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Commissioner Gail Heriot Statement and Rebuttal in the U.S. Commission on Civil Rights' *An Assessment of Minority Voting Rights Access in the United States*

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Commissioner Gail Heriot Statement and Rebuttal

I found this report somewhat stronger than some recent Commission reports. It contains some useful information. Nevertheless, it suffers from some substantial flaws. Consequently, I could support neither the staff-generated part of the report nor the accompanying findings and recommendations.[1]

I will try not to get into the minutiae of what I see as the report's shortcomings—though some of my disagreement comes from its treatment of *Shelby County v. Holder*[2] and (in particular) the way in which it touches on the possibility of post-*Shelby County* legislation. Chief Justice Roberts has already ably explained the reasons for the Supreme Court's decision. Others have defended the position that additional legislation is not warranted at this time.[3] Since this is not my area of expertise, there is little I can add to the debate. Instead, I would like to make a few more general (and somewhat scattered) points about voting rights and the enforcement of those rights. On some of these points I suspect there will be substantial agreement.

THE IMPORTANCE OF VOTING RIGHTS

A good way to illustrate the importance of voting rights is to examine the behavior of actual politicians: Most of them will work hard to gain the goodwill of their constituents. By and large, that is a good thing. Non-voters, on the other hand, usually get less attention—except, as in the case of children, when actual voters have very strong desire to benefit them.[4]

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[1] Because of a death in my family, I was unable to attend the telephonic meeting at which Commissioners voted on the report. For the record, I would have voted no. My understanding is that the report was adopted by a vote of 6 to 0. All of those voting were appointed by Democratic office holders.

[2] 570 U.S. 529 (2013).

[3] *See, e.g.*, Ilya Shapiro, *Don't Use MLK to Push Harmful Election Laws*, Forbes (January 22, 2014), https://www.forbes.com/sites/ilyashapiro/2014/01/22/dont-use-mlk-to-push-harmful-election-laws/#26b47492750a. Although there have been proposals, no additional legislation has been enacted. Congressional leaders may have adopted something akin to Shapiro's position at least for the time being. That could, of course, change in the future.

[4] Whether the lack of voting rights is a problem in need of a solution will depend on the nature of the case. These days it would be difficult to find Americans willing to defend the concept of excluding voters based on their race. But other reasons for denying a group the vote are much more defensible. For example, children are a large non-voting population, but since parents almost always view themselves as protectors of their children rather than antagonists or competitors, this is rightly not viewed as a problem. The number of 8-year-olds with the maturity to exercise the franchise responsibly is certainly verging on zero if it is not actually zero.

Another non-voting population is non-citizens. For most people, this is in essence by definition. A citizen is a member of the polity; a non-citizen is not. There are various rights and responsibilities that follow from that. One could argue that resident non-citizens are "affected" by the decisions made by voting citizens and their representatives. That's true. But it's also true of non-resident citizens. We live in an inter-connected world. Our nation's policies on foreign aid, immigration, and trade often have a profound effect on individuals around the world. Yet (so far) no one has argued that non-resident, non-citizens should have a say in the political decision-making of a country. (Indeed, the current investigation into whether Russia attempted to influence the 2016 election demonstrates the general consensus that non-resident, non-citizens should have no right to influence elections.)

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Consider the case of Senator Thomas E. Watson of Georgia (1856-1922), whose political (and journalism) career spanned many decades, beginning prior to the disfranchisement movement in the South and concluding after disfranchisement was a fait accompli. The Tom Watson of the 1880s was a passionate fusion populist, seeking to unite poor whites and poor African Americans in order to gain what he saw as their fair share of the South's then-meager resources.[5] For reasons

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Where a polity chooses to draw the line (or, put differently, how it chooses to define "citizen" for the purposes of the franchise) may vary. But the fact that politicians will, all other things being equal, pay more attention to the citizen than to the non-citizen is considered by most to be a feature and not a bug. Once a non-citizen becomes a citizen, the commitment of the polity to him or her increases significantly, and so does his or her commitment to the polity. Note that some American municipalities allow non-U.S. citizens to vote in municipal elections. Rachel Chason, *Non-Citizens Can Now Vote in College Park, Md.*, Wash. Post (September 13, 2017). These municipalities are essentially defining "citizen" for municipal purposes differently from the federal government. There is no inherent reason that this cannot be done. Whether such an expansion of the electorate is permissible under the law in any particular state or locality is a subject beyond the scope of this report. I can offer only the observation that there are conflicts of interest between elected officials and existing voters in these matters. A requirement that such matters be put directly to the voters or a requirement that they secure a supermajority of the members of the municipal legislature would therefore hardly come as a surprise.

A third population that is sometimes disfranchised is felons. In part this is an element of the felon's punishment (and in part the motivation for it stems from a lack of confidence in the felon's wisdom and from doubt that his or her interests are compatible with the polity's). In an era that increasingly shrinks from incarceration, fines, and many other forms of punishment, stigmatizing felons by denying them the franchise is one of the milder punishments remaining. Objections come not so much from penologists as from political parties and activists who perceive, rightly or wrongly, that "the felon vote" will go to their coalition.

If the reason for felon disfranchisement were to deny as many African Americans the vote as possible rather than to deny felons the vote, this should be viewed as a Constitutional violation (even though Section 2 of the Fourteenth Amendment obviously anticipates that felons will be disfranchised in some states and that this will be permissible). See Const. amend. XV; Const. amend. XIV, § 2. But the argument that felon disfranchisement is simply a clever way to deny African Americans the vote without appearing to do so is weak. The first ten states to disfranchise felons were Kentucky (1792), Vermont (1793), Ohio (1802), Louisiana (1812), Indiana (1816), Mississippi (1817), Connecticut (1818), Alabama (1819), Missouri (1820), and New York (1821). There is no discernible pattern here. Some have questioned why these states took so long to disfranchise felons. If the states were not motivated by the existence of large populations of free African Americans in their midst, what was motivating them? Why didn't they disfranchise felons a century earlier? The answer here lies in the 18th century conception of felonies: They were punishable by death. Consequently, it was seldom necessary to consider whether felons should be disfranchised. Dead men, regardless of race, don't vote. See William Blackstone, IV Commentaries on the Laws of England 98 (University of Chicago 1st ed. Facsimile 1979)("The idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform"). Moreover, prior to the ratification of the Fifteenth Amendment, a state that wanted to disfranchise African Americans could do so without resorting to an extraordinarily weak and clumsy proxy.

[5] The one Southern state in which fusion populism (in the form of an alliance of the Republican and Populist Parties) briefly took control of government was North Carolina. Unlike states in the Deep South, North Carolina had an African-American population of only about 35% in 1890. In addition, western North Carolina had a large population of small white farmers whose sympathies had been with the Union and who generally voted Republican. Together with members of the Populist Party, the group took control of North Carolina in the mid-1890s. Those who favored African-American disfranchisement usually saw it specifically as a way to defeat that coalition. See Michael Perman, Struggle for Mastery: Disfranchisement in the South 1888-1908 148-72 (2001). By contrast, in South Carolina, disfranchisement was spearheaded by Governor "Pitchfork" Ben Tillman, a Democrat with a strong populist streak, who feared the African-American vote would form an alliance with the "conservative" vote (i.e. what Tillman viewed as the Low Country landowning and commercial elite). See id. at 91-115.

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beyond Watson's control, within a few years, African Americans had been effectively disfranchised in Georgia.[6] Attempting to appeal to the African-American vote was therefore no longer a useful strategy for an ambitious office seeker like Watson. At that point, he began to voice his approval of disfranchisement.[7] By the 1910s and 1920s, Watson had morphed into one of the most virulent racists one could ever encounter.[8] Referring to "the Negro," he remarked, "*In the South, we have to lynch him occasionally, and flog him, now and then, to keep him from blaspheming the Almighty, by his conduct, on account of his smell and his color*."[9]

Compare Watson's career with that of Alabama Governor George Corley Wallace (1919-1998). Wallace straddled the other end of the history of African-American disfranchisement. After being elected governor for the first time, he said the following in his January 14, 1963 inaugural address:

That contrast illustrates the differing political currents leading to African-American disfranchisement in each state. See generally id. But if there is one unifying theme, it may be this: Political alliances were so fluid in the South during the 1890s that no one could state with certainty how they would turn out. Would African Americans and poor whites living in the Appalachian Mountains form an alliance? Or would the alliance be African Americans and the landowning and commercial elites of the Tidewater/Low Country/Black Belt counties? Or would alliances be formed on the basis of race? We all know that in the end it was the last of these alternatives. But that was by no means obvious in the politically and economically turbulent turn-of-the-century South. See generally Michael Perman, Struggle for Mastery: Disfranchisement in the South 1888-1908 148-72 (2001); J. Morgan Kousser, The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South 1880-1910 (1974).

