

# THE FUTURE OF VOTING RIGHTS

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## PREFACE

On November 13, 2013, the *Journal of Legislation and Public Policy* and the New York University School of Law Office of Development and Alumni Relations co-sponsored the 2013 Law Alumni Association (LAA) Annual Fall Conference, titled “The Future of Voting Rights.” The Fall Conference served as *Legislation’s* annual symposium. Richard Pildes, Sudler Family Professor of Constitutional Law at NYU School of Law moderated the conference. Panelists included Robert Bauer, Professor of Practice and Distinguished Scholar in Residence at NYU School of Law, and co-chair of the Presidential Commission on Election Administration; Julie Fernandes, senior policy analyst at the Open Society Foundations; Benjamin L. Ginsberg, partner at Jones Day and co-chair of the Presidential Commission on Election Administration; Dale Ho, director of the ACLU Voting Rights Project; Samuel Issacharoff, Bonnie and Richard Reiss Professor of Constitutional Law at NYU School of Law; Spencer A. Overton, professor of law at George Washington University Law School; and Myrna Pérez, Deputy Director of the Democracy Program at the Brennan Center for Justice.

The conference followed on the heels of the Supreme Court’s decision in *Shelby County v. Holder* to strike down parts of the Voting Rights Act as unconstitutional, and examined the potential ramifications of the decision throughout political and voters’ rights communities. Panelists further discussed other hurdles they have identified in ensuring fair and full voting in United States elections.

We are proud to present the collected remarks from this evening to you in this volume of the *Journal of Legislation and Public Policy*. As we have seen, issues with the Voting Rights Act have continued to percolate through legal and political systems throughout the nation. As panelists predicted during the conference, there have been rapidly escalating issues revolving around various restrictive measures in voting systems, and significant political activity has been mobilized around the Court's decision. As further developments in the voting rights area occur, *Legislation* looks forward to providing current and meaningful scholarship and commentary.

*Legislation* wishes to thank the New York University School of Law administration for their partnership in presenting the conference. We also thank the panelists who kindly agreed to have their remarks printed. Remarks appear in the order they were delivered. The remarks below have been transcribed from the recording of the conference and, where appropriate, edited to better suit the written form.

Without further ado, we present "The Future of Voting Rights."

Alessandra Baniel-Stark  
*Editor-in-Chief*

#### INTRODUCTORY REMARKS OF RICHARD PILDES

*Richard Pildes\**

There are two broad sets of issues that we are going to talk about here tonight that concern voting rights issues in the United States both today and going forward. The first is the constant embarrassment we seem to be having with respect to our voting systems in elections. This time, in the 2012 elections, it was the embarrassingly long lines—seven or eight hours—in places like Virginia and Florida.<sup>1</sup> The question is: why can't we get this right, especially in a country that seems to be very good at delivering mass-volume consumer goods or services in the private sector?

The second issue we are going to focus on is the Supreme Court's very high-profile decision in *Shelby County* this past June.<sup>2</sup>

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1. Jeremy W. Peters, *Waiting Times at Ballot Boxes Draw Scrutiny*, N.Y. TIMES, Feb. 4, 2013, <http://www.nytimes.com/2013/02/05/us/politics/waiting-times-to-vote-at-polls-draw-scrutiny.html>.

2. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

*Shelby County* held that a part of the Voting Rights Act, in place since 1965, was unconstitutional.<sup>3</sup> Section 5 had singled out particular states and counties in the country, particularly in the South, and placed them under a unique regime of federal control in which they could not change anything about their voting systems without getting federal approval.<sup>4</sup> So: What are the likely consequences of this decision? What are the consequences already? And if Congress is going to respond to the Court's decision by getting back into the picture—either now or some point down the road—what are the forms, ideally, that legislation to protect the right to vote ought to take today?

We couldn't have a better panel to discuss these issues than we have here this evening.

REMARKS OF ROBERT BAUER

*Robert Bauer\*\**

On the subject of the commission, Ben will speak from his perspective about the charges under the executive order pursuant to which the commission was established. I want to make a few preliminary observations influenced somewhat—though we can't talk about where we're headed as a commission for now, we are still collecting information, we will be engaging in extensive deliberations on what our recommendations will be—by what we have seen to date in our travels around the country, and our conversations with a wide variety of scholars, experts, groups, and the general public. At every public meeting, we have an open mic where the public can come forward and offer perspectives as voters on the electoral process.

I want to talk about what lines mean—it isn't the only issue we are addressing but in some respects it is quite representative—and then discuss what is changing in the field of election administration, as far as I can tell from what we've learned so far in the commission.

Lines are a problem where they occur. There's no question about it. It came to the attention of the press, the voting public, and eventually the political parties, the candidates, and the President, who discussed it in the State of the Union Address. Lines are one of a number of problems. There are a variety of issues that contribute to lines; it is

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3. *Id.* at 2615.

4. *Id.* at 2618 (citing Voting Rights Act of 1965, § 4(a), 79 Stat. 438).

\*\* Professor of Practice and Distinguished Scholar in Residence, New York University School of Law; Co-chair of the Presidential Commission on Election Administration.

not a uni-causal phenomenon. Lines can be a product of mismanagement of the polling place, very heavy flow, a very long ballot. They can be a function of problems with inadequate resources, or how resources are deployed—as with both limited machinery or machinery that isn't functioning the way that it should. Lines seem simple, but are also an example of an issue which is quite complicated. Lines bring into the discussion a range of questions about the quality of election administration in the United States.

We are discovering as we go around the country, speaking for myself, that there is remarkable agreement between parties and among various stakeholders about some of the fundamental problems that have affected the electoral process, impeded the full exercise of the franchise, and that disrupt the voting experience. That is reassuring to us, because it means we have heard testimony in an environment that is remarkably free of the political conflicts we see raging elsewhere; testimony that is focused on substance, fact, management, and other best practices. We can focus on election administration as public administration and see the voting experience improved by better public-administrative practices.

Part of what is driving the conversation is voter expectation across the country; Democratic, Republican, Independent, or none of the above. Voters, after all, live in a world in which they are used to having goods and services provided to them in a certain way. We heard just recently about Amazon entering into an agreement with the United States Postal Service to deliver packages on Sunday. This is a country now where people expect speed and efficiency and convenience. That is catching up with the electoral process. A system that once might not have put so much emphasis on customer service is beginning to do more of that.

Professionalism in the provision of this customer service is becoming much more of a watch-word and has had a considerable amount to do with the way the Commission was constructed by the President: It consists of—as Ben and I like to say—the two “political hacks” at the top; below us are experts in election administration and senior executives of companies that have built a reputation of being very attentive to ways in which to better deliver services within their industry. So there may be a development in the culture that is beginning to merge with what we expect as a matter of democratic theory. What we think about the right to vote and how it should be delivered might well, slowly but surely, be undergirded and powered forward by broader developments in what voters as citizens expect in the voting process in the same way they expect it in other aspects of their lives.

## REMARKS OF BENJAMIN L. GINSBERG

*Benjamin L. Ginsberg\**

Good evening. First of all, thank you very much for having me here to discuss the first of your issues on the panel, about the work of the Presidential Commission. It's a special treat to be up here with my very good-looking colleague Bob Bauer to talk about this. It really has been a pleasure and a joy to travel around the country to deal with these issues, that are essentially the nonpartisan issue of all legally permissible voters being able to cast their ballots without undue hardships or accessibility issues. It's a very important bipartisan issue, so I do appreciate the opportunity for us to be able to talk further about it with all of you. Let me also echo what Bob says about NYU, and about Rick and Sam and the program that they put together here. It really is a terrific program that really has benefited not only thought and critical thinking in the area, but also all the students who get to take their courses. It is particularly great to be here on this panel.

Bob mentioned that the President, in his executive order, charged us with looking at a number of issues.<sup>5</sup> "Long lines" was certainly the marquee issue, and a problem, as Bob noted, that we've addressed. We are also looking at such things as poll workers, and the recruitment and training of them—really an interesting and challenging problem around the country; voting accessibility for uniformed and overseas voters—the notion that people serving overseas or living overseas should have undue hardships in casting their votes is as anti-thetical as barriers at a polling place to being able to vote. We are looking at voter rolls and poll books, clean registration rolls, the poll books that are actually used in the polling place. There is certainly an overlay with the long line issue—on the ability to move people through in an easy and coherent fashion. Voting machine capacities: you all here in New York, in your primary, had to use lever machines—which, honest to God, we thought were done and gone after Florida, but it was great to see them kind of resurrected for your primary here—but there is an issue, I'll talk a little bit about, on machines. Ballot simplicity, ballot design, provisional ballots, absentee ballots, and the adequacy of contingency plans for national disasters are also issues. So that's a pretty full plate of issues with regard to

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\* Partner at Jones Day; Co-chair of the Presidential Commission on Election Administration.

5. Establishment of the Presidential Commission on Election Administration, Exec. Order No. 13,639, 78 Fed. Reg. 19,979 (Mar. 28, 2013).

people being able to go into polling places and cast and count their ballots.

Bob mentioned our Commission. It really is a group that I think has given us considerable insights—the five professional election administrators and then the private sector folks. We have the Vice President of Theme Parks at Disney on our panel, because who knows how to deal with lines better than Disney? Bob trying to hold deliberative meetings in Dumbo's Flying Circus was really kind of something to behold, but it goes with the territory; they have some very good techniques for moving people through. We have the Chief Executive Officer in North America at Deloitte & Touche on our panel, and the General Counsel of the New York Public Library, who was formerly the General Counsel at Allstate. And these folks, plus the five state and local election administrators, really have given the two “political hacks” a great deal of insight on the issue.

So to frame a little bit of what we've seen as we've gone about, and are still going through the process of deciding the precise recommendations that we'll make regarding best practices: If you were going to design a voting system for a country, it would not be what we have in the United States. That's a fundamental issue. There are over 8,000 jurisdictions with over 8,000 individuals who have some sort of authority, in and of themselves, about the way ballots are cast and counted. You will be surprised to know, after we've gone around the country and met with many, many state and local elections officials, that the quality is somewhat uneven between them. And so, if you are looking for similar ballots being able to be cast and counted the same way, there is an inherent issue to be dealt with in the fact that there are over 8,000 jurisdictions with independent authority. The folks who go out and serve the polling places on election days are volunteers, they are not professionals. They work maybe two days a year, really more likely two days every other year. And that's not a whole lot of training, and the amount of training that they get generally amounts to a couple of hours. And, to deal with many of the problems on the list that I mentioned, that's something that we have to deal with as well.

