DEMOCRACY & JUSTICE COLLECTED WRITINGS BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at NYU School of Law

The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. We work to hold our political institutions and laws accountable to the twin American ideals of democracy and equal justice for all. The Center's work ranges from voting rights to campaign finance reform, from racial justice in criminal law to Constitutional protection in the fight against terrorism. A singular institution — part think tank, part public interest law firm, part advocacy group, part communications hub — the Brennan Center seeks meaningful, measurable change in the systems by which our nation is governed.

About Democracy & Justice: Collected Writings 2013

The material in this volume is excerpted from Brennan Center reports, policy proposals, and issue briefs. We've also excerpted material from public remarks, legal briefs, congressional testimony, and op-ed pieces written by Brennan Center staff in 2013. The volume was compiled and edited by Jeanine Plant-Chirlin, Jim Lyons, Erik Opsal, and Kimberly Lubrano. For a full version of any material printed herein, complete with footnotes, please email jeanine.plant-chirlin@nyu.edu.

Introduction from the President

Our political system's long slide toward dysfunction tipped into crisis in 2013. Amid shutdowns and debt ceiling drama, for the first time, government dysfunction ranked highest among Americans' concerns about the well-being of our nation.

So we have to do what Americans have done every time our institutions fall short of our values. We can't just complain. Despite filibustering and gerrymandering, Super PACs and shutdowns — we can do better.

That's where the Brennan Center for Justice comes in. We start with research. We communicate widely. We craft reforms. And we fight for them in court. That's the way Americans have always made legal change.

Over the past few years, the Brennan Center has become one of America's most effective nonpartisan voices for democracy and justice. When we have to, we fight to defend our values. Hours after the Supreme Court gutted the Voting Rights Act, states across the country erupted in a festival of voter suppression. We are fighting back.

But defensive fights — even defensive victories — are not enough. More than ever: If we don't fix our systems, we won't solve our problems.

This is the Brennan Center's next great mission. We aim to become the dynamic center of a new generation of reform ideas. And we're off to a great start.

Our voter registration modernization proposal would guarantee that every eligible American could vote. Nine states enacted parts of our plan in 2013. Our proposal for an independent oversight for the NYPD is now law. In New York State, we came within one vote of passing small donor public financing and comprehensive reform. And *The Washington Post* hailed our "smart" plan to reform federal funding to reduce mass incarceration.

This volume offers a sample of this great work from 2013.

We are continuing the fight in 2014. Already, our voting reforms have seen bipartisan consensus in — of all places — Washington, D.C. In January, lawmakers introduced a bipartisan bill to strengthen the Voting Rights Act. One week later, President Obama's voting commission released new ideas to improve access to the ballot box. In New York, Gov. Andrew Cuomo included public financing in this year's state budget.

We take our charge from Justice Brennan and his notion of the living constitution — which, at its heart, reflects the core values of our Declaration of Independence — that we are all created equal. Every day, our works seeks to hold America accountable to that fundamental ideal.

Michael Waldman
President

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DEMOCRACY AND JUSTICE TODAY

‘That Sound You Hear is the Shredding of the Social Contract’

Bill Moyers

The veteran journalist, in a powerful address, warns that our democracy is at risk.

I met Justice Brennan in 1987 when I was creating a series for public television called “In Search of the Constitution,” celebrating the bicentennial of our founding document.

By then he had served on the Court longer than any of his colleagues and had written close to 500 majority opinions, many of them addressing fundamental questions of equality, voting rights, school segregation, and, in *New York Times v. Sullivan* in particular, the defense of a free press.

Those decisions brought a storm of protest from across the country. Although he said he never took personally the resentment and anger directed at him, he did subsequently reveal that his own mother had told him she always liked his opinions when he was on the New Jersey court but wondered, now that he was on the Supreme Court, “Why can’t you do it the same way?” His answer: “We have to discharge our responsibility to enforce the rights in favor of minorities, whatever the majority reaction may be.”

Although a liberal, he worried about the looming size of government. When he mentioned that modern science may be creating “a Frankenstein,” I asked, “How so?” He looked around the chamber and replied: “The very conversation we’re now having can be overheard. Science has done things that, as I understand it, make it possible through these drapes and those windows to get something in here that takes down what we’re talking about.”

That was 1987 — before the era of cyberspace and the maximum surveillance state that grows topsy-turvy with every administration. How I wish he were here now — and still on the Court!

My interview with him was one of 12 episodes in that series on the Constitution. Another concerned a case he had heard back in 1967 involving a teacher named Harry Keyishian, who had been fired because he would not sign a New York State loyalty oath. Justice Brennan ruled that the loyalty oath and

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Moyers received a Brennan Legacy Award, and delivered a version of this speech at the Brennan Legacy Awards Dinner, November 19, 2013. This essay first appeared online at TomDispatch.com.

other anti-subversive state statutes violated First Amendment protections of academic freedom. I tracked Keyishian down and interviewed him. Justice Brennan watched that program and was fascinated to see the actual person behind the name on his decisions. The journalist Nat Hentoff, who followed Brennan's work closely, wrote that "He may have seen hardly any of the litigants before him, but he searched for a sense of them in the cases that reached him." Now, watching the interview with Keyishian, he said: "It was the first time I had seen him. Until then, I had no idea that he and the other teachers would have lost everything if the case had gone the other way."

Toward the end of his tenure, when he was writing an increasing number of dissents on the Rehnquist Court, Brennan was asked if he was getting discouraged. He smiled and said, "Look, pal, we've always known — the Framers knew — that liberty is a fragile thing. You can't give up."

The historian Plutarch warned us long ago of what happens when there is no brake on the power of great wealth to subvert the electorate. He wrote: "The abuse of buying and selling votes crept in and money began to play an important part in determining elections. Later on, this process of corruption spread to the law courts and to the army, and finally, when the sword became enslaved by the power of gold, the Republic was subjected to the rule of emperors."

We don't have emperors yet, but we do have the Roberts Court that consistently privileges the donor class.

No emperors yet, but we do have a Senate in which, as a study by the political scientist Larry Bartels reveals, "Senators appear to be considerably more responsive to the opinions of affluent constituents than to those of middle-class constituents, while the opinions of constituents in the bottom third of the income distribution have no apparent statistical effect on their senators' roll call votes."

No emperors yet, but we have a House of Representatives controlled by the far right of the political spectrum that is now nourished by streams of "dark money" unleashed by the gift bestowed on the rich by *Citizens United*.

No emperors yet, but one of our two major parties is now dominated by radicals engaged in a crusade of voter suppression aimed at the elderly, the young, minorities, and the poor while the other party, once the champion of everyday working people, has been so enfeebled by its own collaboration with the donor class that it offers only token resistance to the forces that have demoralized everyday Americans.

Writing in *The Guardian* recently, the social critic George Monbiot said: "I don't blame people for giving up on politics. When a state-corporate nexus of power has bypassed democracy and made a mockery of the voting process; when an unreformed political system ensures that parties can be bought and sold; when politicians [of the main parties] stand and watch as public services are divvied up by a grubby cabal of privateers, what is left of the system that inspires us to participate?"

Why are record numbers of Americans on food stamps? Because record numbers of Americans are in poverty. Why are people falling through the cracks? Because there are cracks. It is simply astonishing that in this rich nation more than 21 million Americans are still in need of full-time work, many of them running out of jobless benefits, while our financial class pockets record profits, spends lavishly on campaigns to secure a political order that serves its own interests, and demands that our political class push for further austerity. Meanwhile, roughly 46 million Americans live at or below the poverty line, and with the exception of Romania, no developed country has a higher percent of kids in poverty than we do.

Yet a study by scholars at Northwestern University and Vanderbilt finds little support among the wealthiest Americans for policy reforms to reduce income inequality.

Listen! That sound you hear is the shredding of the social contract.

Ten years ago *The Economist* — no friend of Marxism — warned: "The United States risks calcifying into a European-style class-based society."

And in the words of a headline over a recent article in the *Columbia Journalism Review*: "The line between democracy and a darker social order is thinner than you think."

We are this close — this close! — to losing our democracy to the mercenary class. So close it's as if we are leaning way over the rim of the Grand Canyon, waiting for a swift kick in the pants.

This is the oldest story in America: the struggle to determine whether "we, the people" is a moral compact embedded in a political contract, or merely a charade masquerading as piety and manipulated by the powerful and privileged to sustain their own way of life at the expense of others.

When Justice Brennan and I talked privately in his chambers before that interview almost 20 years ago, I asked him how he had come to his liberal sentiments. "It was my neighborhood," he said. Born to Irish immigrants in 1906, as the harsh indignities of the Gilded Age were flinging hardship and deprivation at his kinfolk and neighbors, he saw "all kinds of suffering — people had to struggle." He never forgot those people or their struggles, and he believed it to be our collective responsibility to create a country where they would have a fair chance to a decent life. "If you doubt it," he said, "read the Preamble [to the Constitution]."

Let's all go home tonight and do just that.

Just as I asked Justice Brennan how he came to his philosophy about government, he asked virtually the same of me (knowing that I had been in both the Kennedy and Johnson administrations). I don't remember my exact words, but I told him — briefly — that I had been born in the midst of the Great Depression to parents who had to drop out of school in the fourth and eighth grades, respectively, because they were needed in the fields to pick cotton to help support their families. I recalled that FDR had been president during my first 11 years, that my father listened to his "fireside chats" as if they were gospel, that my brother went to college on the GI Bill, and that I myself had been the beneficiary of public schools, public libraries, public parks, public roads, and two public universities; how could I not think that what had been good for me was also good for others?

That was the essence of my response to Justice Brennan. I wish now that I could talk to him again, because I failed to mention perhaps the most important lesson about democracy that I ever learned.

On my 16th birthday in 1950 I went to work for the daily newspaper in the small east Texas town where I grew up. It was a racially divided town — about 20,000 people, half of them white, half of them black; a place where you could grow up well-loved, well-taught, and well-churched, and still be unaware of the lives of others merely blocks away. It was nonetheless a good place to be a cub reporter — small enough to navigate but big enough to keep me busy and learning something every day. I soon had a stroke of luck. Some of the old-timers in the newsroom were on vacation or out sick, and I got assigned to

report on what came to be known as the "Housewives' Rebellion." Fifteen women in town — all white — decided not to pay the Social Security withholding tax for their domestic workers — all black.

They argued that Social Security was unconstitutional, that imposing it was taxation without representation, and that — here's my favorite part — "requiring us to collect [the tax] is no different from requiring us to collect the garbage." They hired themselves a lawyer — none other than Martin Dies, Jr., the former congressman best known, or worst known, for his work as head of the House Committee on Un-American Activities in the witch-hunting days of the 1930s and '40s. They went to court — and lost. Social Security was constitutional, after all. They held their noses and paid the tax.

The stories I helped report were picked up by the Associated Press and circulated nationwide. One day the managing editor, Spencer Jones, called me over and pointed to the AP ticker beside his desk. Moving across the wire was a notice citing the reporters on our paper for the reporting we had done on the "Rebellion." I spotted my name — and was hooked. In one way or another — after a detour through seminary and then into politics and government — I've been covering the class war ever since.

Those women in Marshall, Texas, were among its advance guard. Not bad people, they were regulars at church, their children were my classmates, many of them were active in community affairs, and their husbands were pillars of the business and professional class in town. They were all respectable and upstanding citizens, so it took me a while to figure out what had brought on that spasm of reactionary defiance. It came to me one day, much later: They simply couldn't see beyond their own prerogatives. Fiercely loyal to their families, to their clubs, charities, and congregations — fiercely loyal, in other words, to their own kind — they narrowly defined membership in democracy to include only people like them. The black women who washed and ironed their laundry, cooked their families' meals, cleaned their bathrooms, wiped their children's bottoms, and made their husbands' beds — these women, too, would grow old and frail, sick and decrepit, lose their husbands and face the ravages of time alone, with nothing to show from their years of labor but the creases in their brow and the knots on their knuckles. There would be nothing for them to live on but the modest return on their toil secured by the collaborative guarantee of a safety net.

In one way or another, this is the oldest story in America: the struggle to determine whether "we, the people" is a moral compact embedded in a political contract, or merely a charade masquerading as piety and manipulated by the powerful and privileged to sustain their own way of life at the expense of others.

I should make it clear that I don't harbor any idealized notion of politics and democracy; remember, I worked for Lyndon Johnson. Nor do I romanticize "the people." You should read my mail and posts on right-wing sites. I understand what the politician in Texas who said of the state legislature: "If you think these guys are bad, you should see their constituents."

But there is nothing idealized or romantic about the difference between a society whose arrangements roughly serve all its citizens (otherwise known as social justice) and one whose institutions have been converted into a stupendous fraud. That difference can be the difference between democracy and plutocracy.

Toward the end of Justice Brennan's tenure on the Supreme Court, he made a speech that went to the heart of the matter. He said:

> "We do not yet have justice, equal and practical for the poor, for the members of minority groups, for the criminally accused, for alienated youth, for the urban masses. ... Ugly inequities continue to mar the face of the nation. We are surely nearer the beginning than the end of the struggle."

And so we are. One hundred and fifty years ago today, Abraham Lincoln stood on the blood-soaked battlefield of Gettysburg and called Americans to "the great task remaining." That "unfinished work," as he named it, remained the same then as it was when America's founding generation began it. And it remains the same today: to breathe new life into the promise of the Declaration of Independence and to assure that the Union so many have sacrificed to save is a union worth saving.

In this "unfinished work" the Brennan Center for Justice has much to do.

VOTING REFORM

Playing Offense: An Aggressive Voting Rights Agenda

Michael Waldman

Those who support voting rights must move onto offense. We need to learn the lessons of recent victories and defeats. We must win the fight for public opinion. And we need a commitment to continued innovation — including, critically, a pro-voter election integrity agenda.

One year before the 2012 election, democracy was playing defense.

Our nation was founded on an essential premise of political equality, the ideal that "all men are created equal." In fits and starts over two centuries, we widened the circle of participation. The right to vote became over time the fundamental embodiment of the American idea.

But suddenly, in state capitals across the country, Republican lawmakers had moved abruptly to curb voting rights. In all, 19 states enacted 25 new statutes to cut back on the franchise, the first major rollback since the Jim Crow era. Measures ranged from harsh new voter ID requirements (in Pennsylvania, Wisconsin, and elsewhere), to an end to same-day registration (in Maine), to strict limits on early voting (in Florida and Ohio), to barriers that made it nearly impossible for outside groups to register citizens (in Florida). The Brennan Center for Justice calculated the new laws would make it far harder for at least 5 million citizens to vote.

No unexpected crisis impelled this wave of action — only a shift to Republican Party control in statehouses. The new laws bore an unmistakable partisan tint. Pennsylvania GOP leader Mike Turzai seemed tipsy on truth serum when he bragged that his new voter ID law "is gonna allow Governor Romney to win the state of Pennsylvania." They also bore an unmistakable racial tint. Of the 10 states with the highest black turnout in 2008, the legislatures of eight passed measures making it harder to vote — laws that hit hardest minority, student, poor, and elderly citizens.

Then something remarkable happened. Citizens fought back. A high-octane communications effort by voting-rights groups brought the issue to the center of political debate. The Justice Department lived up to its responsibility, too, and blocked many laws using the Voting Rights Act. Lawyers for democracy forces fanned out to courtrooms across the country. Judges, regardless of party, acted as a counterweight to partisan manipulation.

This article appeared in *Democracy: A Journal of Ideas,* Spring 2013.

Startlingly, by Election Day, *every single one* of the worst new laws had been blocked, blunted, postponed, or repealed. It was a heartening victory — a rare, distilled triumph of public-interest law and citizen activism. But public attention shone a klieg light on deep underlying problems. The self-proclaimed world's greatest democracy tolerates a voting system that is ramshackle, rife with error, and prone to manipulation. Long lines are just one visible symptom. In central Florida, waits as long as seven hours turned away an estimated 49,000 voters. As conservative columnist David Frum wrote, "America's voting system is a disgrace."

This time, these flaws did not prove dispositive: The election was not close. But if Florida 2000 was an electoral wreck, America 2012 was a terrifying near-miss. On election night, President Obama waxed eloquent describing people who waited hours to vote, then blurted out, "By the way, we have to fix that." Mr. President, to invoke a familiar phrase, "Yes, we can." But how?

Progressives must embrace ambition and innovation — the next generation of reforms can't just rehash old victories or fend off assaults from the other side.

Just possibly, the voting brawl will launch a new era in the fight to strengthen American democracy. Many voters were furious. African-American turnout increased, partly in reaction to attempted disenfranchisement. But defensive victories, no matter how vital, are not enough. As Winston Churchill said, "Wars are not won by evacuations." Progressives must embrace ambition and innovation — the next generation of reforms can't just rehash old victories or fend off assaults from the other side. We must put forward an agenda that addresses public concern for election integrity without disenfranchising voters. And we must be far more strategically ambitious about building a politically potent movement for change. That starts with an insistence that policy elites and political allies again put democracy reform at the center of their concerns.

Lessons Learned

As we move to seek reforms, we would do well to draw some basic lessons from the fights of the past two years.

Problems are fundamental; reforms must be fundamental. Many culprits produced long lines on Election Day. Certainly, national standards to assure adequate early voting periods would help. So would rules to make sure there are enough voting machines per precinct. But new technologies offer the possibility to leap forward — to shift the paradigm of how we run elections. Reimagining voter registration is the key.

Today's system of individualized, self-initiated voter registration was first created a century ago in an explicit effort to keep former slaves and new European immigrants from voting. It has barely been updated since. It relies on paper records, administered by thousands of local jurisdictions. The Pew Center on the States reports millions of names of dead people or duplicates clog the records, while tens of millions of eligible citizens are missing. Tinkering alone will not fix voter registration.

Rather, the United States should plunge forward to modernize its voter-registration system. States should be required to take responsibility for

registering all eligible voters, using existing computerized voter rolls, and bulking them up with names voluntarily obtained from driver's licenses, Selective Service records, or any of a dozen other lists. This would add up to 50 million voters to the rolls. It would be portable — people who move from town to town would no longer drop from the rolls, as happens today. It would cost less. And it would curb the potential for fraud, error, and foolishness on voter rolls. In this way, it meets concerns of both left and right. It offers a chance for an armistice in the endless trench warfare over voting. Instead of joylessly repeating the same fights over "voter fraud" and potential suppression, here is a reform that helps solve both problems at once. This proposal has gathered enormous momentum since I first discussed it in 2008.

The United States should plunge forward to modernize its voter registration system.

The courts still matter, enormously. In 2012, judges strikingly stood up for core democratic values. This was true of judges chosen by Republicans as well as by Democrats. The Pennsylvania Supreme Court, for example, was split evenly between the two parties — but the judges were unanimous in blocking the law requiring an ID that 758,000 Pennsylvania voters did not have. Now that so many state capitals are gripped by one-party rule, judges will be obliged to play the check-and-balance role once reserved for the loyal opposition.

Conservatives took note. Stymied in 2012, they asked what is arguably the country's most ideologically polarized bench, the U.S. Supreme Court, to defang the lower courts. In two key cases to be decided in the current term, states are urging the Court to curb Congress's power to protect voting rights in the states (and thus judges' power to enforce the law). The Voting Rights Act (VRA), the nation's most successful civil-rights statute, is at risk in *Shelby County v. Holder* — despite its overwhelming bipartisan congressional reauthorization in 2006. Opponents argue that Section 5 of the VRA, which requires states with a history of discrimination to receive approval from the Justice Department before implementing voting laws that hurt minority rights, is an "Eyes on the Prize"-era relic. That argument would be easier to make if Southern states did not keep passing laws to make it harder for black people to vote. Just as worrisome, Arizona and six other Tea Party-influenced states urged the Court to revoke Congress's power to assure strong voter-registration rules in states. Many observers were surprised, and not pleasantly, when the justices agreed to hear this case. A *Citizens United*-style overreach would devastate election law.

So pro-democracy forces will need to advance powerful jurisprudential arguments. We cannot find ourselves in the position we were in after *Citizens United* — surprised by the Court's radicalism and flummoxed by the strategically deft campaign to undo longstanding laws. Several state laws (including Pennsylvania's) were only postponed, not blocked permanently; litigation continues. Today the VRA and other statutes stand strong to protect the public. Unless our lawyers are as good as theirs, that could change, and fast.

Winning in the court of public opinion. The fight over voting unfolds on surprisingly difficult terrain. The public sees voting as a privilege, rather than a right. It fears fraud. Voter ID laws are broadly popular, even among those (such as racial minorities) who would suffer most.

But research by pollster Celinda Lake drew a powerful conclusion: Despite public skepticism about voting rights, it is still possible to tap a deep well of patriotism to garner support for them. The American creed of political equality still holds totemic power.

Armed with these insights, voting-rights groups waged a sophisticated media campaign in 2012. Research reports garnered wide coverage; media outlets — even comedy shows — devoted huge amounts of attention to voter disenfranchisement. The new laws became widely understood as an illegitimate drive to twist the rules to benefit political insiders. Under pressure, the Republican governors of Michigan and Virginia blocked harsh changes. Significantly, the transformed issue terrain likely helped advocates win court victories as well. In previous years, judges saw these laws as arcane election-administration matters. In 2012, they understood the rules as part of a nationwide partisan push. As federal judge Brett Kavanaugh — a former Ken Starr deputy! — wrote in partially striking down the South Carolina voter ID law, "The Voting Rights Act of 1965 ... [has] brought America closer to fulfilling the promise of equality espoused in the Declaration of Independence and the Fourteenth and Fifteenth Amendments to the Constitution."

Progressives must have an election-integrity agenda. Progressives will need to do much better, too, at making clear our commitment to election integrity. Of course, the "voter fraud" claimed by Heritage Foundation fellows and *Wall Street Journal* editorialists does not exist. A person is more likely to be killed by lightning than to commit in-person voter fraud — the only kind of fraud blocked by a voter ID requirement. The entire conservative push is premised on an easily discredited urban myth. Snopes.com could solve the problem.

Progressives should unambiguously embrace an election-integrity agenda that protects against genuine risks without disenfranchising legitimate voters.

But progressives look Pollyannaish if we belittle concerns about election integrity. After all, politicians have been trying to stuff the ballot box since senators wore togas. It was progressive reformers who fought for decades to improve the honesty and integrity of elections.

In fact, experts confirm two areas of genuine risk. Both involve election manipulation by politicians. Electronic voting machines, after all, could be hacked. The remedy — paper records, an "audit trail" to frustrate fraud — has now been adopted by nearly every state. This anti-fraud victory should be embraced by voting activists. The other real fraud risk comes from absentee balloting. (Most "fraud" examples actually describe abuse of absentee ballots, as when a nursing-home worker fills out all the forms for infirm residents.) Of course, requiring voter ID does little to prevent this abuse. Rather, expanded early voting offers an alternative to absentee ballots.

I believe progressives must take one more step. We should unambiguously embrace an election-integrity agenda that protects against genuine risks without disenfranchising legitimate voters. The Republican demand for voter ID laws is not the problem per se. The problem comes from laws requiring ID that many people do not have. About 11 percent of voters lack a driver's license or another current government photo ID. Rhode Island, in contrast to the stricter ID laws conservatives favor, passed a law that accepts nongovernmental

ID such as insurance cards, credit or debit cards, even health-club cards. This approach has caused little disenfranchisement or fraud.

Nevada Secretary of State Ross Miller, a Democrat, has an even more exciting idea. He suggests that driver's license photos be included in polling place signature books. If voters don't have the ID, a photo would be snapped, which would serve as their ID going forward. Details of such a plan would matter greatly. But done right, that too could point to an end to the divisive voter ID battles of recent years.

Acclimating ourselves to the need for some form of ID will be hard for voting-rights advocates. In the heat of battle, it can be difficult to bend. But most citizens see voter ID as simple common sense. Only if we show them we share that understanding will they listen to our arguments that some forms of ID would lock millions out of the ballot box. Tellingly, voting-rights advocates won a significant victory in Minnesota, where voters rejected a proposed constitutional amendment establishing a restrictive ID regime. The most effective ad showed a former Republican governor and the current Democratic incumbent implying that some form of ID might be appropriate, but that this particular proposal needed to be sent back to the legislature.

Nobody ever marched for election administration. But millions have marched for democracy. Thanks to the voting wars, they may be ready to do so again.

A plausible election-integrity agenda will give legislative allies firm ground on which to stand. They can insist that only eligible citizens can vote — but every eligible citizen must be able to vote.

A Political Strategy

In all, the exhilarating victories of 2012 offer ample lessons on how to win. But we have seen moments of possible reform arrive and dissipate before. The potential of this moment will vanish too unless democracy advocates become far more relentless in demanding action. Democracy reform must become a central political strategy. Conservatives understand this. As soon as they got so much as a pinkie on a lever of power, they used it to cut back on democratic rights. (In the state legislatures, they curbed collective bargaining as well as voting. In the Supreme Court, they quickly undid decades of doctrine through *Citizens United*.) The right understands these issues actually address power, not process.

By contrast, when the Democrats had the White House, 60 votes in the Senate, and an iron grip on the House of Representatives, they did nothing to advance democracy. In fact, Barack Obama — former Project Vote organizer and constitutional law scholar — has done less to advance political reform than any Democratic president since the 1940s.

Perhaps that will change. But the first step must come from outside pressure. Here, there is hope. For the first time in memory, major progressive organizations have decided that democracy reform must become a central strategic objective. Major environmental groups (led by the Sierra Club and Greenpeace), unions (led by the AFL-CIO and SEIU), and traditional civil-rights groups (led by the NAACP) have organized a new and rambunctious

"Democracy Initiative." These groups, boasting millions of members, have come to recognize that they have little chance to achieve their objectives unless the political system changes. They are now fighting for voter-registration modernization, for small donor public financing of campaigns, and for filibuster reform. Here is one response to *Citizens United* that needs no constitutional amendment or change in Court personnel. If conservatives want to flood the system with money, we need to flood the system with voters. If this initiative takes hold, it could mark a major turning point.

We need nothing less than an eruption of creative policy, a groundswell of innovative advocacy, and an unflinching insistence that democracy reform again be at the heart of the progressive agenda. Nobody ever marched for election administration. But millions have marched for democracy. Thanks to the voting wars of 2012, they may be ready to do so again.

Early Voting: What Works

Diana Kasdan

Much of today's election system was developed more than a century ago. Confining voting to a single 8- or 12-hour period simply does not reflect how most Americans live. To modernize the system, we must expand early voting.

All seven recommendations discussed below share two primary criteria: 1) they track the policies set forth by statute, regulation, or statewide guidance in at least a majority of the nine states with the highest use of early in person voting (EIPV) and 2) the election officials interviewed — including those outside of the highest usage EIPV states — overwhelmingly identified the policies as among the key ingredients for successful administration of EIPV.