[6] The Disfranchisement Movement in the South was a pivotal moment in American History. It began in earnest in about 1888, and came to head in each state in the South at different times. By the early 1900s, it had been mostly accomplished. See Michael Perman, Struggle for Mastery: Disfranchisement in the South 1888-1908 (2001). A few non-obvious things are worth noting here: (1) In many locations in the South (including Watson's Georgia), the African-American vote had already been severely depressed on account of extra-legal violence and fraud (as well as laws that made that violence and fraud possible); this ultimately made things easier for the Disfranchisement Movement, which made disfranchisement an explicit part of state constitutions; (2) Many of those who advocated African-American disfranchisement would have preferred to disfranchise not just African Americans (most of whom were illiterate at the time), but also illiterate whites (of which there were many); they did not, however, always have the political clout to accomplish that end as to illiterate whites (though sometimes they did); (3) The movement was in part a reaction to the populism (and in particular fusion populism) of the late 19th century, in part a Progressive reaction to election fraud, and in part an effort to weaken the Republican party both locally and nationally; and (4) While raw racism was certainly part of the motivation for many, almost never did the laws relating to disfranchisement explicitly refer to race and some states (*e.g.*, Arkansas and Tennessee) accomplished disfranchisement of African Americans mainly through the mechanism of the poll tax, which tended to depress the white vote too. See Perman at 5, 11-12, 19, 177; J. Morgan Kousser, Shaping of Southern Politics 250-57 (1974). Also see Sheldon Hackney, Populism to Progressivism in Alabama 147 (1969); Jack Temple Kirby, Darkness at the Dawning: Race and Reform in the Progressive Party 4 (1972); Dewey W. Grantham, Southern Progressivism: The Reconciliation of Progress and Tradition (1983).

[7] Thomas E. Watson, *The New Georgia Encyclopedia*, http://www.georgiaencyclopedia.org/articles/history-archaeology/thomas-e-watson-1856-1922.

[8] For those who regard the Soviet Union and Nazi Germany as representing opposite ends of the political spectrum, Watson's transformation from class-based to race-based fanaticism may seem surprising. For those who regard the two as close cousins, his transformation seems far less remarkable.

[9] Michael Newton, *White Robes and Burning Crosses: A History of the Ku Klux Klan from 1866* 38 (2014) (italics added).

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> In the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny, and *I say segregation now, segregation tomorrow, segregation forever*.[10]

But that was before the success of the Voting Rights Act of 1965. In just a few short years, African-American voter registration had skyrocketed in Alabama. By the 1970s, he was asking forgiveness for his past sins.[11] And, in a remarkable turn of events, he largely received it. He was re-elected to a third term as governor in 1982 with a huge share (90%) of African-American votes.[12]

Colman McCarthy was among those who thought Wallace's transformation to be sincere. He wrote in 1995:

> In the annals of religious and political conversions, few shiftings were as unlikely as George Wallace's. In Montgomery, Ala., last week, the once irrepressible governor—now 75, infirm, pain-wracked and in a wheelchair since his 1972 shooting—held hands with black southerners and sang "We Shall Overcome."
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> What Wallace overcame is his past hatred that made him both the symbol and enforcer of anti-black racism in the 1960s. On March 10, Wallace went to St. Jude's church to be with some 200 others marking the 30th anniversary of the Selma-to-Montgomery civil rights march.
>
> It was a reaching-out moment of reconciliation, of Wallace's asking for—and receiving—forgiveness. In a statement read for him—he was too ill to speak—Wallace told those in the crowd who had marched 30 years ago: "Much has transpired since those days. A great deal has been lost and a great deal gained, and here we are. My message to you today is, welcome to Montgomery. May your message be heard. May your lessons never be forgotten."
>
> In gracious and spiritual words, Joseph Lowery, a leader in the original march and now the president of the Southern Christian Leadership Conference, thanked the former separatist "for coming out of your sickness to meet us. You are a different George Wallace today. We both serve a God who can make the desert bloom. We ask God's blessing on you."[13]

McCarthy wrote that Wallace "was using his waning political power to bond with those he once scorned." And maybe he was right about Wallace's sincerity. But whether Wallace was sincere or

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[10] *George Wallace's 1963 Inaugural Address*, Wikipedia,https://en.wikipedia.org/wiki/George_Wallace%27s_1963_Inaugural_Address (italics added).
[11] George C. Edwards, Martin P. Wattenberg & Robert Lineberry, Government in America: People, Politics and Policy 80 (14th ed. 2009)(Wallace stated in 1979 in connection with his infamous stand in the schoolhouse door, "'I was wrong. Those days are over, and they ought to be over.'").
[12] *Id.*
[13] Colman McCarthy, *George Wallace—From the Heart*, Washington Post (March 17, 1995), https://www.washingtonpost.com/wp-srv/politics/daily/sept98/wallace031795.htm?noredirect=on.

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insincere, there is a simpler point: In a reasonably well-functioning democratic republic, successful politicians spend a lot of time trying to please voters; they seldom spend as much time trying to please non-voters. In Wallace's final term as governor, he appointed more than 160 blacks to state governing boards. He worked to double the number of black voter registrars in Alabama's 67 counties and hired African Americans as staff members.[14] In that sense at least, he was a changed man.[15]

The lesson? At least from the standpoint of discrete and insular groups that are sufficiently large to matter on Election Day, the right to vote may well be our most important right.[16] Without it, everything else will be in jeopardy.[17] The Jim Crow Era in Watson's Georgia and Wallace's Alabama, with its unhinged devotion to racial segregation, would have been unthinkable without disfranchisement.[18] Many of the Deep South's laws designed to keep African Americans working on the plantation (instead of migrating north where their prospects were often better) would have been similarly impossible.[19]

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[14] *Id.*

[15] In some ways this was a return to Wallace's early career as a judge on the Third Judicial Circuit of Alabama. There, interestingly enough, he had a reputation for being fair regardless of the race of the litigants before him and for being courteous to African-American attorneys. As a result, in his initial (failed) run for governor in 1958, he was endorsed by the NAACP. It is said that he attributed his loss to the perception that he was "liberal" relative to his opponent on race issues (although he put it in much cruder terms). It is further said that he vowed not to let that perception stand in the way of his election again. See https://en.wikipedia.org/wiki/George_Wallace.

[16] The group need not be large. American political parties are coalitions (although the coalitions are constantly changing and re-organizing themselves). Even a small group, especially if it is well-organized and cohesive, can be the difference between victory and defeat, and hence courting such a group can be well worth a politician's or a party's time.

[17] Indeed, in a nation like ours, where government has its fingers in all sorts of pies, the franchise can be important not just to protect rights, but also to protect patronage. Members of a disfranchised group are less likely to get government jobs or contracts. Government projects—from parks to roads to utilities—are less likely to be located or improved upon in the areas where those members will benefit from them.

[18] It is interesting to compare African-American disfranchisement with the era prior to the enfranchisement of women. Unlike African Americans at the time, women as a class could not be described as "insular." Most women lived in families that included both men and women. The argument against women's suffrage was frequently that husbands, fathers and sons could be trusted to look after the interests of women outside the home, while women looked after the interests of their menfolk inside the home. Yet it is hard to avoid noticing that legislation that purported to protect working women from strenuous work or long hours was often advocated by men-only unions whose members were in competition with women for jobs and that women themselves were in no position to vote. See Muller v. Oregon, 208 U.S. 412 (1908). Of course, Progressive women often supported such legislation too. But those lobbying for such legislation were seldom working women; more often, they were members of the upper-middle class. See Suzanne LaFollette, Concerning Women (1926). Whether women are well served by protectionist legislation has been a major theme in feminist literature of the 20th century. My point here is simply that the heyday of such legislation was during a period that women were unable to vote in many parts of the country.

[19] These laws were at least as destructive as the Jim Crow laws. But they get considerably less attention today. *See, e.g.*, Williams v. Fears, 179 U.S. 270 (1900)(upholding an 1898 prohibitive tax on labor recruiters in Georgia); David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 Tex. L. Rev. 781 (1998).
See also Benno Schmidt, Jr., *Peonage* in The Oxford Companion to the Supreme Court of the United States 729 (Kermit Hall, et al., eds. 2005). In order to abolish peonage, the laws that made peonage possible had to be

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The right to cast a ballot must therefore be guarded with great care. That will come as a surprise to no one. Unfortunately, it doesn't answer any of the hard questions: For example, *what constitutes great care in this context?* Along with the right to the ballot is the right to have one's ballot count, which requires the exclusion of those who are not entitled to a ballot.[20] Policies that are intended to facilitate the right to cast a ballot—like early voting and requirements that election officials take the voter's word for his or her identity—can increase the likelihood of voter fraud. We know there have been problems in North Carolina—the state that received the most attention in this report. One election had to be run again in order to ensure its integrity.[21]

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dismantled one by one—a task that involved multiple trips to the Supreme Court by both the United States and private litigants. See Pollock v. Williams, 322 U.S. 4 (1944)(and cases cited therein).