Bob touched on the technology. The technology has not come close to keeping up with where we are today, as a society, in terms of the machines. Not only that, but also it's extremely difficult for election officials to find machines with which they are satisfied in terms of their capabilities. We have not met one election official who has said to us: “We love our voting system. It is a terrific voting system; it does everything we want.” Not one. We've talked to the machine manufacturers: “Why don't you make better machines?” The answer is the

market is so diverse—because there are over 8,000 jurisdictions—that it’s tough to be able to sell to the market. On top of that, we have a certification process for new technology that was written in 2005<sup>6</sup> and can’t be updated because, under the current statutory scheme, certification is left to the Election Assistance Commission,<sup>7</sup> a body that has zero of its five commissioners filled, no nominations in the pipeline, and no appetite in Congress to name the commissioners. So, even if a locality wants to find a new technology, there are sort of inherent problems in the system.

So, that’s some of the fun that Bob and I are having. We look forward to reading our report as much as you do. And, thank you again for having us here. It really is an issue that Bob and I—as partisan hacks, who first met on opposite sides of a House recount in 1982—are determined to make a bipartisan effort to try and make better. Thank you.

REMARKS OF MYRNA PÉREZ

*Myrna Pérez\*\**

Bienvenidos. Welcome. In addition to being at the Brennan Center, which is proudly affiliated with NYU, I am also an adjunct professor here. It is very encouraging and heartwarming to have both former professors and current students in the same room.

I want to discuss two things with respect to the future of the Voting Rights Act. I want to look at legislative trends so we can see what state legislatures around the country are doing, and then some on-the-ground activity.

It’s very important to remember that going into 2012 the predominant narrative was that state legislatures were rushing to pass legislation to restrict voting rights.<sup>8</sup> This was indeed very significant. We had more than 180 bills that would restrict voting rights in some way be introduced in 41 state legislatures.<sup>9</sup> These restrictions included cutbacks to early voting, stringent photo identification laws, restrictions

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6. U.S. ELECTION ASSISTANCE COMM’N, 2005 VOLUNTARY VOTING SYSTEM GUIDELINES, VOLUME I (2005), available at <http://www.eac.gov/assets/1/AssetManager/2005%20voluntary%20voting%20system%20standards%20volume%201.pdf>.

7. 42 U.S.C. § 15322 (2012) (outlining the duties of the Election Assistance Commission).

\*\* Deputy Director, Democracy Program, Brennan Center for Justice.

8. *Election 2012: Voting Laws Roundup*, BRENNAN CENTER FOR JUSTICE, (Oct. 11, 2012), <http://www.brennancenter.org/analysis/election-2012-voting-laws-roundup>.

9. *Id.*

on rights for people with criminal convictions, requiring documentary proof of citizenship to register to vote, barriers to community groups trying to register voters, and other barriers in front of the ballot box.<sup>10</sup> When all of the dust had settled, we had more than twenty-five laws and two executive actions pass in more than nineteen states that would have made it harder for many Americans to vote.<sup>11</sup> But that was not what many voters experienced on election day. And that was because a great number of people, including people on this panel, stepped in and stepped up on behalf of voters. We had voters repealing legislative acts and the Department of Justice stepping in in some cases.<sup>12</sup> We had individual organizations and voters defend against some of these restrictions. On election day, we had far fewer of these restrictions in place actually affecting what voters experienced.

The 2013 experience was considerably different. Then, we only had ninety restrictions around the country, only in thirty-three states.<sup>13</sup> Ninety is half of what we saw in 2012. Granted, it's still not done, and we are worried about some bills being passed in Ohio and some other places.<sup>14</sup> But it looks very different when you compare it to other positive and expansive legislation we've seen being considered. We have seen 233 pieces of legislation that would expand access to the ballot box in forty-five states.<sup>15</sup>

Introduction is not a perfect measure of where the country is going. When you look at the passage rate, there is more parity. We had about eight states pass nine restrictive bills and ten states pass thirteen bills that would expand the franchise.<sup>16</sup> There are a couple things we can take from this: Cynically, we can say that many of the state legislatures that were going to pass restrictive legislation have already done so. There's an opportunity in that because now we can focus on the kind of bipartisan bills that might allow for more voters to have access. We saw some of this in a state like Virginia, which passed both restrictive and expansive legislation.<sup>17</sup> It also means that we need to continue the effort to make restricting the right to vote toxic. There are many people who have responded to these restrictions, and have stood

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10. *Id.*

11. *Id.*

12. *Id.* ("In the past two years, vetoes, referendums, court decisions, or the Department of Justice have blocked or blunted restrictive measures in 14 states.")

13. *Voting Laws Roundup 2013*, BRENNAN CENTER FOR JUSTICE (Dec. 19, 2013), <http://www.brennancenter.org/analysis/election-2013-voting-laws-roundup>.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*



up for those rights and insisted that legislators listen to them and do their part to make sure we have a free and fair election system.

I think it's important that we have a clear-eyed view about what is at stake and what we can expect to see in the future. When we are looking at threats and opportunities, we have to remember that in many states we are under a different regime. The *Shelby County* decision could be a game-changer in a number of ways, because we don't have what has been universally hailed the most effective piece of protection against discrimination in voting. That means that some jurisdictions which had previously been prevented from implementing discriminatory voting practices will have fewer burdens and hurdles to face in doing that.

In this new world it's a little bit too early to say that we have seen trends. But there are some observations, some things we can look at on the ground and see that the practice of elections are going to be different, and the jurisprudence around election law is going to change. I'll only look at a few observations—again, not trends until more time has passed. One thing that I think is worth observing is whether or not we were right about many of the things that Section 5 did. For example, one of the primary reasons that people thought Section 5 was so effective was because it prevented case-by-case litigation in situations in which a discriminatory practice was prohibited in one instance and then would come up in another. Justice Ginsburg called it a multi-headed hydra.<sup>18</sup> There are a lot of resources and time and effort being spent in this kind of litigation, trying to stop these discriminatory practices. In two states—which were previously covered by Section 5, North Carolina and Texas—there is a major piece of legislation that is being challenged, and there have been a bunch of lawsuits. There are no fewer than four lawsuits happening in North Carolina to challenge the same omnibus legislation and there are no fewer than three in Texas, not including those that have already been consolidated. So, the idea of having a mechanism like Section 5 to prevent the waste of resources and extra litigation is something that history might prove that we were right about.

Another interesting thing to observe is how other tools in the Voting Rights Act are going to be used. There's a little-known provision in the Voting Rights Act known as the pocket trigger or the bail-in provision.<sup>19</sup> It allows a court to subject a state to preclearance. It can be done in a variety of fashions on a case-by-case basis. It's used

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18. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2633 (2013) (Ginsburg, J., dissenting) (“Early attempts to cope with this vile infection resembled battling the Hydra.”).

19. Voting Rights Act of 1965, 42 U.S.C. § 1973c (2012).

as a form of relief, it's called "3c" relief.<sup>20</sup> Some of the studies on this have indicated that this has been sparingly used in the past. This makes sense, right, because we had Section 5. We didn't need to be pulling in a bunch of jurisdictions with this pocket trigger. But in 2010, there was a study published in the *Yale Law Journal* that indicated that since 1972, we've had nine jurisdictions be subject to the preclearance provision through the pocket trigger.<sup>21</sup> Thus far, only a few months after *Shelby County*, we've had at least six cases request this kind of relief. We don't know if all of them are going to get it, but we could possibly observe that some of the jurisprudence around voting rights could focus around this pocket trigger.

The other observation—which again is too early to call a trend—is that the Department of Justice is not the first one in in a lot of these cases. The Department of Justice had an incredibly important role in the preclearance regime. It was the one that was responsible for the administrative procedure. Defendants did have the option of going through court system, but the vast majority of cases were decided through the DOJ's administrative procedure. Now that we have no functioning Section 5, there are a lot of private groups that are out there filing these cases first, and the Department of Justice is having to come in. We could have lots of questions about strategies regarding races to the courthouse and having to build a record and those sorts of things. But I think the question and role of the DOJ is something we all should be looking at.

Finally, there is unfortunately increasing evidence that the kinds of changes that we thought would happen, that would be pernicious and harmful to minority voters, are indeed going to happen. For example, the concern that there would be jurisdictions that would try to revive changes that were blocked by Section 5 previously has happened. We've had Texas. Texas is a case that I'm involved in; their voter ID law was previously stopped through the preclearance law, and now they're implementing it.<sup>22</sup> We have cases where Section 5 was thought to deter private bad acts. In North Carolina, their omnibus bill has a number of different components, but one of the legislative

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20. *Id.*

21. Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 *YALE L.J.* 1992, 2010 (2010) ("section 3 has bailed-in two states, six counties, and one city").

22. *Texas v. Holder*, 888 F. Supp. 2d 113, 115 (D.D.C. 2012), *vacated*, 133 S. Ct. 2886 (2013); Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, *N.Y. TIMES*, Jul. 5, 2013, <http://www.nytimes.com/2013/07/06/us/politics/after-Supreme-Court-ruling-states-rush-to-enact-voting-laws.html> (discussing Texas's decision to implement law previously blocked by *Texas v. Holder*).

leaders said, effectively, “we were just going to pass a voter ID bill but now that we have no Section 5 we are just going to load it up.”<sup>23</sup> We’ve had bills that laid dormant and now are being revived. Alabama had passed a photo ID law, they had subjected it to preclearance and withdrew it. Now *Shelby County* happened, it had never been blocked because they withdrew it, and now it’s being enacted.<sup>24</sup> We expect to see these kinds of changes happening more and more often. It’s especially important to remember that when we combine this with legislative trends; many of the former Section 5 jurisdictions don’t have active legislatures right now, but they will. In January we can expect that ten of the jurisdictions that were subject to Section 5 will have new legislatures and we need to watch what they’re doing.