Laws in States with the Highest EIPV Rates, as of 2012

EIPV Laws	Arkansas	Florida	Georgia	Nevada	New Mexico	North Carolina	Tennessee	Texas	Utah
Must begin EIPV a two full weeks before Election Day	✔		✔	✔	✔	✔	✔	✔	✔
Must offer weekend voting	✔	✔	✔	✔	✔	✔	✔	✔	
Sets minimum daily hours and allows extended weekday hours	✔	✔	✔	✔	✔	✔	✔	✔	✔
Allows both public and private voting locations	✔			✔	✔	✔	✔	✔	✔
Sets standards for quantity or distribution of EIPV locations		✔	✔		✔	✔		✔	✔
Counties must update county poll book or state voter file daily during EIPV		✔		✔	✔		✔	✔	
Must educate the electorate about the EIPV schedule			✔	✔	✔		✔	✔	✔

Table 2: The laws regulating EIPV statewide are based on each state's requirements for general elections. In some states, these standards do not apply, or are different, for primaries or special elections. Additionally, this chart only captures the minimum requirements of state law. As discussed in the report, in several of the states and counties interviewed, common practices meet or exceed these standards even if not mandated by state law. This is particularly true with respect to the daily updating of countywide poll books or the state voter registration file.

Excerpted from *Early Voting: What Works,* October 2013.

1. Begin EIPV a Full Two Weeks Before Election Day

Currently, nearly half the states with early voting laws specify that early voting begin between two and three weeks before Election Day in a general election. All nine states with the highest EIPV rates in both 2008 and 2012 fell within this range for both of those election years, with the exception of Florida, which had only eight days in 2012. By contrast, states offering significantly more or less time to cast an early ballot have not seen greater use of early in person voting.

According to election officials interviewed — all of whom had implemented EIPV periods beginning two to three weeks before recent general elections — this period was an effective minimum duration for generating the administrative benefits described above. They consistently said less time would be insufficient, and significantly more time was unlikely to increase voter use of EIPV or administrative benefits. Michelle Parker, assistant director of elections for Travis County, Texas, stated: "I can't imagine us starting [early voting] much sooner. I think it's about right, two full work weeks and a weekend. I can't imagine it being any longer. ... Making it shorter would be difficult in our big elections because we would increase wait times and crowding." Likewise, Scott Gilles, Nevada's deputy secretary for elections, believes a two-week period is optimal: "[T]he counties essentially run the election for two weeks in advance of Election Day, not as if they are gearing up for just one big day. It provides them the ability to get their system in line for Election Day, which is still the biggest day."

Weekends are peak voting days, and the last weekend before Election Day often sees the biggest day of early voting turnout.

Conversely, Florida's 2012 debacle, when it cut EIPV from two weeks to one, shows holding early voting for less than two weeks is not wise policy.

2. Provide Weekend Early Voting, Including the Last Weekend Before Election Day

Weekend voting can help maintain a more manageable and even distribution of voters over each day of EIPV. It also has the potential to increase overall usage of EIPV by drawing voters who are less likely to vote during weekdays due to work schedules, or might otherwise wait until Election Day but for the convenience of weekend voting. Indeed, in some jurisdictions, weekends are peak voting days, and the last weekend before Election Day often sees the biggest day of EIPV turnout.

Not surprisingly, the majority of states with early voting require some weekend days or give local election officials discretion to offer weekend voting. In eight of the nine states with the highest EIPV turnout in 2008 and 2012, there are statutory mandates for at least one weekend day of early voting. In three of those states, the final Saturday before Election Day is the last mandated day of EIPV. Notably, weekend voting hours were offered in 2008 and 2012 in all the jurisdictions we interviewed, even when not required by state law.

Policies or practices that make weekend voting equally accessible as weekday voting can also help increase its usage. In New Mexico, state law requires eight hours for each weekday and Saturday voting, and Bernalillo County goes even

further, offering 12 hours on every day of early voting. This approach has made Saturday voting a meaningful option in New Mexico and election officials reported Saturday is one of the most popular voting days across the state.

3. Set a Consistent Number of Minimum Daily Hours for Each Day of EIPV and Provide Extended Hours Outside Standard Business Hours

Election officials can reduce lines during EIPV, enhance access for many voters, and even increase EIPV turnout by maximizing daily hours and including a regular set of nonbusiness hours.

Election officials can reduce lines, enhance access, and even increase early voting turnout by maximizing daily hours and including a regular set of nonbusiness hours.

State laws generally are less specific in mandating that minimum hours of EIPV be offered outside of usual business hours. A minority of states with early voting, 14 of the 33 jurisdictions, explicitly require early voting locations remain open outside regular business hours or explicitly grant local jurisdictions discretion to offer additional hours. In contrast, as with weekend voting, such policies and practices are standard among the states with the highest EIPV turnout in the last two presidential elections. All nine of these states have statutes that set minimum daily early voting hours and most explicitly authorize local jurisdictions to set at least some early voting hours beyond the minimums specified. In two of the nine states, Arkansas and Nevada, the statutory minimums are 8:00 a.m. to 6:00 p.m., automatically establishing one hour at the beginning and end of the day outside standard business hours.

The number of hours of EIPV per day is a significant contributor to EIPV usage. According to our research, in states with some of the highest rates of EIPV, like New Mexico, Tennessee, and Texas, election officials chose to offer EIPV for significantly more hours than the statutory minimum. In Montgomery County, Tennessee (pop. 184,468), for example, early voting typically occurs from 8:00 a.m. to 6:00 p.m., well beyond the daily three-hour minimum set by law. In Bernalillo County, New Mexico (pop. 673,460), the county provides 12 hours of EIPV for general elections. This 12-hour daily schedule is 50 percent more than the legally mandated eight hours. And in Travis County, Texas (pop. 1,095,584, which includes the state capital, Austin), one early voting "mega center" is open until 9:00 p.m., an additional two hours beyond the statutorily required 12-hour day. In describing the choice of extended hours, two common refrains were the importance of making hours consistent over several days to encourage use, and including evening hours for those more likely to vote outside work hours, or on their commute home.

4. Allow Counties to Use Both Private and Public Facilities

Because early voting locations typically operate as "vote centers" — serving all registered voters in a county — and must remain open several days, election officials need the flexibility to choose facilities that can meet unique logistical, security, and capacity needs. Election officials can best address these needs when they are able to use a mix of public and private facilities. A handful of states limit early voting to the county clerk's office. Notably, many of these are states in which early in person voting is the same as, or little more than an extension of, no-excuse absentee voting. In contrast, most states with EIPV,

including most of the nine states with the highest EIPV rates, permit election officials to use a range of voting locations, both public and private.

Most election officials confirmed the benefits of using a variety of voting locations. County-owned libraries, recreation centers, and community centers were commonly selected voting locations among all officials interviewed. With the exception of election officials in Illinois and some smaller counties with only one voting location, all other state and county election officials we interviewed reported that non-government facilities were valuable early voting sites. Private sites included malls, shopping centers, unused vacant commercial spaces, churches, and corporate office centers. Daniel Burk, former registrar of voters in Washoe County, Nevada, reported that for 15 years EIPV turnout "never reached more than 15 percent of voting until we switched over to commercial voting locations in 2004."

Even when state laws mandate a preference for government buildings, officials often supplement them with private locations. In Utah, state law directs that early voting locations must be government facilities "unless the election officer determines that ... there is no government building or office available" that meets certain criteria. This exception is invoked frequently. Utah Director of Elections Mark Thomas estimates more than half the state's early voting locations are in private buildings. One challenge for EIPV supervisors is finding locations that are willing to hand over their space and relinquish security control to election officials for several nights. But in North Carolina, local election officials can demand that a public facility suspend conflicting uses during the entire early voting period. Not only does such a requirement give election officials enormous leverage in dealing with their public sector counterparts, it also reduces the need for private facilities. Nonetheless, private buildings may offer better space to accommodate large numbers of voters and voting machines.

5. Distribute Early Voting Places Fairly and Equitably

Fair and equitable siting policies are critical to the successful administration of EIPV, just as they are on Election Day. An extensive body of academic literature addresses the ways siting policies can impact, and even increase, turnout. Further, the laws and practices in states with the highest EIPV rates — many of which attempt to address the issue of equal access of EIPV sites — suggest more specific standards on this point can improve EIPV usage.

As is true with other early voting policies, most state laws say little about the distribution of early voting facilities. In contrast, laws in those states with high rates of EIPV are more likely to set rules either about the number of early voting locations per county, how they are to be distributed within each county, or both. Georgia, New Mexico, and Texas all mandate a minimum number of early voting locations based on county population. New Mexico has an additional provision requiring equitable distribution of voting sites based on population density and travel time. While Florida and North Carolina impose no population-based minimum number of EIPV locations, they do have laws requiring equitable distribution of discretionary satellite locations. And Utah requires early voting locations in its most populous county, Salt Lake (which represents nearly 40 percent of the state's population), be proportionately distributed based on the county population.

Not surprisingly, standards for the number and placement of early voting locations vary widely. For instance in New Mexico, any county with 250,000 or more voters must establish at least 15 additional early voting locations beyond the clerk's office. Across the border in Texas, counties with populations between 120,000 and 400,000 must establish at least one additional early voting location for each "commissioners precinct" covered by the election, and those with a population of more than 400,000 must establish at least one additional early voting location for each state representative district covered by the election. And in Georgia, only counties with populations of more than 550,000 must make "any branch of the county courthouse or courthouse annex" available for early voting purposes.

6. Update Poll Books Daily

Daily and electronic updating of poll books can help election officials manage two challenges related to early voting implementation. First, if a countywide poll book is updated daily by each early voting site, administrators will not face the crunch of having to manually update and prepare accurate precinct-specific poll books just days, or less, before Election Day. Second, officials will have a real-time mechanism to verify that a voter has not already cast an early ballot at another early voting location, or absentee. Absent such contemporaneous record keeping, it is theoretically possible that a voter could cast ballots at multiple sites during the early voting period and on Election Day and not be discovered until after Election Day. Although this has not been a serious problem anywhere (especially since it is easy to get caught after the election), there is no reason not to eliminate any risk.

States should ensure counties provide sufficient advance notice and widespread public education about early voting opportunities.

Plainly these issues are important to election integrity, but for the most part, early voting laws do not clearly require daily updating of countywide poll books. Just over half of the early voting states have general requirements concerning maintenance of poll books at early voting sites, or for providing the names of those who already voted early or absentee to local precincts in time for Election Day. And very few — Colorado, Florida, Illinois, Maryland, Tennessee, Texas, and West Virginia — mandate the specific technology or procedures to enable daily updating of countywide poll books or use of a statewide registration database. Among states with the highest EIPV rates, however, over half have laws or statewide policies that specifically require or encourage systems to ensure daily updating of poll books during early voting. While we found no evidence that the lack of specific laws mandating daily, countywide updates to the poll books created problems, our interviews confirmed the benefits of a system in which each early voting site has the capacity to daily, and electronically, access and update the voter rolls during the EIPV period.

In practice, the election officials we interviewed uniformly ensure daily updating during EIPV. Using electronic poll books or computers at each voting site networked to the countywide or state registration database, administrators access and update voter rolls at least daily if not more. Election officials overwhelmingly agreed that in addition to easing the management of poll books, particularly in preparation for Election Day, electronic systems also enhanced the integrity of the voting system.

7. Educate the Electorate About Early Voting

States should ensure counties provide sufficient advance notice and widespread public education about EIPV opportunities. This will achieve two goals. First, it gives voters the specific information they need to determine when and where they can most readily vote in light of their work and family schedules and travel options. Second, according to election officials we interviewed, and academic research, counties can increase EIPV usage by widely publicizing its availability through a range of public communications.

About half of the early voting states have laws specifically requiring some form of public announcement of the early voting period (distinct from generally applicable notice requirements).

Not surprisingly, most states with the highest EIPV rates — six of the nine — have such public notice requirements. Laws in Georgia, Nevada, New Mexico, Tennessee, Texas, and Utah require that local election officials furnish all voters with notice of EIPV schedules. Still, even these rules vary widely on the timing of when voters are notified. In Georgia, for example, it need only be "reasonable," while in other states in can be as short as 72 hours (Texas) or as long as 25 days before Election Day (Tennessee). And the specificity of the form of notice also varies considerably. In another two of the highest performing EIPV states, Florida and North Carolina, all counties must submit their schedule for EIPV to the state election authority in advance. While these laws do not explicitly require advance notice provided directly to voters, they do create a publicly accountable process for establishing schedules in advance of the EIPV period.
In general, however, most of these statutory requirements fall short of providing the necessary guidance to ensure adequate voter education. Interviews confirmed that, for the most part, public education efforts depend on the initiative of local election administrators. For example, in the 2012 election, Bernalillo County, New Mexico, truly adapted to the needs of its constituents by offering a mobile app that allowed early voters to find the nearest polling place, learn approximate wait times, and get directions.

In Travis County, Texas, election officials anticipated heavy turnout in 2008 and conducted a widespread media campaign encouraging early voting, including engaging in multiple media interviews for both print and television. Administrators in both believe these efforts resulted in greater use of EIPV. In addition to encouraging EIPV, officials also emphasized that voter education is important for preventing voter confusion between the early voting and Election Day locations and times.

Modernizing Voting: States in the Lead

Secretaries of state play the lead role to ensure an efficient and inclusive voting system. Innovators from both parties, without fanfare, are advancing reforms to modernize the antiquated electoral system. The Brennan Center brought together leading state officials to discuss how to improve voting. The conversation touched on what's right, what's wrong, and how to expand access to the polls.

Wendy Weiser, *Democracy Program Director, Brennan Center for Justice*

Any serious effort to improve our voting system and to reduce long lines at the polls has to address our voter registration system. Other critical reforms are expanding early voting and setting minimum standards so that no voter has to wait in line for more than an hour, but for today's purposes, we are going to focus on the key problem of the voter registration system, which is currently the biggest barrier to free, fair, and accessible elections in the United States — our paper-based, outdated voter registration system.

The system is currently full of errors which create needless barriers to voting, opportunities for abuse and fraud, and long lines on Election Day. The scale of the problem is enormous. More than 50 million Americans, 1 in 4 eligible citizens, are not registered to vote. While some choose not to register, far too many try to register and either fail or are knocked off the voter rolls. A Harvard-MIT study in 2008 found that up to 3 million eligible voters thought they were registered, showed up at the polls to vote, only to be turned away or told their votes wouldn't count. An earlier study found a full one-third of unregistered citizens were previously registered, and then moved, and their voter registrations did not move with them, and they didn't update them.

Our voter rolls aren't only incomplete, they're also filled with errors. A study by the Pew Center on the States found 1 in 8 of the registration records on our voter rolls is invalid or has serious errors in it. And these problems beget other problems. When a voter's name can't be found on the rolls, she cannot vote a ballot that will count. When poll workers have to spend their time searching through poll books to find names that have been improperly knocked off — that have been misspelled, that are at the wrong address — and when they had to help voters cast provisional ballots, we end up with long lines at the polls. We can and should fix that. When a citizen takes responsibility to vote, the government has a responsibility to make sure the system will work, that she can be registered and vote on Election Day.

These remarks are excerpted from a Brennan Center-sponsored event at the National Press Club in Washington, D.C., January 24, 2013.

Hon. Ross James Miller, *Secretary of State, Nevada, Democrat*

In Nevada, this has been my highest priority, making sure that the polling locations are as accessible and convenient for people to be able to cast ballots as possible. In Nevada, we've had a couple of tough elections since I've been the chief elections officer, and overall, I've been proud of the elections that we've run.

We've had a very robust early voting system in Nevada. Last election, 61 percent of Nevadans voted early, along with 9 percent who voted absentee. In our early vote system, it's a little bit different. We have literally dozens of locations throughout some counties where any voter can cast ballots. There are hundreds of hours, and we put them in locations that are convenient for people, be it at shopping centers or libraries, even supermarkets. ...

We have also worked very aggressively to try to upgrade our voter registration program, notably through online voter registration, which we had statewide for the first time this last election. It saw a tremendous usage and a tremendous spike from 2010 where we had a pilot program in just one county. ...

When a citizen takes responsibility to vote, the government has a responsibility to make sure the system will work.

But our major initiative that we're looking forward to this session, to try to push for the 2014 election and beyond, is an upgrade into an electronic poll book. We still have an antiquated poll book on Election Day — it's paper-based, you sign in, you have to provide your signature, they have to compare the signature that's on file. If that signature does not match, the voter is required to produce a government-issued photo ID. If they don't produce it or the photo doesn't appear to match, then they're given a provisional ballot, which in Nevada only allows you to vote in federal races. Over 60 percent of those federal provisional ballots last cycle did not count. I believe firmly that by upgrading to the electronic system, we can displace this very antiquated system.

Hon. Alvin A. Jaeger, *Secretary of State, North Dakota, Republican*

North Dakota, in case you don't know it, is the only state that doesn't have voter registration. Some people find that somewhat odd. Some reporters in this city have talked — because we had a very high-profile Senate race — about our lax voting laws. And it puzzled me, and quite frankly, even frustrated me a little bit, because as I understand it, to vote, you have to be a United States citizen, you have to be 18 years of age, and to the best of my knowledge in most states, you have to have been a resident for 30 days. So we automatically assume that everybody over 18 meets those qualifications. They're voters. They may not come to the polls, but they're voters, they're eligible voters.

In recent years, our state adopted identification requirements. We accept a variety of them. And so a voter comes to the polls, they show some type of identification. They're allowed to vote. Now, when you vote, and I would suspect this isn't any different in any other state, your name is recorded in a poll book. And we have a centralized poll book for all 53 counties. All of that information as to who has voted in their respective counties is recorded there. And so there is a record of who has voted, and so if I come in to vote, I show my identification, we have electronic poll books, my name pops up. Are you

still here, there, whatever? And I'm allowed to vote. It is not a requirement that your name is in there. If you show the identification and you provide all of those things that we need, you're allowed to vote. If your name isn't in the system, guess what, it will be entered in, at that time, as a record that you have voted.

Hon. Kate Brown, ***Secretary of State, Oregon, Democrat***

As the secretary of state of Oregon, my mission is to make voting as accessible as possible for all eligible Oregonians. I believe that your vote is your voice and that every single voice matters, and for me, this is a very personal mission. When I ran for the state house a few years ago back in 1992, I had a very hotly contested primary that I won by seven votes. I don't pretend that every single vote doesn't matter. In Oregon, I think many of you know, we were the first state in the nation to move to all vote by mail — we're calling it Universal Ballot Delivery — and the system has been very successful. In the 2012 election cycle we saw 82.7 percent of registered voters turn out. It's because we make it simple and accessible by putting a ballot in their hands through the mail.

Our challenge has been on the registration side. Like my colleague in North Dakota, I don't believe registration should be a barrier to participation, and so we've been working to make it easier to register to vote in Oregon, and obviously, with vote by mail, we need a voter registration database in order to be able to send you your ballot. So it's really important for us that our voter registration database be up to date and as accurate as possible, both to save money and obviously provide greater efficiency for our voters. So three years ago, we moved to an online voter registration system. We've had over 240,000 Oregonians use that system.

Hon. Mark Ritchie, ***Secretary of State, Minnesota, Democrat***

The state is known primarily because we are an Election Day registration state. We like to say we were the first. The truth is Connecticut had Election Day registration in the 1880s, the first hour in the morning. I think Wyoming had Election Day registration in primaries in the '20s. ... Election Day registration is extremely popular in the states it's in. It's popular with those of us who administer it because it exempts us from Motor Voter (National Voter Registration Act). ... There are other advantages to Election Day registration. For example, seven to eight points higher turnout, that kind of thing. Sixty-one percent of Minnesotans have used Election Day registration. Lots of us have used it with our kids or because we've moved. Half a million or more people use it every time in a big election cycle. It's quite important.

It also has been challenged dramatically. Last year it was challenged in the courts and I would refer you to the Eighth Circuit Court, Donovan Frank was the judge. It was put to him that Election Day registration and another part of our law was unconstitutional. The argument being that voting isn't a right, it's a privilege, and you have to jump over certain things to have that right. He wrote a dramatic opinion saying oh, that's actually not true, it's a right, and only a court, a judge, can take away your right. And that applied both to Election Day registration but also to questions that had to do with guardianship. It was also challenged in the legislature. It was also challenged on the ballot, of course, there was a constitutional amendment placed on the Minnesota ballot. Election Day registration went up on a straight up-or-down vote in Maine a couple years ago, 61 percent of the citizens said no, we want to keep Election Day registration. In Minnesota, there's quite a dramatic debate about this, but in the end, the citizens voted to keep our system.

Beverly Hudnut, ***Special Counsel, Campaign Legal Center***

Every four years after a presidential election, there's a window of opportunity to address things that worked well in an election process, and to try to bring Republicans and Democrats together to try to think about what went wrong and what we can do to improve the system. ...

I'll tell you what we learned in our conversations on Capitol Hill with over 25 offices, mostly on the Senate side, both Republicans and Democrats. I think everybody agrees: If you're deceased, your name should not be on a voter registration list. Everyone agrees: If you move from one jurisdiction to another, particularly within a state but also from state to state, that it should be relatively easy to move your voter registration with the appropriate safeguards so that you can vote. I think everybody agrees that only U.S. citizens should be on voter registration lists and that everybody who is eligible to vote should be able to register to vote. ...

It makes sense to do everything we can to minimize errors on these voter registration lists to reduce litigation. Some advocate for automatic registration. If you're eligible to vote in a particular jurisdiction, your name should automatically be added. There are variations of that — automatically added to a list, but with the ability to opt in, or opt out. Some hold sincere beliefs that each person has an obligation as a citizen to take the affirmative step to register to vote, as is required with our current opt-in system. There are concerns about privacy and security issues with government private databases — who accesses and controls the data. And, of course, where is the money going to come from to implement any changes. So even though there are lots of little problems identified there, we did come away from this process the last four years feeling as though there is a lot of common ground. We have heard from both Republican and Democratic Senate and House staff that it's important to keep these conversations going.

Breakthrough Reform in Colorado

Myrna Pérez and Jonathan Brater

In 2013, as many legislatures passed laws to improve voting as to curb rights — a shift in momentum. The most sweeping bill: Colorado passed comprehensive election reform, joining Maryland, Oklahoma, Virginia, West Virginia, and others to expand rights.

State legislatures across the country are hard at work expanding the right to vote. Already, more than 200 bills to improve voting access have been introduced in 45 states in 2013. Friday in Denver, Gov. John Hickenlooper made Colorado the latest to expand rights, joining Maryland, New Mexico, Oklahoma, Virginia, and West Virginia. More legislation is awaiting signature in Florida. To be sure, some states continue to push needless restrictions on the ability of citizens to participate in elections, and voters and their advocates must remain vigilant against any such efforts. Still, the trend is unmistakable: After years of backsliding, states are embracing free, fair, and accessible elections.

In many cases, the bills have enjoyed broad bipartisan support, another encouraging trend. Legislators are expanding access to the ballot in a variety of ways, from reducing the burden of voter identification requirements, to modernizing voter registration, to expanding early voting.

Colorado provides a great example. The Voter Access and Modernized Elections Act includes a number of provisions that would make it easier to register and vote. With the governor's signature Friday, Colorado is now the 11th state to enact Election-Day registration, which leads to higher registration rates and turnout. The bill institutes a system of portable registration, so that when voters move they can still cast a ballot which will count. It also establishes a bipartisan election modernization task force, paving the way for future reforms. Further, the bill eliminates the problematic "inactive — failed to vote" status that led to voters being denied ballots in certain elections simply because they had failed to vote a single time.

After years of backsliding, states are embracing free, fair, and accessible elections.

The Voter Access and Modernized Elections Act is truly a comprehensive election reform bill. And the most promising development is the bipartisan way it was conceived. The Colorado County Clerks Association — the officials who actually run elections, and come from both political parties — worked with lawmakers, community groups, and election officials to hammer out a compromise that expands voting access and works for election administrators as well.

The Colorado example and the broader trend of expansive legislation are a welcome change from the 2011-12 legislative session, when partisan state legislatures across the country passed a wave of restrictive voting laws. Before the 2012 election, 19 states passed 25 laws and 2 executive actions that would make it more difficult to register and vote. But despite this effort to restrict voting rights, voters and civil rights advocates eventually prevailed. Thanks to the actions of citizens, courts, and the Department of Justice, by November 2012, all the worst measures had been reversed, blocked, or blunted.

This article appeared on The Huffington Post, May 16, 2013.

Yet problems persisted on Election Day. Our outdated voter registration system, insufficient safeguards for voter access, and inadequate standards for voting machines and poll workers led to hours-long lines in many polling places. Commenting on the voters *still* waiting in line to vote as he gave his victory speech on election night, President Obama remarked, "we have to fix that."

The positive developments in 2013 show this message is getting through. Even in Florida, which saw some of the worst voting restrictions and the longest voting lines, legislators passed a bipartisan bill aimed at decreasing wait times. Better than merely stemming the tide of restrictive laws, voters and election officials are now enjoying a positive wave of their own as more and more states move to expand voting access.

Unfortunately, some state legislatures continue to insist on making it harder for people to vote. Among these dubious outliers is North Carolina, which is considering bills that would reduce the early voting period, end same-day registration, make it harder for citizens who have completed their criminal sentences to regain their voting rights, and increase the powers of untrained "challengers" to try to prevent registered voters from casting ballots. Others would make the state's voter ID law more restrictive by limiting the types of acceptable IDs and impose a tax penalty for parents of students voting in their college communities. These suppressive voting laws are exactly the type of backward-looking, partisan, and anti-participation moves that were rejected in 2012.

North Carolina is out of step with the times, and if it does not reverse course, it risks finding itself on the wrong side of history. The story of 2013, at least thus far, has been one of lawmakers moving to make it easier, not harder, for voters to participate in our democracy. Hopefully, the states not yet part of that story will start moving in the right direction.

Presidential Panel Can Modernize Elections

Wendy Weiser and Jonathan Brater

After long lines marred the 2012 election, President Barack Obama created a bipartisan commission to improve voting. The panel held a series of public hearings last year. Below is a summary of the Brennan Center's key recommendations. The commission report, issued in January 2014, embraced many of the Center's proposals.

Harnessing technology to improve voter registration falls squarely within the Presidential Commission on Election Administration's charge to make recommendations for "the efficient management of voter rolls and pollbooks." We urge the Commission to recommend that states use electronic systems to modernize, simplify, and enhance the security of voter registration and voter rolls. By managing voter rolls with updated technologies and tools, states will also better "ensure that all eligible voters have the opportunity to cast their ballots without undue delay," as well as eliminate many of the obstacles voters face when attempting to cast ballots.

The need for reform is great. Voter registration is the single biggest election administration problem in the United States. A 2012 Pew study found that 24 million registrations nationwide are invalid or have serious errors, such as an incorrect address. A system in which 1 in 8 records has serious errors raises the prospect of fraud and manipulation. Further, more than 50 million Americans, or 1 in 4 eligible citizens, are not registered to vote. This leads to problems on Election Day. Stephen Ansolabehere examined election data and determined that in 2008, up to 3 million eligible citizens could not vote because of problems related to registration. Recent data suggest this problem has not abated. In the 2012 election, 2.8 percent of in-person voters experienced registration problems, up from 2.0 percent in 2008.

The paper-based voter registration system used in many jurisdictions is the principal source of the problem. It relies on forms with illegible and incomplete information, which election officials must then transcribe. This leads to further errors stemming from misreading forms or making typos. Registrations are difficult to update, meaning voter registration addresses do not match actual addresses. This outdated system is wasteful and inefficient, and relies on 19th-century technology that is out of step with the kind of electronic transactions citizens have increasingly come to expect in all other aspects of modern government, business, and life. This creates needless barriers to voting, opportunities for fraud, and delay and confusion at polling places — which in turn leads to long lines on Election Day.