[20] Opponents of voter ID laws frequently argue that cases of voter impersonation (the kind of fraud most obviously prevented by such laws) are very rare. While it is impossible to say for sure, I strongly suspect they are right. But even the fiercest critics of voter ID laws, like Justin Levitt, agree that some cases occur. See Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, Washington Post (August 6, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.e42a723f0d09.

On the other hand, otherwise qualified voters lacking in an ID are also uncommon. And those who cannot acquire one without unreasonable inconvenience are very rare indeed. Efforts to estimate the numbers of those without IDs by comparing voting rolls with driver's license and other ID lists are prone to over-estimation. Voting rolls are often heavy with individuals who have recently died, moved out of the jurisdiction, or become incapacitated. Driver's license lists are more up to date. The best solution for the cases of no ID that do exist may be for political activists in those jurisdictions that choose to have voter ID laws to assist them in securing an ID.

Moreover, opponents of voter ID laws should take into consideration the fact that voter ID laws help combat other kinds of voter fraud too. Consider the example of a felon in a jurisdiction where felons are not permitted to vote. He may be perfectly aware that he is not entitled to vote, but may be willing to chance it anyway, thinking that if he is caught after the fact he will simply deny that he was the person who showed up at the polling station. This is a lot riskier in a jurisdiction that requires the presentation of an ID. Prosecuting authorities are unlikely to believe the "It wasn't I" defense. The point holds true for other kinds of individuals (*e.g.*, non-citizens) who manage to register but are not entitled to vote.

Unlike the case of voter impersonation, cases of felons voting in jurisdictions where they are not entitled to vote appear not to be rare at all. See Byron York, *When 1,099 Felons Vote in Race Won by 312 Ballots*, Washington Examiner (August 6, 2012) (referring to the 2008 Senate race in Minnesota), https://www.washingtonexaminer.com/york-when-1-099-felons-vote-in-race-won-by-312-ballots. *See also* John Fund & Hans von Spakovsky, Who's Counting (2012) (detailing various kinds of voter fraud and other kinds of election irregularities across the country).

[21] See Mark Binker, *New Election Ordered in Pembroke*, WRAL (December 20, 2013), https://www.wral.com/new-election-ordered-in-pembroke/13237755/.

Commissioner Narasaki writes in her Statement that "once an election has been held—fairly or not—the result cannot be undone." I agree that running an election again is a rarely-invoked remedy (in part because the margin of victory for the winning candidate is rarely so small as to leave the proper outcome in doubt). But, as in the Pembroke case, it does happen. Bell v. Southwell, 376 F.2d 659 (1967), is an especially well-known example.

[21] *See, e.g.*, Tyler O'Neil, *Hillary Clinton Says Supreme Court Nominee Brett Kavanaugh Will Bring Back Slavery*, PJ Media (July 13, 2018)("'I used to worry that they [the Republicans] wanted to turn the clock back to the 1950s. Now I worry they want to turn it back to the 1850s.'"); *Biden Tells African-American Audience GOP Ticket Would Put Them "Back in Chains,"* CBS News (August 14, 2012), https://www.cbsnews.com/news/biden-tells-african-american-audience-gop-ticket-would-put-them-back-in-chains/.

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On the other hand, requirements that voters present an ID can exclude the occasional voter who does not have an ID and cannot get one except at great inconvenience. How do we reconcile those two competing considerations? It isn't always easy, and intemperate statements about the motives of members of the opposing party don't make it any easier.[22] As Thomas Sowell is fond of saying, "There are no solutions. There are only trade-offs."[23] For what it's worth, large majorities of

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I should also mention in this context Commissioner Yaki's ill-considered statement about the Federalist Society for Law and Public Policy. The Federalist Society is an organization of conservative, libertarian and classically liberal lawyers, law students and law professors. It has about 65,000 members, including many of the nation's most distinguished jurists. It also happens to include both Commissioner Kirsanow and me as well as most center-right attorneys of my acquaintance. Not only do its members not fit the description Commissioner Yaki gives them, the organization has been described in quite positive terms by individuals usually viewed as left of center. For example:

"For over a decade, I have been privileged to be involved in Federalist Society events, and it's a really interesting thing that they have seen fit to invite me even though I generally don't think like them on a lot of things, and the quality of the speakers and the free-for-all discussion is unparalleled, so it's really been a privilege."—Neal Katyal, Acting Solicitor General (Obama Administration).

"I think one thing your organization has definitely done is to contribute to free speech, free debate, and most importantly, public understanding of, awareness of, and appreciation of the Constitution. So that's a marvelous contribution, and … in a way I must say I'm jealous at how the Federalist Society has thrived in law schools."—Nadine Strossen, Professor of Law, New York Law School & Former President, American Civil Liberties Union.

"[T]he Federalist Society has brought to campus the commitment to real, honest, vigorous, and open discussion. It is a result of the works of the Federalist Society to create a wonderful environment for discussing social, political, legal and constitutional issues."—Paul Brest, Professor of Law & Former Dean, Stanford Law School.

The Federalist Society's programs are not held in secret; even Commissioner Yaki is welcome. It is one of the most open organizations I have ever known. And it strives to include speakers from across the ideological spectrum in its panel discussions. I can recall only one occasion when a panel on which I was a speaker was not balanced (only because the liberal speaker failed to show up). Although, as a speaker, I had already given my own view on the topic (which was a more conservative view), I spontaneously got up and gave the liberal point of view too, just to make sure that the Federalist Society maintained its tradition of presenting the many sides of each issue.

By contrast, I once witnessed an official of the supposedly "mainstream" Association of American Law Schools aggressively bar a conservative staff member of this Commission from attending one of its programs. The official who did so made it clear she believed that the staff member was somehow there to spy on the speakers (every last one of whom was so far to the left that the average American would need a telescope to see them). In fact, the staff member, who had traveled from Washington to New York for the event, was there to scout out left-of-center speakers to invite to the Commission's September 15, 2010 national conference. Like the Federalist Society, but unlike the AALS, the Commission's Chairman at the time, Gerald Reynolds, although a conservative himself, strongly preferred for the conference to include speakers with an array of viewpoints.

The AALS is also famous for having brought in over 20 speakers to discuss the then-recent passage of California's Proposition 209 (which prohibited discrimination or preferential treatment on the basis of race, sex, or ethnicity in public employment, public contracting and public education). Every last one of the speakers opposed the initiative; not a single supporter was invited to speak, despite the fact that several law professors who had worked on the campaign, including me (the campaign's statewide co-chair), were present at the meeting). See also Charles Fried, *"Diversity": From Left to Far Left*, Washington Post (January 3, 2000)(comparing the AALS's lack of viewpoint diversity in panel presentations to the Federalist Society's strong viewpoint diversity). Something has happened to organizations that are supposedly mainstream in the last 25 years. And it isn't good.

[23] Fox News Interview of Thomas Sowell, https://www.youtube.com/watch?v=3_EtIWmja-4&feature=youtu.be. The extent to which the various Statements of my Commission colleagues fail to address these tradeoffs is disheartening. The soaring rhetoric they employ makes it all sound so easy: If only nice people were in charge of

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Americans think that both voter ID requirements *and* early voting are reasonable methods of conducting elections.[24]

It's not just first-order questions that are difficult: Exactly who should have the power to protect the right to cast a ballot? Who should decide which trade-offs to make?[25] If too much power is

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the nation, everything would be fine. Alas, it's not that easy. I like soaring rhetoric as much as the next person … well almost as much. But sooner or later one must get down the job of conducting fair and free elections, which requires reconciling oneself to the imperfect world we live in.

William Blackstone famously said, "it is better that ten guilty persons escape than that one innocent suffer." He is did not say that is better for 100,000 guilty persons go free rather than one innocent suffer imprisonment, and I would venture to say he would not have been willing to put such a large thumb on the side of innocence. What is the right tradeoff between the inclusion of eligible voters and the exclusion of fraudulent votes? I don't know the answer to that question. But at least I acknowledge that it's a real question.

My colleagues are apparently of the view that serious election fraud is fairly rare in this country. And I am inclined to believe they are right about that. May it ever be so. But as Americans we are lucky in this respect. Fraudulent elections in other parts of the globe are the rule rather than the exception. See, e.g., Bernd Beber & Alexander Scacco, *The Devil Is in the Digits: Evidence that Iran's Election Was Rigged*, Washington Post (June 20, 2009); Dany Bahar, *A Fraudulent Election Means Even More Problems for Venezuela*, Brookings Institute Podcast (May 22, 2018); Kim Sengupta, *Zimbabwe Elections: Opposition Politician Arrested Amid Allegations of Voting Fraud: Senior Official in MDC is Seeking Political Asylum, After Claiming Poll Results Were Rigged*, The Independent (August 8, 2017).