#### REMARKS OF DALE HO

*Dale Ho\**

Thank you so much for having me here tonight. It’s really an honor to appear on a panel with such a distinguished group of speakers. I’m going to talk very briefly about how we can expect the world to be different after *Shelby County* in one respect. I want to try to address that issue through two questions: What did litigation look like under Section 5; and now, what is voting litigation going to look like without Section 5?

Just to briefly recap: Section 5 required certain jurisdictions with the worst histories of discrimination in voting in the country to obtain preclearance, or approval, before implementing any changes to their voting laws, either from the Department of Justice or from a district court in Washington, D.C.<sup>25</sup> Now those jurisdictions can implement those changes to their voting laws, and they can only be challenged by victims of discrimination after the fact, perhaps after a tainted election has occurred.

So what did litigation look like under Section 5? I want to talk about this through the lens of two high-profile cases from 2012 which I had the privilege of participating in in small ways: litigation over

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23. Laura Leslie, *NC Voter ID Bill Moving Ahead with Supreme Court Ruling*, WRAL, Jun. 25, 2013, <http://www.wral.com/nc-senator-voter-id-bill-moving-ahead-with-ruling/12591669/>.

24. Kim Chandler, *Alabama photo voter ID law to be used in 2014, state officials say*, AL.COM (June 25, 2013, 5:07 PM), [http://blog.al.com/wire/2013/06/alabama\\_photo\\_voter\\_id\\_law\\_to.html](http://blog.al.com/wire/2013/06/alabama_photo_voter_id_law_to.html).

\* Director of the ACLU Voting Rights Project.

25. Voting Rights Act of 1965, 42 U.S.C. § 1973c (2012).

Texas's voter ID law<sup>26</sup> and litigation over cutbacks to Florida's early voting period.<sup>27</sup> I want to give a couple of caveats before I talk about this. These two cases, although they're pretty interesting I think, aren't really representative of the bulk of what Section 5 actually did. Most laws that were stopped under Section 5 were not statewide election laws but actually were laws adopted at the county or local level. Eighty percent of Section 5 objections issued by the Department of Justice, for instance, were not to statewide election laws, and most Section 5 activity actually occurred in the redistricting context rather than in the registration or ballot access context.<sup>28</sup> These kinds of cases are referred to sometimes in the academic literature as "vote dilution" cases, as opposed to "vote denial" cases.<sup>29</sup> That is, they're cases that concern the weight of voting power that minority communities have under a particular redistricting arrangement and whether that redistricting arrangement is fair to a minority community.<sup>30</sup>

I'm going to talk about a different kind of case: vote denial cases, which are about basic access to registration and the ballot itself. I want to focus on these cases, even though they're not all that representative of Section 5, because they're high-profile cases and I would think they draw a lot of attention. They affect a lot of people, maybe tens of thousands or even hundreds of thousands of voters; unfortunately, I think—as Myrna referred to earlier—these kinds of suppressive voter laws appear to be the wave of the future. What Florida did with its early voting period has been replicated this year, unfortunately, in North Carolina.<sup>31</sup> Texas's voter ID law, which was blocked under Section 5,<sup>32</sup> was replicated in Texas after Section 5 was struck

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26. *Texas v. Holder*, 888 F. Supp. 2d 113, 115 (D.D.C. 2012), *vacated*, 133 S. Ct. 2886 (2013).

27. *Florida v. United States*, 885 F. Supp. 2d 299, 302 (D.D.C. 2012).

28. See U.S. DEP'T OF JUSTICE, *Section 5 Objection Letters*, [http://www.justice.gov/crt/records/vot/obj\\_letters/index.php](http://www.justice.gov/crt/records/vot/obj_letters/index.php) (last visited Aug. 25, 2014). One hundred and fifty-eight out of 1089 Section 5 DOJ letters have been directed towards states. A vast majority of the letters relate to redistricting. See *id.*

29. See, e.g., Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691 (2006).

30. *Id.*

31. Voter Information Verification Act, N.C. GEN. STAT. ANN. § 163 (West 2014).

32. *Texas v. Holder*, 888 F. Supp. 2d 113, 115 (D.D.C. 2012), *vacated*, 133 S. Ct. 2886 (2013).

down,<sup>33</sup> and unfortunately in some other places.<sup>34</sup> These kinds of laws seem to have a larger effect on minority voters.<sup>35</sup>

The Florida early voting case was a case in which Florida sought to reduce its early voting period from fourteen days to eight days, including eliminating voting on the last Sunday before election day.<sup>36</sup> In the 2008 election, over half of African American voters in Florida utilized the early voting period, as compared to about a quarter of white voters.<sup>37</sup> In particular, on the last Sunday before the election, African American voters made up one-third of the electorate.<sup>38</sup> The evidence in that case showed that for some voters with difficult schedules, the choice really is between voting early or not voting at all. The board found that this burden fell disproportionately on minority voters—African Americans in particular—and initially blocked it. Eventually Florida was permitted to go ahead—I’m abridging some of the details here just for the sake of simplicity—but Florida was ultimately permitted to reduce the number of early voting days, so long as it maintained the same number of early voting hours. So the early voting period got truncated, but the number of hours on which people could vote on days during the early-voting period actually expanded.

Well, how did that work out for Florida? Florida experienced the longest wait times in the country on election day in 2012, with many people casting ballots after the President’s victory speech.<sup>39</sup> One civil engineer at the Ohio State University calculated that, in his estimation, 200,000 voters gave up in Florida due to frustration with the lines, which were admittedly not due to the cut in early voting alone, but

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33. Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, N.Y. TIMES, Jul. 5, 2013, <http://www.nytimes.com/2013/07/06/us/politics/after-Supreme-Court-ruling-states-rush-to-enact-voting-laws.html> (discussing state officials’ decision to immediately begin enforcing voter identification laws following the Supreme Court’s decision to strike down Section 5 of the Voting Rights Act and vacate the decision in *Texas v. Holder*).

34. See *Voter ID Laws Passed Since 2011*, BRENNAN CENTER FOR JUSTICE (Nov. 12, 2013), <http://www.brennancenter.org/analysis/voter-id-laws-passed-2011>.

35. Factsheet, ACLU, OPPOSE VOTER ID LEGISLATION (July 21, 2011), available at [https://www.aclu.org/files/assets/aclu\\_factsheet\\_on\\_voter\\_id\\_legislation\\_7\\_2011.pdf](https://www.aclu.org/files/assets/aclu_factsheet_on_voter_id_legislation_7_2011.pdf) (“Voter ID laws have a disproportionate and unfair impact on low-income individuals, racial and ethnic minority voters, students, senior citizens, voters with disabilities and others who do not have a government-issued ID or the money to acquire one.”).

36. H.B. 1355, 2011 Leg., Reg. Sess., 2011 Fla. Laws 2011-40.

37. Erika L. Wood, *Florida. How Soon We Forget.*, N.Y. TIMES, Apr. 5, 2012, <http://campaignstops.blogs.nytimes.com/2012/04/05/florida-how-quickly-we-forget/>.

38. *Id.*

39. Amanda Terkel, *Florida Early Voting Fiasco: Voters Wait for Hours at Polls as Rick Scott Refuses to Budge*, HUFFINGTON POST (Nov. 4, 2012), [http://www.huffingtonpost.com/2012/11/04/florida-earlyvoting\\_n\\_2073119.html](http://www.huffingtonpost.com/2012/11/04/florida-earlyvoting_n_2073119.html).

may have been contributed to by it.<sup>40</sup> One study by a professor at Reed College, Paul Gronke, who is maybe the leading expert on early voting in the country, concluded that there was a substantial drop-off among African American voters in 2008 who used the early voting period as compared to all other voters in 2012.<sup>41</sup> So even with Section 5, we experienced some problems.

Texas's voter ID law is another example. This is the law that permits you to vote in person only if you have one of a few very limited forms of government-issued photo ID.<sup>42</sup> So a state-issued driver's license, you're good. A state-issued concealed weapons permit, you're good. A state-issued student ID card from the University of Texas, not so good. If the issue is fraud, and the issue is that we need to make sure these people have been identified properly by the state, the law doesn't make all that much sense. If the law is intended to instead try to change the shape of the electorate, it starts to make a little bit more sense. So here's what the evidence in that case showed: One-third of counties in Texas don't have a Department of Public Safety, which is their equivalent of a DMV which issues state-issued IDs, which meant that for some Texans it would be a round trip of over 100 miles to get to one of these offices in order to obtain an ID.<sup>43</sup> These kinds of burdens fell disproportionately on poor voters, and minority voters in Texas are disproportionately poor, so the Texas photo ID law was blocked by the federal district court under Section 5.

So what is this kind of litigation going to look like without Section 5? I think it's going to differ in at least four respects. First, the problem is going to be bigger and badder and in more places. Myrna referred to North Carolina, which had been considering a voter ID bill at the time of the *Shelby County* decision. The week that the Supreme Court struck down Section 5, a state senator in North Carolina said, "Now we can go forward with the full bill."<sup>44</sup> So instead of just voter

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40. Scott Powers & David Damron, *Analysis: 201,000 in Florida didn't vote because of long lines*, ORLANDO SENTINEL, Jan. 29, 2013, [http://articles.orlandosentinel.com/2013-01-29/business/os-voter-lines-statewide-20130118\\_1\\_long-lines-sentinel-analysis-state-ken-detzner](http://articles.orlandosentinel.com/2013-01-29/business/os-voter-lines-statewide-20130118_1_long-lines-sentinel-analysis-state-ken-detzner) (citing a study conducted by Ohio State University professor Theodore Allen).

41. Paul Gronke & Charles Stewart III, *Early Voting in Florida* 6 n.15 (MIT Political Sci. Dep't Research Paper No. 2013-12), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2247144](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2247144).

42. BRENNAN CENTER FOR JUSTICE, *supra* note 34 (summarizing Texas's voter identification law requirements).

43. Thomas Beaumont, *Primaries offer 1st major test of voter ID laws*, ASSOCIATED PRESS, Feb. 28, 2014, <http://bigstory.ap.org/article/primaries-offer-1st-major-test-voter-id-laws>.