Excerpted from written testimony submitted at a public hearing of the Presidential Commission on Election Administration on September 4, 2013, in Philadelphia, Pennsylvania.

Registration errors contribute to long lines in two significant ways. First, poll workers waste time searching pollbooks for names that have been improperly left off the rolls or misspelled, or when they attempt to determine whether a voter is registered elsewhere. Second, voters with registration problems often must cast provisional ballots, which take extra time and force poll workers to divert their efforts from assisting other voters.

Based on our research, we recommend states upgrade their registration systems in four specific ways:

- Use Electronic Registration: When eligible citizens interact with state agencies, they should have the opportunity to register seamlessly, and the agencies should electronically transfer the information collected from consenting applicants to election officials — without relying on paper forms.

- Make Registration Portable: Once an eligible citizen is on a state's voter rolls, she should remain registered and her registration should automatically move with her as long as she continues to reside in that state.

- Provide Online Registration: Allow eligible citizens to register to vote, and view, correct, and update registration information online.

- Ensure a Safety Net: Eligible citizens should be able to update and correct their registrations up to and on Election Day.

Not surprisingly, these reforms are popular and enjoy bipartisan support. The majority of states — at least 43 — have already implemented at least one element in recent years. The momentum has continued in the 2012-2013 legislative session. At least 25 states introduced bills to modernize registration in whole or in part. Several bills passed, including a wide-ranging modernization bill in Colorado, a bill in Maryland to expand same-day registration during early voting, electronic registration in New Mexico, and online registration in Illinois, Virginia, and West Virginia.

A. States Should Implement Electronic Voter Registration at Government Agencies

States should electronically collect and transfer voter registration information from citizens applying for services at state agencies to election officials. Since the passage of the National Voter Registration Act (NVRA), states have provided voter registration opportunities at departments of motor vehicles, public service and disability agencies, and other designated agencies. In many cases, agencies continue to rely on ink-and-paper voter registration forms, limiting both the effectiveness of, and compliance with, federal law. But there is no reason for the registration process to generate new paperwork when an individual has already provided information to obtain, for example, a driver's license or veteran's benefits. Instead, upon consent, the agency can electronically transfer the already-collected information — much of which is the same as that needed to complete a voter registration application, along with the information specific to the registration process — to election officials.

States with electronic registration consistently find it creates more secure and accurate rolls. Electronic systems reduce problems stemming from paper forms, such as incomplete and illegible information and data entry errors. In 2009, Maricopa County, Arizona, examined registration forms containing incomplete, inaccurate, or illegible information and found that although only 15.5 percent of registrations were done on paper, these accounted for more than half the flawed forms. This means electronic records were five times less likely to contain errors.

Electronic registration also increases registration rates at the agencies implementing it and improves NVRA compliance. Virtually every state that has adopted electronic registration at DMVs experienced a sharp jump in voter registrations (including updates) at those agencies. For example, in South Dakota, electronic registration led to a sevenfold increase in DMV registrations between 2003 and 2008. When Kansas and Washington began electronically transferring voter information in 2008, DMV registrations nearly doubled.

Finally, electronic registration is more efficient, saving money and freeing up resources for other election administration needs. Maricopa County found it costs only 33 cents to collect and process an electronic registration, as opposed to 83 cents per paper form. And other states have reported low one-time startup costs that are quickly offset by the savings — Delaware saved $200,000 with electronic registration, and Washington's Secretary of State's office saved $126,000 in the first year alone, with additional savings to counties.

States should electronically collect and transfer voter registration information from citizens applying for services at state agencies to election officials.

For all these reasons, electronic registration at voter registration agencies is increasingly popular. At least 23 states have some form of electronic transmission of voter information at DMVs, and in some states at other voter registration agencies as well. Full implementation of electronic registration at every appropriate state agency can build upon this progress.

1. Incorporate Electronic Registration at as Many Appropriate Agencies as Possible

We recommend that states build upon the progress made at DMVs by expanding electronic registration to as many state agencies as possible. This will maximize the effectiveness of agency-assisted registration by expanding it beyond the DMV population. There is movement toward expanding electronic registration at other agencies, including in Kentucky, where social service agencies use a partially electronic system, our research found. And both California and Oregon recently considered legislation to implement electronic registration at all NVRA agencies.

Appropriate agencies for electronic registration include all agencies legally required to provide voter registration services, those that serve the largest number of eligible citizens, those that serve populations not captured on other agencies' lists, those with computerized records, and those that already capture most of the information required for voter registration.

2. Minimize the Use of Ink-and-Paper Forms

States should design their electronic registration systems to minimize the use of ink-and-paper or mail forms during the course of electronic registration. The optimal approach is a fully electronic transfer model. This would involve agency employees transferring an applicant's information in an electronic format that election officials can review and directly upload into the voter registration database. Less optimal is a "partially" electronic system, in which information is sent electronically, but the agency must still print and mail the registration form or other information to election officials. Electronic transfer

is better because it requires less paper and eliminates another level of data entry — two outcomes that reduce costs and errors.

At least 17 of the 23 states with some level of electronic registration at DMVs have a fully electronic transfer process. These states demonstrate the myriad options agencies can use to electronically transfer voter information to election officials. Arizona includes a voter registration questionnaire on its paper DMV form. If an applicant is eligible and consents to register, the DMV transfers the information in an electronic format to a secure site. The statewide voter registration system then retrieves the information and distributes it to county election officials for verification. Maricopa County reports this has led to cost savings and increased reliability, and other states have successfully emulated Arizona's model. Pennsylvania integrates the registration application with an electronic DMV application form. DMV users enter information at self-service computer terminals, using an electronic application that includes questions about voter registration. Pennsylvania's model also helps reduce data-entry errors and protects individuals from having to share potentially sensitive information, such as party affiliation, with agency employees.

3. Use Mechanisms for Signature Collection

States should use efficient mechanisms to collect a registrant's signature during or after the course of the electronic registration process. There are multiple methods and points in time for capturing an applicant's signature before her vote is cast. Thus, the inability to capture a hard signature at the time of electronic registration should not render the process incomplete. Whether election officials capture a signature from pre-existing records, at the time of electronic registration, or at some other point before voting, that step should not interfere with a registrant's ability to cast a ballot that counts. States have had success with a variety of approaches.

The majority of states with electronic registration transfer a digital copy of each individual's wet signature from the individual's DMV record. This is an efficient approach for registrants already in the DMV system. Other registration agencies, such as social services and veterans' agencies, could implement a similar system by collecting electronic signatures during transactions. Some states, such as Delaware and New York, use a pad and stylus to capture an electronic signature. Jurisdictions can also consider other methods of electronic signature capture, such as touch-screens at government offices, tablets, and smart phones.

B. States Should Make Registration Portable

The second key improvement to voter roll management is making registration portable. We recommend that states have policies that fully effectuate portable registration. Portable registration means that as long as an already-registered voter resides within the state, she remains registered and her registration moves with her — there is no need to fill out a new registration form at a new address. To accomplish portable registration, states should capture address changes before and up through Election Day. The methods for accomplishing this include automatic address and name changes through electronic registration at government agencies, online address and name updates, and mechanisms to enable voters to update their addresses and names and vote on Election Day.

Making registration portable will substantially reduce one of the major sources of inaccuracy in the rolls: incorrect addresses. According to Pew's 2012 study, of the 24 million registrations that are significantly inaccurate, half contain an incorrect address. Better mechanisms for keeping registration addresses up to date are critical in our mobile society, in which 11-17 percent of Americans move in a year. Better managing changes in registration addresses would alleviate a potential threat to election integrity.

Studies also suggest that making registration portable would address one of the major reasons eligible citizens are unable to participate in elections. In 2002, Professor Thomas Patterson found that 1 in 3 unregistered eligible individuals is a formerly registered voter who has moved. Professor Michael McDonald published a 2008 study looking at the potential effect of portable registration on movers and found it could increase turnout by up to 2 million.

Below, we highlight best practices and successful methods states use to achieve or move toward portable registration.

1. Achieve Full Portability Through an Election Day Mechanism

Given our highly mobile society in which citizens frequently move for jobs, school, family obligations, and changed economic circumstances, states can only fully achieve portable registration if they allow voters to update their addresses through Election Day. The ideal Election Day address update mechanism would allow registered voters to cast a regular ballot if they moved within the state, even if they moved to a different county. This would keep rolls current and reduce the possibility of an eligible vote not being counted. Delaware and Oregon offer great models. In Delaware, voters may update their address on Election Day and vote a regular ballot. In Oregon, where elections are conducted by mail, voters can request ballots at their new address any time through Election Day, including by picking up a ballot at an election office on Election Day. Other states offer an Election Day address update mechanism at the polls and have movers vote by provisional ballot.

2. Move Toward Portability with Streamlined Address Updates Prior to Election Day

States should also use electronic and online registration systems to facilitate more frequent address updates. Making address updates easier will decrease the number of voters whose registration addresses do not match their current addresses when they show up to vote.

Every state is currently required by the federal Motor Voter law to automatically update the address of any registered voter who updates her address with a motor vehicle agency and does not indicate that the change of address is not also for voter registration purposes. While most states do have a process for motor vehicle address changes also to serve as voter registration address changes, the paper-based processes fail to capture many voters who move. The address update process works especially well in states that use electronic registration at DMVs and seamlessly integrate voter registration into their DMV services. In addition to ensuring that the process for sharing address updates from the DMV is automatic and electronic, states should expand this practice to all agencies that offer voter registration services.

C. States Should Provide Online Voter Registration

The Commission should recommend that all states offer online voter registration. Online voter registration consists of a secure, web-based portal that eligible citizens may use to register to vote. Secure, online registration provides many of the same benefits as electronic registration at agency offices. There is less risk of inaccurate or incomplete information, because voters enter registration information directly into the online system and digital records are more secure and accurate than paper records. In addition, online voter registration can further increase access and expand the electorate, particularly among young voters. Online voter registration is relatively inexpensive to implement. States that have introduced online registration have recouped costs in as little as one election. Oregon spent $200,000, the same amount it previously spent on printing paper registration forms in a single election cycle.

For all these reasons, online registration is already highly popular and expanding rapidly. When the Brennan Center released *Voter Registration in a Digital Age* in 2010, only six states had online registration, and five

more were developing systems. Today, 19 states have or will soon have online registration.

1. Make Online Registration Available to All Eligible Citizens

States should make online voter registration available to as broad a population as possible to increase the number of people who use the system and maximize its benefits to the state. Most states with online voter registration have linked the system to DMV information, which limits its availability to the DMV population. As with electronic registration, making online voter registration available to all eligible citizens, even if they lack driver's licenses or state IDs, would improve the voter experience and allow jurisdictions to realize greater benefits.

2. Do Not Require Exact Matches to Permit Registration

States should not require an exact match between the information a registrant provides and existing information in motor vehicle or other databases in order to allow an individual to register to vote online. Our research has shown that almost 20 percent of records in voter registration databases do not match records in motor vehicle databases because of typos by government officials. Therefore, requiring an exact match with DMV information will prevent large numbers of eligible citizens from getting on the voter rolls.

States should make online voter registration available to as broad a population as possible.

3. Allow Viewing and Updating Registration Records Online

Online systems should allow voters to review, update, and correct voter registration information using the same secure site with which they can submit an application. This is one more way — beyond the initial online registration — that states can make voter rolls as accurate and up to date as possible. Indeed, all states with online registration currently provide an online method for their residents to submit certain updates to their voter registration. Ideally, voters should have the option to use the system to update *all* of the basic information in their registration record. This includes their political party affiliation (if collected), their address, and a name change, if applicable. With the exception of California, currently all states that have online voter registration and request party affiliation allow this to be updated online.

D. States Should Ensure a Safety Net

Finally, states should provide a fail-safe correction process that allows voters to correct errors in their registration or their omission from the rolls, up to and including on Election Day. If states modernize their registration systems in the other ways recommended here, the number of voters utilizing the safety net should be minimal. Nevertheless, it is an important safeguard to prevent problems on Election Day. With a sensible fail-safe process in place, eligible individuals with errors in their registration will be able to vote without undue delay and without resorting to problematic, time-wasting provisional ballots.

Virginia's Step Forward on Restoring Rights

Carson Whitelemons

Virginia's Republican governor made it easier for people with past criminal convictions to regain their right to vote. Previously, Virginia was one of only four states to permanently disenfranchise ex-offenders.

Republican Gov. Bob McDonnell announced on May 29 that Virginia is taking a welcome first step in restoring voting rights to people with criminal convictions in their pasts. McDonnell's actions, which have an enactment date of July 15, amend the current law and automate the restoration of rights process for nonviolent felons who meet specific criteria. Previously, persons with past criminal convictions had to wait at least two years before even applying to have their voting rights restored. According to the governor, his actions will restore the right to vote to over 100,000 people, a momentous change in a state whose policies have long been far outside of the mainstream. But we can go further. In Virginia and elsewhere, we must ensure that people with past criminal convictions who live and work in their communities are empowered to participate in our democracy.

Virginia was one of only four states in the nation to permanently disenfranchise those with past criminal convictions unless they individually applied to the governor to have their rights restored. McDonnell's policy moves us closer to our ideal of a robust, participatory democracy. It also enhances public safety by giving persons with criminal convictions a second chance to become full-fledged stakeholders in their communities. McDonnell acted in accord with leading law-enforcement groups, faith-based groups, and the majority of the Virginia public when he changed Virginia's outdated policy.

And Virginia does not stand alone: Other states are also making positive steps forward in fully reintegrating people with past criminal convictions into our democracy. In Delaware, the legislature amended the state constitution to eliminate a five-year waiting period hampering the voting rights of persons with past criminal convictions. Governor Terry Branstad also recently somewhat streamlined Iowa's application process for those who wish to have their rights restored — though it still remains onerous. All of these are important improvements to the patchwork of laws across the country that deny the right to vote to over 4.4 million people living and working in our communities.

Other states are also making positive steps forward in fully reintegrating people with past criminal convictions into our democracy.

But we can do more. McDonnell's actions, while commendable, could be changed at the whim of the next governor. Even if McDonnell's actions stand, there are hundreds of thousands of people with criminal convictions in Virginia that still would not have the right to vote. We cannot continue to predicate voting rights restoration on the full payment of fines and court fees, or limiting the kind of offenses that are eligible. It deprives Americans with mistakes in their pasts a chance to participate in our democracy as free citizens. Automatic rights restoration upon release from prison would simplify the restoration process and ensure that everyone is given a stake in our communities.

This article appeared on the Brennan Center blog, June 11, 2013.

MONEY IN POLITICS

Will Social Media Transform Politics?

Walter Shapiro

The television era in campaigns is drawing to a close. Social media will be its replacement, enabling candidates to target their messages in a way not seen since the days when politicians spoke to voters only through stump speeches.

American politics have been shaped by three great transformations since William Jennings Bryan electrified the 1896 Democratic Convention with his "cross of gold" speech. That sea-change election brought with it such modern innovations as barnstorming the nation (Bryan traveled 18,000 miles delivering 600 speeches) and a tidal wave of special-interest money (Republican William McKinley raised the modern equivalent of more than $400 million).

The television era is passing in politics. And campaigns waged within the confines of social media will bring with them daunting challenges for the media, campaign reformers, and voters.

An announcer in a small glass box on stage at the 1924 GOP Convention in Cleveland symbolized the next great innovation — radio coverage of politics. By 1928, Republicans were spending the bulk of their campaign budget on radio advertising. In fact, one of the managers of Herbert Hoover's campaign wrote in *The New York Times* that the advent of radio coverage meant that a candidate can no longer "make a popular 'wet' speech in Milwaukee without adding fury to the energies of the 'dry' advocates in the South."

The next transformation was ... c'mon take a wild guess. The television age can be dated from the first "I Like Ike" ad in the 1952 campaign or from the evening of September 27, 1960, when John Kennedy and Richard Nixon faced off in the studios of WBBM in Chicago. But (stunning revelation ahead) for the last half century nothing in politics has been as powerful as the 30-second spot.

During that entire period, campaign reform has been entwined with television commercials. As a young Washington reporter, I covered one of the first Senate campaign reform hearings more than four decades ago, before Watergate and the 1974 legislation. What remains etched in memory is the image of the presidents of the three broadcast networks standing next to charts showing how prime-time entertainment would be gutted if candidates for federal office were granted limited free TV time.

These days, about the last vestiges of civility in politics are preserved by candidates being forced by law to say, "I'm Millard Fillmore and I approve this message." When a billionaire behind a Super PAC vows to spend $300 million in the next election cycle, no one worries that he is going to flood the country with bumper stickers or bid up the going rate for campaign issue advisers. The power of television remains so self-evident that it is automatically assumed that virtually all the money raised in politics ends up funding TV ads or those who make them.

But what if the 2012 campaign was another watershed in politics comparable to the little glass box for radio announcers on stage at the 1924 GOP Convention? Based on my coverage of the 2012 election, campaign retrospectives and off-the-record

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sources, I am convinced that we are at another great transition moment in American political history.

By 2016 or 2020, social media will have replaced television as the engine that drives political persuasion. Looking back it is already evident that Facebook was a major, if mostly uncharted, battlefield in the war between Barack Obama and Mitt Romney. As Jonathan Alter writes in his campaign chronicle, "The Center Holds," "One way or another, Obama connected to 98 percent of the Facebook users in the United States, which exceeded the total number of American voters."

(The most detailed look at the role of big data and social media in the 2012 campaign was written after the election by journalist Sasha Issenberg for the *MIT Technology Review*.)

In theory, this social media metamorphosis holds the potential of dramatically lowering the cost of campaigns since candidates can now reach most voters without paying for expensive television time.

In reality, like the sticker price for higher education, the cost of campaigns never goes down. Media consultants will always insist that their candidates double down on television in part because that is how image-makers get rich. But it is also likely that the cost of advertising on leading social media platforms like Facebook will rise exponentially because of quasi-monopoly status.

It is, of course, impossible to foresee all the implications of a technological change still in its infancy. For example, Dwight Eisenhower's 1952 Madison Avenue ad team never envisioned that in just 12 years the most explosive negative commercial in political history would be broadcast (once) — the LBJ daisy ad subliminally linking Barry Goldwater with nuclear war.

What is evident — and this should concern campaign reformers — is that political campaigns will lose much of their transparency. If future elections are waged within the algorithms of Facebook (or its successors), then suddenly the bulk of politics will be conducted on private property. The change is akin to all campaign speeches moving from the public square to privately owned shopping malls where entry is zealously monitored by security guards.

Television, in contrast, is the ultimate public medium. Not only are broadcast networks and cable systems subject to government regulation, but also it is impossible to conduct a stealth campaign on television. Even a sketchy Super PAC with an ambiguous name like Citizens for a Radiant Tomorrow cannot get away with running television ads that will only be viewed by persuadable voters. If you put your ad up on prime-time network television or, say, MSNBC at four in the morning, you know it will be seen by political reporters and trackers from the opposition party.

Even with 2012 technology, it was possible for campaigns to send personalized Facebook messages to carefully targeted voters such as Colorado conservatives who believe in home schooling or Prius-driving Floridians who are ardent recyclers. Unless you fit that precise category, you will never see those ads — a reality that makes social media far different than television.

We are on the cusp of returning to the era before radio, when a candidate could make one pitch in Mississippi and another semi-contradictory argument in Minnesota. With these kind of targeted appeals, a Super PAC or a shadowy nonprofit group could run an entire political campaign on social media without leaving publicly discernible fingerprints.

And who knows what will be possible on social media with the technology that will be available in 2016 and 2020?

My argument is not that Facebook and its competitors should be subject to intense government regulation in the name of clean elections. (Good luck getting that through Congress in any case.)

Rather, it is to sound the tocsin and shout out the news that the television era is passing in politics. And campaigns waged within the confines of social media will bring with them daunting challenges for the media, campaign reformers, and voters. So, a piece of advice as we begin to look toward the 2016 presidential race: "Fasten your seatbelts; it's going to be a bumpy night."

Albany's Tax Break Racket

Lawrence Norden and Ian Vandewalker

By setting artificial time limits on tax breaks, Albany lawmakers milk money from special interests when the loopholes are about to close.

Call it the case of the almost-but-not-quite disappearing tax break.

It will surprise no one that lawmakers can have many reasons to vote for particular tax breaks: growing the economy, helping constituents, and, sometimes, helping a big campaign contributor.

Yet, the New York State Legislature has raised the dispensing of tax breaks to a high art.

In Albany, what is legal is often most scandalous. As long as money drives policy in Albany, corruption will remain endemic.

Why award a tax break only once? Far better to set a time limit for the tax breaks — and then ask for more campaign contributions before it is set to expire.

There may be perfectly legitimate reasons for granting a given tax break for a certain period. But the legislature's record in repeatedly renewing these breaks raises cause for concern, and offers further evidence that New York's campaign finance system is in need of a major overhaul.

As part of its testimony last week before the Moreland Commission to Investigate Public Corruption, the Brennan Center for Justice uncovered 14 different tax breaks that have been repeatedly sunsetted and renewed, covering everything from financial services to film production to wagers on horse racing.

One example: In 1999, the legislature passed a series of new regulations on horse racing and some other gambling interests that included a reduction of taxes on wagers from 7.5 to 1.6 percent. The package was scheduled to expire in 2007, but has been reauthorized seven times since then, most recently in 2013.

The horse racing industry makes enormous political donations in New York. According to Common Cause of New York, racino interests contributed $2.5 million to political campaigns in the state between 2005 and 2012, and another $2.4 million to the Committee to Save New York. Horse racing interests other than the racinos contributed another $2.2 million over that period.

The New York Gaming Association, whose members are New York racinos, and its PAC have given prodigiously — over a quarter of a million dollars to state candidates and committees in the last three years alone. In just the three months before the 2013 extension of the lower tax rate, a period covering January to March of a non-election year, they made contributions to 61 different candidates and committees.

Another example: Everybody recognizes film and television production is important to the city and state's economy. So it might make sense to award these industries permanent tax credits, even though

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they will cost the state $374 million this year.

Yet, the legislature has prevented these credits from expiring three times since 2006. Just a handful of the film and television production companies that have benefited the most from the film credit have together given more than $400,000 to both major political parties since it was enacted.

There is nothing inherently wrong with preferential tax treatment for certain industries or transactions. Millions benefit from the home mortgage deduction, for example.

But there would be great uncertainty if that deduction came up for renewal every five years. The same is true with these tax breaks. Business would benefit from knowing the rules in advance. That might make it more difficult for incumbents to raise money, but that shouldn't be what makes policy in New York.

It's difficult for legislators who depend on their ability to raise huge sums from special interests to win re-election to act in the public interest.

The only way to give individual donors anything close to the power of the real estate or entertainment industries is a system of small donor multiple matching funds, like the one used so successfully in New York City for the past 24 years.

The governor named his commission wisely. A body to investigate "public corruption" need not investigate illegal practices alone.

In Albany, what is legal is often most scandalous. As long as money drives policy in Albany, corruption will remain endemic.

Bring Small Donor Matching Funds to New York State

Gov. Andrew Cuomo (D-N.Y.)

At a Brennan Center event attended by key business and civic leaders, Governor Andrew Cuomo outlined his support for a system of small donor multiple matching funds, similar to the one used successfully in New York City. The proposal passed the New York State Assembly, but fell one vote short in the State Senate in 2013.

I support an aggressive form of campaign finance. I support a public finance system basically modeled on the New York City system. We've had experience there, it's been a great laboratory — just import the New York City public finance system to New York State.

We put forth a very aggressive disclosure bill, which is very simple — disclose all contributions in 48 hours, period. No subchapters, no caveats, all political contributions — political committees, lobbying organizations, everything — within 48 hours. It's real-time disclosure, rather than periods that can now be up to six months in between disclosure periods.

I support a real enforcement mechanism at the board of elections, which right now doesn't exist, and real rules — campaign funds can't be personal funds. That line has been blurred over the years, and it needs to be clarified. I want lower campaign limits because New York State has some of the highest limits in the country now. Starting from being a reformer in this area, we've gone to the exact opposite extreme.

We also need more regulation on independent expenditure committees because they are, in some ways, the most dangerous aspect that is now in this system, albeit a recent intervention. ... The premise is they are independent. But these ties now are so close that it really begs credibility that they're truly independent. I would also be more aggressive as to when they're actually engaging in campaigning, thus triggering the disclosure laws. The more disclosure the better, especially with independent expenditure committees.

Change is hard in any venue, in any regard. Change is hard in our own personal life. Eat less and you will lose weight. Yeah, I get it, but that eating less piece is a problem. So change is hard. Change is especially hard when you're trying to move a bureaucracy and the status quo. It gets even harder when the change involves the individuals personally. For the legislators, this is not

From remarks delivered at an event sponsored by the Brennan Center, the Committee for Economic Development, New York Leadership for Accountable Government (NY LEAD), Americans for Campaign Reform, and the League of Women Voters New York, March 8, 2013.

about changing a policy that will affect someone else. This is changing a policy that affects them and their livelihood, and they know this area up close and personal. So it is challenging.

I believe the independent expenditure committees have made it more complicated because the juxtaposition between an independent expenditure committee and public financing is truly difficult to explain. The politicians feel a public financing system will handcuff them, and if an independent expenditure committee then parachutes into the race, they'll be defenseless. On one hand you're limiting contributions to $175 matching funds. On the other hand, an unnamed committee can come into the race and spend a million dollars. And they have seen that happen. So they have a real substantive issue with what protection do they have from an independent expenditure committee, which is a good question and a question frankly I haven't been able to fully answer at this point. I've spoken about the independence, I've spoken about the disclosure, but it is not a prophylactic to the basic vulnerability of *Citizens United,* which is yes, you could come up with a very restrictive system with very restrictive limits and then have an independent expenditure committee come in and totally violate the spirit of what we were trying to accomplish. That has made it more complicated.

The public is aware more than ever of the money in campaigns. The public is fed up, and I think that's our opportunity.

The good news is, people get — especially after President Obama's election — the power in small donors. And the political system gets it — the power of the money in the small donors, the power of the participation in the small donors, the power of the emails in the small donors, and the grassroots and showing up. So that whole world of politics has really been awakened, and that's good news.

I think there's also good news in that the public is aware more than ever of the money in campaigns. This presidential election showed them up close and personal, night after night, how distortive large sums of money can actually be. And everyone sat in their living room and watched those television ads, and they didn't know who any of these people were and any of these groups. They all have basically the same name. "Americans for America." "Americans for the Red White and Blue." "New Americans for a New America." And they see these ads night after night after night, and you have no idea who they're about. So I think that the public is fed up, and I think that's our opportunity.

I also think the exciting news is, when you make a change in New York, it is a change that resonates across the country. We changed the marriage equality law. I saw within weeks the change reverberate across the country. People watch New York. It's not just another state. And when New York does something, other states follow. For many years, we were the progressive capital, the progressive leader. We had to deal with these issues first. We were the most complex, the most diverse, the most sophisticated. So the power of example from New York, especially in a field like this, I think could have a national effect.

The question for you is how do you best effect change at this time in this system?

There are two basic alternatives. One alternative is to go to the politicians and effect change through the politician — by changing politicians, by getting a

politician to agree with you, by getting a politician to promise. The alternative is to effect change through the people. Through the politicians, you are assuming that the politicians will act as they suggested they would act at the time you had the conversation.

