptions and expectations serve a critical function.[220] Public perception matters, for example, when it comes to the perceived fairness of the election process as well as the perceived validity of any later-raised objections. Adjusting these perceptions to account for the possibility of sandbagging may make it harder for participants to successfully engage in sandbagging in the first place.

The public's expectations are likewise important. Public expectations may be particularly impactful when actors rely on misrepresentations and disingenuity in trying to manipulate elections. If the public expects to see these sorts of distortions, it may be more straightforward for participants who are committed to free and fair elections to effectively correct any misperceptions that follow.

Finally, framing these tactics as sandbagging allows for the possibility—however remote—that an actor in the process may think twice before participating in conduct that is characterized in this negative light.

Forum. Of course, it is not plausible to think that simply framing the problem as sandbagging (or through some similarly accurate and accessible term) is going to be enough to resist the practice. To the contrary, one of the central insights gleaned from viewing these trends through the lens of sandbagging is to recognize just how difficult it is to counteract the behavior, even once it is recognized for what it is. Technocratic reforms—even the most meritorious of technocratic reforms—are not enough if they are premised on the expectation of being implemented in good faith. The possibility of sandbagging still lurks, seeking to exploit the new-and-improved system from within.

Nevertheless, there is one election-related institution that is particularly competent at recognizing and deterring sandbagging. This institution is the judiciary. "Trial court sandbagging is easily disrupted by appellate courts."[221] To this end, equitable doctrines play an important role when sandbagging occurs, including in the context of election-law cases.[222] These equitable doctrines help to explain why, in the Ninth Circuit decision discussed above—where the plaintiffs asked the court to invalidate an election based on a constitutional objection that they failed to raise before the election—the court refused to even consider the claim.[223]

Principles of equity likewise explain why a California appeals court dismissed a challenge where the petitioner in effect "[closed his] eyes and [did] not check an election for irregularities" but instead waited "to see if the ineligible candidate [would have] an effect on the outcome."[224] It also explains why the Supreme Court

220. Ball, *The Secret History of the Shadow Campaign*, *supra* note 195.

221. Thomas M. Hoskinson, *Criminal Procedure: Trial Integrity and the Defendant's Rights Under the Plain Error Rule 52(b)*, 37 SUFFOLK U. L. REV. 1129, 1144–45 (2004).

222. *Soules*, 849 F.2d at 1180; *see supra* notes 51 and accompanying text; *see also supra* note 168 (discussing *Purcell* principle).

223. *Soules*, 849 F.2d at 1180.

224. McKinney v. Super. Ct., 124 Cal. App. 4th 951, 960, 21 Cal. Rptr. 3d 773, 779 (2004).

of the Virgin Islands rejected the claim of a candidate who, "by his own admissions at trial, became aware of his ballot claim one week before the election, yet chose to forgo a pre-election challenge and[,] before asking for relief[,] waited to see how the electorate would vote."[225]

In each of these cases, the court, in adjacent passages, used the term "sandbagging" to explain why it would not consider the challengers' claims on the merits.[226] Even more frequently, courts recognize, with disapproval, the phenomenon of sandbagging, even if they do not use the term itself. Often, the courts do so in the context of a discussion over laches—a doctrine developed to mitigate this type of strategic conduct.[227]

Even at the trial-court level, judges have demonstrated facility with election-related attempts at sandbagging. As discussed, the period after the 2020 elections was characterized by a range of attempts to unsettle the results, including through brazen, rapid-fire, relentless attempts at sandbagging aimed at the courts. In response, judges at every level, across numerous jurisdictions, had remarkably little difficulty disposing of the claims that came before them. The courts assessed the arguments, found they lacked merit in fundamental respects, and rejected them. The judges appeared not to be distracted, confused, or otherwise fazed by plaintiffs' attempts at unsettling the process through sandbagging. Instead, courts during this period relied on familiar principles, including those associated with laches and other equitable doctrines, to dispose of these high-profile, high-stakes cases more or less in the normal course.[228]

In the election law space, an ongoing debate concerns the relative value of enlisting the courts, rather than alternative institutions, to resolve election-law disputes and to address other election-related problems and challenges.[229] The threat of sandbagging is a reminder of the courts' deep familiarity with the thorny challenges posed by participants who seek to exploit the process in unfair ways, including through sandbagging. It is also a reminder of the courts' high levels of competency in responding to this sort of conduct. Of the many proposed reforms competing for consideration in the aftermath of the 2020 elections, some provide for an increased role for the courts in election administration.[230] The phenomenon of sandbagging provides a point in their favor.