Moreover, election fraud was once common here too. See, e.g., John F. Reynolds, *A Symbiotic Relationship: Vote Fraud and Electoral Reform in the Gilded Age*, 17 Soc. Sci. Hist. 227 (1993); Denis Tilden Lynch, "Boss" Tweed: The Story of a Grim Generation (2017); Pamela Colloff, *What Happened to the Ballot Box that Saved Lyndon Johnson's Career?*, Texas Monthly (November 1998); Robert A. Caro, Means of Ascent: The Years of Lyndon Johnson (1990); T. Harry Williams, Huey Long (1969); Mike Royko, Boss: Richard J. Daley of Chicago (1971).

It feels like my colleagues want it both ways. On the one hand, even though the racially-motivated voter exclusion and voter intimidation they fear is now rare, they refer back to a period before some of them were born as proof we must be ever-vigilant. And, yes, we must. But, on the other hand, they scoff at the notion that we must be vigilant about election fraud too, even though that is also part of our history. And like racism, election corruption has never been entirely eradicated.

[24] *See, e.g.*, *Four in Five Americans Support Voter ID, Early Voting*, Gallup Poll (August 22, 2016), https://news.gallup.com/poll/194741/four-five-americans-support-voter-laws-early-voting.aspx.

[25] The North Carolina ID case may be an example of how partisanship may, whether consciously or unconsciously, affect one's perceptions. The North Carolina legislature is majority Republican and was accused by the plaintiffs in that case (led by the North Carolina NAACP) of targeting racial and ethnic minorities. Okay, maybe. Since I have not carefully read through the record in that case, I am not in a good position to judge.

Here's what I can say: The trial judge (appointed by George W. Bush) found no such intent. The appellate judges (two appointed by Barack Obama and one by William Jefferson Clinton), not only found such an intent, they stated that the statute targeted racial and ethnic minorities "with almost surgical precision." None of that is comforting.

The Supreme Court declined to take the case and hence neither agreed not disagreed with the decision of the Court of Appeals. In retrospect, I am glad the Supreme Court denied the petition for certiorari. If it had taken the case and issued one of the 5-4 decisions for which it has become famous, reversing the Court of Appeals, it would have meant that *every* judge involved in the case voted along party lines. The issue isn't worth the appearance of that kind of partisanship.

But here is what I find troubling about the case: While I do not think I or my colleagues have enough information to second-guess the differing results in the case, I do know enough to say the Court of Appeals is engaged in serious hyperbole in saying that the statute targeted minorities "with almost surgical precision." It's a highly quotable turn of phrase, but it happens not to be true. Even the NAACP's own expert witness (whose numbers I believe were

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concentrated in the hands of a single authority (whether it is the federal government or a local registrar, an executive officer or a judicial one), abuses are sure to follow.[26] This, I believe, is one of the shortcomings of this report. The assumption lurking behind some of its conclusions is that all would be well if the federal government (in the form of the Voting Section of the Civil Rights Division of the U.S. Department of Justice) were the primary arbiter of what is appropriate and what is not.[27] But is it true? Are state and local authorities really the only ones that act out of partisan or other inappropriate motives? What if it's also the attorneys at the Voting Section of the Civil Rights Division who need to be watched carefully?[28]

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inflated) estimated that African-American voters without IDs number about 6% while white voters without ID number about 2.5%. If that's considered anything close to surgical precision in the Fourth Circuit, I intend to make sure my loved ones never undergo surgery there.

Note that this report quotes the "almost surgical precision" language three times and paraphrases it once and that three of the Commissioners appointed by Democrats quote it in their Commissioners' statements. Note also that only Commissioners appointed by Democrats voted to approve this report. See *supra* at note 1.

[26] Some have argued that Congress should pass legislation re-establishing preclearance at least for selected jurisdictions they regard as high-risk for efforts to disfranchise minority groups. They argue (not irrationally) that state and local governments, out of partisan motives, may in the future make changes in election procedures that unreasonably interfere with the right to vote, and challenging those changes in court in the traditional manner will sometimes be unwieldy and time consuming. Preclearance would help eliminate that problem. Fine. That's true. *But what if it is the Department of Justice's Civil Rights Division or other federal institutions that are acting unreasonably out of partisan motives? That is not an irrational fear either.* See infra at note 29 (discussing the Civil Rights Division's effort to overrule the voters of Kinston, North Carolina, who had voted by a ratio of 2 to 1 to make their local elections non-partisan). Just as challenging a state or local government's decision in court can be unwieldy and time consuming, so too can challenging an action of the Civil Rights Division.

[27] The various statements of my colleagues also contain a touch of this. For example, Commissioner Narasaki writes, "It is abundantly clear that … the right to a fair and equal vote … is under siege in several states and jurisdictions, and given that reality *state sovereignty is not an inviolable right*." (Italics added). In the same vein, Chair Lhamon writes, "Americans need strong and effective *federal* protections to guarantee that ours is a real democracy." (Italics added.) (Note that both of them are long-time inside-the-Beltway denizens.) The tragedy here is that my colleagues don't seem to understand that many Americans trust the attorneys in the Voting Section of the Civil Rights Division at the U.S. Department of Justice even less than they trust the politicians and bureaucrats of their own state and locality. And it's not just because the attorneys in the Voting Section are overwhelmingly left of center. See infra at note 28. It is also because those attorneys have proven themselves unwilling to protect Americans from voter fraud and voter intimidation in an even-handed manner. See Statement of Commissioner Gail Heriot in U.S. Commission on Civil Rights, Race Neutral Enforcement of the Law?: DOJ and the New Black Panther Party Litigation 125 (2010)(discussing United States v. New Black Panther Party and United States v. Brown, 494 F. Supp. 2d 440 (S.D. Miss. 2007), aff'd, 561 F.3d 420 (5th Cir. 2009)).

[28] These days I don't think anyone would bother to deny that career employees of the federal bureaucracy—particularly at the higher levels—tend to be disproportionately ideologically left of center. See, e.g., Mike Causey, *Are Feds Democrats or Republicans? Follow the Money Trail!*, Federal News Radio (April 3, 2017), https://federalnewsradio.com/mike-causey-federal-report/2017/04/are-feds-democrats-or-republicans-follow-the-money-trail/. It is also well-established that high-level career employees tend to self-select into agencies whose mission they regard as compatible with their ideological perspective. Consequently, agencies like the National Labor Relations Board have particularly high concentrations of left-of-center career employees while the Department of Defense has particularly high concentrations of right-of-center employees. See Joshua D. Clinton, Anthony Bertelli, Christian R. Grose, David E. Lewis & David C. Nixon, *Separated Powers in the United States: The Ideology of Agencies, Presidents and Congress*, 56 Am. J. Polit. Sci. 341 (2011).

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I believe that, in the end, any search for a single, disinterested institution that can always be trusted to protect us all from the abuses of others will be in vain.[29] Ambition must be made to counteract ambition.[30] There is no other way.

Finally, there is the problem that no Washington insider likes to mention: As a nation, we lavish resources on protecting the right to cast a ballot and making it as convenient as possible. And, in general, that is a good thing. This report itself is an example of that concern. But we need to keep in mind why are we doing this. If the point is to choose our policymakers by democratic means (and surely that is the point), the system isn't working nearly as well as it should.[31] Increasingly, real policy is made not by elected officials, but by bureaucrats who are virtually unaccountable to

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I have no data showing the political or ideological affiliations of *all* attorneys in Voting Section of the Civil Rights Division of the Department of Justice. On the other hand, Hans von Spakovsky has reported that he obtained through the Freedom of Information Act the resumes of the 16 attorneys hired into the Voting Section during the first several years of the Obama Administration. His description of their resumes made it clear that they were decidedly left of center, one and all. Some were well left of center. *See* Hans von Spakovsky, Every Single One: The Politicized Hiring of Eric Holder's Voting Section (August 15, 2011), https://www.heritage.org/civil-society/commentary/every-single-one-the-politicized-hiring-eric-holders-voting-section.
Moreover, research conducted at my direction found that other civil rights agencies (for which we do have figures) show extraordinary one-sidedness in partisan or ideological balance. For example, of the 844 entries going back to 1991 for political donors who listed "EEOC" as their employer on Opensecrets.org , 38 (4.5%) went to Republicans or Republican or conservative affiliated groups. All of the others (95.5%) went to Democrats or Democratic or liberal/progressive affiliated groups. (No one listed "Equal Employment Opportunity Commission" as employer.) Similarly, I directed my staff to determine who, from a list of 565 employees of the Office for Civil Rights at the U.S. Department of Education, had made political contributions recorded on Opensecrets.org. Of the 43 donors found, 41 (95.3%) had given to Democrats or Democratic or liberal/progressive affiliated groups, and 2 (4.7%) had given to Republicans or Republican or conservative affiliated groups. There are few, if any, state legislatures as one-sided.
Especially given the von Spakovsky data, it would be surprising if the Voting Section at the Civil Rights Division were significantly different from OCR or the EEOC. See also Ralph R. Smith, *Which Party Receives the Most in Political Contributions from Federal Employees?*, FedSmith.com: For the Informed Fed (May 19, 2016)(finding that $137,603 worth of political contributions are made to Democrats by Department of Justice employees, while $14,939 worth of political contributions are made to Republicans), https://www.fedsmith.com/2016/05/19/which-party-receives-the-most-in-political-contributions-from-federal-employees/.