44. Leslie, *supra* note 23.

ID, they followed in Florida's footsteps and cut their early voting period by a week. They ended same-day registration, which is a method of access that about ten states in the country have. Those states have on average ten percentage points higher turnout than states without same-day registration. They ended pre-registration for teenagers. And there was a host of other not-so-goodies—"baddies," I guess, is what I would call them. Now we're litigating more issues than we were litigating before. It would have just been voter ID; now it's this monster bill.

We see things like Arizona implementing a dual registration system, where if you use the federal voter registration form in Arizona you'll be permitted to vote in federal elections but not in state elections.<sup>45</sup> You actually have to use a separate form now in order to do that. The last state that had a dual registration system was Mississippi. It enacted it in the 1890s.<sup>46</sup> It did so with the express purpose of making it harder for African Americans to vote. So Arizona is reviving a sort of ignominious history of dual registration systems, and it's been replicated by another state—Kansas is now doing it, too.<sup>47</sup> So we have a bigger and badder problem.

Second problem: the timing of the remedy is different. Obviously, before, Section 5 blocked laws before they were implemented. Now we have to litigate after the fact, and the speed of these cases is going to be quite different. When Texas and Florida sought to make these changes to their voting laws, they were given expedited litigation schedules out of due respect for state sovereignty. I can guarantee you that we will not get the same level of deference from courts when we're protecting the individual right to vote, which is apparently less valuable than state sovereignty.

The third way in which these laws will be different: the burden of proof is obviously different. Texas and Florida had to prove that their laws were not discriminatory, and bore the burden of proof in those cases. Now plaintiffs will have to prove that those laws are, in fact, discriminatory.

And a fourth way in which these cases are going to be different: the substantive standard for establishing liability is quite different

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45. Reid Wilson, *Arizona law may restrict voting in local elections*, WASH. POST, Oct. 9, 2013, <http://www.washingtonpost.com/blogs/govbeat/wp/2013/10/09/arizona-law-may-restrict-voting-in-local-elections/>.

46. Zachary Roth, *With eye on 2014, GOP ramps up war on voting*, MSNBC, Nov. 23, 2013, <http://www.msnbc.com/msnbc/gop-war-voting-sweeps-us>.

47. Joshua Lott, *2 States Plan 2-Tier System for Balloting*, N.Y. TIMES, Oct. 11, 2013, <http://www.nytimes.com/2013/10/12/us/2-states-plan-2-tier-system-for-balloting.html>.

under Section 2 than it was under Section 5. The Florida and Texas cases were pretty simple. You show that the law imposes a burden and that burden falls disproportionately on minority voters and essentially you can win that case under Section 5, which prohibited laws that have a retrogressive effect on minority voters, that leave minority voters in a worse position than they were before that law.

Section 2's standard is quite murkier. It prohibits laws that, under the totality of the circumstances, interact with social and historical factors such that minority voters have less opportunity to participate in the political process and elect candidates of their choice.<sup>48</sup> If you are confused, don't worry—so am I. We are very confused about how exactly Section 2 is going to be applied in these kinds of vote denial cases. The standard for Section 2 in redistricting cases is actually quite clear, but the range of factors we're going to have to show in these kinds of cases under Section 2 of the Voting Rights Act is less clear. There's very little case law on this: hundreds of Section 2 cases on Westlaw and Lexis but fewer than forty of them deal with vote denial type schemes and only, I think, eighteen of them were successful.

So we have an uphill battle ahead of us, but at least it's exciting. Thanks for your time.<sup>49</sup>

#### REMARKS OF JULIE FERNANDES

*Julie Fernandes\*\**

Good evening everyone and thank you, Rick, for the introduction. I also want to thank the *Journal of Legislation and Public Policy*

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48. Voting Rights Act of 1965, 42 U.S.C. § 1973(b) (2012) (“A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.”).

49. See Press Release, ACLU, ACLU Files Lawsuit Challenging Wisconsin's Unconstitutional Voter ID Law (Dec. 13, 2011), available at <https://www.aclu.org/voting-rights/aclu-files-lawsuit-challenging-wisconsin-unconstitutional-voter-id-law>; Press Release, ACLU, Federal Court Strikes Down Wisconsin Voter ID Law (Apr. 29, 2014), <https://www.aclu.org/voting-rights/federal-court-strikes-down-wisconsin-voter-photo-id-law> (this decision was handed down after the symposium was held).

\*\* Senior policy analyst, Open Society Foundations.



for inviting me. It is a privilege to be here with my colleagues, many of whom I speak to a lot. I'm going to talk about the Voting Rights Act, what I think we lost, what I think a new voting rights act could look like, and then some of the challenges that we have with both Congress and the courts in being able to enact something and sustain it that would actually fill the gap left after we lost *Shelby County*.

My colleagues have talked a bit already about what we lost, but I want to frame it a bit for my purposes here. So, when we lost preclearance, what was declared unconstitutional was the coverage formula which determines which jurisdictions are subject to the preclearance mechanism.<sup>50</sup> So we still have preclearance, it still exists as procedure,<sup>51</sup> but nothing is being fed into it. When we lost that, we essentially lost preclearance all the way around. The main thing that Section 5 did was stop discrimination from being implemented and apply ahead of time. Why is that a big deal? Because post-hoc remedies don't work very well in our world. In the world of elections, once an election happens it's over, no one cares. They only care to the extent that you can establish that whatever went wrong or actually affected the outcome. How hard is that to establish? Very. When the wrong that happened is that people were denied or deterred from the vote, it's almost an impossible thing to establish. In elections, unlike employment or housing discrimination, there's no money. You're not going to pay people damages. You're not going to give them the apartment. How do you give them their democracy back after the election? You don't. So under Section 5 we had this incredible power to stop discrimination from happening, and we don't have that anymore.

What else did we lose? We lost notice and disclosure. What am I talking about? Under the Section 5 regime, twenty-five percent of the country had to submit every voting change they wanted to propose to DOJ,<sup>52</sup> sometimes to the United States District Court of the District of Columbia, and tell them, "We're going to do this."<sup>53</sup> They had to do it ahead of time, and there was a process to decide whether it was retrogressive or whether it had a discriminatory purpose. But they had to tell them. And also part of the analysis in the Civil Rights Commission's decision was whether you had talked to minority community about this change and asked who they talked to. There was an affirmative obligation to tell the community, to tell us, to talk to them, and to

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50. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (declaring § 4(b) unconstitutional).

51. *Id.* ("We issue no holding on § 5 itself, only on the coverage formula.")

52. *Id.* at 2643.

53. Voting Rights Act of 1965, 42 U.S.C. § 1975a (2012).

be very transparent about the process. That is gone. It's as if the lights have been turned off, and we see nothing. Eighty-five percent of the objections that were interposed from DOJ were not at the statewide level but at the local level, school boards, county commissions, water districts, police juries, etc.<sup>54</sup> All the things that really matter to folks all over the country where they live, which is, so often, not partisan at all. It's about political power for different groups. In some parts of the country that breaks down along racial lines. It's so much better than it used to be—I wouldn't be standing here if it wasn't—but it's still not all the way there. So we lost notice and disclosure.

We also lost the deterrent effect of Section 5. If you know that someone is looking at you, how likely are you to do it in a way that's, kind of like, stinky? Low. If you have to tell people, talk to the minority community, then you might say, "Okay let's just not do that." I've talked to so many local legislators for almost, scarily, twenty years, in this context, and they are worried, "is this going to look okay?" Look at the transcripts in the South Carolina voter ID case. There were discussions among the legislators: "Can we do this?" etc. They don't have to talk like that anymore, do they? Because litigation is hard, expensive, rare.

I want to give an example of the world post-Section 5 to illustrate at the local level what might go out there, with the small indications we have. I have to mention Pasadena, Texas. 150,000 people. They used to have a city council of eight single-member districts. They did a referendum at the urging of the mayor to change it from eight to six single-member districts and two at-large districts, meaning the people would be elected from the entire city.<sup>55</sup> They did this in the face of a rapidly accelerating Latino minority population that's increased something like forty-something percent to sixty-something percent in ten years.<sup>56</sup> Their voter registration hasn't caught up, but it will. Many people are concerned that this change was made with a discriminatory purpose and are looking into whether it has a discriminatory effect. The majority is actually on tape saying, "We can do this now because we don't have to ask DOJ anymore." Not having to ask DOJ means

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54. U.S. DEP'T OF JUSTICE, *supra* note 28.

55. Cindy Horswell, *Pasadena Voters to Face Redistricting Measure*, HOUS. CHRON., Oct. 30, 2013, <http://www.houstonchronicle.com/news/politics/houston/article/Pasadena-voters-to-face-redistricting-measure-4941044.php>.

56. *Id.*; Phillip Martin, *Pasadena Redistricting Plan Discriminates Against Hispanics*, PROGRESS TEX. (Oct. 18, 2013), <http://progresstexas.org/blog/pasadena-redistricting-plan-discriminates-against-hispanics> ("In Pasadena, the Hispanic population has grown from 48.2% to 61.6% in the last decade. The Republican mayor of Pasadena is doing everything he can to stop that.").

we don't have to have an anti-discrimination check on what we're doing. That's all that that means; same in North Carolina. So they had a referendum that won by eighty-seven votes.<sup>57</sup> They are now making the change, full-stop. There are folks down there trying to decide whether they have a lawsuit, whether they can afford it. Two years later they might have a remedy. Two years later.

So what do we need? This is where I'm spending a lot of my time, working with colleagues, working with Congress to see a fix. The question isn't what the new trigger is. It's what the mechanism is that can protect minority voters. And can we pass it? And will the Supreme Court think it's constitutional? In that last bit, who knows? I don't know how many people have read *Shelby County v. Holder*, but it is stunning. I was very involved in the reauthorization of the VRA back in 2006. We spent all of our time worrying, "Bernie, Bernie." We thought we had a very strong argument that we didn't need to worry about it. We were all about congruence and proportionality. Rick Pildes testified before Congress. So did everyone and their mother, anybody you could find.

And then it turns out we forgot about equal sovereignty of the states. Why? Because who the hell is thinking about that? The doctrine of equal sovereignty of the states, which Justice Roberts says is the reason why the formula is unconstitutional.<sup>58</sup> The cases he cites are: two are from before the Civil War, the third is from the 1890s,<sup>59</sup> and the whole doctrine was developed in terms of thinking about admission of states to the union.<sup>60</sup> But that's why we lost. So who knows what's constitutional? I don't know.