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225. St. Thomas-St. John Bd. of Elections v. Daniel, 49 V.I. 322, 338 (2007).

226. *See Soules*, 849 F.2d at 1180; *McKinney*, 124 Cal. App. at 960, *St. Thomas-St. John Bd. of Elections*, 49 V.I. at 338.

227. *See, e.g.*, Nader v. Keith, 385 F.3d 729, 736 (7th Cir. 2004).

228. *See, e.g.*, *supra* notes 170, 171 and accompanying text. *See also* JOHN DANFORTH, BENJAMIN GINSBERG, THOMAS B. GRIFFITH, DAVID HOPPE, J. MICHAEL LUTTIG, MICHAEL W. MCCONNELL, THEODORE B. OLSON & GORDON H. SMITH, LOST, NOT STOLEN: THE CONSERVATIVE CASE THAT TRUMP LOST AND BIDEN WON THE 2020 PRESIDENTIAL ELECTION 3–6 (2022), https://lostnotstolen.org [https://perma.cc/KR9K-SQCW].

229. *See, e.g.*, Manheim, *Election Law and Election Subversion*, *supra* note 17, at 349–50; Heather K. Gerken & Michael S. Kang, *The Institutional Turn in Election Law Scholarship*, *in* RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 86 (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds., 2011) (summarizing some of the debates).

230. *See generally* Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337 (discussing the role to be played by state courts); Hasen, *Identifying and Minimizing*, *supra* note 7, at 297 ("[I]f there is a bona fide

Feedback. Finally, those seeking to counteract sandbagging might seek to consider the response it should trigger once it is recognized as such. Given the corrosive effects of this phenomenon, it would be difficult to defend any response that is intended to facilitate or reward sandbagging. But at what cost should it be deterred? Imagine, for example, that an attempt at electoral sandbagging introduces an error into the counting process during the recount stage. Is it appropriate to allow that error, once it is recognized by a court, to survive a subsequent election contest? Imagine, further, that correcting this error would nudge the vote totals from one apparent winner to another. Is it appropriate to allow the error to remain, even in this scenario? Recall that the declared winner of an election affects not just the participant engaging in sandbagging (which typically is a candidate, or someone aligned with that candidate), but also the electorate and society at large. Could it possibly be appropriate to recognize a candidate as the winner of an election if, absent an opponent's attempts at sandbagging at an earlier stage, that candidate would not have been awarded the requisite number of votes?

The treatment of sandbagging in the litigation context—and, specifically, the civil litigation context—suggests, perhaps counterintuitively, the answer is yes. The response to sandbagging should be something close to zero tolerance.[231] This treatment of sandbagging may be appropriate even if it means an error remains uncorrected, even if others are affected, and even if the stakes associated with sandbagging in a given case may seem small in isolation.[232] And this treatment may be appropriate even if it requires courts to rely on equitable doctrines and other flexible principles.

It can be difficult to accept that this approach may be appropriate in the context of elections. Voters, among others, may be affected by this hard line even when they were uninvolved in the sandbagging itself. However, as discussed above, the deeply corrosive effects of electoral sandbagging are at least as damaging as sandbagging is in the litigation context more generally. There should be at least as strong of an imperative to find ways to resist and deter the practice. As a result, courts—and others in adjudicative roles or positions of authority—should presumptively respond to electoral sandbagging with the same degree of intolerance that is found in the civil litigation context. These actors should refuse to entertain arguments premised on sandbagging. They should refuse to entertain these arguments even if the result is to allow errors to remain baked into a given election

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dispute about fraud or about who actually won an election, states should have procedures for judicial or other administrative review by those empowered to examine facts and evidence and make a determination about election outcomes.").