Mayor Ed Koch, God rest his soul, spent a lot of time getting pledges from the politicians on redistricting, where they would literally sign cards, and then they got to Albany after the election and they didn't want to follow through on the cards. Now, we had the pledge cards, but there's no real legal action — you can't sue someone for a pledge, maybe in the court of morality, but that court meets rarely in Albany. It was sort of a breathtaking revelation, that you could have people who said, I pledge, I'm there, I promise, and after the election the memory fades.

You develop popular will, you create a majority of people supporting an issue, and if the politician doesn't follow the people, then you can replace the politician.

I prefer route two — you go to the people and you convince the people, you change public opinions and you create public opinion, and the politicians follow the people. I believe in the system more than I believe in the politicians, because the system is flawless. The system has a very simple equation. You develop popular will, you create a majority of people supporting an issue, and if the politician doesn't follow the people, then you can replace the politician.

Now, developing public will is hard, and it's time consuming, and it's expensive. But every initiative that we have won, especially in the past two years, followed that model. I've laid forth a State of the State agenda — the agenda that I went through with you — each one of those agenda items, I do community forums all across the state. My cabinet, between my cabinet and myself, will do hundreds and hundreds of meetings all across the state. We'll spend millions of dollars on TV commercials on those issues — developing the political will, because my formula is the opposite. I leave the politicians there, develop the popular support, and then introduce the politician to the popular support. And you would be amazed how politicians tend to follow the public support.

We're taught that the politicians lead, right? That's what's civics course said. Politicians, we elect them to lead and they get up and they say I have a vision of where the future is, and we're going here and they lead the people. Maybe, sometimes, rare exceptions. More often, the people move first, and the politicians follow. That's what I have seen.

Marriage equality in this state — how did we get it passed? Millions of dollars in advertising. Hundreds and hundreds of meetings all across the state. And you saw it go up continually in the polls. At one point, it was close to 60 percent support for marriage equality, which was remarkable because at one point it was 20-30 percent. And it was a very affirming demonstration of how progressive society can be and how quickly it can change. But it became popular, and then politicians were introduced to the popularity, and politicians quickly do the calculation, what it means to be against a popular position. That's what we're doing with women's equality, campaign finance, minimum wage, all of these issues — getting them to a tipping point where they are strong enough that the politicians need to follow.

That's the lesson I learned in the Clinton administration for eight years, that's what we did whenever there was an initiative — you build the public support first and then you call the question. It's the way LBJ did it, it's the way Nelson Rockefeller did it in Albany for many years, and it's a formula that works. It is a time-consuming, exhausting effort. But, it is also the most effective way to do it.

Now, why do it? I read the Committee for Economic Development report. "Pay-to-play" is a problem, I understand that. I was the attorney general for four years. I literally put people in jail for pay-to-play, which was acting in the public capacity in response to a contribution. Part of the danger in this system is politicians will do things for money. Politicians will perform acts or be influenced by contributions. And that tends to be the apparent and the obvious danger, and it's real. Again, I've done a number of investigations. A number of people went to jail just for that.

But there's an even worse problem that campaign finance is creating, in that the people in this state, people across the country, have become disassociated from their government, and they just don't believe and they don't trust, and they think that government isn't about them. And that is a killer. That is a killer because every relationship is only as good as its level of trust. Even a relationship between a citizen and their government. And what they're saying today is: "I'm not electing these people. My voice, my vote has nothing to do with this. There's money coming in from all sorts of sides, tremendous money, corporate money, big money, and it's not me. So I feel disassociated during the electoral process. And when they get there, not only are they dysfunctional, gridlocked politics, but they're not about me, and now I'm isolated and I'm alone. And the one source, my government, that was supposed to give me strength, was supposed to give me confidence, I feel no connection with."

Competent government and public trust — those are the two elements you need to make the whole situation work. Nothing will restore the trust more than campaign finance.

I believe inherently and innately in the power and capacity of government. Why? Because government is just us. I never saw government as some alien creature. Government is us. It is the vehicle for collective change where we come together and say, we'll do things through government that we can't do alone. That's government. I believe in government because I believe in us, and I believe in the commonality. But government is only as good and only as powerful and only as effective as the trust from the people, and we don't have it.

For my governorship, what politics is about today is a very simple formula: demonstrate government competence and capacity — that the government can actually work, that it can do something efficiently, effectively, that it's not gridlocked, and it's not incompetent. Government competence, capacity, and public trust. Those are the two elements you need to make the whole situation work: competent government, public trust. Nothing will restore the trust more than campaign finance. And until we have campaign finance, nothing else will. That's why what you're doing is so important.

Special Interest Spending Swamps Judicial Elections

Alicia Bannon

Every year since 2000, the Brennan Center and Justice at Stake have looked at spending in state judicial races. This year, after Citizens United*, the system tilted: Outside money, heavily from special interests, came to dominate state court contests.*

In recent years, as the cost of judicial campaigns has soared, the boundaries that keep money and political pressure from interfering with the rule of law have become increasingly blurred.

Thirty-eight states conduct elections for their Supreme Courts, including partisan and nonpartisan contested elections and up-or-down judicial retention votes. During the 2011-12 election cycle, many of these judicial races seemed alarmingly indistinguishable from ordinary political campaigns — featuring everything from Super PACs and mudslinging attack ads to millions of dollars of candidate fundraising and independent spending.

Since 2000, *The New Politics of Judicial Elections* series has tracked the increased politicization and escalating spending in state judicial campaigns, as well as the growing role of special interest money. These trends continued in 2011-12, even as several new and troubling developments emerged.

- **Television spending hit record highs:** States saw record levels of spending on television advertising in high court races. The 2011-12 cycle saw $33.7 million in TV spending, far exceeding the previous two-year record of $26.6 million in 2007-08 ($28.5 million in inflation-adjusted terms). In 2012 alone, more than $29.7 million was spent to air TV ads, topping the previous single-year record of $24.4 million in 2004 ($29.3 million when adjusted for inflation). Negative advertisements aired in at least 10 states, including misleading ads that described candidates as being "sympathetic to rapists," "volunteer[ing] to help free a terrorist," and "protect[ing] . . . sex offenders."

- **Independent spending escalated:** *Citizens United v. FEC,* 2010's blockbuster Supreme Court decision that unleashed unlimited independent spending on elections, cast a long shadow on the 2011-12 judicial election cycle. Special-interest groups alone spent a record $15.4 million on television ads and other electioneering in high court races in 2011-12, accounting for more than 27 percent of the total amount spent on high court races. This spending was more than 50

Excerpt from *The New Politics of Judicial Elections 2011-12,* October 2013.

percent higher than the previous record $9.8 million in independent spending by interest groups in 2003-04 ($11.8 million when adjusted for inflation), which made up 16 percent of total spending.

- **National politics invaded judicial races:** National groups better known for their efforts to influence presidential and congressional elections turned their sights on judicial contests in several states. Major spenders included the Republican State Leadership Committee in North Carolina, the National Rifle Association-linked Law Enforcement Alliance of America in Mississippi, the progressive advocacy group America Votes in Florida, and the conservative group Americans for Prosperity, financially supported by billionaire brothers Charles and David Koch, in Florida and North Carolina.

- **Costly races continued around the country:** Total estimated spending on judicial races in 2011-12 was $56.4 million, slightly lower than the total spending in the last presidential election cycle in 2007-08 ($57.1 million, or $60.7 million when adjusted for inflation). Twelve states saw more than $1 million of spending on high court races in 2011-12, similar to 2007-08, when spending surpassed $1 million in 11 states. Spending was concentrated among a few interest groups and political parties: The top 10 spenders were responsible for approximately $19.6 million of total spending in 2011-12, compared with just $12.3 million in 2007-08.

- **Merit selection faced new challenges:** In merit selection states, judges are appointed from a slate of qualified finalists identified by a nominating commission, and then typically stand for an up-or-down retention vote after subsequent terms. While retention races have historically been less politicized than contested elections, in 2012 two merit selection states, Florida and Iowa, saw prominent and politically charged challenges to sitting justices. These justices were ultimately retained, but only after costly battles. Several states also saw ballot measures in 2012 that would have injected new politicization into merit selection systems. These proposals were likewise rejected by voters.

The good news is that states retain powerful tools to resist the growing politicization of judicial races.

The good news is that states retain powerful tools to resist the growing politicization of judicial races. Strong disclosure laws and recusal rules promote accountability and help ensure that special interests cannot buy justice. Public financing can provide judicial candidates with an alternative path to running a competitive race without needing to rely on contributions from lawyers and litigants seeking to influence judicial decision-making. Merit selection, meanwhile, is designed to ensure that judges are selected based on their qualifications and to help insulate them from political pressure (although in recent years concerns have emerged regarding the politicization of retention elections). Finally, voter guides and judicial performance evaluations give ordinary citizens the information they need to assess judges based on their experience and qualifications — and not on misleading attack ads. These common-sense measures can help ensure that citizens feel confident that their judges are accountable to the law and the Constitution, not to special interests.

Restoring the Voters' Trust in NYS Government

Peter L. Zimroth

Comprehensive campaign finance reform with small donor matching at its core has strong support across the state. Business and civic leaders have also backed change. Former NYC Corporation Counsel Peter L. Zimroth, a member of New York Leadership for Accountable Government — a coalition of business, civic, and philanthropic luminaries — urged the New York State Senate's Independent Democratic Conference to introduce a strong measure.

The New York State campaign finance system needs to change. We have the highest contribution limits in the nation; and even these are almost meaningless because of the many legal loopholes. As a result, wealthy donors dominate our elections and our politics. Candidates spend their time and effort currying favor with this "donor class," which in turn expects influence with those candidates once they take office.

Voters who cannot afford to donate many thousands of dollars become an afterthought. These voters have a lesser say in who becomes a candidate, who gets elected, and what agendas are followed after the election. In essence, these voters have almost no role in crucially important parts of the political process. And this inability to participate meaningfully leads to disaffection and to cynicism. It is no wonder that when our state is hit by political scandals like the ones we are living through now, many New Yorkers think, "well, that is just politics as usual."

The current scandal has led to many proposals for reform. But the most important, in my view, is the proposal for public financing of campaigns that has as its central element matching funds for small donors. This is the system that was enacted locally for New York City elections in 1988 when the late Ed Koch was mayor, Peter Vallone, Sr. was Council president, and I was the corporation counsel. A program like that, if it is effectively administered and enforced in a nonpartisan way, can combat the widespread cynicism and disaffection enveloping the political process by giving voters with limited financial means a more meaningful voice in that process. It also has the hope of changing the "show me the money" culture that seems to pervade our politics.

New York City's Small Donor Matching System Has Transformed City Elections

New York City's public financing law, adopted in response to widespread corruption scandals in the 1980s, has turned a substantial number of people into first-time donors in city elections. A comparison of the broad participation in city elections to the anemic participation in state elections is telling. In 2009, almost 90 percent of New York City's census block groups had at least one person

From testimony before the New York State Senate's Independent Democratic Conference, May 1, 2013.

who gave $175 or less to a City Council candidate. By contrast, in 2010, only 30 percent of the city's census block groups had at least one small donor to a State Assembly candidate. Plainly, increasing the impact of small donations through a matching program creates powerful incentives that have increased the number of people who give. And because voters who give even modest campaign contributions are more likely to volunteer and otherwise participate in political campaigns, the city's reforms have increased civic engagement as well.

New York City elections also draw contributions from far more diverse areas that are much more representative of the electorate. Residents in areas with lower income, higher poverty rates, and higher concentrations of minority residents are much more likely to contribute in a City Council election than in a State Assembly election. The poor and predominantly black Bedford-Stuyvesant neighborhood had 24 times more small donors for the City Council in 2009 than for the State Assembly in 2010. This trend was found in many other neighborhoods as well: Chinatown had 23 times as many donors in city elections as state races, and the significantly Latino neighborhoods of upper Manhattan and the Bronx had 12 times as many donors.

Because the amounts contributed are so small and are from so many people, these donors are not and cannot be seeking influence through their donations. They are, however, increasingly involved in our democratic processes and adding their views and voices to the electoral ensemble. Because their contributions are multiplied by matching funds and because people who contribute, even small amounts, are more likely to volunteer their time, candidates must pay attention to their views.

Support is Widespread for Reform

Comprehensive campaign finance reform with small donor matching at its core has strong support across the state. Good-government and community groups have long supported reform. Participation across New York City in the city's campaign finance program shows that it is popular with voters of ordinary means.

Business and civic leaders across New York have expressed their support for comprehensive reform as well. I and other New Yorkers in business, finance, real estate, law, and philanthropy have come together to form New York Leadership for Accountable Government, or NY LEAD, and are working hard to support comprehensive campaign finance reform in New York.

In short, a diverse coalition has come together to demand reform because comprehensive campaign finance reform is the single most valuable change we can make to ensure the health of our democracy.

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Reducing the influence of money in politics is one of the most important issues facing our state today. Adopting robust campaign finance reform, with a small donor matching system, lower contribution limits, and effective, nonpartisan administration and enforcement is the best means to enhance the role of voters with limited means and return them to their rightful place in our democracy. Candidates should be spending their time and effort listening to voters and working on legislation, not pursuing big donors. Comprehensive changes to our campaign finance system are the answer to the problems that continue to plague state government. Now is the time to introduce the proposed legislation and to enact it.

Sunshine for Nonprofits

New York State Attorney General Eric Schneiderman

Across the country, shadowy new nonprofit groups pour money into elections without disclosure. Federal regulators have done little. States can have a sharp impact. At a Brennan Center event in June, Attorney General Schneiderman announced the nation's most stringent disclosure rules for political spending by nonprofits. New York's provisions now require that nonprofits spending more than $10,000 on state or local elections must disclose not only their expenditures, but also their donors. Strong rules are the best way to prevent abuse by the IRS.

Let me talk to you about nonprofits. The loophole of choice, the vehicle for dark money in American politics is the abuse of 501(c)(4) charitable organizations. We know that there were massive independent expenditures through Super PACs and PACs in last year's election, well over a billion dollars, but at least we know who paid for the ads. We know who spent the money. You may not agree with Sheldon Adelson, but we know he gave a lot of money to Newt Gingrich. The only reason to use a 501(c)(4) instead of a PAC or Super PAC is to conceal your identity. Anyone who is using money through this charitable form to do politics, it's like a person walking into a bank wearing a mask. You should start asking questions before they even get up to the teller. Why are you doing this through a 501(c)(4)? The only reason is to conceal your identity. There's nothing that you can't do through a Super PAC as long as you're willing to tell the public who you are.

My office regulates all the nonprofits in the state. It is not something I thought about a lot when I was running for Attorney General. You don't see a lot of candidates saying, "Wow, I can't wait to take over the charities bureau." But it is in fact one of the most important functions of my office, and it has been one of the richest areas in my work since I've been attorney general. New York has more people in the nonprofit sector than any other state, about 18 percent of our statewide workforce. We have some of the greatest cultural, educational, health care, social service nonprofits in America. And they do a lot of good work.

Folks in my charities bureau noticed about a year ago that there were big problems, and this is way before any scandal broke about the IRS, big problems in their regulation of 501(c)(4)s. That there were groups setting up, sending in an application for nonprofit status, spending money on a campaign, going out of business, before the IRS even got to them. They had — and this is an area that I also think we're going to be working on together in the months ahead — they had no definition of what you could and could not do as a (c)(4). The Internal Revenue Code says you must act exclusively as a social welfare organization. The same term is used in 501(c)(3) for being exclusively a charity,

From remarks delivered at a breakfast sponsored by New York Leadership for Accountable Government at Weil, Gotshal & Manges LLP, June 5, 2013.

but somehow or other, the IRS doesn't treat the words the same — issued a regulation saying "well, in (c)(4), exclusively means primarily." It refused to define what that meant, and that laid the groundwork for the chaos that is now coming to light in the scandal at the IRS about its handling of (c)(4)s.

And I never knew anything about this. We started looking at this area. We decided to take action in December 2012. This is all long before the story of alleged IRS abuses broke. But I could have predicted that bad things were going to come to light just based on our own experience. For the IRS's failure to define any coherent standards is really what underlies all of the chaos that is now coming to light, such as efforts to do crude word searches to try and find groups that were doing politics. If our friends on Capitol Hill are honest about pursuing this inquiry, I think we're going to find a lot of other crude word searches and other clumsy efforts to deal with the problem that they really couldn't deal with — all because it was created by their own incoherent interpretation of the law. As far as I'm concerned, "exclusively" means "exclusively," and if you don't want to act exclusively for social welfare, you shouldn't get nonprofit status.

You now live under regulations that require any nonprofit that spends $10,000 a year or more on state or local elections to fully itemize those expenditures and fully disclose its donors.

But the IRS has failed to deal with this. We saw the problem emerging. We saw money start to come into New York State campaigns through (c)(4)s last fall, including some hotly contested state senate races. And so the people in my office came up with a creative strategy that I believe will be very effective, and can set a model for the rest of the country.

I don't control spending on federal elections or what nonprofits do in federal elections, but we can regulate activity in New York State on local elections. So today, regulations have become effective in New York State. You now live under regulations about 501(c)(4)s, unlike the citizens in the rest of the United States, which require any nonprofit that spends $10,000 a year or more on state or local elections to fully itemize those expenditures and to fully disclose its donors. The regulations cover all forms of advocacy and cover all forms of media and methods of communication. Starting today, every 501(c)(4) is going to have to report this information to my office in their annual filings. And in a few months, we're going to start, as we receive those, these will be posted on our website so everyone can see who's paying for what in New York State and local politics. We wanted to get this into effect before the mayoral election and other things that are coming up this fall and whatever comes our way in 2014.

This form of transparency is absolutely essential in a post-*Citizens United* world. If there are attack ads running against someone, I would like to know if it's paid for by people in the community that person's running in, or paid for by some outside interest group. If there are anti-ads running on our referendum that's coming on casino gambling, attacking casino gambling, I think people would like to know if that's paid for by folks with a moral objection to gambling or if it's paid for by the casinos in New Jersey who don't want competition. You will know that in New York.

So what are we doing to make sure that this can go forward and set it as a national model? The first thing is that we have tailored the regulations — and I would urge you that if anyone wants to do this in another state, that this is a critical part of the process — to make sure that we only get information that's not being disclosed elsewhere. Our regulations say if you're disclosing it through the lobbying commission or some other source, you don't have to do it again, you just have to tell us where it is so the public can get to it. And we provide for waivers to protect donors who have reasonable basis to fear that they may be the subject or targeted because of their donation. We also allow people to conceal their identities if they are willing to explicitly designate that their contributions are to go for nonpolitical purposes.

If there are attack ads running against someone, I would like to know if it's paid for by people, or paid for by some outside interest group.

So we have made sure that all we're doing — we just had this slight suspicion we may be challenged in court over our regulations — we made them as tight and narrow and careful as possible. I think we will withstand a judicial challenge. It is important that we do so, because we want to set an example for other states, and we want to set an example for the federal government and use this to call attention to the real problem at the IRS, which is not the word searches or the "Star Trek" videos or whatever these other elements of misconduct are. It really is what became clear to us before we knew any of these facts: an incoherent system of trying to manage the laundering of money through 501(c)(4)s into politics. We have to have clear rules. The IRS staff has to have clear guidelines. And I think that that's something that we can try to give them some guidance on how to do with our regulations.

Bringing Dark Money to Light

Rep. Chris Van Hollen (D-Md.)

Federal law today allows nonprofits to spend vast sums without disclosure. Tougher disclosure passed the House and won a Senate majority in 2010 after Citizens United, *but was blocked by a filibuster. Rep. Chris Van Hollen, a sponsor of the DISCLOSE Act, discussed the need for transparency in campaign finance, and his drive to press regulators to act.*

The whole idea here is to require disclosure to the public, to the voters, when groups are engaged in spending money to try and influence your vote. And it's based on a pretty simple principle, that all of us voters have a right to know who is bankrolling these political campaigns. That principle was supported by eight out of the nine Supreme Court justices. And of course that was the entire idea behind the DISCLOSE Act, which we first introduced back in 2010. It is pretty straightforward in concept. It requires all organizations that are spending money on political campaign expenditures to disclose the sources of the funding of those political expenditures to the voters, including 501(c)(4)s, but also other organizations that are engaged in spending money in that fashion.

That idea, that very simple and powerful idea of disclosure, used to be a bipartisan idea. In fact, Senator McConnell, who has now made it one of his purposes in political life to defeat the DISCLOSE Act, took a very different position with respect to disclosure back in 2000. ... This was at a time when Senator McConnell was opposing the McCain-Feingold legislation that established 527s, and of course 527s are required to disclose. On "Meet the Press," here's what Senator McConnell said: "Republicans are in favor of disclosure. If you're going to do that, and the Senate voted to do that, and I am prepared to go down that road, then it needs to be meaningful disclosure. ... 527s are just a handful of groups. We need to have real disclosure, and so what we ought to do is broaden the disclosure to include at least labor unions and tax-exempt business associations and trial lawyers, and so you include all the major political players in America." And he ended his statement saying, "Why would a little disclosure be better than a lot of disclosure?"

Well, I agree with Senator McConnell in the year 2000. Why would a little disclosure be better than a lot of disclosure? As you know, we require 527s to disclose. We should require, for the good of our democracy, as eight out of nine Supreme Court justices said, we should require groups that are trying to

From the keynote delivered at a Brennan Center symposium, "Political Money in the 2012 Election, the 113th Congress, and Beyond," held at the National Press Club, June 18, 2013.

influence your vote in these political campaigns to tell us who's bankrolling their operations. And, we need to continue to push forward to get that done.

We first introduced DISCLOSE in the year 2010. It passed the House and the Senate version, introduced by Senator Schumer and others, actually had a vote in the Senate, but it was blocked — 59 senators in favor, and the others opposed. So a strong majority in favor of the DISCLOSE Act, but blocked because it fell one short of getting the 60 votes necessary to stop the filibuster and proceed to a final vote. In one of the sort of sad ironies of history, that 60th vote would have been Senator Kennedy, who died earlier that year. Scott Brown voted against allowing the bill to come to a vote, he voted against disclosure, so it never got the 60 that would have led to a final passage of the Senate DISCLOSE bill.

We should require groups that are trying to influence your vote in these political campaigns to tell us who's bankrolling their operations.

So here we are. We've reintroduced this DISCLOSE bill in the House of Representatives. ... But I think we all know that in the House this measure is not moving any time soon, unfortunately. And in the Senate, given Mitch McConnell's absolute opposition, intransigence, it's hard to see in the short term how we get a vote that would get cloture. Even if we had a majority — which I think we'd have a majority vote in the Senate on DISCLOSE today — but Mitch McConnell would clearly block any effort to get it to a final vote.

As we marshal the effort to pass that in the coming years, what can we do in the meantime? Well, there are lots of things we can do. We need to focus on pieces of this puzzle, and sort of try and address it from every angle. The Securities and Exchange Commission is undertaking a rule making. The Supreme Court in *Citizens United* was really clear, they specifically mentioned the benefit of informing shareholders about when a company's getting involved in political campaigns. They couldn't have been clearer. Here's what Justice Scalia, and Justice Alito and others had to say: "With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether their elected officials are 'in the pocket' of so-called money interests." Again, that's eight of the nine justices in *Citizens United*. We need to pursue this before the SEC, and they're obviously in the process of taking a look at it.

And we need to pursue it in the courts. Now, one of the measures working its way through the courts is a lawsuit I filed a number of years ago, *Van Hollen vs. FEC*. ... This particular case relates to whether or not an entity has to disclose a contribution made to it when that entity is then engaged in spending money to try and influence the election of a candidate "campaign." And the way the FEC narrowed the statute was to say that if you gave money to one of these entities, a 501(c)(4), it only had to be disclosed if you gave that money with the specific intent and purpose of it being used to run a political expenditure ad. If the organization took that money and spent it for political campaign ads, unless you specifically told them that was your purpose, the entity wouldn't have to

disclose, which clearly deviated from the clear purpose of the law, which had no test of purpose in giving. You have an agency applying an interpretation of the law that had no basis in the statute itself. That case is right now on remand, we won at the district court level, it was reversed in part at the circuit court level. It's back before the court, and we expect a decision out of that court some time later this summer or fall. So, whether it's the FEC, or the IRS, or the SEC, it's important that we continue to press the very simple principle of disclosure, and why that's important to our democratic process.

My focus today has obviously been on disclosure. But disclosure is just one part of a very broad effort to try and make sure that big money doesn't totally dominate our political system. In the House, in the Democratic Caucus, leader Nancy Pelosi has put together a sort of umbrella effort, called DARE. D is for Disclosure, A is for Amend — looking at constitutional amendments. R is for Reform, campaign finance reform, and there are a number of very important efforts — Congressman Sarbanes, Congressman Price, and others of us have been working on that piece. And the E is for Empowerment, which is trying to make sure voters have access to the polls. We had a victory yesterday in the Supreme Court decision in the Arizona case, prohibiting states from piling on, with their own requirements, layering on top of the federal requirements in efforts to try and limit access to the ballot box. That was an important victory. The E in DARE, or Empowerment, features a whole slew of measures to try and make sure people have access to the ballot box including things like not having to stand in line for five, six, seven hours. All important parts of making sure that our democracy works.

Our challenge is to get voters to engage on this issue. This has to become more of a part of campaigns around the country.

That's the agenda writ large. Our challenge is to really get voters to engage on this issue. This has to become more of a part of campaigns around the country. And it's not an issue that people need to look at in isolation. Everybody who's been involved in this effort recognizes that the issues we're talking about here today — whether it's DISCLOSE, whether it's campaign finance reform, whether it's trying to improve access to the ballot box — is all part of an effort to make sure that people have an equal voice in the process. And that when you don't do that, you get legislation in many cases that is tilted in favor of those people who decide to invest a lot of money in trying to shape legislation. They try and shape it through lobbying efforts. Obviously there are groups on all sides of every issue, and they try and shape it at the ballot box in terms of the money put into campaigns, including independent expenditures.

In order to really engage the public, we need to connect the dots on all these issues. We need to continue to paint a picture of how a broken campaign finance system and a system that is fueled largely by secret money does not serve, in many cases, the broad interests of the American public. That it serves, disproportionately, the interests of folks who are spending a lot of money to try and influence the process. And only by connecting those dots, on whatever issue you want to talk about, are we going to be able to really engage the voters and show that this is a fundamental issue, and that it's fundamental to a democracy that works for everybody.

Sometimes it's easy to get discouraged because it has been so difficult making progress in these areas. But I just encourage you to not give up, because when you actually put this question to the public, the forces of transparency and accountability, and trying to make sure that we empower people based on their capacity to vote, not on their capacity to contribute and spends lots of money, we win. Overwhelming majorities of the American people — Democrats, Republicans, and Independents — support the idea of disclosure. They support the notions behind campaign finance reform. If you could ever get an election to be about that issue, then the candidates supporting that issue will win. The challenge, of course, is when so many things are going on in peoples' lives, with the economy, with education, with health care, is to link those issues that are front and center in their minds up with the issue of campaign finance reform and disclosure.

That fusion has to take place in the mind of voters in order for us to succeed in this effort. And nobody knows those issues better than the people gathered here in this room. We're counting on all of you to help spread the word, so that we can have a better system, and a system that truly works for everybody, based on one person, one vote, as opposed to the amount of money being spent on the campaign.