We are still trying to decide if we need preclearance. We think yes. How can we make that happen? Is there a new formula? If there is, it's going to be narrow, not broad. It's a difficult question about

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57. Jeff Newpher, *Proposals pass, but voters split on redistricting question*, PASADENA CITIZEN, Nov. 10, 2013, [http://www.yourhoustonnews.com/pasadena/news/proposals-pass-but-voters-split-on-redistricting-question/article\\_90f0d207-5dc4-5c9d-8b31-bffb9452e5ec.html](http://www.yourhoustonnews.com/pasadena/news/proposals-pass-but-voters-split-on-redistricting-question/article_90f0d207-5dc4-5c9d-8b31-bffb9452e5ec.html) ("The tally: For 3,290 (51 percent) to Against 3,203 (49 percent), just an 87 vote difference.").

58. *Shelby Cnty.*, 133 S. Ct. 2612, 2623 ("Not only do States retain sovereignty under the Constitution, there is also a "fundamental principle of equal sovereignty" among the States.").

59. *Id.* (citing *Lessee of Pollard v. Hagan*, 3 How. 212, 223, 11 L.Ed. 565 (1845); *Texas v. White*, 7 Wall. 700, 725–726, 19 L.Ed. 227 (1869); *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892)).

60. *Id.* at 2648 (Ginsburg, J., dissenting) ("It pins this result, in large measure, to 'the fundamental principle of equal sovereignty . . . [i]n *Katzenbach*, however, the Court held, in no uncertain terms, that the principle applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.'").

how to get through this trick bag from Chief Justice Roberts about how you have to be both recent but look at history. Figure that out. We know that the Supreme Court doesn't like Congress, hates Congress, and doesn't like DOJ, hates DOJ, but loves courts! So what can we do with courts? Can we expand 3c,<sup>61</sup> in the way that Myrna was talking about under 3c, the pocket trigger? You have to find intentional discrimination before the court has the power to declare a preclearance remedy. So can you expand that? Can you give courts more authority to find other violations of the Voting Rights Act that could be predicates? Can you have other types of proceedings in court that you could argue for other jurisdictions to require preclearance? Can we have some kind of notice requirements on certain jurisdictions that are linked to discrimination? Can we somehow make changes to the VRA to get preliminary injunctions, to make it easier to stop voting changes from being implemented, some way to define irreparable harms differently in this context given that we're talking about elections and the cliff?

One other thing: Congress is always a hornet's nest and always bad. It's always bad and yucky. And in 2006, when we reauthorized the VRA it was George Bush, Republicans in the House and Senate, and we did it with overwhelming votes. Don't tell me it's bad out there, it's always ugly.

REMARKS OF SPENCER A. OVERTON

*Spencer A. Overton\**

Good evening. I want to start by thanking your dean, Trevor Morrison. Thank you. Congratulations. Trevor was a star in the White House and you should be thrilled that he is your leader here. I am honored to be here with Sam Issacharoff and Rick Pildes. They are leaders in the field in terms of the textbook, they are generous with comments and feedback, they are really stars around the world. You should be proud that they are yours. Also I'd like to thank the Alumni Association and the *Journal*.

When we talk about the future of voting rights, a group of scholars has emerged that argue that Congress should look beyond the race-discrimination approach and adopt largely race-neutral reforms for

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61. Voting Rights Act of 1965, 42 U.S.C. § 1973c (2012).

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federal elections.<sup>62</sup> The epicenter of this movement is right here at NYU. For example, Sam Issacharof, and Rick Pildes argue that instead of using the limited race-driven Fifteenth Amendment, Congress should use its power under the Elections Clause to pass general reform for federal elections.<sup>63</sup> Sam offers what he describes as a “non-civil rights vision” that would help insulate the right to vote from naked efforts at partisan manipulation.<sup>64</sup> To this end, in the aftermath of *Shelby County*, Sam has proposed that Congress require that states and localities disclose election changes for federal elections.<sup>65</sup> Rick has made a similar argument and contemplated uniform felon voting laws and uniform identification requirements for federal elections. They have been joined by a handful of other scholars.<sup>66</sup> I understand the shift. Race relations have improved dramatically in the last fifty years. Our nation has elected an African American president. The argument for general reform is that today’s primary problems are barriers like long lines. For other problems, like partisan manipulation, this argument would go that discrimination isn’t the primary problem.

I agree that it’s important to protect the voting rights of all Americans. I also agree that we should do what we can to include as many people as possible. I disagree to the extent that their work suggests that, in updating the Voting Rights Act, Congress should not focus on preventing voting discrimination or enforcing the Fifteenth Amendment. Selecting between the Fifteenth Amendment and the Elections Clause is a false choice. We can work to both prevent racial discrimination in voting in Congress while at the same time improving election administration in the states to help all Americans. There are three big reasons I have in terms of differing with them. First, voting discrimination persists and warrants attention. Second, generic reform is not an effective tool to stop discrimination, especially in local elections like school boards, county commissioners, and sheriffs. Third, while generic reform that benefits all Americans at first seems to be an

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62. Samuel Issacharoff, Comment, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013); Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741 (2006); Rick Pildes & Daniel P. Tokaji, *What Did VRA Preclearance Actually Do?: The Gap Between Perception and Reality*, ELECTION L. BLOG (Aug. 19, 2013, 4:39 AM), <http://electionlawblog.org/?p=54521>; Eric Posner & Nicholas Stephanopoulos, *Don't Worry About the Voting Rights Act*, SLATE (Nov. 20, 2012, 3:35 PM), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2012/11/supreme\\_court\\_and\\_section\\_5\\_of\\_the\\_voting\\_rights\\_act\\_it\\_s\\_ok\\_to\\_strike\\_it.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2012/11/supreme_court_and_section_5_of_the_voting_rights_act_it_s_ok_to_strike_it.html).

63. Issacharoff, *supra* note 62.

64. *Id.*

65. *Id.*

66. Pildes, *supra* note 62.

easier political sell in Congress, actually a Voting Rights Act that prevents discrimination attracts broader support.

So, first point, discrimination persists. In many parts of the country, many whites and people of color cast ballots for different candidates along racial lines. Political operatives try to benefit from this racialized voting by manipulating the election rules to lower the turnout or dilute the votes of racial and linguistic minorities. The problem is increasing in many areas, in part because of the growing number of Latino and Asian populations that threaten the political status quo. For example, in 2011, the Latino community passed fifty-six percent of the population in Nueces, Texas. The county officials responded by gerrymandering the election districts so Latinos would not dominate on the county commission.

Some people say that there's high minority turnout, so doesn't that mean things are a lot better? Well that's not a reason to surrender voting discrimination protections, because high turnout often triggers discrimination. For example, in 2010, African Americans in Augusta-Richmond, Georgia made up a larger percentage of turnout in November (fifty-two percent) than in July (forty-three percent). So what did they do? They moved the elections from November back to July where African American turnout was lower. Another example: in 2009, following Latino growth, officials in Runnels County, Texas, failed to put a single bilingual poll worker at any county polling place despite a court order that they do so. Ninety percent of Latinos in Runnels County speak Spanish at home.

My second argument is that generic election reform is not an effective barrier to discrimination. Some suggest that general election reform is the best way to protect minorities. For example, if African Americans stand in line twice as long on average as whites, if we just reduce the line time we'll be fine. The problem is that this does not stop politicians from manipulating election rules based on race. For example, a federal mandate that we have lines that are under ten minutes nationwide would not prevent Nueces County from redrawing election lines to diminish Latino voting strength.

Even with generic election reforms, we'd still need effective voting-rights protections to ensure that states and local politicians don't abuse their discretion. Promoting broader access is critical, but it's distinct from the goal of preventing voting discrimination. By analogy, a tax deduction for mortgage interest promotes access to home ownership—but separate laws are still needed to stop banks from engaging in predatory lending. Different problems require different solutions. Generic election reform is also inadequate because it is limited to fed-

eral elections. The choice to move beyond racial discrimination and rely only on the Elections Clause limits the reforms to federal elections. If you look at eighty-six percent of the objections caught by Section 5 since 2000, they would not be stopped by federal reform.<sup>67</sup> They wouldn't be disclosed under Sam's proposal to require disclosure for federal reforms. Many important changes are just not caught by federal reforms: local redistricting, changes to local candidate qualifications, changes in the number of members on a county commission. A lot of these local commissions are missed, and a lot of them go under the radar. These things we've talked about, the statewide stuff, we hear about on Rachel Maddow or in the *New York Times*. But in places like Runnels County, Texas, population 11,000, people don't have money to bring a lawsuit. They're not getting the attention of national groups.

Third, and final argument: Maybe we assume that Congress is going to pass something that helps all Americans, rather than just minorities, and therefore general reform is better. Look at the affirmative action context. A top-ten-percent plan might be better than a race-admission plan, at least according to popular support. That doesn't carry over to the voting context though. And that's before Democrats and Republicans disagree on general election reform. Many Republicans see early voting, election-day registration, and less restrictive voter identification as partisan proposals that invite fraud and inappropriately infringe on state power. On the other hand, Republicans and Democrats generally agree that voting discrimination is wrong. And so in updating the VRA in the past, Democrats and Republicans have come together in a bipartisan manner because of this.

I respect Sam and Rick. Apologies if I've oversimplified their arguments. Sam is up next, I'm sure he will give a more nuanced version of their position. I also agree that we need to improve voting for all Americans. Nevertheless, let me be very clear. In the aftermath of *Shelby County*, Congress should not surrender its obligation to enforce the Fifteenth Amendment. Instead, more effectively enforcing voting discrimination should be a key goal in updating the Voting Rights Act.

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67. U.S. DEP'T OF JUSTICE, *supra* note 28.

## REMARKS OF SAMUEL ISSACHAROFF

*Samuel Issacharoff\*\**

Let me just say thanks. This is a topic that has been a career point. I'm reminded of some of this—Myrna was my student when I taught at a satellite institution of ours that we hold uptown.<sup>68</sup> When Dale talks about the Mississippi dual registration: I tried that case when it was struck down, it was one of my early big cases; I'm glad to hear that it still has legs.