231. *See, e.g.*, United States v. Sisto, 534 F.2d 616, 624 n.9 (5th Cir. 1976) ("If the record indicates that counsel for the complaining party deliberately avoided making the proper objection or request, plain error will almost never be found. This court will not tolerate 'sandbagging'—defense counsel lying in wait to spring post-trial error."). Plain error, in this context, "dictates reversal [of a trial court's judgment if the appellate court is] in doubt as to what the jury's verdict would have been had the [error been timely corrected].").

232. *Cf.* United States v. Reyes, 102 F.3d 1361, 1365 (5th Cir. 1996) ("The [Supreme] Court stated that '[i]f the forfeited error is "plain" and "affect[s] substantial rights," the Court of Appeals has authority to order correction, but is not required to do so. . . . We choose to exercise the discretion afforded us under the Supreme Court's mandate and refuse to disturb the jury's verdict in this case. . . . [A] contrary decision in this case would encourage the kind of sandbagging that the plain error rule is, in part, designed to prevent.").

process and, indeed, even if correction of those errors might, in theory, flip an election result from one apparent winner to another. They also should refuse to accept arguments premised on sandbagging even if the stakes in the case before them seem relatively minor—even if, for example, the participants are engaging in low-level sandbagging in an effort to tip a close election in one direction or the other. And they should refuse to accept these arguments even if the rejection of the arguments requires developing an appropriate set of equitable doctrines and related principles (such as those associated with principles of privity or the unclean-hands doctrine) or extending those concepts into a new context.[233]

Just as there is no easy fix for the myriad pathologies that currently plague the U.S. system of elections, there is no easy way to fix the problems posed by electoral sandbagging. Nevertheless, recognizing the threats posed by sandbagging, and prioritizing ways to resist and deter this insidious practice, is essential for the electoral system to stabilize and begin to improve.

CONCLUSION

In the United States, litigation and election administration are structured in a similar manner. Both consist of discrete phases which provide opportunities for review of results obtained in prior phases. This basic structure can create room for participants to try out a familiar but problematic tactic. A figure of authority can perpetuate an error in an earlier stage of the process and wait to see if that phase produces a desired outcome. If so, the actor lets the error pass. If not, the actor refers to the earlier error in an effort to undo the disfavored result. This tactic constitutes sandbagging, and it is deeply problematic both in the courtroom setting and in the context of election administration.

It is only in the courtroom setting, however, that American law has figured out the importance of strictly discouraging such a tactic with minimal patience and an eye toward correcting incentives. In the courtroom setting, sandbagging triggers well-established concepts such as laches and estoppel. Those equitable principles prevent the party engaging in the sandbagging from benefiting from the conduct. These rules help to protect the court, the litigants, and the legitimacy of the process more generally.

In the election context, by contrast, sandbagging can occur without a well-established response. In part, this discrepancy reflects the complicated nature of electoral sandbagging, which can occur not only before a judge but also before a range of other actors. It also reflects the challenges posed when sandbagging is attempted not by a single participant, but rather between multiple participants loosely working together. And it reflects the bewilderment induced when actors engaged in sandbagging make quasi-legal arguments but also seem prepared to tolerate or even rely on a breakdown in the rule of law in order to achieve their ends.

Recognizing the overlap between these practices and a more familiar phenomenon—sandbagging—helps to provide clarity. Both inside and outside the courtroom, sandbagging is a problem. It undermines the efficacy and efficiency of

233. *See supra* note 51 and accompanying text.

the affected process, and it threatens to produce unfair outcomes as well as to delegitimize the process in question.

Participants in the electoral process therefore should work to resist these efforts. Simply recognizing the problem—framing the tactics as "sandbagging"—may help to convey both the underhandedness of the practice and the scope of the threat posed. Careful consideration of forum also may provide relief. Finding ways of funneling sandbagging-related disputes into the courts may help to ensure that the tactic gets what it deserves: namely, application of equitable principles designed precisely to resist and deter these sorts of efforts. Finally, responding to sandbagging, whenever possible, with intolerance—even when that intolerance has unwanted side effects—should help, at least on the margin, to establish and maintain appropriate incentives going forward. These efforts to counteract electoral sandbagging should not occur in isolation but rather as part of broader reforms seeking to ensure well-functioning elections in the United States.