[29] Partisan and other inappropriate motives, sometimes conscious, but more often unconscious, exist at all levels of government. A case worth examining in this regard involves Kinston, North Carolina. Kinston is a town of less than 25,000 residents in the eastern part of the state. African Americans make up almost two thirds of its population. Voters in Kinston voted by a 2 to 1 margin to have its local elections conducted in a non-partisan manner. There is nothing unusual about this; many local jurisdictions conduct elections without listing on the ballot the party affiliations (if any) of the candidates. It is as common as dust.
As common as it is, in 2009, the Obama-Era Civil Rights Division refused to tolerate it. Put differently, it refused to allow the voters of Kinston, very much including the African-American voters, the dignity of deciding how to conduct their own local elections. It insisted the words "DEMOCRAT" or "REPUBLICAN" appear on the ballot for local officials. It is hard not to wonder whether the Civil Rights Division was motivated by a desire to defend the right of African Americans to vote (on everything except whether their elections will be non-partisan) or a desire to benefit the Democratic Party.

[30] Federalist 51.

[31] See generally Philip Hamburger, Is Administrative Law Unlawful? (2015). For a view that the unaccountable career bureaucracy is a good thing, see Eugene Robinson, *God Bless the "Deep State,"* WASH. POST (July 19, 2018).

Electronic copy available at: https://ssrn.com/abstract=3249121

voters.[32] While concern over the right to cast a ballot and the integrity of that ballot is certainly a good thing, we need to spare a thought for elections' raison d'être too. Are we seeing the level of self-governance to which a free people should be entitled? It is getting increasingly difficult to answer that question positively.[33] And surely those who argue most energetically for federal agencies to supervise elections are often the ones who argue federal agencies to supervise our daily lives.

A FEW THOUGHTS ON SAFEGUARDING THE RIGHT TO CAST A BALLOT (AS WELL AS OTHER RIGHTS)

At the individual level, the right to vote can seem very unimportant. It is rare—to the point of being almost unheard of—for an election to be decided by a single vote. On Election Day, many Americans choose not to exercise their right to vote. Some view themselves as insufficiently informed about the candidates to cast a vote they can be proud of, and it is not uncommon for them to be right about that. Others find it distasteful or simply a waste of their time. They have jobs to do, families to tend to, and other activities that bring purpose to their lives.

But those who worry that this will cause basic voting rights to go undefended may be worrying unnecessarily. Unlike with some other rights, with voting rights, there are well-organized third parties with a strong and direct incentive to prevent abuse. Elected officials and political parties are the most obvious examples.[34] Their jobs depend on elections, and they are not about to let the voting strength of their political coalitions be reduced without a fight. Indeed, if anything, elected officials may be accused of spending a disproportionate amount of their time worrying about voting issues (and hence about their own re-election) to the detriment of issues that affect their constituents' lives in more direct ways.[35]

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[32] This, of course, was a major tenet of the Progressive Movement: Out with elected mayors, in with city managers with "expertise" in administration; out with the election of local officials of many kinds, in with the "short ballot;" out with Presidential appointees to do the work of the executive branch, in with "civil servants"; out with separation of powers, in with delegation of rulemaking and adjudicatory authority to administrative agencies staffed with career bureaucrats; out with "politics," in with "disinterested experts" who theoretically have the best interests of the country in mind.

[33] For the lighter side of this issue, see the BBC's *Yes, Minister* or its sequel *Yes, Prime Minister*. See https://en.wikipedia.org/wiki/Yes_Minister. Yes, I can still laugh at this problem now and then, but it's getting harder as time goes on.

[34] Elected officials and political parties are not the only ones with a motive to defend voting rights. There are many others, probably too many, whose fortunes rise and fall according to who occupies the White House, the governor's mansion, or the mayor's office or which party controls the legislative branch. That can include political appointees, aspiring political appointees, public contractors, aspiring public contractors, lobbyists, lawyers, businesses, unions and many others. All of them have a strong and direct incentive to ensure that members of their political coalition can vote. In addition, there are those whose interest in public policy is intense despite its having little direct effect on their lives or fortunes (though they may be rarer than we would all like to think).

[35] One way in which the interests of elected officials (as well as identity politics organizations) may diverge from their rank-and-file voters can be seen in the area of "vote dilution." In theory, vote dilution can mean very different things. First, it can refer to apportionment such that much larger numbers of voters live in one district than in another. This has been prohibited since Reynolds v. Sims, 377 U.S. 533 (1964) and is rarely a genuine issue today.

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To be sure, elected officials and political parties also have an incentive to make sure that members of the opposing political coalition *cannot* vote or that supporters of their coalition who are not entitled to vote get to do so anyway.[36] But one important limitation on such abuses is the American two-party system, which I believe is significantly better for this purpose than a multi-party system. There is almost always a large, well-financed coalition willing to push back against threats of disfranchisement (with African-American disfranchisement of the late 19th and early 20th centuries as the major exception). [37] Alas, the same cannot be said for many of our other rights.

Second (and more relevant to the present discussion), it can refer to apportionment such that the members of a particular group are distributed over several districts, rather than concentrated in one or more districts where they can form a majority. A variation on the latter theme can be this: It is also considered vote dilution to concentrate the votes of the minority such their votes are more than sufficient to elect the candidate of their choice (and hence votes are wasted that could have gone towards influencing elections in other districts).

Here is the problem with the second form of vote dilution: For rank-and-file voters in a particular minority group, it is seldom clear whether they will be better off having 10% of the vote in six of ten districts on the city council or 60% of the vote in one of ten districts. The 10% may not be enough of allow the group members to elect the candidate of their dreams, but it will sometimes be enough, through adept coalition building, to defeat the candidates of their nightmares. It is not obvious whether it is better for them to have six city council members (and hence a majority) who at least are not hostile to their interests or one city council member who can voice their position at city council meetings and attempt to drive deals with the other members. It may depend on the issues that come before the council, which are never completely foreseeable. It may also depend on the coalition-building talents of the particular person elected, which are difficult to gauge prior to that person's election. On the other hand (and here's the rub), the elected official or aspiring elected official from that minority group's protected district may flatter himself or herself into believing that the choice is indeed clear.

[36] Commissioner Narasaki makes a similar point when she writes that "people willing to suppress votes to stay in power will always be seeking new ways to accomplish that goal." The point she doesn't make, but which is also valid, is that people willing to engage in election fraud to stay in power will always be seeking new ways to accomplish *that* goal. See United States v. Brown, 494 F. Supp. 2d 440 (S.D. Miss. 2007), aff'd, 561 F.3d 420 (5th Cir. 2009). Again, we should avoid the temptation to believe that federal authorities are the only good guys and that state authorities cannot possibly be engaged in an effort to thwart local fraudsters when they say that is their intent.

[37] When elected officials from both major parties conspire together for the benefit of elected officials qua elected officials (i.e. when they act in a "bipartisan manner"), the protections offered by the two-party system break down. That's when the voters are in real trouble. See Jean Merl, State's *Redrawn Congressional Districts Protect Incumbents*, L.A. Times (February 9, 2002)("In a rare burst of bipartisan cooperation, legislators did their best to make all districts either safely Democratic or safely Republican; thus they sharply curtailed the likelihood of competition this year"). Even so, the danger isn't that individual voters will be "disfranchised" in the strict sense. It's something more dangerous, since it may slip the notice of average voters, and even if it does not, punishing both parties is not an easy task.

This may be an example of the old joke: There are two parties in the American political system: The Stupid Party and the Evil Party. Now and then they get together and do something that is both stupid and evil. This is known as "bipartisanship."

In no other area of law and policy is there a greater incentive for elected officials to advocate for special interest legislation. The special interest is, of course, they themselves—the class of incumbent politicians. See, e.g., The Bipartisan Campaign Reform Act of 2002, Pub.L. 107-155, 116 Stat. 81, enacted March 27, 2002, popularly known as the McCain-Feingold Act, (generally making it more difficult for incumbent politicians to be challenged). See also Citizens United v. Federal Election Commission, 558 U.S. 310 (2010)(holding unconstitutional on First Amendment grounds the section of McCain-Feingold that made it illegal for a conservative non-profit to publicly show a film that was critical of Hillary Clinton shortly before the Presidential primaries in which she was a candidate).

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One reason that large disfranchisements of existing voters have been extremely rare in history (again with one major exception) is the obvious one: *Voters don't like to be disfranchised.*[38] And as Ralph Waldo Emerson taught us, "When you strike at a king, you must kill him." I have sometimes told the story of the lead-in to Wyoming's entrance into the Union to my law students. Unlike any state at the time, the Wyoming Territory gave women the right to vote. Fearing that Wyoming's example would cause the women of other states to demand the vote, Congress initially balked at Wyoming's application for statehood, telling the Wyoming territorial legislature that it must disfranchise women first. But the Wyoming legislators stood their ground and cabled back to Congressional leaders, "We will remain out of the Union one hundred years rather than come in without the women." Eventually Congress relented.