Think *Citizens United* Was Bad? Wait. It Could Get Worse.

Lawrence Norden

Four years ago the Supreme Court lifted limits on outside spending in Citizens United. *In 2013, the Court heard arguments in a case that could allow unlimited money to go directly from big donors to politicians.*

In the three years since the *Citizens United* decision opened the floodgates to outside spending in American elections, we've seen a vast rise in campaign spending. The 2012 elections, with about $7 billion in reported political spending, were by far the most expensive in history. *Citizens United* may be deeply unpopular — polling shows that up to 80 percent of the American people disagree with the ruling — but it is the law of the land. For the foreseeable future, Super PAC spending is here to stay.

With politicians soliciting — and donors giving — seven-figure checks, running for office will become even more expensive.

That's the bad news. What's worse: *Citizens United* may be only the beginning.

On October 8, the U.S. Supreme Court will hear oral arguments in *McCutcheon v. FEC,* a case that could make the political system awash in even more money. The difference: These millions won't have to be funneled through secret PACs without any nominal connection to the candidates. If the Court rules in favor of Alabama businessman Shaun McCutcheon, unlimited money will go straight from big donors to the politicians they're seeking to influence.

How? It's actually pretty simple. In *McCutcheon,* the court will consider the constitutionality of aggregate contribution limits. This is the total amount any one donor can give in federal elections directly to all candidates, political parties, and PACs, combined. While a donor can give up to $5,200 to a single candidate, for example, with aggregate limits in place, the combined total he or she can give to all candidates through a variety of entities is $123,200.

The ceiling is important for several reasons. Money donated to one candidate, party committee, or PAC doesn't always stay there. These organizations can, in turn, funnel the money to a single candidate. So what began as a $5,200 limit is actually a $123,200 limit. Removal of this curb will only exacerbate what is an already bad situation.

If aggregate limits were struck down, one politician could use joint fundraising committees to directly solicit more than $3.6 million from a single donor in a single election cycle. That's more than 70 times the annual median family income.

With politicians soliciting — and donors giving — seven-figure checks, running for office will become even more expensive. The money chase will become even more fervent. Individual donation limits would be rendered meaningless. It won't just be a question of the 1 percent vs. the 99 percent — a fraction of a fraction of 1 percent of all Americans will become political kingmakers.

It doesn't need to be this way. Surveys show ordinary Americans, regardless of party, support common-sense limits on campaign contributions. Everyone

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has a right to political speech. But the volume of that voice should not be solely dependent on the size of one's wallet. One can get an amplifier to speak before a crowd in a city park. But that does not mean one can purchase an amplifier so loud it drowns out the ability of everyone in the city to hold a conversation.

Although the stakes in *McCutcheon v. FEC* are high, there is some cause for optimism. Despite the Supreme Court's recent record as a defender of moneyed interests, this should be an easy case for upholding limits. The court has never struck down a federal contribution limit as unconstitutional. Even in *Citizens United*, the Court emphasized that curbs on direct contributions are both constitutional and necessary to prevent corruption. If the justices reverse course on October 8, the consequences for democracy could be grave.

Understanding True Corruption

Prof. Lawrence Lessig

Lessig, the Roy L. Furman Professor of Law and Leadership at Harvard Law School, delivered the Brennan Center's annual Jorde Symposium in January at the University of California, Berkeley School of Law. He noted that each general election is essentially the product of an earlier selection process in which large donors determine which candidates can wage a campaign. Dependence on big money undermines representative democracy, Lessig noted.

So here's the argument I want to lay out: I'm going to set it up with a certain framing of the problem. But I want to introduce this problem by telling you a story, and Disney told me that all stories have to begin like this, so once upon a time, the story goes, there was a place called *Lesterland*. *Lesterland* looks a lot like the United States. Like the United States, it has around 310 million people and of the 310 million people it turns out 144,000 of them are named Lester. So that means about .05 percent of *Lesterland* is named Lester. Now the thing about *Lesterland* is that Lesters have a certain kind of power in *Lesterland*. There are two elections every election cycle in *Lesterland*. There's a general election and there's a Lester Election. In the Lester Election the Lesters get to vote. In the general election all citizens over 18, in some states if you have an ID, get to vote. But here's the catch: To be allowed to run in the general election, you must do extremely well in the Lester Election. You don't necessarily have to win, but you must do extremely well.

Now what can we say about this picture of democracy called *Lesterland*? Well, we can say number one, as the Supreme Court said in *Citizens United,* that the people in *Lesterland* have the ultimate influence over elected officials — because after all, there is a general election — but only after the Lesters have their way with the candidates who wish to run in that general election. And number two, we can say, obviously, this dependence upon the Lesters is going to produce a subtle, understated, maybe camouflaged "bending" to keep these Lesters happy. And number three, reform that angers the Lesters is likely to be highly unlikely in *Lesterland*.

Okay, now once you have this conception of *Lesterland*, I want you to see three things that follow from this conception. Number one, the United States is *Lesterland*. The United States also looks like this, also has two elections, one's called the general election, the other is called the money election. In the general election, all citizens get to vote if you're over 18, in some states if you have an ID. In the money election it's the relevant funders who get to vote. And as in *Lesterland*, to be allowed to run in the general election, you must do extremely well in the money election. You don't necessarily have to win, but you must do extremely well.

The Jorde Symposium was created in 1996 by Brennan Center Board Member Thomas M. Jorde to foster top-rate scholarly discourse from an array of perspectives. These remarks were delivered on January 29, 2013.

But here's the key: There are just as few relevant funders in this democracy as there are Lesters in *Lesterland*. Now you say, "Really? .05 percent?" Well, here are the numbers from 2012. In 2012, 0.4 percent of America gave more than $200 to any federal candidate, .055 percent gave the maximum amount to any federal candidate, .01 percent gave $10,000 or more to federal candidates, .0003 percent gave $100,000 or more. And my favorite statistic: .000042 percent — and for those of you doing the numbers, you know that's 132 Americans — gave 60 percent of the Super PAC money spent in the 2012 election cycle. So I'm just a humble lawyer. I look at .4, .055, .01 and I think it's fair for me to say, .05 percent is a fair estimate of the relevant funders in our system for funding elections. In this sense, the funders are our Lesters.

Now, like we can say about *Lesterland*, this is what we can say about USA-land: Number one, the Supreme Court is completely wrecked. The people have the ultimate influence over the elected officials because there is a general election. But only after the funders have had their way with the candidates who wish to run in that general election. And number two, obviously, this dependence upon the funders produces the subtle, understated, camouflaged, we could say "bending" to keep the funders happy.

Members of Congress and candidates for Congress spend anywhere between 30 and 70 percent of their time raising money to get back to Congress to get their party back into power.

Members of Congress and candidates for Congress spend anywhere between 30 and 70 percent of their time raising money to get back to Congress to get their party back into power. Democratic leadership handed out a PowerPoint slide to all incoming Democratic freshmen. This slide, which gives them their daily schedule, includes explicitly four hours devoted to the task of calling to raise money. And this is just during the day. What do they do at night? Go to fundraisers and raise more money. Now any human that had this life would develop a sixth sense, a constant awareness about how what you do will affect your ability to raise money. In the words of the "X-Files," they will become shape-shifters as they constantly adjust their views in light of what they know will help them to raise money. Leslie Byrne, a Democrat from Virginia, describes that when she went to Congress, she was told by a colleague "always lean to the green," and to clarify, she went on, "he was not an environmentalist." And then point three, reform that angers the funders is likely to be as highly unlikely in USA as *Lesterland*.

That's the first point to see. Here's the second: The United States is *Lesterland*, the United States is worse than *Lesterland*. Because you can imagine in *Lesterland* if we Lesters got a letter from the government that said, "You know, you guys get to pick who's going to be the candidates that run in the general election," you can imagine we would develop a kind of aristocratic attitude. We would begin to believe we need to act in the interest of the country as a whole. Lesters come from all parts of society and there are rich Lesters, poor Lesters, black Lesters, whites — not many women Lesters, but put that aside for a second — they come from all parts of society. It simply is possible that the Lesters would be inspired to act for the good of *Lesterland*. But in our land, in this land, in USA-land, the Lesters act for the Lesters because the shifting coalitions that comprise the .05 percent comprise the .05 percent because of the issues they know will be decided in the next congressional term. So if it's climate change legislation, it's oil companies and coal companies that comprise

a significant portion of the .05 percent. If it's health care, it's pharmaceutical companies or doctors or insurance companies that comprise a significant portion of the .05 percent. Whatever the issue is, that's what determines who the Lesters are and these Lesters don't gather for the public interest. So in this sense, the United States is worse than *Lesterland*.

And then point number three, whatever one wants to say about *Lesterland* — against the background of its tradition, whatever explains this interesting little place — in our land, in USA-land, we have to recognize that a *Lesterland*-like government is a corruption. Now, by corruption, I don't mean cash secreted around in brown paper bags. I don't mean a kind of Rob Blagojevich sense of corruption. I'm not talking about the violation of any criminal statute. I'm not asserting that anybody in our system does anything illegal. I'm not talking about breaking the law. Instead, I mean a corruption relative to the Framers' baseline for how the Republic was to function.

Congress has evolved a different dependence. Not a dependence upon the people alone, but increasingly a dependence upon the funders.

So the Framers gave us what they explicitly called a Republic. But by a Republic they meant a representative democracy. And by a representative democracy, as Madison explains in Federalist 52, they meant a government that would have a branch that would be dependent upon the people alone. So here's the model of government: They have the people and they have the government, and through that exclusive dependency so would the public good be found. But here's the problem: Congress has evolved a different dependence. Not a dependence upon the people alone, but increasingly a dependence upon the funders. This is a dependence, too. But it's different and conflicting from a dependence upon the people alone so long as the funders are not the people. It is a corruption, and we should understand it precisely as a corruption of the architecture of this Republic.

...

If the problem is this dependency — or a certain disciplining practice that the dependency produces, a practice of spending tons of time fundraising from a tiny slice of America, those two components together describe the problem — then the problem is not money in the abstract. The problem is not the amount of money that's in the political system. The problem is not that corporations are persons or money is speech — those are not the problems. The problem is this: The time spent to raise money from a tiny slice of American people. And if that's the problem then the solution to the problem is to find a way to address this nature of the problem by changing the time spent fundraising and by changing the slice of America from which these funds are raised. To make them, the elections, citizen-funded elections, not Lester-funded elections. That's the solution to the problem if the problem is as I've described it.

The good news is there are plenty of proposals now out there by people who have recognized this as the problem that would push us to a place where elections would be citizen-funded and not Lester-funded. The idea of Bruce Ackerman and Ian Ayres, in their "Voting With Dollars" book, of vouchers that every citizen would have that they would give to candidates running for Congress to fund their campaigns. An idea which in my book I modified a

bit to basically make it conditional upon being able to receive those vouchers, that you agree to fund your campaign with vouchers and contributions limited to just $100 per citizen. The Fair Elections Now Act, which would match small dollar contributions and give a pretty large stipend to an initial candidacy to make sure it could run a successful campaign. John Sarbanes's Grassroots Democracy Act, which has a matching fund proposal, a tax credit proposal, and a pilot program for the vouchers proposal. Or the most ambitious anti-corruption proposal that we've seen, I think in 100 years, United Republic's American Anti-Corruption Act, which would create essentially a very large voucher program tied to a whole string of changes that would change the economy of influence inside of Washington. All of these would be solutions to the problem I've described because all of them would bring more citizens, maybe aspiring to all citizens, serving the role as the funders and not just the Lesters.

Now, it might also be a solution to something else. If we think about elections in the way I've set them up here, elections can be either discrete or continuous. Discrete in the way that voting elections are discrete — they happen on two days in the course of a two-year cycle. Or continuous in the way that the money election is continuous: Every single day the candidate is trying to raise money so every single day you have a chance to vote, over the whole period of the election cycle. Today with both of these elections, we see candidates appealing to the extremes, trying to get the politically motivated class to turn out — and they turn out to be people at the extremes. Trying to raise money from those who get motivated the most — they turn out to be people at the extremes. But if we had a voucher system for funding elections, that may produce a different set of incentives. Indeed, it may create the incentives like the incentives that exist in Australia where every single citizen has to show up to the voting booth. Because they all have to show up to the voting booth, campaigns need to appeal to all citizens because they're very likely to vote if they've shown up at the voting booth. And the vouchers would enfranchise all in a similar way, giving candidates an incentive to speak to all of these people because all of these people would be necessary to fund the kind of campaigns that needed to be funded if you need to raise money from the vouchers.

...

The nation faces critical problems requiring serious attention. But we have these institutions incapable of this attention — distracted, unable to focus, aloof — and who is to blame for that? Who is responsible for that? It's too easy to blame the Blagojeviches. It's too easy to blame the evil people. There are evil people in these stories, but there are good people, too. Decent people, the people who could've picked up a phone — us. We, the most privileged, the most capable, have the obligation to fix this. As academics, maybe not because we can't perhaps say clearly enough what the source of these problems is and what the remedy for them is. Maybe not as academics but as citizens. Because the most outrageous part is that the corruptions I've been describing have been primed by the most privileged, but permitted by the passivity of the most privileged, too — us.

What We Can Learn from Nixon's Milk Money

Ciara Torres-Spelliscy

The dairy industry gave brazenly illegal campaign contributions to President Richard Nixon's 1972 re-election campaign. The Supreme Court can learn from this lesson in McCutcheon, *wrote former Brennan Center attorney and new Fellow Ciara Torres-Spelliscy.*

In *The New York Times,* I wrote about the illegal contributions from the dairy industry to President Richard Nixon's 1972 re-election campaign. I focused on this as a reason why the current Supreme Court should uphold aggregate contribution limits, a post-Watergate reform.

The matter of Nixon's milk money actually came up recently at the Supreme Court from an unexpected source: Senator Mitch McConnell's lawyer. During oral argument in *McCutcheon v. FEC*, Justice Alito asked, "In *Buckley* [*v. Valeo*], the Court sustained aggregate limits. What has changed since *Buckley*?"

The money the dairy industry gave to Mr. Nixon's campaign was illegal six ways to Sunday.

Mr. Burchfield, the lawyer representing the Senator, responded, "[o]ne of the concerns in *Buckley* was the dairy industry, which contributed to hundreds of PACs supporting President Nixon's re-election. That is no longer possible."

This answer before the justices raises a number of issues. First, what was the story with Nixon's milk money and second, would it be impossible to repeat today?

Most of the questionable money came from the Associated Milk Producers, Inc. (AMPI), a conglomeration of 20 dairy cooperatives.

As the D.C. Circuit noted in *Buckley v. Valeo* (the case that reviewed the post-Watergate reforms including contribution limits): "The record before Congress was replete with specific examples of improper attempts to obtain governmental favor in return for large campaign contributions. One example of the quid pro quo of contributions in exchange for public acts was from the dairy industry." The same court noted, "[l]ooming large in the perception of the public and Congressmen was the revelation concerning the extensive contributions by dairy organizations to Nixon fund raisers, in order to gain a meeting with White House officials on price supports."

The money the dairy industry gave to Mr. Nixon's campaign was illegal six ways to Sunday. AMPI's donations were unlawful because there was the quid pro quo of exchanging a pledge of $2 million in campaign contributions for a sizable increase in federal milk subsidies.

Although no one was convicted of bribery, several individuals involved entered plea deals with the Watergate special prosecutor. For example, David L. Parr, special counsel to AMPI, pled guilty to criminal conspiracy charges. Harold Nelson, AMPI's general manager, pled guilty to criminal conspiracy charges for illegal payments to a government official and illegal campaign contributions. Both Parr and Nelson went to jail. John Valentine and Norman Sherman, who ran a computer mailing firm, pled guilty to aiding and abetting AMPI in making the illegal contributions.

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Lest I give the misimpression that this was just a Nixon or Republican problem: Let me be clear that AMPI was giving to both sides of the aisle. Indeed, campaign manager Jack Chestnut was convicted of accepting illegal campaign contributions from AMPI for Democrat Hubert Humphrey's presidential campaign.

AMPI's campaign money was illegal because it came from a corporate source. Corporations, then and now, are barred from giving directly to a candidate for federal office under the Tillman Act. AMPI itself pled guilty to one count of conspiracy and making illegal campaign contributions. The company tried to conceal that the money was from a corporate source through fake billing and bogus bonuses, as well as padded legal fees. AMPI was fined $35,000 (almost $144,000 in today's dollars) for these illegal donations.

Individuals at AMPI also flouted the spirit of campaign disclosure laws by splitting the millions they were spending into smaller $2,500 amounts and routing it through hundreds of PACs. Nixon's fundraiser Herbert Kalmbach testified before the Senate, "We were trying to develop a procedure ... where they [AMPI] could meet their independent reporting requirements and still not result in a disclosure."

This obfuscation nearly worked. As the Senate Select Committee's Report on Watergate detailed, "the milk producers could report the contributions [to the 100 intermediate] ... committees, without the ultimate beneficiary, the President's campaign, being disclosed." And, moreover, the names of the committees were meant to be innocuous, such as the one ironically named, "Americans United for Honesty in Government." For a list of the Orwellian PAC names, see the original evidence from the Watergate hearings.

Then there was the small matter of tax avoidance. One reason to route the money through multiple committees in $2,500 increments was to try to avoid triggering the gift tax that kicked in at $3,000 at the time. In 1976, the IRS hit AMPI with a huge tax bill — much of it linked to the illegal campaign contributions.

So was Sen. McConnell's lawyer correct that this couldn't happen again? Well partially. Arguably, it never should have happened in the first place, given that much of the money was corporate and therefore not allowed at all in a presidential campaign.

Nonetheless, one of the safeguards enacted post-Watergate to stop a repeat of the milk money madness was strict limits both on how much individuals can give to candidates, parties, and PACs, as well as the aggregate limit that McConnell and McCutcheon want to eviscerate. The behavior of chopping up a million-dollar donation into less noticeable $2,500 chunks in dummy PACs is also captured by the FEC's anti-earmarking regulations. Today, this behavior would also be more difficult to get away with because of online PAC disclosures at the FEC.

These campaign finance laws are meant to maintain the integrity of our democracy to prevent a situation where those with the biggest wallets get their wish list granted by those in power.

But this argument that Nixon's fundraising couldn't be repeated under current law seems a tad disingenuous, as Sen. McConnell and his ilk seem hell bent on dismantling all regulations on campaign money. If they succeed in striking the aggregate limit at issue in *McCutcheon*, I'm sure the next lawsuits will be over disclosure, coordination rules, anti-earmarking rules, and then, finally, all contribution limits, whether for rich individuals or multinational corporations.

These campaign finance laws are meant to maintain the integrity of our democracy to prevent a situation where those with the biggest wallets get their wish list granted by those in power. Don't forget, the whole point of the campaign money from the milkmen was to get $100 million — roughly half a billion in today's dollars — in federal price supports for dairy products. Ultimately, such a brazen wish list to the government winds up costing the average taxpayer a pretty penny.

VOTING RIGHTS AT RISK

A Decision as Lamentable as *Plessy* or *Dred Scott*

Andrew Cohen

In June 2013, the Supreme Court by a 5-4 vote struck down the heart of the Voting Rights Act: the requirement that states with a proven history of discriminatory voting laws receive clearance from the Justice Department or a federal court before changing voting laws. The decision is one of the worst in the history of the Court.

Let's be clear about what has just happened. Five unelected, life-tenured men this morning declared that overt racial discrimination in the nation's voting practices is over and no longer needs all of the special federal protections it once did. They did so, without a trace of irony, by striking down as unconstitutionally outdated a key provision of a federal law that *this past election cycle alone* protected the franchise for tens of millions of minority citizens. And they did so on behalf of an unrepentant county in the Deep South whose officials complained about the curse of federal oversight even as they continued to this very day to enact and implement racially discriminatory voting laws.

When rights are weakened for some, they are weakened for all. We all are much weaker in the wake of this ruling.

In deciding *Shelby County v. Holder,* in striking down Section 4 of the Voting Rights Act, the five conservative justices of the United States Supreme Court, led by Chief Justice John Roberts, didn't just rescue one recalcitrant Alabama jurisdiction from the clutches of racial justice and universal enfranchisement. By voiding the legislative formula that determines which jurisdictions must get federal "preclearance" for changes to voting laws, today's ruling enables officials in virtually every Southern county, and in many other jurisdictions as well, to more conveniently impose restrictive new voting rules on minority citizens. And they will. That was the whole point of the lawsuit.

In a 5-4 ruling over liberal dissent, the Supreme Court today declared "accomplished" a "mission" that has become more, not less, dire in the four years since the justices last revisited the subject. They have done so by focusing on voter turnout, which surely has changed for the better in the past 50 years, and by ignoring the other ruses now widely employed to suppress minority votes. In so doing, the five federal judges responsible for this result, all appointed by Republican presidents, have made it materially easier for Republican lawmakers to hassle and harry and disenfranchise likely Democratic voters. And they have done so by claiming that the Congress didn't mean what it said when it renewed the act by landslide votes in 2006.

No statute is ever perfect. Perhaps Congress should indeed have updated the "coverage formula" of Section 4 when it last revisited the law. But there are plenty of imperfect laws kept afloat by courts, including this Court. What happened here is that the Court's conservatives were no longer willing to countenance the intrusion upon "state sovereignty" that Section 4 represented in the absence of what they considered to be "updated" justifications for federal oversight. To the majority, the fact that "minority candidates hold office at

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unprecedented levels" was more important than the fact that Section 4 was invoked more than 700 times between 1982 and 2006 to block racially discriminatory voting measures.

The Decision

The opinion itself is as accessible as any you are likely to read. Writing for the Court, the Chief Justice declared that Congress simply failed to update the "coverage formula" of Section 4 to address the very successes that the Voting Rights Act has brought to minority voting rights over the past 50 years. If Congress is to divide the states between "covered" and uncovered jurisdictions, the Chief Justice wrote, it bears a heavy burden under the 10th Amendment and "must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It simply cannot rely on the past."

The 15th Amendment, which decrees "that the right to vote shall not be denied or abridged on account of race or color," the Chief Justice wrote in a remarkable passage, "is not designed to punish for the past; its purpose is to ensure a better future." Yet the Court's ruling today directly contradicts that lofty premise. A black voter in Shelby County today, as a result of this ruling, has a much grimmer "future" when it comes to voting rights than she did yesterday. Without Section 4's formula, Section 5 is neutered, and without Section 5 that black voter in Shelby County will have to litigate for her rights herself after the discriminatory law has come into effect.

In a passionate dissent, Justice Ruth Bader Ginsburg immediately homed in on the extraordinarily aggressive nature of what the Court has just done. "The question this case presents," she wrote, "is who decides whether, as currently operative, Section 5 remains justifiable, this Court, or a Congress charged with the obligation to enforce the post-Civil War amendments 'by appropriate legislation.'" Until today, Justice Ginsburg wrote, the Court "had accorded Congress the full measure of respect its judgments should garner" in implementing that anti-discriminatory intent of the 14th and 15th Amendments. Until today.

"The Court," Justice Ginsburg wrote, "makes no genuine attempt to engage with the massive legislative record that Congress assembled. Instead, it relies on increases in voter registration and turnout as if that were the whole story." And then she proceeded to outline the countless ways in which racial discrimination in voting practices is alive and well in Alabama and other jurisdictions covered by the law. "The sad irony of today's decision," she wrote, "lies in its utter failure to grasp why the VRA has proven effective." It has been effective, of course, because it has made it harder for vote suppressors to suppress the votes of minority citizens. No more and no less.

The Winners

We should also be clear today about who the winners and the losers are in the wake of this opinion. The primary winners are vote suppressors in those many jurisdictions covered by Section 5, the politicians, lobbyists, and activists who have in the past few years endorsed and enacted restrictive new voting laws in dozens of states. The legal burden now will be shifted from these partisans to the people whose votes they seek to suppress. This will mean that discriminatory practices will occur with greater frequency than they have before. The Constitution, the Court declared, must be color-blind and may not discriminate between states even if it means being blind to the political realities of a nation still riven by racial divides.

Even in those jurisdictions not covered by Section 5 of the Voting Rights Act, lawmakers will cite today's ruling to justify future restrictions on voting — and in that sense this is a national disaster and not just a regional one. Proponents of racial redistricting, or voter identification laws that are really a poll tax, will find succor in today's ruling. And that means we will see more of these measures and, as we do, the people most directly impacted by them will have fewer ways in which to fend them off. The deterrent effect of Section 4, alone, was enormous. As U.S. District Judge John Bates remarked last year in a case out of South Carolina, its mere presence has stopped lawmakers from pitching hundreds more dubious laws.

So the winners today are officials like Rep. Darryl Metcalfe, the Republican state senator from Pennsylvania, who defended his state's statutory effort to suppress votes in the 2012 election by dog-whistling that those registered voters too "lazy" to get

new identification cards didn't merit a ballot. Rep. Alan Clemmons, a Republican state representative from South Carolina, also wins today. He's a politician from a Section 5 state that sought to restrict voting rights. He answered "Amen" to a constituent who had written that encouraging black voters to get voter identification cards would "be like a swarm of bees going after a watermelon." Also winning big as a result of *Shelby County*? The grandees of the current iteration of the "voter fraud" myth.

The Losers

Who loses today? Not just the tens of millions of minority voters whose ability to cast a ballot now may be more easily restricted by new voting laws. Not just the millions who now will be more vulnerable to redistricting plans that are patently discriminatory. But the poor, the elderly, and the ill of all races, men and women who have voted lawfully for years but who will not be able to find the money to pay for new identification cards, or take the time out of work to travel to state offices to get one, or have the health to make the journey to obtain identification they otherwise do not need. These people, everywhere, were the indirect beneficiaries of Section 5 of the Voting Rights Act. And today their right to vote is far less secure.

So the losers today are registered voters like Craig Debose, a Vietnam veteran and longtime resident of South Carolina. Last year, he traveled 11 hours by train to Washington to testify in a Section 5 lawsuit. He doesn't have a car, which is why he didn't have photo identification, which is why he was going to be disenfranchised by state lawmakers until the Voting Rights Act saved him (for at least the last election cycle, the South Carolina law is still on the books). Losing today, too, is Jacqueline Kane, an elderly woman in Pennsylvania who had voted lawfully without incident for decades but who would have been forced from her nursing home to get an identification card. All to prevent "voter fraud" no one can prove.

Losing today also are citizens of all races in Texas who work for a living but cannot afford to travel hundreds of miles to state licensing offices. They were spared last year by Section 5 when a federal court declared, among other things, that officials intentionally limited the hours of operation for offices available to issue new identification cards so as to preclude the working poor from getting there. "A law that forces poorer citizens to choose between their wages and their franchise unquestionably denies or abridges their right to vote," declared a federal court last year. Today's ruling in Washington stands for precisely the opposite proposition.

Postscript

The Court's majority is wrong. Terribly wrong. The Voting Rights Act isn't outdated. Its vitality was amply demonstrated in the years before the 2006 renewal, and in the years since. What has become outdated is the patience of a certain political and legal constituency in this country that has decided for itself over the past few years that there now has been *enough* progress toward minority voting to justify the law's demise. To this constituency, it is *enough* that more blacks and Hispanics now vote or are elected to office. To them, Section 4's actual burdens on officials — petty little bureaucratic burdens when compared to the burden of losing one's right to vote — suddenly are burdens so unreasonable they cannot be constitutionally borne.