Let me put off responding to Spencer and say some general things. A very important social theorist once said, "Never let a crisis go to waste."<sup>69</sup> He usually used a lot of expletives, but I'll avoid that. Let me suggest that there are three crises in our voting systems and law of democracy. The first has to do with public administration and loss of faith in the capacity of our public institutions to handle the electoral system well. Part of that is what Ben and Bob are addressing with the Presidential Commission. There's just an obvious problem when you can get through Disney World easily, but you can't cast a vote down the street in Florida. But it's more than that. There's a strong belief among mostly Republicans that there is a significant problem with voter fraud in this country, which undermines the integrity of the political system. There's a strong belief among mostly Democrats that there is a great deal of vote suppression in this country, which also undermines the integrity of the political system. There's surprisingly little support for either claim, but that doesn't stop it being believed by each side's adherents.

There's a second crisis that we face, which is that, for much of the twentieth century, we policed through much of the excesses of our voting system through the prism of race. Rick and I joke that when we teach the Law of Democracy course, a good part of it could just be called "the law of Alabama," because that's where the cases come from. They are all race cases, and when they're not, they really are race cases. So, when you read *Reynolds v. Simms*,<sup>70</sup> the companion to

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68. Professor Issacharoff is referring to Columbia Law School.

69. Gerald F. Seib, *In Crisis, Opportunity for Obama*, WALL ST. J., NOV. 21, 2008, <http://online.wsj.com/news/articles/SB122721278056345271> (citing Rahm Emanuel saying "You never want a serious crisis to go to waste.").

70. 377 U.S. 533 (1964) (The Supreme Court held that the existing and two legislatively-proposed plans for apportionment of seats in the two houses of the Alabama Legislature are invalid under the Equal Protection Clause in that the apportionment is not on a population basis and is completely lacking in rationality).



*Baker v. Carr*,<sup>71</sup> it just doesn't happen to look that way. So we've dealt with the problem of voting through the vantage of the most vulnerable groups in our society. Women we took out of the equation early on in the twentieth century, we extended the franchise to women categorically, and there was no litigation that followed from that. With black Americans there was a constant battle that has defined the law of democracy. Now we are finding that the issues of the day are slightly different. We can debate how much, but they're different enough that they don't fit into the classic discrimination model that has defined so much of the law regulating political process in this country.

The third crisis we face is a loss of faith in the political process to yield results. We can't deliver public goods through our political system anymore, effectively. We have gridlock in Congress, polarization in Congress. The extreme poles have taken control.

These three crises come together right now. There's a sense that something is deeply wrong with the political system. These three, I would submit to you, come from a distinct feature of American democracy, which somehow contribute and enhance the difficulties we're having at the moment. First, the United States has partisan control of the election system, which means that at every moment there's a temptation to change the rules, cheat a little bit, screw the other side. That is what politics is about. It's us or them; only one wins. Both Bob and Ben have been on the losing side of presidential elections. It's no fun. It's much better to be there for the acceptance speech. But what do other countries do? In Europe, they have the Venice Commission, which is the European commission that oversees new democracies. Point one of the Venice Commission: Never have partisan administrators. We violate that as a matter of norm.

Another question: who can vote, and are they really who they claim to be? Every other country has a national ID. I'm from Argentina; it's not a bastion of liberalism and democracy, but election day works well! Everybody votes, we know who votes, it's no big deal. Why? You have a national ID. You go, you vote. And both the ID and the vote are mandatory.

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71. 369 U.S. 186 (1962) (The Supreme Court held that a complaint containing allegations that a state statute effected an apportionment that deprived plaintiffs of equal protection of the laws in violation of the Fourteenth Amendment presented a justiciable constitutional cause of action, and the right asserted was within reach of judicial protection under the Fourteenth Amendment, and did not present a nonjusticiable political question).

The second problem is that we have a Constitution that doesn't speak about democracy. There's a reason for that: we wanted to make sure the slave states would never have to submit to federal authority, so we made everything up through judicial doctrine. One person, one vote—where's that in the Constitution? Where's any protection of the right to vote in the Constitution? We have a huge void. All modern democracies start with Constitutional protections of political parties. Not in ours—we had to read it in. Other systems have constitutional protections of all sorts of integrities in the elections system; not in ours.

Third, we have certain practices which are anathema to all other democratic countries. Gerrymandering? You really want to let the incumbents draw their own lines? Now, how much does that contribute to the polarization? That's a matter of social scientific dispute. But even the appearance of letting these guys keep themselves in office has got to be deeply offensive to any kind of democratic principle.

So where does this take us? There's a lot in this field that keeps trying to confront these issues. Let's turn just for the moment to *Shelby County*.

Let me applaud Spencer for the greatest thing that one can do, which is to be invited to someone else's home and immediately insult the hosts. Life as it should be. If you don't have something bad to say just shut up. Now, here's the problem with the Voting Rights Act. I've been a voting rights lawyer. A lot of these statistics we are hearing about are old statistics. The Voting Rights Act's Section 5 did its heroic work initially. It was important in getting African Americans registered to vote. It did a little bit of work around language issues. But the bulk of its work was to break the back of the Jim Crow South, and that it did. And now we have, instead of a one party Jim Crow South, a bipartisan environment which is heavily overladen with race, but not entirely. It is a much more complicated arrangement, so that in 2006, when Congress talked about the reauthorization of Section 5, there were a lot of debates about how it should be structured. The upshot was that Congress couldn't decide, so they just left everything in place. In 2006, the VRA was extended for twenty-five years. The trigger for most of the jurisdictions being covered by Section 4 and 5 was what the turnout was in 1964. 1964. This was going to run in 2031. In 2031, the youngest person who would be eligible to vote in 1964 would be either eighty-five or eighty-eight years old, depending on whether the state had an eighteen- or twenty-one-year-old voting requirement. What that means is that most people in the country who are subject to preclearance are subject to a condition because of some-

thing that happened when the youngest person they could talk to about it is eighty-five or eighty-eight years old. If you know twenty-year-olds, eighty-five, eighty-eight, and, even forty-year-olds are near dead, all of them. Why would you want to have your legal life and responsibilities determined by that?

So why am I skeptical about this? Well, as I said, we used to teach this course as the law of Alabama. Interestingly, in the last 10 years, if we were going to call the course anything we would call it the law of Ohio. Why? Because Ohio turned out to be the pivotal state in every presidential election post 2000, and because it was the pivotal state, and unfortunately because the experiences in Florida in 2000 taught us all too well that election rules can be manipulated and how they are manipulated can be outcome-determinative. And that you can play that card ahead of time. Playing it after the fact is nasty, ugly, and gets you in trouble, and on TV, and written up. What we learned is that the rules can be manipulated where it matters. And in every presidential election, ground zero is Ohio.

Now what's interesting about Ohio? Ohio is not a covered state under Section 5, and has never been a covered state under Section 5. There has never been a formula that anybody has ever proposed that would address Ohio and address some of the ridiculous regulations that come out of Ohio. But between 2006 and 2012, the most important developments in the law of democracy in this country turned out to have come out of Ohio litigation, primarily in the federal courts in the Sixth Circuit, some went to the Supreme Court where they unanimously affirmed or refused to grant cert on them.<sup>72</sup> What these cases find is that the courts identify the same problems that I identified at the beginning. There's too much vulnerability in the system. There's a failure of public administration. There's the manipulation possibility for partisan reasons. And there's increased vulnerability among minority communities to all of these. What the courts did was fashion a new constitutional doctrine of protection of the integrity of the vote and the electoral process against manipulation by those who are inside and have the most to gain by manipulating it. They looked, of all things, to *Bush v. Gore*,<sup>73</sup> which established the principle that if you manipulate the election rules and you can't defend it, and you do it post-hoc and in an outcome-determinative way, the courts will step in.

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72. See, e.g., *Obama for America v. Husted*, 697 F.3d 423 (6th Cir.), *stay denied*, 133 S.Ct. 497 (2012); *Jolivet v. Husted*, 694 F.3d 760 (6th Cir. 2012); *Morrison v. Colley*, 467 F.3d 503 (6th Cir. 2006).

73. 531 U.S. 98 (2000) (holding that ordered manual recounts of presidential ballots, without specific standards, violated equal protection).

Now you may agree or disagree with the outcome in *Bush v. Gore*,<sup>74</sup> but it was an interesting doctrinal development that the courts had to come up with as to why this matter was justiciable. What Ohio federal courts, particularly the Sixth Circuit, have done, is craft a new set of doctrines that protects voters as such. Not as minority, Republican, or Democratic voters. But they start questioning the deep vulnerabilities that our system has. The disagreement that Spencer and I play out—the latest edition of *Harvard Law Review* has the exchange—it's a prospect for taking advantage of the crisis. The theorist is Rahm Emanuel, for those of you who don't recognize his name without the expletives. What that does is to start to look beyond the immediacy of how it's done in a particular case and tries to think systematically about the core vulnerabilities of what's wrong with our election system and our democracy, and how to address those systemically in the world in which we exist today.

#### QUESTIONS AND ANSWERS

##### *Question from Richard Pildes to Dale Ho*

*One role I should play as moderator is to press back a little bit. My concern always in these discussions is about a kind of an echo chamber in which there are a lot of assumptions taken for granted that would be challenged if there were more proponents of the other view in the room.*

*So let me just raise a question, directed to Dale, about voter identification, which is such a big issue and presumably everybody in the room is familiar with it. So, I agree that there's not been any meaningful evidence marshaled about actual in-person voter fraud that rises to any level of significance in the United States. I also agree with what Sam alluded to, which is that there's a very strong perception out there, which is very widely shared, that there is a concern about the integrity of the voting process in terms of whether there are people who are not eligible to vote who are showing up.*

*If you look at the polling data, 75% of people regularly say, in poll after poll, over a number of years about this, that they have that concern and that people should have to show identification.<sup>75</sup> If you*

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74. *Id.*

75. See, e.g., 75% Support Showing Photo ID At The Polls, RASMUSSEN REPORTS (June 9, 2011), [http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/june\\_2011/75\\_support\\_showing\\_photo\\_id\\_at\\_the\\_polls](http://www.rasmussenreports.com/public_content/politics/general_politics/june_2011/75_support_showing_photo_id_at_the_polls); 71% Favor Requiring Voter ID at the Polls, RASMUSSEN REPORTS (Oct. 17, 2012), [http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/october\\_2012/71\\_favor\\_requiring\\_voter\\_id\\_at\\_the\\_polls](http://www.rasmussenreports.com/public_content/politics/general_politics/october_2012/71_favor_requiring_voter_id_at_the_polls); 59% Believe Voter ID Laws do Not Discrimi-

break that down by demographic groups, it's a majority of demographic groups whatever way you cut it. It's a majority of democrats who say that in these surveys;<sup>76</sup> it's a majority of African Americans who say that in these surveys.<sup>77</sup> If there's a perception that's widely shared of threats to the integrity of the process, should democratic systems be able to respond to that? Whether it's the perception of corruption in campaign finance, or whether it's with respect to voter identification?