I have looked at that story in the past as one in which the legislators stuck to their principles—that Wyoming women were equal partners in the settlement of the territory and that it would be morally wrong to deny them their right to participate. And I hope and trust that this was indeed the case for at least a number of the legislators. But, upon reflection, there's another way to look at the situation: Women already had the vote. The first legislator to suggest that he might be willing to disfranchise women had better hope and pray that his colleagues follow suit and that women are indeed disfranchised. Otherwise he will likely be angrily voted out of office at the next opportunity.[39]

Almost no one argues that there is any significant chance that the African-American Disfranchisement will be repeated in the lifetime of anyone around today. The catastrophic circumstances in the South at that time have virtually no chance of recurring. We have plenty of problems to deal with. That isn't one of them.

That doesn't mean that smaller interferences with the right to vote won't happen. There may even be lots of them.[40] Indeed, there will probably be lots of

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[38] Some states during the African-American Disfranchisement Movement considered the idea of continuing to allow African-American men and illiterate white men to vote, but allowing literate women and/or women of property (but not other women) to vote. Among the states to consider this approach were Alabama and Mississippi. See Michael Perman, Struggle for Mastery: Disfranchisement in the South 1888-1908 (2001). It was believed such an approach would cause less resentment than disfranchisement.

[39] It's important to understand just how unusual the disfranchisement of a major group is, not just in American history, but in the history of Western democracy. Political scientist Richard Valelly wrote:

> No major social group in Western history, other than African Americans, ever entered the electorate of an established democracy and then was extruded by nominally democratic means such as constitutional conventions and ballot referenda, forcing that group to start all over again. Disenfranchisements certainly took place in other nations, for example, in France, which experienced several during the nineteenth century. But such events occurred when the type of regime changed, not under formally democratic conditions. In Europe, Latin America, and elsewhere, liberal democracies never sponsored disfranchisement. Once previously excluded social groups came into any established democratic system, they stayed in.

Richard M. Valelly, The Two Reconstructions: The Struggle for Black Enfranchisement 2 (2004).

[40] There will also be lots of false alarms. Some of the cases mentioned by Chair Lhamon, in my opinion at least, are not quite what they appear to be on the surface. For example, she originally stated that "[i]n New York just three

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years ago baseless racially identifiable citizenship challenges prevented Americans from voting" (in response to my statement, she has since changed "prevented" to "impeded") and cites to the New York State Attorney General's press release. But looking at a press release alone is not always the best way to understand what is baseless. In this case, accounts in the media present a different side of things: In Deerpark, New York, a town of a little under 8000, Town Supervisor Gary Spears filed a challenge to voter registrations by 30 persons with Chinese names. Spears said that the fact that all 30 individuals wrote down the same address raised red flags for him. It turns out that all of them are students at a small college, Fei Tian College, which is affiliated with the Falun Gong movement. While the residence is listed as a three-bedroom, single-family home in the town tax records, it is apparently functioning as a dormitory at this small college. Some of the registrants also apparently showed up on Facebook as having addresses in California. Only two registrations were cancelled. But as I understand the matter from news media accounts, they were added back to Deerpark's voting rolls before any election had passed, meaning that nobody was ever actually denied the right to vote. See, e.g., Holly Kellum, Voting Registration of 30 Deerpark Citizens Cleared, The Epoch Times (October 14, 2015), https://www.theepochtimes.com/voting-registration-of-30-deerpark-citizens-cleared_1877222.html; Chris Fuchs, Chinese-American Students File Lawsuit Alleging Voter Intimidation, NBC News (October 27, 2015), https://www.nbcnews.com/news/asian-america/chinese-american-students-file-lawsuit-alleging-voter-intimidation-n452166. All in all, this seems to be a case of a reasonable challenge that turned out to be unfounded. No harm was done. It is one of life's everyday misunderstandings blown out of proportion by our current polarized political culture.

Chair Lhamon also states that "[i]n North Carolina we heard testimony about a voter over 90 years of age who had to make eleven trips to different state agencies and institutions to try and obtain the correct paperwork because her voter registration card did not match the name on her license."

That may sound terrible, but the real story turns out to be not so terrible. According to the transcript, the voter in question was then-92-year-old Rosanell Eaton, who was also one of the named plaintiffs in the North Carolina NAACP v. McCrory litigation. Mrs. Eaton was a heroine of the Civil Rights Movement. As a young woman in 1939, she was among the first African Americans to register in her county. To do so, she had to recite the preamble to the Constitution as proof of her literacy. She went on to be an assistant poll worker for 40 years and was responsible for registering more than 4000 people to vote.

It is telling that to challenge North Carolina's voter ID law, the North Carolina NAACP had to use a plaintiff who actually did have an ID, in this case a driver's license. The problem was simply a name discrepancy. Her driver's license said "Rosanell Eaton" while her voter registration said "Rosanell Johnson Eaton," which she apparently assumed would be a problem. Mrs. Eaton sued well before the North Carolina voter ID law had gone into effect (and hence before the procedures had been worked out). But in any event, it was clear right from the beginning that, she easily could have voted by absentee ballot even without an ID. Alternatively, if she preferred to vote in person, the procedure for reconciling one's voter registration to one's driver's license (as opposed to the other way around) was easy and would have taken only five minutes. Even the procedure for reconciling one's driver's license to one's voter registration is much easier than the eleven trips she and her daughter apparently took. See Sterling Beard, *The Left's Faux Martyr*, National Review Online (August 19, 2013), https://www.nationalreview.com/2013/08/lefts-faux-martyr-sterling-beard/.

Finally, Chair Lhamon points to a Georgia legislator whom she describes as having "openly stated that he does not want early voting because of the type of people—voters of color—who will use it." I agree with Chair Lhamon that parts of the statement of the legislator in question were problematic. But he appears to be motivated by purely partisan concerns, not race. He believed that early voting opportunities are disproportionately being located within easy distance of African-American mega-churches (whose members disproportionately vote Democratic) and wrongly believed this to be a violation of "the accepted principle of separation of church and state." That's silly. His main grievance appears to be that early voting opportunities within easy distance of large numbers of Republican voters were rarer (and hence election officials were not acting in a non-partisan manner). If he is right on that, he has a legitimate point. See Fran Millar, Interim DeKalb CEO Honeymoon Over, http://www.thecrier.net/our_columnists/article_a5bd6f90-37c0-11e4-a3e0-0019bb2963f4.html.

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them.[41] But I take some solace in the fact that, as a nation, we are better prepared to deal with voting rights issues than we are with issues arising out of a number of our

[41] Commissioner Adegbile points out that "successful" §2 cases (as defined in the staff-generated part of this report) have quadrupled in the years since *Shelby County* when compared to the same number of years immediately preceding that case. Part of this may be just timing. The census is always taken at the beginning of the decade. The work of redistricting takes place about two years later, so litigation over re-districting tends to be decided in 2013-2014 or so. But I suspect that he is right that the number of §2 challenges has grown or at least that it will grow. That should be expected. The upshot of *Shelby County* was that, unless Congress legislates further, the old preclearance system would be replaced by §2 litigation as the dominant method for dealing with these issues in all states instead of just in non-covered jurisdictions. That is not troubling in itself.

The important question is whether §2 litigation is somehow less effective at dealing with violations of the law than was the preclearance method in those jurisdictions where preclearance was previously required. Looking at the twenty-three §2 cases classified in this report as "successful," I am not yet convinced that it is. Eleven out of the total took place in jurisdictions that weren't covered in the first place, so the change in procedure wrought by *Shelby County* did not affect them. (Note that this lends some credence to the Supreme Court's conclusion that Congress's use of a 1975-vintage formula for determining which jurisdictions are high-risk for violations of the law was unfairly out of date. Moreover, it is evidence that §2 litigation has been sufficient to control abuses. If it hadn't been, there would have been massive pressure to extend preclearance nationwide.)

The fear of those who would like to see preclearance restored was that in the formerly covered jurisdictions, §2 lawsuits would be too cumbersome a method for derailing proposals that violate the law. Those proposals would therefore be implemented before a court had an opportunity to make a decision and act. But that doesn't seem to have happened. According to the chart on pages 275-77, of the 12 cases in covered jurisdictions, five resulted in preliminary injunctions (a standard tool for preventing likely violations that threaten to cause irreparable harm before they can be fully litigated).