Today's decision is the legal sanctification of an ugly movement that has brought America a new generation of voter suppression laws. It is the culmination of an ideological dream of a young Reagan administration official named John Roberts, who sought 30 years ago to block an earlier renewal of the law. It is the latest manifestation of America's unfortunate eagerness to declare itself the grand victor even when a fight is clearly not won. Indeed, as today's setback demonstrates, the nation's fight for voting rights will never be over because the effort to undermine these rights is ceaseless. Section 4 of the Voting Rights Act was so strong that it took 48 years and this dubious ruling to bring it down. But down it has come.

For these reasons and many more, the Supreme Court's decision in *Shelby County* is one of the worst in the history of the institution. As a matter of fact, and of law, it is indefensible. It will be viewed by future scholars on a par with the Court's odious *Dred Scott* and *Plessy* decisions and other utterly

lamentable expressions of judicial indifference to the ugly realities of racial life in America. And to those tens of millions of Americans whose voting rights were protected *last year* by Section 4, it is a direct slap in the face rendered by judges who today used the banner of "states rights" to undermine the most basic right any individual can have in a free society — the right to be able to vote free from racial discrimination employed by public officials.

The America described by the Chief Justice, the one in which "blatantly discriminatory evasions of federal decrees are rare," is an America which has never once existed and which obviously does not exist today. The America the rest of us see so clearly with our own eyes, the America in which officials all over are actively seeking to suppress black and Hispanic votes, is the one that tens of millions of the rest of us have to live with, at least for now, without the protections of Section 4 of the venerable law. When rights are weakened for some, they are weakened for all. We all are much weaker today in the wake of this ruling.

Voting Rights: The Courts Must Step In

When the Supreme Court gutted Section 5 of the Voting Rights Act, it noted that the law's Section 2 still prohibited discriminatory voting laws. One of the worst: Texas's harsh new voter identification bill, which a federal court had already found was enacted with an intention to discriminate. The Center and other rights groups filed suit, urging a federal court to strike down the law. The case will test the remaining strength of the Voting Rights Act.

The photo identification requirements of SB 14 disproportionately prevent Latino and African-American citizens in Texas from voting in person and, in the totality of the circumstances, deny Latino and African American citizens an equal opportunity to participate in the political process and were enacted for that purpose. ...

SB 14's Effect on Minority Citizens in Texas

The photo ID requirements of SB 14 disproportionately and negatively affect Latino and African-American citizens residing in Texas. At the time when elections are conducted in Texas, Latino and African-American citizens are, and will be, substantially less likely than white citizens to be able to present the photo identification required by SB 14 for in-person voting because Latino and African-American citizens are, and will be, substantially less likely to possess that photo identification at the time elections are conducted. This effect is not, and will not be, mitigated by SB 14's limited exceptions to the photo ID requirements for in-person voting.

Thousands of Texas citizens are eligible and qualified to register to vote, but currently lack the forms of photo identification required by SB 14 for voting in person on Election Day or in early voting. Upon information and belief, the percentage of Latino citizens who currently lack the required forms of photo ID and the percentage of African-American citizens who currently lack the required forms of photo ID are significantly higher than the percentage of white citizens who currently lack the required forms of photo ID.

Among the thousands of Texas citizens who lack the forms of photo identification required by SB 14, the percentages of Latino and African-American citizens who

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Excerpt from the complaint in *Texas State Conference of NAACP Branches and the Mexican American Legislative Caucus of the Texas State House of Representatives v. Steen.* The plaintiffs are represented by the Brennan Center's Myrna Pérez, Vishal Agraharkar, and Wendy Weiser, as well as attorneys from the Lawyers' Committee for Civil Rights Under Law, the Law Offices of Jose Garza, the national office of the NAACP, the Law Office of Robert S. Notzon, Potter Bledsoe LLP, Dechert LLP, and the Law Offices of William Bonilla, P.C.

encounter (and will continue to encounter) substantial burdens in obtaining the required identification are significantly higher than the percentage of white citizens who encounter such burdens. As a result of these differential burdens, the racial impact reflected in the current photo ID ownership rates ... is not being mitigated, and will not be mitigated, by the possibility that Texas citizens without the required photo ID may obtain such photo ID in the future. Moreover, these differential burdens, by race, themselves have (and will continue to have) a racial impact by increasing the disproportion, by race, in the rates of ownership of the photo identification required by SB 14.

The differential burdens by race ... arise because Latino and African-American citizens disproportionally have a low socioeconomic status compared to white citizens, and because it is substantially more burdensome for persons with a low socioeconomic status to obtain any of the forms of photo identification required by SB 14.

The factors that contribute to making it more burdensome for persons with a low socioeconomic status to obtain any of the forms of photo identification required by SB 14 include, but are not limited to, the following:

a. All of the forms of photo identification required by SB 14 for in-person voting, except the Election Identification Certificate ("EIC"), require the payment of a fee in order to obtain the identification. Although no fee is charged by Texas for obtaining an EIC, the EIC is not free because voters bear all costs of obtaining the documentation necessary to qualify for an EIC.

b. There are numerous practical obstacles to obtaining an EIC, driver's license, state identification card, or concealed-carry license from DPS because of the limited availability of DPS offices and the limited DPS office hours. As of June 2012, 81 Texas counties had no DPS office, and in 34 additional counties DPS offices are open two days per week or less. No DPS office is open on weekends or after 6:00 p.m. on weekdays. Wait times in DPS offices in metropolitan areas can be as long as three hours during busy months of the year.

c. SB 14 does not mandate paid leave to obtain photo identification required for in-person voting, and many Texans who are without such identification are likely to have to leave work in order to obtain the identification. ...

Upon information and belief, there also are hundreds of thousands of registered voters in Texas who, although they possess one of the six forms of photo identification required by SB 14 for in-person voting, will not have their name on that identification match exactly with their name on the registration list. These individuals are allowed to vote a regular ballot only if an election official decides that the names are "substantially similar," and, upon information and belief, being subject to this discretion by election officials will result in the application of differential standards that disproportionately disadvantage Latino and African-American voters as compared to white voters.

Texas's History of Discrimination in Voting

Texas has a long history of widespread and persistent discrimination in voting against African-American and Latino citizens who reside in the state. This history includes actions to exclude minority citizens from the franchise and, when minority citizens became enfranchised, to substantially impede minority voters from having the opportunity to register and vote. This history also includes the enactment and enforcement of election methods and redistricting plans whose purpose and effect were to dilute the voting strength of minority voters.

The actions taken by Texas to restrict and impede minority voters' access to the ballot have included: use of all-white primary elections, struck down in *Smith v. Allright* (1944), and *Terry v. Adams* (1953); use of a discriminatory poll tax as a prerequisite to voting, struck down in *United States v. Texas* (1966), after the Voting

Rights Act was adopted; and the enactment, after the poll tax was invalidated, of a series of voter registration procedures which would have significantly minimized minority political participation, and which were struck down first on constitutional grounds, *Beare v. Smith* (1974), and then were barred pursuant to an objection interposed under Section 5 of the Voting Rights Act.

Texas has a long history of widespread and persistent discrimination against African-American and Latino citizens.

The actions taken by the state of Texas and its subjurisdictions to minimize and dilute the voting strength of minority voters have included the following: At least one of the state's statewide redistricting plans enacted following each Census, beginning with the 1970 Census and continuing through the 2010 Census, was denied preclearance under Section 5 of the Voting Rights Act because of its discriminatory purpose and/or effect; in *LULAC v. Perry* (2006), the Supreme Court held that a congressional redistricting plan enacted by the Texas legislature in 2003 violated Section 2 of the Voting Rights Act, and found that the plan bore "the mark of intentional discrimination that could give rise to an equal protection violation;" in the past three decades, there were more successful suits against Texas subjurisdictions filed under Section 2 of the Voting Rights Act, challenging discriminatory election methods and redistricting plans, than in any other state in the country; and, in the past three decades, Texas had the second-highest number of Section 5 objections (which concerned dilutive voting changes as well as other discriminatory changes).

The history of voting discrimination in Texas continues to diminish the ability of Latino and African-American citizens to participate equally with white citizens in the political process. Elections at the state and local level in Texas are characterized by racially polarized voting. ...

Voter Identification Legislation and the Legislative Process

SB 14 was enacted as the result of an unusual and irregular legislative process. That process, and the legislative history underlying the process, provide substantial indicia that SB 14 was motivated, at least in part, by an intent to discriminate against Latino and African-American voters.

... Notwithstanding the expressed concerns regarding the discriminatory nature of the proposed changes to the in-person voter identification requirements, the voter identification bills that passed one house of the Texas legislature from 2005 to 2009 became increasingly more restrictive and stringent with regard to the voter identification to be required for in-person voting, and SB 14 is more restrictive and stringent than those bills. The Texas legislature did not investigate the concerns regarding the discriminatory nature of the voter identification changes, and did not rely on any analysis or study, or any event or occurrence, as a basis for passing, and ultimately approving, increasingly restrictive photo identification bills.

At the beginning of the 2009 legislative session, following the failure of the House-passed photo identification legislation in the Senate in 2005 and 2007, the Senate amended its rules so as to create an exception to the rules that govern when legislation may be considered in that legislative body, which exception specifically was limited to the consideration of photo identification legislation. ...

SB 14's Tenuous Justification

The policy justifications offered in support of SB 14 are unsupported, which provide a further indicia that SB 14 was motivated, at least in part, by an intent to discriminate against Latino and African-American voters.

During the time period identified above during which voter identification legislation was considered by the Texas legislature (2005-2011), there were repeated claims by members of the legislature, other Texas officials, and private individuals that Texas needed to revise the pre-existing voter identification requirements in order to prevent noncitizens from voting and to address immigration by undocumented persons.

Prior to the passage of SB 14, elected public officials in the state of Texas — including Texas state senators and representatives, the secretary of state, the lieutenant governor, and the governor — received a substantial number of letters and emails from constituents that characterized voter identification legislation as legislation regarding illegal immigration, often urging them to enact stricter voter identification requirements to stop undocumented immigrants from voting, and often using inflammatory references to "criminal aliens," "wetbacks," and similar derogatory phrases and racial epithets to refer to unqualified voters who allegedly needed to be prevented from voting by new voter identification requirements. Rhetoric within the legislature regarding voter identification legislation also included racially-tinged statements. ...

Following Senate passage of SB 14, Lieutenant Governor Dewhurst issued a press release stating that SB 14 will increase voter confidence "by ensuring only U.S. citizens — who are legally eligible — vote in Texas elections."

There was minimal or no documented evidence presented to the legislature from 2005 to 2011 of voting by noncitizens in Texas, either currently or in recent history.

The claims that the photo identification requirements of SB 14 are necessary to prevent voting by noncitizens are pretextual, and have an anti-Latino animus. ...

Congress Must Move on Voting Rights Act

Myrna Pérez

The Voting Rights Act was last reauthorized in a strong bipartisan vote. Now lawmakers from both parties have a duty to resuscitate the law, crafting a revised formula for when harmful voting laws can be blocked.

For nearly five decades, the Voting Rights Act has been America's most effective tool to eradicate racial discrimination in voting. Today, a sharply divided Supreme Court has thrown the future of this critical tool in limbo by striking down a key provision of the act. It's now up to Congress to revive the act.

This landmark law was passed in 1965, but there is ample proof it is still critically important today.

The court upheld the act's core — known as Section 5 — that requires jurisdictions with a history of racial discrimination in voting to gain federal approval before changing their voting laws. But it struck down the formula that determines which jurisdictions are covered by Section 5, which as a practical matter means they do not require pre-approval at this time.

The majority held that the formula was based on old data, but it dismissed in essentially one paragraph the vast record Congress considered — about 15,000 pages — which supported its conclusion that certain jurisdictions needed to be targeted.

In light of the Supreme Court's second-guessing of Congress, lawmakers must act in a decisive and bipartisan way — as they did when reauthorizing the law in 2006 — to protect voting rights of countless Americans and ensure that elections remain free, fair, and accessible.

In effect, Section 5 of the Voting Rights Act blocks discrimination before it occurs. This landmark law was passed in 1965, but there is ample proof it is still critically important today. States across the country introduced a wave of voting restrictions since the beginning of 2011. With the help of Section 5, citizens, courts, and the Department of Justice were able to stop changes in voting laws that were discriminatory. For example, Section 5 blocked Texas's strict voter ID law and its redistricting plans. It also helped drastically improve South Carolina's voter ID law by expanding the "reasonable impediment" exception to allow citizens without an ID to vote.

Without a robust mechanism like Section 5 to block and deter discriminatory voting changes, voting rights advocates will need to be even more vigilant. After this decision, states and localities may attempt to revive blocked laws or implement changes that have been passed but not yet submitted for federal approval. For example, Texas's attorney general said today his state's strict voter ID law, which was blocked by a court because of the discriminatory effect it will have on minority voters, can now go into effect.

Further, some jurisdictions may seek to enact new restrictive laws or try to put in place blocked changes that, despite not being in effect, technically remain on the books. For instance, a 2007 Texas

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provision, which limits eligibility for a position of supervisor of a water district to landowners that are registered to vote, is still on the books.

The court's decision does not mean states or other jurisdictions are free to enact racially discriminatory measures, and voting rights advocates will work tirelessly to push back against laws that are discriminatory. But we have lost an important and effective tool. Congress must act swiftly to put a new coverage formula in place to avoid the fallout that may result from today's decision.

In 2006, Congress voted nearly unanimously to reauthorize the Voting Rights Act for another 25 years. The vote — 98-0 in the Senate and 390-33 in the House — came after more than 20 hearings and thousands of pages of evidence showing the continued need for the critical provision of federal approval. Since then, the Justice Department has formally blocked 31 voting changes and Section 5 has deterred countless more.

It is fair to question whether congressional dysfunction will stall a legislative response to today's ruling. But on an issue as important as the fundamental right to vote, advocates remain confident America's leaders can come together in a bipartisan way. They must.

Challenging Voter Registration Restrictions

Both Arizona and Kansas require proof of citizenship to register to vote. In June, the U.S. Supreme Court invalidated Arizona's measure, at least when it comes to federal elections. Justice Antonin Scalia wrote the opinion finding that the Constitution's "Elections Clause" gives Congress broad power to pre-empt state laws and protect the right to vote. Now the states are trying to change the federal voter registration form so they can ask for these documents. The Brennan Center, representing the League of Women Voters, argues the new requirements violate federal law. Here is some background.

This lawsuit arises out of Arizona's and Kansas's continuing campaign to amend the uniform national mail-in voter registration form ("Federal Form") prescribed by the National Voter Registration Act of 1993 ("NVRA") and implemented by the Election Assistance Commission ("EAC") to require applicants for voter registration in those states to provide documentary proof of citizenship with their applications.

Congress enacted the NVRA in 1993 in part to address what it perceived as improper barriers to voter registration embedded in state law. As the statute itself acknowledges, "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." In its long history of promoting voter registration efforts, the League has experienced many of these unfair registration laws and procedures firsthand. Thus, the League's mission mirrors the NVRA's stated goals of "increas[ing] the number of eligible citizens who register to vote in elections for Federal office" and implementing procedures at all levels of government to "enhance[] the participation of eligible citizens as voters in elections for Federal office."

One of the primary ways in which the NVRA was intended to combat problematic state laws and facilitate voter registration was through its mail registration provisions for voters. The centerpiece of these new provisions was the creation of a standardized mail voter registration form that could be utilized by the citizens of any state to register for federal elections. By creating a standardized registration form that "[e]ach State shall accept and use," Congress sought to ensure that states could not disenfranchise voters by setting discriminatory or burdensome registration requirements.

On November 21, 2013, the Brennan Center filed a motion to intervene in *Kris W. Kobach et al. v. United States Election Assistance Commission* on behalf of the League of Women Voters U.S. and its Arizona and Kansas affiliates. Pro bono counsel Kirkland & Ellis LLP and David G. Seely of the law firm Fleeson, Gooing, Coulson & Kitch, LLC, helped author the brief, excerpted here. Brennan Center attorneys Wendy Weiser, Jonathan Brater, and Tomas Lopez represent the plaintiffs.

The Federal Form was also meant to benefit national organizations that registered voters in multiple jurisdictions, such as the League, which would no longer have to contend with varying and confusing state registration laws. Underlying these efforts to "streamline the registration process" was the understanding that states could not unilaterally change the Federal Form. Rather, the development and implementation of the Federal Form was — and remains — a task delegated exclusively to a federal agency: the EAC. (When the NVRA was originally passed, the agency responsible for implementing the NVRA was the Federal Election Commission ("FEC"). The Help America Vote Act of 2002 ("HAVA") later created the Election Assistance Commission and transferred to the EAC the responsibility of prescribing regulations necessary for a mail voter registration form for elections for federal office.)

Following the NVRA's enactment, the FEC commenced official notice-and-comment rulemaking proceedings to develop the Federal Form in accordance with the statute's goals and mandates.

By creating a standardized registration form, Congress sought to ensure that states could not disenfranchise voters by setting discriminatory or burdensome registration requirements.

The Supreme Court's *Inter Tribal Council* Decision

Earlier this year, the Supreme Court, in *Ariz. v. Inter Tribal Council of Ariz., Inc.*, held that Arizona's requirement that voter registrants provide documentary proof of citizenship was pre-empted by the NVRA with respect to applicants using the Federal Form. The Supreme Court agreed that the NVRA requires all states to "accept and use" the "Federal Form," which, as developed and approved by the EAC, does not require documentary proof of citizenship. As the Court explained, "[n]o matter what procedural hurdles a State's own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available." The Court further found that the NVRA's "accept and use" requirement is a constitutional exercise of Congress's power under the Elections Clause, and pre-empts state regulations governing the "Times, Places and Manner" of holding federal elections. Accordingly, the only route for Arizona — or Kansas — to add a documentary proof of citizenship requirement to Federal Form applicants would have been to challenge the EAC's denial of the request at that time or to again request that the EAC alter the Federal Form and to "challenge the EAC's rejection of that request in a suit under the Administrative Procedure Act."

Arizona, and more recently, Kansas, have repeatedly requested that the EAC alter the Federal Form to require documentary proof of citizenship and the EAC has at least twice rejected those requests, and more recently, the EAC staff deferred consideration of their renewed request. Beginning in 2005, Arizona requested that the EAC modify the instructions on the Federal Form to accommodate the state's newly enacted documentary proof-of-citizenship requirement. On March 6, 2006, the EAC denied Arizona's request. In a letter sent by Executive Director Thomas Wilkey, the EAC explained that the modification requested would violate the NVRA. The EAC further explained that Arizona was obligated to "accept and use" the Federal Form and hence it could not apply its requirement to Federal Form applicants. On March 13, 2006, Arizona Secretary of State Jan Brewer wrote to the EAC indicating that,

despite the agency's decision, she planned to continue to instruct state election officials to apply a proof-of-citizenship requirement to the Federal Form, and requesting that the EAC reconsider its decision. In July 2006, the EAC again considered the question and voted on whether to modify the Federal Form pursuant to Arizona's request. The measure failed by a 2-2 vote, having not received approval of three members of the EAC as required by law for the EAC to take any action.

Although, as the Supreme Court noted, Arizona could have challenged the EAC's rejection of its request under the Administrative Procedure Act at the time, it failed to do so. Instead, it continued to require proof of citizenship from Federal Form applicants, prompting the lawsuits that resulted in the *Inter Tribal Council* decision. Nor did Arizona or Kansas request that the EAC amend the Federal Form to permit documentary proof of citizenship during subsequent EAC rulemakings.

Arizona and Kansas Renew Their Requests to EAC

Following the U.S. Supreme Court decision in *Inter Tribal Council*, Arizona once again renewed its request that the EAC modify the Federal Form, and Kansas renewed a similar request it had first made in 2012. Defendant Alice Miller, the acting executive director of the EAC, responded to both requests by stating that the requests "raise[d] issues of policy concern that would impact other states," and therefore could not be permitted without the approval of the Commission which would not be possible while the Commission lacked a quorum.

Kansas and Arizona filed the instant suit on August 21, 2013. Plaintiffs ask the court to set aside the EAC's actions as unlawful, declare that the EAC may not defer consideration of the requests until it has a quorum, and issue a writ of mandamus compelling the EAC immediately to modify the Federal Form so that each state may require registrants using the form to provide documentary proof of citizenship. Plaintiffs also ask the court to declare that the NVRA exceeds Congress's power to regulate the "Times, Places and Manner" of federal elections to the extent that it permits the EAC to refuse to modify the Federal Form to allow states to require documentary proof of citizenship for registration.

GOVERNMENT DYSFUNCTION & THE COURTS

Political Polarization: The Great Divide

2013 was marked by intense partisanship: government shutdowns, threats to default, filibusters, and accusations. But is the widening gulf between parties actually a problem for our government? Last spring, two Brennan Center experts joined other scholars and practitioners in a symposium at NYU School of Law. The discussion surprisingly showed more than a few areas of agreement.

RICHARD PILDES, *Sudler Family Professor of Constitutional Law, NYU School of Law (moderator):* The defining feature of American democracy over probably the last 20 years, but even more so today, has been the emergence of extreme political polarization within government, at the very least, and maybe among the rest of us. It is unlike anything that we have had in American democracy since the late 19th century. There is virtually no center. The most conservative Democrat now is considerably more liberal than the most liberal Republican. This process seems to have begun in the late 1970s and has been accelerating.

Many people view this extreme polarization as making American democracy dysfunctional, particularly in a system of separated powers with checks and balances, a House, a Senate, and a presidency, elected from different constituencies on different time cycles, which is dramatically unlike a parliamentary system. Can the American system function effectively in the face of these kinds of extreme divisions?

So the first question is whether this extreme polarization is as bad as is typically discussed in the media.

ROBERT BAUER, *Partner, Perkins Coie; Former White House Counsel; General Counsel for Obama for America, 2008 and 2012; Distinguished Scholar in Residence, NYU School of Law:* Well, let me distinguish this very powerful, very extreme sorting out of ideologies into opposing political camps from what I call polarized debate. Polarization is not what creates the singular dysfunction that we're talking about. It is the way in which those differences are discussed and affect negotiation. The debate has become extreme.

PILDES: Why aren't you troubled about the actual polarization of the political parties beyond public debates, civility, and discourse?

BAUER: Years ago I remember people saying the biggest problem we have with the American political parties is that there isn't a dime's worth of difference between them. It was thought that the voters weren't really presented with a

This discussion took place at NYU School of Law on April 1, 2013. The edited transcript first appeared in the Spring 2013 issue of *NYU Law* magazine.

sharp choice, debate didn't have a particularly gleaming edge to it, and therefore the political process suffered. But that's obviously not true anymore.

BENJAMIN GINSBERG, *Partner, Patton Boggs; General Counsel, Romney for President, 2008 and 2012:* Something has caused the elected representatives in Washington to change their relationships with each other over the course of the past 20 years. There is a notable difference in the collegiality and how much they talk to each other about golf or restaurants or families. When it comes to the cause, we need to deal with that.

There really are differences between the parties now in a way that hasn't happened before, and it helps to look at the three areas where that manifests itself in the policy realm. It's certainly true in the size of government, all of these dangerous fiscal-cliff actions that are taking place. It's certainly true on the social issues, by and large, where there are just two concepts that are pretty far apart and hard to bridge the gap.

The challenge is not so much polarization but paralysis. Can we have a system as polarized as it is now without government being either paralyzed or lurching from one extreme to the other?

The military and our foreign policy muscle was the third area. Now, interestingly enough, you'd be hard-pressed to really find great differences between the current president and the past president on most foreign policy matters. So we need to take a look within those particular issues for why this is happening.

PILDES: But why would certain issues be more polarizing today than in the past? Haven't we always been deeply divided at some ideological level on these kinds of issues?

GINSBERG: The country is going through a growth spurt and hasn't quite come to grips with who it is. You've written about the Voting Rights Act and how that started breaking up the coalitions. The Vietnam War tore the Democratic coalition asunder. Coalitions have been breaking up over the last 40 or 50 years and just aren't quite re-formed yet. The media is a very different place today in terms of transmitting views than it was even 10 years ago. It's much more polarized. Over the last 40 years people have come to live much more with people like them rather than in diverse communities. That contributes, too.

MICHAEL WALDMAN, *President, Brennan Center for Justice:* Well, the period of consensus that we think of as the norm from which we've deviated was itself unusual in American history. Many things that were the quirks of American politics have worked themselves out and are no longer so different. It used to be said that Americans were ideologically conservative and operationally liberal. Now people tend to sort out more in both of those areas.

I have a book in my office, "The Deadlock of Democracy," which not only talks about political parties not being responsible and you couldn't tell what the difference was between them, but that there were really multiple party systems where conservative southern Democrats and northern liberal Republicans each played their own roles. Those vanished in the mid-1960s with the move of southern white Democrats slowly into the Republican Party, first for the presidency, then for the Senate, then for the House. Less noticed but just as significant, the Rockefeller Republicans disappeared in the Northeast. These

big trends make us look more like a European-style ideologically divided party system. The challenge is not so much polarization but paralysis. Can we have a system as polarized as it is now without government being either paralyzed or lurching from one extreme to the other?

PILDES: That is one of the big questions. If we are forming European-style parliamentary parties — a much more unified Democratic Party, a much more unified Republican Party, much sharper differentiations between the parties — can those changes be made to work within an institutional framework from 200 years ago that wasn't designed with the idea of political parties at all?

The polarization that we've seen is not only a function of the voters or even the money in the system pulling people, but the difficulty that people inside the system have had resisting it.

SAMUEL ISSACHAROFF, *Bonnie and Richard Reiss Professor of Constitutional Law, NYU School of Law:* I don't find the polarization disturbing. People should disagree strongly about things like the death penalty or abortion or the size of the military or foreign interventions. What I find reassuring is that public opinion surveys generally show a bell-shaped distribution of views among the American population where the center still holds in terms of broad public views on even the most controversial issues. The difficulty is that the institutional framework through which those social views are mediated reinforces the poles. The election system where we use "first past the post" — that you get one more than the other side and you get everything — means that you're going to end up with two basic parties.

PILDES: Let's talk about the dramatic change in the media over the last 10 years. We no longer have the three major broadcast networks with 25 million viewers and network anchors like Walter Cronkite or Tom Brokaw, centrists moderating representations of what's going on in politics. Instead, we have cable television and the Internet, which is a much greater source of political information but which many people use to confirm the beliefs they already hold. How much is public opinion actually more polarized today? And how much are politics actually reflecting that polarization?

MONICA YOUN, *Brennan Center Constitutional Fellow, NYU School of Law:* People who study election law tend to be policy wonks, and that often leads to an assumption that people vote their policy preferences. Sam is absolutely right to say that there still is a relatively bell-shaped distribution of views on a number of social issues. What the evidence of the southern Democrats and the Rockefeller Republicans has hinted to me is that people will vote their party even despite their policy preferences. People's affiliation toward parties may be less policy-based than tribal affective, more like a sports team or a religion.