*Now, in New York, we show up at the polls and we don't have to show any identification. We sign our name to the poll-book and supposedly the poll-worker is going to compare our signature to how we signed our name when we registered, and make a decision as to whether we are properly identified. In every other major democracy, people do show identification, they show photo identifications, partially that's because, as Sam said, they have national ID cards.*

*So the question I want to pose is: explain exactly, to the 75% of the people out there who think this is a common-sense requirement, how can we have a system where you're supposed to match signatures as a way of getting the integrity of the process. Is it identifications per se, photo ids per se that is the objection? Are there forms of identification, including photo identification, that you would accept as a way of regulating the election process?*

*Dale Ho:*

Thanks. There are a lot of questions in there, but let me try to address some of the pieces that you talked about. It's no surprise to me that there's majority support for photo ID laws, and it's no surprise to me that there's majority support for photo ID laws across demographic groups. Polling shows that 60% of African Americans, for instance, support photo ID laws, even though there's been a lot of

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nate, RASMUSSEN REPORTS (Oct. 2, 2013), 59\_believe\_voter\_id\_laws\_do\_not\_discriminate (finding that 70% of likely voters favor an ID requirement).

76. Michael Brandon & Jon Cohen, *Poll: concerns about voter fraud spur broad support for Voter ID laws*, WASH. POST (Aug. 11, 2012), [http://www.washingtonpost.com/politics/poll-concerns-about-voter-fraud-spur-broad-support-for-voter-id-laws/2012/08/11/40db3aba-e2fb-11e1-ae7f-d2a13e249eb2\\_story.html](http://www.washingtonpost.com/politics/poll-concerns-about-voter-fraud-spur-broad-support-for-voter-id-laws/2012/08/11/40db3aba-e2fb-11e1-ae7f-d2a13e249eb2_story.html).

77. Mario Trujillo, *Poll: 70 percent support voter ID laws*, THE HILL (May 16, 2014), <http://thehill.com/blogs/blog-briefing-room/206300-poll-70-percent-support-voter-id-laws>.

concern raised among voting rights advocates and civil rights organizations that these laws disproportionately affect voters of color.<sup>78</sup>

The reason it doesn't surprise me that most people, and most people across demographic groups, support photo ID laws is that most people have photo ID cards. Most people of *all* races have photo ID cards. So when you ask these people, "Can you show a photo ID? Do you support showing a photo ID to vote?" most of them say, "Sure!" because it's not a big burden for them, but it is a big burden for a substantial number of people.

We are litigating a case in Wisconsin over its voter ID law—we're actually in the midst of trial right now—and the evidence in that case has shown that over 60,000 voters in Milwaukee County alone do not have a government-issued photo ID card that would be deemed acceptable under the state's photo ID law.<sup>79</sup> Now, we started the case last Monday by putting on a parade of some of our clients telling their stories about why they don't have ID; why they can't afford an ID; some of the challenges they face in obtaining birth certificates to get an ID, because even if the ID is nominally free, the birth certificate is not. If you were born out of state it can be challenging to obtain a birth certificate, or if you're older, and say for example you're African American, maybe you were born at a time when hospitals didn't take African American patients. Maybe you were born at home to a midwife and you didn't get a birth certificate issued at all. We had clients who told stories like that.

We had one client who told a story about a misspelling on his birth certificate. His name is Eddie Lee Holloway, Jr., and his birth certificate says Eddie Junior Holloway. He was refused an ID by the State of Wisconsin, because they said, "You are not this person on the birth certificate." He said, "Well actually, in fact, I am. Can I correct my birth certificate?" and they said, "Well, it's going to cost some money. We can't tell you exactly how much, but \$400 to \$600." Four to six hundred dollars for this man to vote. When asked the question on the stand, "Mr. Holloway, do you have \$400 to \$600?" his reply was, "I don't have 400 to 600 *cents*." He is not a well-off guy.

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78. Peter Moore, *Democrats Back Voter ID Laws*, YouGov (July 31, 2013), <http://today.yougov.com/news/2013/07/31/democrats-back-voter-id-laws/> (finding that 59% of African Americans polled supported voter ID laws).

79. Press Release, ACLU, ACLU Files Lawsuit Challenging Wisconsin's Unconstitutional Voter ID Law (Dec. 13, 2011), *available at* <https://www.aclu.org/voting-rights/aclu-files-lawsuit-challenging-wisconsins-unconstitutional-voter-id-law>; Press Release, ACLU, Federal Court Strikes Down Wisconsin Voter ID Law (April 29, 2014), <https://www.aclu.org/voting-rights/federal-court-strikes-down-wisconsin-voter-photo-id-law> (this decision was handed down after the symposium was held).

Now what was, I thought, really interesting when we put our clients up on the stand, was the lawyers for the State asked a series of questions. The same sort of boilerplate questions they had thought of to ask our clients. Questions like:

Haven't you ever flown on a plane before?

Answer: No.

Haven't you ever traveled out of the country before?

Answer: No.

Haven't you ever owned a car and driven one before?

Well, I may have driven one once or twice, but, no, never owned a car before.

I think it took about three witnesses before the State realized that they were starting to look like complete jerks. These things that we take for granted as middle-class or upper middle-class or even better—I can't speak for everyone in the room [laughs]—are things that for a lot of people in this country, certainly not a majority but a minority of this country, a sizable one, are experiences that they don't have access to. And they shouldn't be disenfranchised.

*Richard Pildes:*

*Could you just say what kind of identification, if any, would you view as legitimate form of identification? Given that we don't have national identity cards.*

*Dale Ho:*

My brethren at the ACLU might have some issues with national identification cards. I can't sit here and tell you what form of ID we would support or not support, but let me just give you an example of something we would say should be acceptable: Veteran's Administration identification cards ought to be deemed acceptable. But they are not acceptable for voting in Wisconsin, purportedly because they don't have expiration dates. These are people who fought for our country and for our democracy, and yet cannot use the ID cards issued by the VA in order to vote. I think that's a problem, just to give one example.

And to the point that you made about public support for voter ID laws: one would think that if voter ID laws improve confidence in the system that polling would show that, right? But if you look at polls, there's a great study by Stephen Ansolabehere and Nate Persily, who serves on the Commission, which shows that voter confidence does

not improve when you ask people for ID. In fact, it decreases, because people start to think there's a problem.<sup>80</sup>

*Richard Pildes:*

*Let me just close this off by making the point that it's also true that when you have campaign finance reforms, there's no evidence that campaign finance reforms increase confidence in the process either. In fact, there's good evidence that it often decreases public confidence in the system because now you have people circumventing these rules.<sup>81</sup> So it's a complicated issue, how much public perception in these areas is something we should rely on. I just brought up the polling data because, of course, within legislatures the voter identification issue is a totally partisan issue.*

*Question from Richard Pildes to Spencer Overton*

*Spencer, did you want to respond to Sam and then I'll open it up to the audience?*

*Spencer Overton:*

Let me respond to Sam and also to the last question. I think that the ID issue is an important issue. But there are a lot of instances of local discrimination that are problematic. Sam talked about Ohio. We've got Bob and Ben, and they've got resources, they'll be in court, they're going to attract the media to their disputes. There are a lot of people in Reynolds County, though, who don't have the money for media or to bring lawsuits, and to me that's a significant problem. That's not the only problem; certainly the problems that Sam identifies are legitimate issues. I'm just saying that we shouldn't ignore this issue in Reynolds County. We've got a great system in terms of democracy, but our decentralized system means there's not a lot of transparency in local elections. We've got 3000 different counties. If Ben does anything, if Bob does anything, the paper is all over them. We've got massive disclosure, massive transparency, in every move they

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80. See Stephen Ansolabehere & Nate Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1756 (2008).

81. See Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 148–49 (“Of course, we would not be so bold as to suggest that passage of [the Bipartisan Campaign Reform Act] caused an increase in perceptions of corruption. . . . However, we cannot help noting that the trends in these measures are exactly the opposite of what reformers might expect.”).



make. But in terms of these local election officials, it's much easier to manipulate rules and disenfranchise people, and that's something we should pay attention to.

*Question from Richard Pildes to Robert Bauer  
and Benjamin Ginsberg*

*How do you deal with the hyper-decentralized way in which elections are run in the United States? It causes so many of these problems that we're talking about. It's amazing that even for national elections for the highest offices in the country we have individual counties with officials holding up, in 2000, punch-card ballots to the light and squinting to see what counts as a vote, because there aren't uniform standards.<sup>82</sup> So much of this process is down at the local level. I assume there's nothing you can directly do about that, but how much of a problem is that, really, for the core of these issues?*

*Benjamin Ginsberg:*

It is a problem. The charge from the President was to prepare a set of best practices, so what we essentially will do is provide a series of best practices. We are aware that one size doesn't fit all in terms of jurisdictions, but we will hopefully give a set of best practices so if there's a problem in a jurisdiction, people in that jurisdiction will be able to see the best practices and hold their officials accountable for not meeting them. And hopefully we can address problems that way.