I took a look at the remaining seven (i.e. the ones in which, according to the chart, no preliminary injunction had issued) to see if they involved a proposal that would have failed preclearance, but instead got implemented before the court had a chance to decide what to do. These cases are a jumble, and I do not claim to be an expert on their sometimes-complicated histories. In some cases it's not even possible, based on the information available to me, to confirm whether the chart is right that no preliminary injunction was granted. Nevertheless, it is not certain that any are examples of what *Shelby County* critics feared—cases where proposals that *would have been derailed by preclearance* instead got implemented before a court had time to make a decision and act (although Patino v. City of Pasadena, 230 F. Supp. 3d 667 (S.D. Tex. 2017), might be such a case). I discuss some of them infra at note 42.

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other rights.[42] Voting issues seldom slip by unnoticed.[43]

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[42] Post-Shelby County cases in which the lack of the former preclearance procedures likely led to the implementation of an illegal voting procedure are at worst rare. According to the Report's chart on pages 221-4, there are seven "successful" §2 cases from formerly preclearance jurisdictions where no preliminary injunction issued. But that doesn't necessarily mean an illegal voting procedure was implemented that would have been prevented by a preclearance process. For example, in Benavidez v. Irving School District, No. 3:2013cv00087 (N.D. Tex. 2014), a continuing duty to preclear would not have yielded a different result. How do I know that? Because it was precleared. The plaintiff brought the case in spite of that and apparently won. And in Terrebonne Parish NAACP v. Jindal, 3:14-CV-00069-JJB-EWD (M.D. La. August 17, 2017), a preclearance process would not have changed things, since defendants had not changed election procedures in a way that would have triggered that process. Instead, plaintiffs were arguing that the defendants should change procedures that had been in place a long time.

Of the cases I was able to examine, Patino v. City of Pasadena, 230 F. Supp. 3d 667 (S.D. Tex. 2017), may come the closest to being what preclearance supporters fear, see *supra* at note 41. No preliminary injunction appears to have issued there, so the City of Pasadena's re-districting plan for its city council went into effect for the 2015 election before being permanently enjoined for future elections by the court in 2016. But it appears that no preliminary injunction was requested, and nothing I found in the record explains why.

One thing we do know is that there were facts in dispute in *Patino* (since summary judgment was denied and a trial on the merits occurred). It is therefore possible that a preliminary injunction was not asked for, because the plaintiffs knew that until they had taken discovery and proven their case at a full trial, the balance of equities would be viewed by the court as not weighing in their favor.

The leads to the question whether it is a good thing or a bad thing that sometimes temporary restraining orders and/or preliminary injunctions won't issue in cases where the plaintiff is ultimately successful in proving his or her entitlement to a permanent injunction. That in turn becomes a question of the relative importance of the two different kinds of errors that can occur in the context of a particular case. It's not clear that the failure to grant a preliminary injunction that in hindsight *should* have been granted is always a more serious error than the issuance of a preliminary injunction that in hindsight *should not* have been granted. Sometimes standing in the way of a change to election procedures instituted by democratically elected officials on the ground that it is *possible*, but not especially likely, that the change will eventually be shown to be unlawful will be precisely the wrong thing to do. If so, the §2 litigation method may be superior to the preclearance method, because the courts are in a somewhat better position to balance the dangers of Type I and Type II errors. With preclearance, the Civil Rights Division ordinarily will either preclear or not preclear. The option of allowing a change to be implemented and then revoking preclearance after it has had the opportunity to consider the matter at greater length does not fit in well with the concept of preclearance. Unlike §2 litigation with its time-honored distinction among temporary restraining orders, preliminary injunctions, and permanent injunctions, the preclearance process is not structured to give the Civil Rights Division three distinct bites at the apple.

Note that in the case of *Patino*, the court ordered that in the future the City of Pasadena will be subject to preclearance. This is an option that courts have with jurisdictions that have violated the law. Under §3, they can be "bailed in" to the preclearance system. *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 729-30 (S.D. Tex. 2017). The defendant in Allen v. City of Evergreen, 2014 WL 12607819 (S.D. Ala. 2014), was similarly "bailed in" under §3. It's important to remember that Shelby County did not do away with the preclearance process. If a court designates a jurisdiction under §3, that jurisdiction will be subject to preclearance.

For a discussion of Perez v. Abbott and the special case where the status quo ante is not an option, see infra at note 43.

[43] In cases in which the status quo ante is not an option, §2 litigation may be the superior method of dealing with illegal voting procedures. Perez v. Abbott may be a useful example.

The supposed virtue of the preclearance approach is that it prevents state and local governments from implementing a change in election procedure until that change has been thoroughly considered and approved. If the change doesn't

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Consider, for example, *Shelby County v. Holder*. In that case, 48 amici curiae briefs were filed. Amici included by John Nix et al.; the Judicial Education Project; the Justice and Freedom Fund; the Mountain States Legal Foundation; the Southeastern Legal Foundation; the National Black Chamber of Commerce; Arizona; Georgia; South Carolina; South Dakota; the Pacific Legal Foundation; the Landmark Legal Foundation; Hans von Spakovsky, J. Christian Adams, Clint Bolick, Roger Clegg, Charles Cooper, Robert Driscoll, William Bradford Reynolds, Bradley Schlozman, the Abraham Lincoln Institute for Public Policy Research, the Center for Constitutional Jurisprudence, the Cato Institute, the State of Texas, Project 21, Alabama, Merced County, California, Alaska, American Unity Legal Defense Fund, Professor Patricia Broussard, National Bar Association, Rep. John Lewis, Rep. Frank Sensenbrenner, Dick Thornburgh,

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get approved in time for an election, its proponent must default to the status quo ante. (See *supra* at note 42 for my thoughts on whether this is always the best approach.)

One of the problems with this approach is that sometimes the status quo ante is unworkable. So it was with Texas in *Perez v. Abbott* (Congressional re-districting case). After the 2010 census, Texas had been allotted four more seats in the U.S. House of Representatives. There was no way it could simply default to the re-districting map of the previous decade if its proposal failed preclearance (as it eventually did, just a bit before *Shelby County*).

Here's my understanding of what happened: After the 2010 census, the Texas legislature passed two newly re-districted maps, both of which became the subject of lengthy litigation—one for the U.S. House of Representatives and one for the Texas House of Representatives. Texas opted to submit them for preclearance to the U.S. District Court for the District of Columbia (as the Voting Rights Act permits it to do) rather than to the U.S. Department of Justice. See Carrie Johnson, Could Texas' Redistricting Leave Latinos Behind?, National Public Radio (September 19, 2011)(suggesting that Texas chose to submit its plans to the U.S. District Court for the District of Columbia, because it was leery of the Department of Justice's possible political motives).

But with the primary season fast approaching, no decision on preclearance had been forthcoming, and Texas therefore could not legally implement its plan. Things were starting to look bad.Luckily for Texas voters, parallel §2 litigation had been filed in federal court in Texas. See Complaint in Perez v. Texas, No. 5:11-CV-00360-OLG-JES-XR (W.D. Tex. filed May 9, 2011), and a three-judge panel had been convened. See 28 U. S. C. §2284. With the help of the parties, *that* court (not the U.S.D.C.D.C.) begun to devise (after one false start, see Perry v. Perez, 565 U.S. 388 (2012)) substitute plans. Ultimately, the U.S. District Court for the District of Columbia declined to preclear the original Texas plan. But was the §2 court that saved the day by devising the alternative map, not the preclearance court. That alternative map was implemented in time for the 2012 elections.

It seems to me that having the §2 court design the alternative will usually be a better method of dealing with the cases where the status quo ante is not an option. Nobody should want a court to be deciding how to re-district a state. It is an inherently political decision that, when possible, should be left to politicians, acting within the law. But sometimes judicial action may be necessary. I suspect most people would prefer a court to the lawyers in the Voting Section of the Civil Rights Division, especially given the lack of political and/or ideological diversity of the Voting Section (as discussed *supra* at note 28), courts will likely be seen as more legitimate. Spreading the responsibility out to federal courts across the country rather than concentrating that responsibility in just one court—the U.S. District Court for the District of Columbia—makes sense too. There is a season for this type of litigation. It comes once every ten years after the census. It is impossible to predict how many cases will reach litigation, so it is impossible for the U.S. District Court for the District of Columbia to gear up each decade to handle the cases. In addition, if a single federal court is seen as the arbiter of all such cases, judgeships on that court will be especially controversial and the court will be subject to special scrutiny and suspicions of political bias.

The litigation over Texas's Congressional re-districting continued for years after the 2012 elections. Eventually, the Texas legislature adopted (with only a few modifications) the re-districting plans the §2 court had devised. On March 10, 2017, however, the §2 court decided that the legislature's actions were "tainted" by its earlier actions and that further adjustments would therefore be necessary. Perez v. Abbott, No. 5:11-CV-00360-OLG-JES-XR (W.D. Tex. March 10, 2017). That decision was reversed by the Supreme Court in connection with the Texas map of Congressional districts. Perez v. Abbott, ___ U.S. ___ (June 25, 2018). That reversal occurred only one day before the chart in the staff-generated portion of this Report was adopted by the Commission. The reversal was therefore not reflected in that chart.