SEAN CAIRNCROSS, *Former Deputy Executive Director and General Counsel, National Republican Senatorial Committee:* Today we woke up and found out that the House is moving toward an immigration package that is probably going to look like the Senate's immigration package. So one of the most controversial issues of our current time where both parties have skin in the game looks to be moving forward. Just a little bit of perspective that we shouldn't stand on the panic button.

But I agree with Ben that the relationships between the principals who negotiate

these issues has changed. People travel home much more. There's a 24-hour news cycle and the Internet, and you can rest assured that if you are cutting a deal or you are moderating on an issue that that is a very real force. I can tell you after two cycles at the senatorial committee that the potential for a primary challenge, and this is true on both sides of the aisle, is a significant constraint on your ability to negotiate.

...

PILDES: Michael, you've written in particular about the very polarized debates on voter identification issues and laws that have been emerging over the last two or three years. And what we see there is that, at least within legislative bodies, the votes on these laws break down on completely partisan lines, although public opinion polls generally seem to suggest that three-quarters of voters endorse these kinds of laws.

WALDMAN: The voting wars of the past decade are a symptom rather than a cause of the polarization. There have always been challenges about who could vote, but there has not been as sharp a red/blue divide as now. The public has broad but not particularly deep views on these matters. On the one hand, there's broad public support for something like voter ID. On the other hand, when you point out that a lot of people don't have the particular kind of ID that's being proposed, the public voted against it, as in Minnesota. The real challenge is how to advance something where there is in fact a solution that meets the concerns of both sides in the debate, as I would argue is the case here.

PILDES: What is that solution?

WALDMAN: Well, you could have a system that registers just about every voter and is less susceptible to fraud. And even on the very polarized issue of voter ID, you're now starting to see proposals around the country, as in Nevada, where the Democratic secretary of state has proposed a system where you have to have an ID. But if you don't have it, your photo gets taken at the polls. That has the potential to calm concerns about security without disenfranchising people.

There are some real solutions. We're seated at the table with the co-chairs of the president's new commission on electoral reform [Bauer and Ginsberg]. If we could find a way to take these issues out of the partisan crossfire, it's far more likely to get a solution that actually meets the concerns of all parties.

PILDES: Can we take these issues out of the partisan crossfire, especially at the national level?

WALDMAN: Sometimes, when both parties want something, whether it's a grand bargain between them, or, as in immigration, where suddenly both parties for entirely different reasons want exactly the same thing. But it's important not to neglect some of the soft matters of leadership. The filibuster rules are the same as they've been for a long time, but all of a sudden they're used so incessantly that you suddenly need an impossible supermajority to do anything in the Congress. There are numerous things where the rules are what they are on paper, but if leaders of both parties aren't willing to stand up to their base or exert leadership then the system breaks down. The polarization that we've seen is not only a function of the voters or even the money in the system pulling people, but the difficulty that people inside the system have had resisting it.

PILDES: Ben, you're the one who opened up the personal side of polarization. What, in your view, accounts for the situation Michael is describing?

GINSBERG: I'm honestly not sure. One of the contrasts with the atmosphere in Washington is on the state level, where there are any number of governors from both parties in either unified or divided legislatures who have managed to get an awful lot done in their states. So despite the polarization that we're talking about, and we're really talking about it as a national phenomenon, in any number of states it's not true. I'm not really sure

what the differences are temperamentally and in the relationships between people, and why it is different in Washington from the way it is in so many state capitals.

BAUER: There's no question that the tenor of relationships in the city has changed. When I came to Washington, D.C., full-time in 1976, there was a very different quality to relationships across the aisle. Sometimes the rhetoric was still very hard-edged, but there was more of a likelihood that you would see the previous combatants walking off the floor of the Senate joking with each other. And that's very different than the reported period, post-1994 election, when the Democratic leader of the House and the Speaker of the House did not speak to each other for a year and a half directly. So there's a difference, but to go to Michael's distinction, it's more of a symptom than a cause of the larger divide.

ISSACHAROFF: American government has traditionally depended upon two different things, which both are in short supply right now. One is people who rise above the partisan divides in the institution and are the deal brokers, and there seem to be fewer of those due to the decline of the center.

The other is that there seems to be less identification with the institution than with one's party. If you look at the separation of powers, there is a Senate that has an understanding of its role, and a House in the same way, and a presidency organized around the executive in opposition to the Congress and to the judiciary. That seems to have broken down. There seems to be willingness to disable the various institutions in favor of an immediate partisan objective. The causal stuff is hard to figure out because there are so many factors: that life is more transparent, that our sources of information are more available. The monopoly of information under Walter Cronkite was a terrible thing. I learned about the Vietnam War from Walter Cronkite, but that can't be the right image to hold onto in this era.

Congressional Dysfunction Yields a Crisis in the Courts

Alicia Bannon

Rising numbers of U.S. Senate filibusters helped create a crisis in federal courts. Most attention focused on appeals courts. But a surprisingly high number of trial court judgeships remained unfilled as well. Vacancies are far higher under Barack Obama's presidency than under recent predecessors. Combined with unprecedented workloads, federal district courts are burdened as rarely before.

Recent public attention on federal judicial vacancies has largely focused on the appellate courts. Yet, since 2009, the slow pace of nominating and confirming judges has also precipitated a crisis in the district courts — the trial-level courts that resolve the vast majority of federal cases. As of July 1, 2013, there were 65 vacancies in the district courts out of a total of 677 judgeships, creating a vacancy rate of almost 10 percent. Only 23 nominees are currently pending before the Senate, while 18 district court judges have been confirmed since the start of 2013. The Administrative Office of the United States Courts anticipates that four additional vacancies will open by July 15, 2013, followed by seven more vacancies by January 2014.

The high number of vacant judgeships limits the capacity of district courts to dispense justice and affects the millions of Americans who rely on district courts to resolve lawsuits and protect their rights. District courts are the workhorses of the federal judicial system, resolving legal disputes, conducting civil and criminal trials, and overseeing cases from filing to termination. These courts touch the lives of everyone from the small business owner in a contract dispute, to the family targeted by consumer fraud, to the artist protecting her copyright from infringement. When district courts are not functioning efficiently, it reverberates throughout our entire judicial system.

This analysis examines data on district court vacancies and judicial workloads since 1992. Its findings suggest that judicial vacancy levels are sufficiently high that it is affecting the functioning of our courts.

- **Breaking with historical patterns, district court vacancies have remained high throughout Barack Obama's presidency.** District courts typically see brief peaks in vacancies after a presidential election, followed by a sharp decline in subsequent years. Yet, during the Obama administration, after district court vacancies spiked in 2009 they never returned to their previous level and, in fact, have grown further. For the first time since 1992, the average number of district court vacancies has been greater than 60 for five straight years, from 2009-2013.

Excerpt from *Federal Judicial Vacancies: The Trial Courts,* July 2013.

- **Together, high vacancy levels and heavy caseloads are leaving sitting judges with unprecedented workloads.** Counting both full-time active judges and part-time senior judges, the number of pending cases per sitting judge reached an all-time high in 2009 and was higher in 2012 than at any point from 1992-2007.

- **Vacancies are hurting districts with the greatest needs.** Judicial emergencies, a measure by the Administrative Office of the United States Courts of vacancies in districts with the most acute need for judges, have been higher in 2010-2012 than at any other point since 2002 (the last year for which comparable data is available).

These findings demonstrate the urgent need for the president and Senate to act to fill district court vacancies. Indeed, our findings suggest that to fully address the increasing district court workload, more judgeships are required — further highlighting the importance of filling vacant seats now.

The Virtual Filibuster

Burt Neuborne

Until the recent partial filibuster reform, the costs to a senator of filibustering were minimal. They did not even have to speak. Yet, by lowering these costs the Senate had been transformed into an unconstitutional supermajoritarian body.

Senate Rule XXII, as currently administered, imposes a *de facto* supermajority voting rule on the Senate, requiring 60 votes to enact legislation, or to provide constitutional advice and consent to a presidential nomination. To be sure, final Senate votes on bills and nominations are formally governed by majority rule but in order to be eligible for a final vote, virtually every proposed nominee or bill must clear a *de facto* 60-vote threshold. Over the years, the supermajority threshold, called a filibuster, has evolved from the relatively rare "speaking" filibuster, where a senator, or a relay of senators, hijacks the Senate floor to block a vote, to the modern "virtual" filibuster, where a single senator can play at being a virtual pirate, refusing to yield a virtual floor without the inconvenience of actually doing or saying anything. Not surprisingly, the modern virtual filibuster has morphed into a *de facto* supermajority rule for the transaction of almost all Senate business. I call it the zipless filibuster.

The basic components of the zipless filibuster emerged in the 1970s as the result of two well-intentioned efforts at reform. The original Senate cloture rule governing the old speaking filibuster, dating from 1917, permitted a senator to delay a vote on an issue by continuing to debate it unless two-thirds of the senators *present and voting* opted for cloture. Pre-1970 Senate calendar practice, moreover, forbade consideration of other business until the speaking filibuster was resolved one way or another. Under the old rules, therefore, a filibustering senator was actually obliged to speak for an extended period of time, supporters of a filibuster had to maintain a substantial physical presence on the floor to assure sufficient votes (one-third of senators present and voting) to sustain the filibuster against a surprise cloture motion, and the entire Senate was tied up in knots until the filibuster was ended or the bill withdrawn.

In the early 1970s, Senate Majority Leader Mike Mansfield, seeking to prevent filibustering senators from holding the Senate hostage, initiated a two-track Senate calendar. Under Mansfield's two-track system, filibusters would be carried on during specific parts of the day, with the remainder reserved for regular Senate business, carried out on a separate calendar. While Mansfield's two-track calendar reform succeeded in avoiding general

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paralysis of the Senate, it also made it unnecessary for a filibustering speaker or group of speakers to hold the Senate floor for more than a short period of time each morning before it was time to move on to the other calendar track. Moreover, under a two-track calendar, launching a filibuster no longer had institutional consequences. As far as other Senate business is concerned, filibusters became costless.

Then, in 1975, reformers, led by Sen. Walter Mondale, sought to lower the cloture threshold from two-thirds to three-fifths, but the old guard picked their pockets. Supporters of the filibuster agreed to the three-fifths number, but extracted as a *quid pro quo* that the cloture number be three-fifths of all senators — or a fixed 60 votes. It took the reformers a while to realize that under the new "reformed" rule, it was no longer necessary for anyone to support a filibuster on the floor. Since the new cloture threshold was an absolute 60 votes, supporters of a filibuster could stay home in bed and not worry about marshaling one-third of the senators "present and voting" to defeat a cloture motion. Not only that, reformers agreed to the continuation of the entrenching language in Rule XXII requiring a two-thirds vote of the senators present and voting to alter the absolute 60-vote requirement. It was a massacre of the innocents.

To the nation's loss, we have learned that when you remove the self-limiting transaction costs from the speaking filibuster, it transforms the Senate into a supermajoritarian body.

The modern zipless filibuster was finally perfected by the informal practice of Senate "holds," often carried out in secret, allowing a single senator to freeze an issue merely by threatening to mount a filibuster over it. Now it isn't even necessary for a filibustering senator to take the floor for a few moments each morning. All the senator has to do is threaten to do it. So, we have moved from a speaking filibuster with three self-limiting transaction costs: (1) significant physical commitment by both the filibustering speaker and as many as 32 supporters; (2) public disclosure by forcing a filibuster to occur in the glare of Senate debate; and (3) institutional paralysis during the pendency of a filibuster, to a zipless filibuster with no transaction costs for the participating senators or the Senate itself. To the nation's loss, we have learned that when you remove the self-limiting transaction costs from the speaking filibuster, it transforms the Senate into a supermajoritarian body.

A first step in loosening the current filibuster-driven stranglehold on the Senate would be to restore the transaction costs associated with a filibuster. Abolish "holds." Scrap the two-track calendar. Restore the old "present and voting" criteria for cloture votes. Moving back to a single-track calendar and ending the *in terrorem* power of "holds" could be carried out unilaterally by the current Senate Majority Leader, Harry Reid, or through a point of order raised by a courageous senator challenging the chair's ruling that: (1) Rule XXII can be invoked without taking and holding the floor; and (2) the Senate may move on to other matters while a filibuster is in progress. Under the standard rules of the Senate, rejection of such a point of order by the chair would be immediately appealable to the body without debate, and would be governed by a 51-vote majority. Changing back to a "present and voting" calculation for cloture votes would require a formal amendment to Rule XXII, requiring the same 51 votes if, as I believe, the 1959 entrenching provision is unconstitutional.

Why, you may ask, should 51 senators buck the leadership and begin the process of reinstating the old speaking filibuster? The most obvious response is that reverting to pre-1970s practice would end the zipless filibuster and restore the three self-limiting principal transaction costs associated with the speaking filibuster: (1) the physical toll on the filibustering senators and their supporters; (2) the public nature of the spectacle; and (3) the derailing of the entire institution. While the speaking filibuster was capable of bringing the Senate to a halt on a number of occasions, the transaction costs placed a self-limiting lid on the process. When those self-limiting transaction costs were removed in the 1970s, it was just a matter of time until the zipless virtual filibuster evolved into a standard supermajority voting rule with disastrous effects on the Senate's ability to transact business.

The second reason is that a general supermajority voting rule in the Senate is unconstitutional, not only because it violates an implicit majority rule requirement lurking in the Constitution's text, but because it violates the 17th Amendment's requirement that "each Senator shall have one vote" and deprives each state of "equal suffrage in the Senate" in violation of the Entrenchment Clause of Article V of the Constitution.

If the senators won't act to rescue the Senate from its current partisan stalemate, who will? Usually, we rely on a court to rescue us from unconstitutional folly. It asks a lot, though, to expect a judge to overcome Article III standing problems, as well as the political question doctrine, and invalidate an internal Senate rule in the teeth of the authorization to each house in Article I, Section 5 to "determine the rules of its proceedings." While I believe that Article III judges have both the power and duty to disallow an unconstitutional supermajority voting rule in the Senate, I have no illusions that they will use that power in the current judicial climate. If, on the other hand, a conscientious senator (yes, Virginia, there are conscientious senators) believes that the filibuster rule, as currently administered, has morphed into an unconstitutional supermajority voting rule, that senator is duty-bound to support and defend the Constitution by raising and supporting a point of order challenging the current zipless filibuster as unconstitutional.

Why Gerrymandering Doesn't Explain Congressional Extremism

Walter Shapiro

From the president on down, many blamed gerrymandering for the government shutdown. Yet gerrymandering is not the principal cause of the partisan deadlock.

The map of Iowa's four congressional districts is aesthetically appealing — or, at least, it is to a political junkie like me. No weird computer-drawn shapes never before seen in nature. No skintight districts that follow a highway across the state plucking off a precinct here and skirting a precinct there. In fact, Iowa has managed to adhere to the rectangular lines of the state's 99 counties, so the four districts radiating out from the Des Moines media market boast a geographical and political coherence.

Blaming everything on gerrymandering is self-defeating because it prevents us from searching for the true roots of this low-ebb moment in our political history.

Not surprisingly, a group of nonpartisan civil servants (the Legislative Services Agency) played a major role in redrawing Iowa's political map after the 2010 Census. In 2012, Iowa elected two Democrats and two Republicans to the House with no winning candidate corralling more than 57 percent of the vote. You want competitive elections? In the most Republican district in the state, the GOP incumbent Steve King survived a spirited 2012 challenge from Christie Vilsack, the wife of the former governor who is currently Barack Obama's secretary of agriculture, with 53 percent of the vote.

Think a little about King — a fire-breathing Tea Party favorite from socially conservative western Iowa — the next time you hear glib explanations about the underlying reasons for scorched-earth partisanship in Congress.

During the government shutdown, TV pundits, armchair columnists, and Obama himself excoriated a 269-year-old villain. That supposed scoundrel was former Massachusetts Governor Elbridge Gerry, whose approval of a salamander-shaped congressional district in 1812 gave rise to the word "gerrymander." Two centuries later, gerrymandering is rightfully scorned as undemocratic and it emerges as a popular target during round-up-the-usual-suspects moments in American political life.

At an early October press conference, Obama gave full voice to the theory directly linking the government shutdown to the politically cynical drawing of congressional district lines after the 2010 Census. Obama claimed that "a big chunk of the Republican Party" represents "gerrymandered districts where's there's no competition and those folks are much more worried about a Tea Party challenger than they are about the general election."

That certainly doesn't explain Steve King, whose congressional district was created by a largely exemplary process in Iowa. The six-term incumbent was one of the most outspoken House incendiaries, blithely declaring that the debt ceiling was an illusion because America "can go indefinitely without hitting default." Yet King represents a district where he could be toppled in a Democratic wave election.

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King offers a dramatic example — and I will confess my journalistic weakness for argument by anecdote. But political scientists and election analysts have also been arguing against primarily blaming gerrymandered House districts for the breakdown of a functioning Congress. True, political gamesmanship during redistricting contributes to the vitriolic battles in Washington, but it is far from a major cause of the current deadlock of democracy.

For one thing, the numbers don't work. A post-election analysis by the Brennan Center calculated that partisan redistricting after the 2010 Census netted the Republicans just six more House seats in 2012 than they would have won using the old district lines. Other estimates of the GOP redistricting advantage range from zero to 15 seats. All these projections are iffy because, as Sundeep Iyer points out in the Brennan study, elections are not run as a social science experiment with the same candidates competing in both the old and new districts. But based on virtually every model out there, John Boehner would still be speaker of the House even if all the congressional district lines were sketched by judicial commissions.

What about the oft-quoted fact that Democratic House candidates won 51 percent of the vote in 2012? Doesn't that suggest that a heavy thumb on the scales left the Democrats 17 seats short of a House majority?

That 51-percent number is probably exaggerated. As Sean Trende, the co-author of the *2014 Almanac of American Politics*, points out in an article for Real Clear Politics, the clarity of these aggregate statistics from all 435 districts is muddied by the way different states tabulate votes for unopposed candidates and November runoffs in California where the only surviving candidates were sometimes from the same party. (A prime example was the free-spending California House race between Democratic incumbents Brad Sherman and Howard Berman.) Factoring in third parties, Trende estimates that in 2012 "the total vote for right-of-center parties was roughly equivalent to left-of-center parties."

Democrats also would get less than their fair share of House seats under any redistricting formula because their voters are more tightly clustered. As political scientists John Sides and Eric McGhee point out, "Democratic votes are increasingly concentrated in urban areas where they are more likely to waste votes with large majorities."

An illustration: My own congressman in New York City, Democrat Jerry Nadler, won re-election in 2012 with 81 percent of the vote. In contrast, Mitt Romney carried every single county in Oklahoma while romping home in the Sooner State by a two-to-one margin. But none of the state's five congressional districts is as lopsidedly Republican as Nadler's district is Democratic. In fact, only one GOP House member from Oklahoma won with more than 70 percent of the vote in 2012.

Political scientists also advance the intriguing argument that the House Republicans have veered so far to the right because they decided to rather than because of the contours of their districts. Writing a joint article for Bloomberg News at the height of the shutdown, Nolan McCarty (Princeton), Keith Poole (University of Georgia), and Howard Rosenthal (New York University) make a point that would fit Occam's Razor. Their explanation for the divisiveness on Capitol Hill: "The right wing of the Republican Party has embraced a fundamentalist version of free-market capitalism and succeeded in winning elections."

Sure, some GOP congressional incumbents fear Tea Party primary challengers if they ever veer away from the politics of intransigence. But, as was probably inevitable, the mainstream Republican business community is beginning to mount primary challenges against right-wing House zealots like Michigan's Justin Amash.

Another polarizing factor deserves far more public attention than it has received — the dramatic decline in split-ticket voting. If House incumbents are unlikely to win support from voters who normally opt for the other political party, there is little electoral incentive for them to compromise in Washington.

Writing in the aftermath of the presidential election, polling maven Nate Silver pointed out that in 1992 more than one-sixth of all congressional districts that went heavily (more than 10 percent)

Democratic or Republican simultaneously elected a House member from the other party. In 2012, that figure (a rough measure of ticket splitting) had dwindled to just 2 percent.

Election analyst Charlie Cook makes an analogous point as he notes that only 17 House Republicans currently represent districts carried by Obama in 2012. In contrast, during the 1995-96 government shutdowns engineered by House Speaker Newt Gingrich, 79 House Republicans hailed from districts carried by Bill Clinton.

Some of these trends are the obvious result of the near-extinction of moderate Republicans from the Northeast and conservative-leaning Democrats from the South. Another cause of the decline of ticket-splitting may be the nationalization of congressional elections, which harks back to the success of Gingrich's "Contract with America" in 1994. Also — in an era of austerity with little federal money available even to members of the House Appropriations Committee — it is hard for incumbent legislators to run against the ideological grain of their districts by bragging about the pork-barrel projects they have delivered from Washington.

Please understand that it is impossible to make a high-minded moral case for the virtues of gerrymandering. And, aside from a right-wing fringe that wants to do nothing other than hurl (Ted) Cruz missiles against the Obama White House, there is little public support for political paralysis in Washington.

The intellectual danger lies in conflating the two problems. Blaming everything on gerrymandering is self-defeating because it prevents us from searching for the true roots of this low-ebb moment in our political history. Now that the short-term crisis is over, it is time to abandon bumper-sticker answers that sound persuasive on cable television news, but have little connection with reality.

Why the Senate Went 'Nuclear' on Filibusters

Victoria Bassetti

The Senate's vote to change filibuster rules is not the result of momentary pique. It was a long time coming. A former Senate staff member shows how filibusters became a standard part of every lawmaker's tool kit.

With the Senate changing its rules today on approval of judicial nominees, it's worth exploring how we arrived at this parliamentary version of the Trinity Test of the atom bomb in the New Mexico desert. Majority Leader Sen. Harry Reid deployed "the nuclear option," using a simple majority to change Senate rules to block filibusters of presidential nominees, thereby allowing them to pass with 51 votes.

By allowing filibusters of judicial nominees, the effective threshold for approval was 60. That's because it takes a three-fifths vote of the Senate to invoke cloture, which is the only way to end a filibuster.

On Monday, the Senate completed a cloture trifecta. It failed to stop the filibuster of the nomination of Robert Wilkins to the Court of Appeals for the District of Columbia Circuit. In the preceding 20 days, Republican senators had filibustered Wilkins' erstwhile colleagues on the court, Cornelia Pillard and Patricia Ann Millett. Three for three, the nominees were stopped.

Few Senate rules are better known to the American public. With its nuclear options, gangs of 14, linguistic origins in Dutch piracy, and Hollywood portrayals, the filibuster seems an exotic creature, more at home in a Harry Potter novel than the world's greatest deliberative body.

But today the U.S. Senate is its home, and there it hulks, setting two American ideals — progress and minority rights — in conflict. All too often, it feels, one must suffer for the other.

The filibuster looms now as a fundamentally democracy-distorting practice, effectively imposing a supermajority rule in the Senate, undoing the idea that in a democracy when something has majority support it wins.

In the last 20 years the filibuster has enabled a growing and dangerous politicization of the judicial nomination and confirmation process. Sometimes one has to go nuclear.

The filibuster is governed by the terse provisions of Senate Rule XXII. But filibuster practice is not uniform and the Senate seems to have developed sets of folkways for its use in judicial nominations, executive branch nominations, and legislative action.

With Monday's vote, the Senate returned to the judicial nominations strand of the filibuster and aimed at the D.C. Circuit. The D.C. Circuit, often called the second highest court in the nation, is authorized 11 judges but currently only eight sit in its Pennsylvania Ave. courthouse. Since his re-election, President Barack Obama has sought to fill the vacant posts. And so the stage has been set for the latest showdown.

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Filibuster and cloture petition data is famously imprecise. Cloture can be filed without a filibuster actually taking place. A filibuster might be occurring without anyone knowing it. But a comprehensive Brennan Center study last year found that the amount of time spent on the Senate floor devoted to cloture votes had risen by 50 percent in the last three Congresses over any time since World War II.

The filibuster is simply always in the air in the Senate. Senators routinely put holds (i.e., threaten to filibuster) on bills and nominations. To a senator and his or her staff, the hold is as central to doing the job as having a mitt is to a baseball player. Life without it is simply inconceivable.

Allow me to give two examples from personal experience.

In the mid-1990s, I was the minority chief counsel on the Senate Judiciary Committee's subcommittee on Administrative Oversight and the Courts, which had jurisdiction over court administration. Sen. Dick Durbin of Illinois was my boss and the ranking member. At the time, we had nominated and passed out of committee several expectant judges to the Illinois district courts.

But Sen. Phil Gramm of Texas put a hold on them. He did so because the other senator from Illinois had a hold on a nominee pending for the Commodities Futures Trading Commission. Neither Gramm nor the other Illinois senator would budge on their cross holds and so our perfectly qualified nominees were in limbo, and had been for many months. Two filibusters were threatened. There was only one solution: another filibuster. So Durbin went to the floor and filibustered *everything.* Long story short, within a few days a deal was struck, within a few weeks the Illinois judges were confirmed, and Senate life continued.

A few years later, I was the legislative director for a North Carolina senator. Earlier in the year, a major hurricane had hit the state, and our office had been transformed into a nonstop assistance machine. As the legislative year drew to a close we were still short money on one of our major projects, which if memory serves was temporary housing for displaced Tar Heelers.

The Senate had about four hours of business left on the clock, and we were not getting what we needed. The only option was to gain leverage and force someone to pay attention to us. So I picked up the phone, called the Senate Cloak Room and put a hold on a small technical bill, which turned out to be the provision that would have authorized the government to pay its arrears to the U.N. Within about 15 minutes, our phones were ringing off the hook. Within a few hours, the homeless victims of a hurricane had a housing commitment and the U.N. got its money.

So when does a common, essential practice become noxious, so noxious that almost a century of settled expectations have to be undone? The latest use of the filibuster against three nominees to the D.C. Circuit comes very close.

Data about the need for judgeships in particular circuits is pliable. As Sen. Orrin Hatch of Utah noted on the Senate floor Monday, "it takes only an agenda and a calculator to create a politically useful statistic," right before he cited a string of statistics arguing that the D.C. Circuit doesn't need the three additional judges because it has a relatively light caseload.

The debate this week over the need to fill three vacancies on the D.C. Circuit has not turned on whether the three nominees are qualified. Instead, it has turned on whether the caseload on the circuit warrants a full complement of judges and whether the ideological balance on the court will be undone if a Democratic president is allowed to appoint so many judges. (Full disclosure: One of the three vacancies was created when the judge I clerked for, appointed by President George H. W. Bush, took senior status.)

These points of debate are well worn. Republican and Democratic senators actually seem to have just swapped talking points written the last time the issue arose in the mid-2000s, when Democrats argued that the court was underworked.

Neither party has clean hands in this debate. But one thing is clear. With regard to the administration of justice, in the last 20 years the filibuster has enabled a growing and dangerous politicization of the judicial nomination and confirmation process. Sometimes one has to go nuclear.

A Modest Proposal for Senate Blue Slips

Andrew Cohen

After the recent filibuster reform, senators are finding new ways to create gridlock. By altering blue slips — which ask for the consent of home-state senators on judicial nominees — the Senate can increase transparency by forcing senators to specify why they're blocking a nominee.