*Robert Bauer:*

Ben is completely correct; that is clearly what we're going to try to do. There are two things that I think give us some hope that this can work. Obviously change doesn't take place in this country or in any polity overnight, so obviously there's an adjustment taking place in our electoral process, and it's painful, and in many respects progress is obviously not satisfactory. But in our tour of the country there is both attachment to local tradition—that is to say, the local jurisdictions are very used to doing things a certain way, and we keep on hearing about how one size doesn't fit all, and whatever—but on the other hand there is also a recognition that this is now viewed as a national problem, and that there is an expectation that there are certain standards,

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82. Lynette Holloway & Rick Bragg, *Counting the Vote: Broward County; Tempers Flare as Broward Recount Plods On*, N.Y. TIMES, Nov. 24, 2000, <http://www.nytimes.com/2000/11/24/us/counting-the-vote-broward-county-tempers-flare-as-broward-recount-plods-on.html>.

and wherever an election might have to be administered there is an expectation that those standards will have to be applied, and that jurisdictions will be scrutinized for failing to apply them. For that reason I think it is a problem, but I think it is a problem that, as cumbersome as this multiplicity of jurisdictions may make it, we actually can find over time, if not a solution, certainly at least progress.

*Question from audience to Robert Bauer and Benjamin Ginsberg*

*My question is in relation to the challenge that has been particularly articulated by the two Co-Chairs. It seems that sweeping election laws that actually have a substantive impact on enfranchising very large numbers of voters tend to need bipartisan support to be effective. I know this from experience because I come from Australia, where we have automatic enrollment and compulsory voting. This occurred through bipartisanship because each party assumed that the other party would do worse under automatic enrollment and compulsory voting. One of those parties turned out to be wrong. And it seems that part of the history of bipartisan voting reform is both parties being optimistic about their chances under the new regime, and one of those parties turning out to be wrong.*

*In a modern system where we have such excellent data predicting how individuals are going to vote, it seems that we don't have the capacity for at least one political party to be irrationally optimistic. So my question is, under those conditions, given that the game is zero-sum and the actors are incredibly rational, in terms of choosing voting systems that support their political purpose, can we really expect bipartisanship to return in the form of ideally a major national voting rights act, either reauthorization or an entirely new act.*

*Richard Pildes:*

*If I clip the last part of that question about the voting rights act, maybe again I should ask Ben and Bob about bipartisanship and the prospects for any kind of electoral reform, how much of a stumbling block is this set of issues which was beautifully raised by the questioner.*

*Robert Bauer:*

Well, obviously, just in the last year, I can identify one instance where Ben was irrationally optimistic. [laughter] [*Benjamin Ginsberg: It's good to be with my base. Thank you.*] On the other hand, you know, I don't feel so sorry for Ben, because he took me to Chicago

and had me address the Republican National Lawyers Association, so— [*Benjamin Ginsberg: And they loved you!*] They did, they did—you know, they confused me and thought I was you—but in any event, listen. I think that there are going to be, and this sounds somewhat Pollyanna—but there are many dimensions across which these kinds of fights rage, whether in campaign finance, or in gerrymandering; areas where there is no question that the stakes for partisans are very high in regulation of the political process, and there is no question that partisans are going to be weighing the advantages and disadvantages to them of a certain course of legislative activity or reform. No question. And that will be true in voting rights, for sure, at the federal and at the state level.

I also believe that to some extent ordinary politics, what actually happens in the body politic, starts to move partisans eventually. Not converging toward some happy middle where there's only agreement, but as I mentioned to you earlier, in our trips around the country, in some of these fundamental issues of public administration—delivering services to the voters, within constitutional and statutory frameworks for conducting elections, so that those who are eligible to vote can show up at the polls, cast their ballot, and have some confidence that their votes will be counted—you're hearing a lot more bipartisanship than listening to C-SPAN and watching the House Chamber would suggest. And that's because it's bubbling up from the bottom. And that's where, in my view, a lot of the bipartisanship is going to come: it will come from addressing voter demand, addressing changes in the demographics, and addressing changes in the politics of the country.

*Benjamin Ginsberg:*

I absolutely agree with that. Let me give you some examples of where, sort of to our surprise, we've actually found that both red and blue states are taking on certain reforms. Online registration is one. Secretaries of State in both Republican and Democratic states see the advantages of online registration. Cleaning up voter rolls is becoming much more accepted across the political spectrum—the ERIC project that Pew does,<sup>83</sup> the Kansas Compact<sup>84</sup>—the Kansas Compact now

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83. See generally, ERIC, <http://www.ericstates.org/> (last visited Sept. 22, 2014).

84. See generally PRESIDENTIAL COMM'N ON ELECTION ADMIN., PRESENTATION BY KAN. SEC'Y OF STATE KRIS W. KOBACH (Sept. 20, 2013), available at <https://www.supportthevoter.gov/files/2013/09/SOS-Kris-Kobach-Interstate-Crosscheck-PCEA-.pdf>.

has twenty-seven states participating,<sup>85</sup> ERIC is now up to seven or eight.<sup>86</sup> There is clear, bipartisan agreement—for different reasons, to be sure—but cleaner voter rolls is something that people agree with.

Early voting is being put into place by more and more states. The differences that we see tend to be regional. The Northeast doesn't like early voting. The Secretary of State of New Hampshire, of whom we're not really sure the political affiliation, was the most vociferous person telling us you can never, ever, ever have early voting because you need to show up at your polling place to do it.<sup>87</sup> States out West, both Republican and Democratic, are increasing voting options. On the need for new technologies there is bipartisan agreement that the current technology has fallen apart, and we need to do something to fix it, and that the shelf-life of all the current machines is expiring. And there's great bipartisan agreement, to be sure, that military and overseas voter shouldn't face impediments to voting. So I think those areas of agreement, much to our pleasure, exist and are real and tangible.

*Question from the audience*

*I'd like to pick up on the earlier point about national identity cards. It seems that we may be, over time, moving to a default position where, over time, we would have national identity cards, and I'd like to maybe poll the panel with perhaps the exception of the two members of the Commission, whether they think that a national identity card would be the proper solution. And if so, what agency of the government would be responsible for policing and administering that—the Internal Revenue Service, or perhaps the NSA?*

*Richard Pildes:*

*Julie, do you want to start?*

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85. At publication, the program has grown to 29 states. OFFICE OF THE SEC'Y OF STATE, KAN., CANVASSING KANSAS I (Dec. 2013), available at [http://www.kssos.org/forms/communication/canvassing\\_kansas/dec13.pdf](http://www.kssos.org/forms/communication/canvassing_kansas/dec13.pdf).

86. At publication, the members of ERIC included eleven states plus the District of Columbia. *Who We Are*, ERIC, <http://www.ericstates.org/whowear> (last visited Sept. 22, 2014).

87. See Ben Leubsdorf, *Capital Beat: Early Voting? No-excuse absentee ballots? Gardner's not a fan, but N.H. to study options*, CONCORD MONITOR, July 14, 2013, <http://www.concordmonitor.com/home/7262315-95/capital-beat-early-voting-no-excuse-absentee-ballots-gardners-not-a-fan-but-nh-to>.

*Julie Fernandez:*

I'm not a big privacy person, I'm not an ACLU person. I think there could be a way to have a national ID card that was for everybody, that was free, and that everybody could use. But one thing I do want to say about this issue of an ID is that there really are two separate questions, and we should tease them out for one second. One question is whether or not any type of voter or photo ID is good for our democracy. You know, we can talk about it. Is it possible, could we do it, some other people do it and it seems to work for them; and I think it's a perfectly good conversation, and we should have it and we should think about it.

The second question is, which of these are in place either purposely to, or have the effect of, harming minority voters? It's not like we just started America last week, right? We didn't start this enterprise in the 1980s, or even, frankly, in the 1960s. This enterprise that we are engaged in started a really long time ago, and it did start with slavery. And I hate to be the "slavery person" up here, but there is a part of this whole conversation about our democracy that has to be looking out for people who historically were, and continue to be, targets for marginalization. And it's not a "Republican thing," and it's not a "Democrat thing," it really is a *thing* that political parties can identify groups and then try and manipulate them for their advantage. So I actually am not trusting this sort of "let the political parties fight it out, and find a bipartisan solution, and then we'll all be okay," because we won't. The bottom line is that when we had total Democratic control of the South, African Americans got screwed. And where we have total Republican control of some places, African Americans and Latinos—Texas—are getting screwed. So it isn't about political party. It is about rights, and we do not have a fundamental right to vote in the Constitution, which we should, but we do have a right to non-discrimination based on race in the Constitution. That's my view.

*Question from audience to Dale Ho*

*I want to probe the panel a little bit, particularly on Sam's point. Let me address my question to Mr. Ho, but anybody can deal with. In your case, you put on a number of witnesses who were minority witnesses who didn't have the financial wherewithal to have IDs, or to easily procure IDs. If I were the attorney general of the state opposing you, would my tactic be to put on a bunch of—pardon the expression—a bunch of white hillbillies who also don't have the wherewithal*

*and say “no disparate impact, therefore you lose.” Isn’t that why we need Sam’s analysis?*

*Dale Ho:*

We actually bring Equal Protection claims in our case, not just Voting Rights Act discrimination cases, and our lead plaintiff in that case is an older white woman—eighty-six years old—named Ruthelle Frank. Elected member of her village board, no birth certificate. Elected official, no birth certificate, no ID.<sup>88</sup>

I agree, yes, with the point that these issues of access, apart from the local issues that I think Spencer was talking about very appropriately, do cut across racial lines, and maybe there are ways of addressing those issues with race-neutral legal theories. But the fact is that these issues—the voter ID issue, for instance—do disproportionately affect people of color. Now if the state could disprove that then, yes, we would not be able to prevail under the Voting Rights Act, but that would, as I think you’re alluding to, not insulate the state from potential other challenges from other unjust burdens on the right to vote.

*Question from Richard Pildes to Robert Bauer  
and Benjamin Ginsberg*

*I’m sorry, but we actually are going to have to wrap things up here. It’s unfortunate that there’s only so much knowledge here that we could convey. I know, Bob and Ben that you can’t actually tell us anything about what the Commission is going to do, but given the Disney presence in our conversation and in your commission, can you tell us whether one of the recommendations that the Commission will make to make the voting experience better will be to have a Mickey Mouse at every polling place, or a Donald Duck, or something like that?*

*Robert Bauer:*

Actually, the Disney representative told a group of election officials that he was shocked—shocked!—that there was no concession stand afterwards [laughter].

*Richard Pildes:*

*And on that American note, we will close it up here. Thank you.*

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88. See sources cited, *supra* note 49.