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Brennan Center for Justice, Sen. Majority Leader Harry Reid, Veterans of the Mississippi Civil Rights Movement, Gabriel Chin, the Constitutional Accountability Center, Professor Richard Engstrom, The Leadership Conference on Civil and Human Rights and the Leadership Conference on Civil and Human Rights Education Fund, the Hon. Marcia Fudge, Professor Kareem Crayton et al., Jurisdictions that Have Bailed Out, the National Lawyers Guild, the American Bar Association, National Latino Organizations, Section 5 Litigation Intervenors, the Alabama Black Legislative Caucus and the Alabama Association of Black County Officials, New York, Senator C. Bradley Hutto, Navajo Nation et al., Joaquin Avila, Asian American public interest groups; a group of historians and social scientists; Ellen Katz and the Voting Rights Initiative; the Alaska Federation of Natives and Alaska Natives and Tribes; and the City of New York.

Similarly, in *Crawford v. Marion County Board of Elections*, there were 41 amicus briefs. The individuals and organizations filing include Prof. Richard Hasen, the League of Women Voters of Indiana, the League of Women Voters in Indianapolis, Congressman Keith Ellison, the Electronic Privacy Information Center, the Asian American Legal Defense and Education Fund, Rock the Vote, the National Black Law Students Association, the National Black Graduate Students Association, the Feminist Majority Foundation, the Student Association for Voter Empowerment, Charles Ogletree and a group of historians and scholars; Christopher Elmendorf and Daniel Tokaji; AARP and the National Senior Citizens Law Center; the National Law Center on Homelessness and Poverty; the Lawyers Committee for Civil Rights Under Law; Service Employees International Union; the American Federation of State, County, and Municipal Employees; Common Cause; the Jewish Council for Public Affairs; the National Council for Jewish Women; NAACP Legal Defense and Education Fund; the Cyber Privacy Project; Privacy Journal; Privacy Activism; Liberty Coalition; the U.S. Bill of Rights Foundation; Robbin Stewart; ACORN; Dr. Frederic Schaeffer et al.; Senator Dianne Feinstein; Representative Zoe Lofgren; Representative Robert Brady; the Rutherford Institute; the Asian American Justice Center; the Asian Law Caucus; the Asian American Legal Center of Southern California; the Asian American Institute; R. Michael Alvarez; Lonna Rae Atkenson; Deila Bailey; Thad E. Hall; Andrew D. Martin; National Congress of American Indians; Navajo Nation; Agnes Laughter; Brennan Center for Justice; Demos; Lorraine C. Minnite; Project Vote; People for the American Way Foundation; Pacific Legal Foundation; Karen Handel, then Georgia Secretary of State; Erwin Chemerinsky; Mountain States Legal Foundation; Doris Anne Sadler; Center for Equal Opportunity; Project 21; Senator Mitch McConnell; American Unity Legal Defense; Republican National Committee; Lawyers Democracy Fund; Texas, Alabama, Colorado, Hawaii, Michigan, Nebraska, Puerto Rico, South Dakota; Washington Legal Foundation; Evergreen Freedom Foundation; American Civil Rights Union; and the Conservative Party of New York State.

That is not to say that justice will always be done. It won't be. No nation is ever that lucky in any area of the law. But relative to other rights and other areas of human endeavor, this one at least gets plenty of attention.[44] That's something. Instead, my point is only that I wish elected officials

[44] At times there seems to be an over-sensitivity in this area, especially in efforts to combat voter intimidation, to go alongside occasional under-sensitivity. A few years ago, billboards with the message "Voter Fraud Is a Felony! Up to 3 ½ yrs & $10,000 fine" led to a hullaballoo in Cleveland. The large corporation that owned and leased the

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(and others interested in elections) spent as much time worrying about issues that have affected people's lives more directly.

The voter ID cases are interesting in this regard. The various state laws at issue in those cases get a lot of attention, not just in the courts, but from the press and from various organizations that purport to represent the interests of groups thought to be less likely to have an ID. Yet photo IDs are necessary for lots of activities, not just voting. According to Ashe Schow of the Washington Examiner, they are necessary to open a bank account; to apply for food stamps; to apply for public assistance; to apply for Medicaid or Social Security; to apply for a job; to apply for unemployment benefits; to rent or buy a home; to purchase alcohol, to purchase cigarettes, to drive, buy, or rent a car; to get on an airplane; to get married; to purchase a gun; to adopt a pet; to rent a hotel room; to apply for a hunting license; to apply for a fishing license; to purchase nail polish at CVS, and purchase certain cold medicines.[45] To that list I can add my experience has been (and the GSA web site confirms) that to enter federal buildings one must often present a photo ID.

Given how common photo ID requirements are, one must wonder why all the objections seem to concern voter ID laws. No effort that I am aware of (and certainly nothing like the monumental effort that has been put into combating voter ID legislation) has been put into softening ID laws and policies like those above. Getting a job, renting a home, opening a bank account, and many other things on the list are more important to how an *individual* is able to live his or her life than the ability to vote.[46]

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billboards—Clear Channel Outdoor Holdings, Inc.—came under pressure from local politicians and pressure groups to remove them. Buckling under that pressure, it agreed to do so. As penance, it further agreed to allow their billboards to carry the message, "Voting is a right. Not a Crime!" for free. Patrick O'Donnell, Voter Fraud Billboards that Drew Complaints of Racism and Intimidation Will Come Down, Clear Channel Says, Cleveland Plain Dealer (October 20, 2012), https://www.cleveland.com/metro/index.ssf/2012/10/voter_fraud_billboards_that_dr.html. It is, of course, a fact that voter fraud is criminal. I do not know for certain how common it is, but obviously outcries like the one in Cleveland serve to cause ordinary citizens to conclude it may be more common than they thought. "Why else would local politicians throw such a fit over a billboard that accurately states what the law is?" many will likely wonder.
Is an accurate statement of this kind protected by the First Amendment? It is a question worth considering. The Supreme Court recently issued an opinion finding that a state law designed to protect against voter intimidation went too far toward discouraging free speech. See Minnesota Voters Alliance v. Mansky, ___ U.S. ___ (June 14, 2018)(holding that a Minnesota law prohibiting individuals, including voters, from wearing a "political badge, political button, or other political insignia" inside a polling place is a violation of the First Amendment). What is curious is that some serious allegations of voter intimidation have drawn less attention from officials than the billboard case: Voter intimidation involving two men, standing shoulder-to-shoulder in front of the door to the polling place, wearing paramilitary clothing, hurling racial epithets at white voters and poll workers, with one wielding a night stick, caused far less concern at the Department of Justice almost a decade ago. See Statement of Commissioner Gail Heriot in U.S. Commission on Civil Rights, Race Neutral Enforcement of the Law?: DOJ and the New Black Panther Party Litigation 125 (2010).

[45] Ashe Schow, 24 Things That Require a Photo ID, Washington Examiner (August 14, 2013).

[46] Even the things that look small on paper can turn out to be very important once you know the facts. For example, migraine sufferers whose headaches are triggered by sinus congestion (like me) consider few things as important as obtaining the decongestant pseudoephedrine (in over-the-counter drugs like Sudafed). Yet under federal law, it is apparently available only on presentation of a photo ID.

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Once more for emphasis: I am not arguing that the political classes should pay less attention to voting rights issues. Even if I were arguing that, I would be barking at the moon. In our Era of Big Government, so many believe themselves to have a huge stake in the outcome of elections, it seems unlikely that I or anyone else will be able to persuade them not to worry. I am simply hoping that we can duplicate some of the energy that goes into voting rights elsewhere.

The area that is most troubling right now is free expression. The ACLU, once the nation's premier public interest law firm, has quietly backed away from its traditional position favoring robust protections for unpopular speech. Wendy Kaminer, a former ACLU Board Member, recently wrote in the Wall Street Journal:

> [T]raditional free-speech values do not appeal to the ACLU's increasingly partisan progressive constituency—especially after the 2017 white-supremacist rally in Charlottesville. The Virginia ACLU affiliate rightly represented the rally's organizers when the city attempted to deny them a permit to assemble. Responding to intense post-Charlottesville criticism, last year the ACLU reconsidered its obligation to represent white-supremacist protesters.
>
> The 2018 guidelines claim that "the ACLU is committed to defending speech rights without regard to whether the views expressed are consistent with or opposed to the ACLU's core values, priorities and goals." But directly contradicting that assertion, they also cite as a reason to decline taking a free-speech case "the extent to which the speech may assist in advancing the goals of white supremacists *or others whose views are contrary to our values*."[47]

I am less optimistic about the nation's willingness to put effort into safeguarding the right to free expression than I am the right to vote. I hope I am worrying unnecessarily.

[47] See Wendy Kaminer, The ACLU Retreats from Free Expression: The Organization Declares that Speech It Doesn't Like Can "Inflict Serious Harms" and "Impede Progress," Wall Street Journal (June 20, 2018)(emphasis added).

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