When the White House published its new list of judicial renominations earlier this week one name was notably absent from the previous list: William Thomas, of Florida, an openly gay, black man whose candidacy for a federal trial seat was "blue-slipped" by Sen. Marco Rubio, the state's Republican senator. The administration gave up on Thomas's nomination even though he was well qualified for the position and even *after* Rubio's stated reasons for blocking the nomination were undermined by, well, the facts. You could say that Rubio was *for* Thomas before he was *against* him.

At least Rubio gave a reason for his flip-flop — at least he put himself on the record explaining why he was seeking to block the nomination after he had initially endorsed it. That is more than most senators do when they invoke the hoary blue-slip procedure to knock judicial nominees out of the box without a hearing or a vote. When Oklahoma's two Republican senators blocked the nomination of Arvo Mikkanen for a trial seat in 2011, for example, they never publicly explained why. Nor did Sen. Richard Burr, the Republican from North Carolina, who blue-slipped Jennifer May-Parker's nomination there after first endorsing her candidacy.

The blue slip may have a long history in the Senate — the tradition dates back at least to 1917. But congressional tradition or no, there is something decidedly un-American about an evaluative process that does not permit the person judged, in this case the judicial nominee, to be made aware of the reasons for the judgment. That's the basis of the Fifth Amendment's confrontation clause — you have a right to face your accuser — and there is no good reason why it shouldn't apply, in some sense, to the continuing use of these blue slips.

The blue-slip prerogative rests always with the chairman of the Senate Judiciary Committee, who today is Sen. Patrick Leahy, the Democrat from Vermont. Leahy remains adamant that he will continue to honor the tradition even as senators (of both parties) abuse it to prevent decent public servants from filling the nation's empty benches. Fair enough. I haven't been able to convince him otherwise — no one has — so I'm going to take a different approach. If Leahy won't end the blue-slip tradition, as he should, at least he should immediately alter it to require senators to explicitly and in detail describe their reasons for blocking a judicial nominee.

The candidates deserve to know why these politicians have rejected their nominations. And the American people deserve to be able to evaluate the bases for those rejections.

Right now, as you can see, the blue slip itself is a simple, antiquated form. It has two small lines (I approve/I oppose) and four lines for "Comments." That part of the slip should be revised. An approval, of course, needs no additional explanation — the senator completing the form will presumably be able to express her or his views of the nominee either at the confirmation hearing or before the Senate floor vote that may follow. But if a senator checks off "I oppose" to a nominee, that senator

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ought to be required to explain in detail why. Here are the additional questions I would suggest for the new blue slip:

> If you oppose the nomination of this judicial candidate, please state the reasons for your opposition. Please list any decided court cases or news reports upon which your opposition is based. Please list any published comments, written material, or television or radio broadcasts made by the candidate to which you object.
>
> If you oppose the nomination of this judicial candidate, please state whether you have discussed your opposition with the candidate and whether you have given the candidate an opportunity to respond to your objections. Please produce any letters or other written documents memorializing any such communications.

The blue-slip process has been altered and revised before. There is nothing in the Constitution that precludes adding a substantive component to the process. Nor are there any rules of the Senate that block Leahy from requiring his colleagues to justify the use of their "senatorial courtesies" with facts. The candidates deserve to know why these politicians have rejected their nominations. And the American people deserve to be able to evaluate the bases for those rejections. I know. I know. It won't be a "senatorial courtesy" any longer if the senators who want to blue slip a judicial nominee have to pay a political price to do so. But that wouldn't be a bad thing, would it?

The Strange Alchemy of Life and Law

Justice Albert "Albie" Louis Sachs

The world-renowned civil rights lawyer was appointed by Nelson Mandela to the Constitutional Court of South Africa, where he served until his retirement in 2009. His authorship of the Court's holding in Minister of Home Affairs v Fourie, *a landmark decision for the equal treatment of couples regardless of sexual orientation, is described here.*

In a sense, the question of handling in an appropriate, constitutional way difference based on sexual orientation is a touchstone for the whole constitutional enterprise that goes well beyond simply the rights of a section of the community that's been subjected to oppression.

In 2005, I'm the judge asked to write the first judgment in the *Fourie* case in South Africa. Ms. Fourie had met somebody, she'd fallen in love, they dated, they got on very well together, they moved in together, they went out, they were regarded as a couple by all their friends, and decided let's get married after 10 years, went to the marriage officer, and he said I'll gladly marry you, but I can't. The Marriage Act says "I, A(b), that's the vow, take you, C(d), to be my lawful husband/wife." These are gendered terms, so I can't allow you to take the oath and to marry you. They took the matter on appeal, and a body called the Equality Project challenged the act. So we had these two cases running together and decided to consolidate them in our court.

The hearing: the court is jam-packed with jurists from all over the world. Which way is the court going to go? What will the arguments be? Fairly early on, it became clear that there wasn't going to be any frontal attack on same-sex relationships. Even representatives for the Catholic Church said "we are not saying that the law should not protect same-sex relationships. Tenancies, succession, tax — the law can do all that, but don't call it marriage."

So our case turned on the "m-word." The central question: Was this unfair discrimination on grounds of sexual orientation? What made it easier for us is South Africa's constitution has an equality clause that's very comprehensive. It was drafted by all the members of Parliament and the Upper House and it bars any discrimination on grounds of race, color, creed, birth, national origin, disability, sexual orientation. What opponents of same-sex marriages were arguing, basically, was that marriage was created by religious institutions. Marriage predated the state involvement and the state took over the institution of marriage. It didn't create the institution, therefore it can't change the

Excerpt from Justice Sachs' remarks at the Brennan Center, April 24, 2013.

institution. The state can regulate relationships, but don't call it marriage because marriage really belongs to us. That was their principle argument.

It was coupled with the corollary that somehow if you allowed same-sex couples to marry, this would be an infringement of religious freedom, or would undermine marriage as we understand it. And then that counsel would be asked, well, what do you mean it will undermine marriage? Enlarging its scope — are you suggesting that somehow it will contaminate, and dilute, and enfeeble the institution? Or would it, in fact, enlarge the embrace of the institution? And I don't think there was any serious answer to that.

In some ways the most effective argument the other way came from the counsel for the two women, who was an elderly, white, Afrikaans-speaking man. He'd simply said: My case is a very simple one. Here are two people that are in love with each other. They want to have their union recognized by the state in the same way as everybody else, and the law as it stands is preventing them from doing so. And to the extent that the law is doing that, the law is unconstitutional because it constitutes unfair discrimination on the grounds of sexual orientation.

Equal protection doesn't mean reducing everybody to the lowest level, it means granting rights as fully as possible as circumstances permit.

It was clear that none of my colleagues or I could see any way in which the traditional notions of marriage would be undermined by enlarging the scope of the marriage law to embrace more people. But there was a difficulty about how to express it, what the remedy should be.

Now, what were the big issues that we had to consider? The one was, do you equalize up or do you equalize down? One possibility was that you could get equality by simply saying that if the churches have marriage, and the mosques, and the temples and so on, they can go with marriage, it's their thing; and then you have a civil union for everybody else. There was quite a lot of support amongst intellectuals for that approach. If I was starting off inventing something from the beginning I think I would be really sympathetic to that.

But can you imagine if we had struck down the marriage law and said nobody can marry until we get a new Civil Unions Act? The straights will be saying, these people come along and now we can't do a darned thing just because they can't get it? And gay and lesbian couples would've said, just when we're getting to the mountaintop and we're about to get our right to marry, they're getting rid of marriage. It would've been equality of resentment. Somehow there's something wrong if you're interpreting the law in that way. What an American author said was, you can achieve equal protection by leveling up or leveling down, but he argued for leveling up because what has to be protected is the promise of the Constitution. Equal protection doesn't mean reducing everybody to the lowest level, it means granting rights as fully as possible as circumstances permit.

The second issue would be separate but equal. I think every lawyer in the U.S. knows about *Plessy v. Ferguson* and *Brown* and so on. It's even more powerful in South Africa. Apartheid was separate and the judges argued, what's the problem — you can buy your stamps in the post office just as easily from a

queue for black people as you can from a queue for white people. We knew it was never equal, but even that wasn't the main point. The main point was it was separating our people by saying you don't belong. The argument by one of the legislators was if God had meant black and white to marry he wouldn't have made them different colors. It's the same as if God had meant two males to marry each other or two females to marry each other, he wouldn't have made men and women with different genitals. So there's a strong presentation in the judgment about the dangers of separate but equal.

The part that I found the most difficult to write, to capture what I really wanted to say, was the connection between the sacred and the secular. This feeling you're writing for the nation. Certainly, scriptural doctrine can't dictate the fundamental rights of South Africans. Even if all the scriptures of all the different faiths and beliefs come to the same point, it can't be used as a basis for doing that. In that sense, the Constitution is a secular document created by Parliament, it has to be interpreted in terms of the public life of the nation.

At the same time, the very same Constitution that protects the rights of same-sex couples to have access to the benefits and responsibilities that the state, through its law, gives through marriage to same-sex couples, protects the rights of religious believers and faith communities not to be compelled to celebrate and perform marriages that go against the tenets of their belief. So it's not as though you invoke the Constitution simply to support your side, but it's a Constitution for all seasons, for all people, and that very Constitution that is protecting the rights of the un-emancipated section of the population is also protecting the rights of the diverse formations that make up in South Africa, we'll say the majority community.

The majority of us felt we want to involve Parliament. Parliament has the same obligation to uphold fundamental rights as the court does and my own view, I can't speak for my colleagues, is same-sex marriages would have a much more powerful insertion into South African life and would be more deeply rooted if there was legislation to back it up. The risk that we took was to say the matter must go to Parliament. Parliament can't decide whether same-sex couples have the right, they can decide on how it should be made available. It was some recognition of separation of powers, but also an acknowledgment of the duty that Parliament has, as governed by the same Constitution that we are, that the whole theme of emancipation would be better developed if the nation is involved in the debate rather than just some intellectuals, smart lawyers, making a decision and imposing it on the nation.

The legal issue here is inequality produced by under-inclusion. This is a problem I have with the position that's adopted by, it seems, the majority in the Supreme Court here in America: It's only if you target somebody that inequality, equal protection is violated. I saw in some of the discussion here in the Supreme Court, it was: Well, nobody's been targeted. But it's when you're made invisible, in some ways it's an even more drastic form of exclusion, when the effect is to say "keep out." You don't even get consideration, you're completely invisible. So it's when you're dealing with under-inclusion that, when asking special questions in terms of equality law, that's where the equalizing also becomes really important. It's not just removing a formal barrier — it's creating space for people who've been excluded.

MASS INCARCERATION

‘Moneyball’ for Criminal Justice

Peter Orszag

The former OMB director prominently has urged government to reform programs so they focus on improving performance using economic tools. In this foreword to a Brennan Center policy proposal, he notes that the approach can help transform criminal justice.

Millions of Americans have felt the direct effects of the recent government shutdown, just the latest in a series of fiscal standoffs that have threatened our economic recovery and distracted leaders from the country’s real challenges. With partisan leaders perpetually miles apart on overall spending levels, and with no agreed-upon method for carving up the federal pie, failure seems forever on the horizon. This is an opportune moment to reconsider how we spend federal dollars. Criminal justice policy is an important place to start.

In 2002, Billy Beane, general manager of the Oakland A’s and creator of the “Moneyball” approach to baseball, found a way to get better results with fewer resources, building a team that successfully took on its big-budget competitors despite a substantial financial disadvantage.

Could Washington do the same?

We can use this new era of fiscal scarcity to make Washington work better. By taking a cue from Billy Beane and implementing key tactics, policymakers can make better decisions, get better results, and create more areas of bipartisan agreement — and even help avert future crises.

The approach is simple.

First, government needs to figure out what works. Second, government should fund what works. Then, it should stop funding what doesn’t work.

“Moneyball” encourages success. It encourages results and innovation. It spends dollars wisely. And it is grounded in the most basic economic principles.

Based on rough calculations, less than $1 out of every $100 of government spending is backed by even the most basic evidence that the money is being spent wisely. With so little performance data, it is impossible to say how many of the programs are effective. The consequences of failing to measure the impact of so many of our government programs — and of sometimes ignoring the data even

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Foreword to *Reforming Funding to Reduce Mass Incarceration*, November 2013.

when we do measure them — go well beyond wasting scarce tax dollars. Every time a young person participates in a program that doesn't work but could have participated in one that does, that represents a human cost. And failing to do any good is by no means the worst sin possible: Some state and federal dollars flow to programs that actually harm the people who participate in them.

This Brennan Center report marks an important step toward implementing this funding approach in Washington and beyond. This report's policy framework, termed "Success-Oriented Funding" starts with the justice system. It applies this framework to put forth a concrete policy proposal to reform the nation's single largest source of funding for criminal justice. Funding what works and demanding success is just as critical in this context as for other spending — perhaps even more so considering what is at stake: the safety of the public and a deprivation of liberty for defendants.

Embracing Success-Oriented Funding will move us toward a more effective, socially beneficial, and efficient criminal justice system.

Reducing Mass Incarceration: Move to Success-Oriented Funding

Inimai M. Chettiar, Lauren-Brooke Eisen, Nicole Fortier, and Timothy Ross

A prerequisite for genuine criminal justice reform is changing the financial incentives for police, prosecutors, and correction officials. This Brennan Center proposal offers specific recommendations on how to reorient funding toward effectively fighting crime while also reducing mass incarceration. The reform has been backed by the Police Foundation, the leaders of the conservative group Right on Crime, and other criminal justice experts.

The criminal justice system in the United States is vast. It touches every state and locality, creating a web of law enforcement and legal agencies. As with all complex enterprises, this system is honeycombed with incentives that steer or deter behavior, for good or ill.

Changes to criminal law can only do so much in a justice system that relies heavily on the discretion of individual actors. One key factor affects individual behavior and agency policies: money. Funding structures of criminal justice agencies — direct budgets and grant awards — can create powerful incentives. This is true at all levels — federal, state, and local.

Federal spending is one focal point. Washington spends billions of dollars each year to subsidize state and local criminal justice systems. Specifically, the Justice Department administers dozens of criminal justice grants. In 2012, just some of the largest programs, including the Community Oriented Policing Services and Violence Against Women Act grants, received more than $1.47 billion.

The Edward Byrne Memorial Justice Assistance Grant (JAG) program is the largest nationwide criminal justice grant program. Although JAG represents a small percentage of nationwide dollars spent on criminal justice, it retains an outsize influence on activities and policy. Because it funds a wide array of areas, rather than funding one kind of activity, JAG extends its reach across the entire system. Its dollars flow to local police departments, prosecutor and public defender offices, courts, and others. State and local actors rely on JAG funds year in and year out. JAG, in its original form, was created almost 30 years ago. Not surprisingly, it provides funding driven by criteria developed at a time of rising and seemingly out-of-control crime. JAG has not faced substantial overhaul since then.

Today, the country faces very different criminal justice challenges. On the one hand, crime and violence have fallen sharply across the country. Fears for safety, and crises such as the crack epidemic, have receded into history. The murder rate is almost at its lowest rate in a century.

From *Reforming Funding to Reduce Mass Incarceration,* November 2013.

At the same time, however, a far more disturbing trend has emerged: the growth of mass incarceration in the United States. With less than 5 percent of the world's population, we have almost 25 percent of its prisoners. More than 68 million Americans — a quarter of the nation's population — have criminal records. Over half the people in prison are there for drug or nonviolent crimes. One in three new prison admissions are for parole violations. The cost to taxpayers has soared: Today, the nation spends more than $80 billion annually to sustain mass incarceration. True social costs, such as the harm to families, communities, and the economy, are far higher.

Fortunately, in recent years policymakers and the public have begun to advance a new approach to criminal justice, one that fights crime and violence but turns away from thoughtless criminalization and overincarceration. A wave of innovative reforms, pioneered in cities and states, is starting to reshape criminal justice policy. These new approaches, grounded in data, seek to align public policies to target major public safety goals while reducing unintended consequences. They focus on major, violent crime without mindlessly punishing people. Significantly, these changes are uniting activists and leaders of all political ideologies.

With less than 5 percent of the world's population, the United States has almost 25 percent of its prisoners.

A handful of these new policies have shown the power of tying funding for criminal justice agencies to "success" — clear goals and hard-nosed measurements of what works to meet the twin goals of reducing crime and alleviating mass incarceration.

Currently, JAG, managed by the Department of Justice (DOJ), does not align with these modern criminal justice goals and policies. By statute, DOJ cannot condition funding based on whether grant recipients meet specified goals. However, state and local recipients are required to report on whether the funds meet certain performance measures.

Current measures inadvertently incentivize unwise policy choices. Federal officials ask states to report the number of arrests, but not whether the crime rate dropped. They measure the amount of cocaine seized, but not whether arrestees were screened for drug addiction. They tally the number of cases prosecuted, but not whether prosecutors reduced the number of petty crime offenders sent to prison. In short, today's JAG performance measures fail to show whether the programs it funds have achieved "success": improving public safety without needless social costs.

These measures send a signal to states and localities that the federal government desires more arrests, more cocaine busts, and more prosecutions at the expense of other more effective activities. It is time to update JAG to ensure that its measures fit today's problems, and more importantly, that they promote effective, efficient, and just policies. JAG is an incredibly valuable tool. This report reviews this key federal program and offers a proposal to reorient the incentives it offers to state and local decision-makers.

We begin with a conceptual framework for criminal justice funding broadly, drawing on experimental models and pathbreaking understandings of how

public actors make decisions and respond to incentives. The concept is simple: Scarce public resources should be steered toward policies that measurably work. This approach — what the Brennan Center calls "Success-Oriented Funding" — would link dollars spent on criminal justice to clear, precise goals. Ideally, Success-Oriented Funding would be implemented through widespread laws conditioning dollars spent on criminal justice on meeting clear objectives. If this direct link is not possible, governments can still provide straightforward benchmarks for use of the funding. As is often the case, what gets measured gets done. Setting clear goals for success — through performance measures — can "nudge" the behavior of recipients toward more effective and just practices.

This approach can be directly and concretely applied to JAG. DOJ does not have authority to directly link JAG funding to success. Such action would need to come from Congress. Therefore, this proposal asks DOJ to redraw the performance measures it uses to query grant recipients on their activities. JAG's performance measures should be reoriented to encourage states to modernize their criminal justice practices with more effective, successful ways to reduce crime while also reducing mass incarceration. Appendix A proposes, in detail, new performance measures that would implement Success-Oriented Funding in this critical federal grant program.

Scarce public resources should be steered toward policies that measurably work. This approach would link dollars spent on criminal justice to clear, precise goals.

The best tool at DOJ's disposal to ensure JAG's effectiveness is the program's performance measures.

DOJ should take the following steps, within its authority:

- Replace current performance measures with new, more robust Success-Oriented measures. These new measures would provide clear objectives to more effectively control crime and reduce mass incarceration.

- Permit a recipient to answer "do not calculate," but require an explanation about why they are unable to do so. This change recognizes that some jurisdictions may not have the capacity to collect certain information. However, it encourages states to begin collecting this information by clearly signaling DOJ's interest in the data.

- Ensure each direct recipient of funds reports on measures. Direct recipients (either the state or the locality directly receiving funding from DOJ) should aggregate data for all sub-recipients. This would centralize reporting and reduce the volume of reports sent back to DOJ. Placing reporting responsibility on the direct recipient reduces this burden for smaller sub-recipients.

- Penalize recipients that do not report on performance measures. The high number of JAG recipients skirting reporting requirements prevents the public from assessing the program's effectiveness and leaves it open to criticism. DOJ should determine what penalties are available for it to use and how they should be assessed. The Department should consider withholding all or a portion of funds for nonresponse.

- Encourage recipients to invest more JAG funds to increase reporting capacity. DOJ should encourage recipients to use funds to implement data-collection systems to gather the new information requested by the proposed measures. DOJ should also provide as much technical assistance and training as possible to recipients. This would make reporting on the performance measures far easier.

- Make all data in recipient reports publicly available. Lawmakers, advocates, and the public should have access to an online database that aggregates and analyzes performance reports.

- Make requirements for robust performance measures permanent. Although formal regulation is not necessary to implement new performance measures, a DOJ regulation or formal guidance would codify Success-Oriented Funding for JAG.

JAG is just one starting point. Recasting JAG so it advances the thousands of state and local programs it funds toward new, clear goals can help spur further reform across the country. This shift could reverberate nationwide, moving the country away from business as usual in the criminal justice system — and away from mass incarceration.

It can also serve as a model of Success-Oriented Funding for states and localities. The true power of Success-Oriented Funding comes from strong reforms nationwide tying budgeting for criminal justice agencies directly to achievement of clear performance measures. This report's array of new performance measures can serve as a starting point for states and local governments to build upon to fashion more tailored performance measures.

The Lies We Tell About the Right to Counsel

Andrew Cohen

Although the right to competent trial counsel is allegedly guaranteed by the Constitution, the sad reality is that lawmakers have so trimmed that right that it barely exists.

In anticipation of the 50th anniversary of the United States Supreme Court's landmark ruling in *Gideon v. Wainwright*, I have spent the past few months reading about the right to counsel in America — the way it was half a century ago, the way it is today, and the way it ought to be if we are to give meaning and effect to the mandate the justices unanimously expressed on the morning of March 18, 1963.

The right to counsel has been legislated and judicially interpreted out of existence for millions of Americans caught up in our criminal justice systems. That's the truth. The rest is just a lie.

What I discovered — or, rather, what I was reminded to remember — was perhaps best expressed by someone who read the long piece I wrote on *Gideon* for *The Atlantic*. The right to counsel, this reader pointedly noted, was just "another lie we tell each other to hide the truth" about unequal justice in America. She is right. For all the glory we heap upon *Gideon*, for all the preening we display about our fealty to the rule of law, the sad truth is that there is no universal right to counsel today.

Yes, it exists on paper. And in popular mythology thanks to the justices' ruling in *Miranda v. Arizona* — "You have the right to an attorney..." But the Sixth Amendment's fair trial guarantee of competent counsel, part of the panoply of due process protections the Constitution is supposed to guarantee us all, has been systematically neglected and scorned since 1963. It has been legislated and judicially interpreted out of existence for millions of Americans caught up in our criminal justice systems. That's the truth. The rest is just a lie.

What happened to this vital protection is as simple as the story of Clarence Earl Gideon himself. The Supreme Court in *Gideon* gave us the right to an attorney if we were too poor to afford one. At the time, the broad obligation to provide lawyers to indigent defendants was considered a reasonable burden that state and local officials, and bar associations, could manage. But it was a different time in America — a time before mass incarceration and widespread criminalization for nonviolent offenses.

By 1984, following national spasms of crime and punishment, as criminal prosecutions swamped the nation's courts and prisons, it was clear that the Supreme Court, Congress, and state lawmakers confronted new choices over the right to counsel. Faced with a flood of new defendants, most of whom were too poor to afford their own attorney, legal and political leaders either could recommit themselves to the promise of *Gideon* or they could find ways to limit the scope of the ruling — and thus the scope of the right to counsel.

The first path — ensuring that the new wave of indigent defendants would get competent counsel —

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would have required the expenditure of a great deal of money on public defenders and other resources aimed at fortifying the remedy expressed in *Gideon*. The second path — acknowledging the limitations of the Sixth Amendment protections for indigent defendants — would require a series of judicial rulings and legislative choices that defined the right to counsel so narrowly as to restore the "unequal justice" that Justice Hugo Black bemoaned in his *Gideon* opinion.

We know today which path our legal and political leaders chose. Instead of ensuring that the right to counsel kept pace with the explosion of criminal cases, the Supreme Court and the Congress (and state legislatures) allowed the right to be left by the side of the road. The Court accomplished this mostly in *Strickland v. Washington,* a 1984 decision in which the justices established such low legal standards for recognizing "effective assistance" of counsel that they effectively gutted *Gideon*.

Only Justice Thurgood Marshall dissented in *Strickland*. "My objection to the performance standard adopted by the Court," he prophetically wrote, "is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts. To tell lawyers and the lower courts that counsel for a criminal defendant must behave 'reasonably' and must act like 'a reasonably competent attorney' is to tell them almost nothing (citations omitted by me)."

Sadly today, as a result of decisions like Strickland (and more recent ones), and as experts at the Brennan Center and elsewhere have amply established, there is no meaningful right to counsel for millions of Americans too poor to afford their own attorney. Too many of these men and women often have to wait in jail for months on petty criminal charges before they are given an attorney. Others are represented only for a few minutes by overwhelmed public defenders. In some states, defendants must talk with prosecutors before getting their own public defenders.

Any constitutional right that is recognized in the breach in such a fashion is really no constitutional right at all. As Professor Stephen Bright of Yale Law School and the Southern Center for Human Rights said a few weeks ago, "it is better to be rich and guilty than poor and innocent" in America today. Of course, that's precisely what the nation's leading lawyers and scholars and human rights advocates were saying 50 years ago before the Supreme Court decided the *Gideon* case. We've come so far — and yet here we still are.

We are here, stuck in an unacceptable position, even though the grandees of law and politics know precisely how to solve the problem. It isn't high calculus. It's obvious what needs to be done. The Brennan Center will be out soon with a new white paper highlighting reasonable ways — low-cost options, you could say — in which the right to counsel may be better secured. One idea is for state and federal governments to examine over-criminalization of petty offenses and reclassify ones that have no public safety benefit. Another is to increase funding from a variety of sources for public defenders. Third is making public defender offices more effective, including adding a social worker and rigorous trainings.

These aren't revolutionary ideas or tactics. They are all reasonable and prudent measures. They would secure rights for millions of people whose political power is negligible and whose rights are thus supposed to be protected by our courts of law. Attorney General Eric Holder Friday called this a moral issue, and he's right. He also conceded there is a crisis over indigent defense. This candor is a good start. So is the Justice Department's Access to Justice Initiative. But now our judges and our elected officials have to act more boldly. If there still is a constitutional right to counsel it cannot be observed in the breach.

Indeed, as we begin the next 50 years after *Gideon*, what's most striking to me is the vast gulf between what we teach our children about the right to counsel and the truth about the right to counsel. When it comes to this vital right, we are today making a series of choices about the Constitution, and our fellow citizens, that are legally unsound and morally indefensible. If we are honest about the problem, we'll solve it. If we continue to lie to one another about it, America's poorest will continue to receive the very second-class justice the Supreme Court once promised it would end.

Ending Mass Incarceration is Pro-Growth and Pro-Family

Inimai M. Chettiar

When U.S. Attorney General Eric Holder announced in August that he was limiting the use of mandatory minimums, the policy shift stirred debate.

U.S. Attorney General Eric Holder's directive to curb use of mandatory minimums for nonviolent drug offenders is practically and politically critical. But it is only a first step on what will be a long road to undo four decades of irrational criminal justice policies.

As laudable as Holder's changes are, it is important to remember what they are and what they are not. First, Holder's directives are purely discretionary. They do not carry the force of law. Holder's successor — or the next administration — can reverse them easily. Even today's U.S. attorneys can ignore them. Second, federal prisons house only about 14 percent of the total correctional population. The vast majority of criminal prosecutions are undertaken by state and local prosecutors, who are outside Holder's control.

But Holder's speech could be as symbolically important as when President Harry Truman ordered the desegregation of the U.S. military nearly 65 years ago to the day. Given its high-profile prosecutions of government whistle-blowers and Wall Street insider traders, no one would argue that the Obama/Holder Justice Department is a bunch of softies when it comes to crime. And just as the roster of conservative luminaries collected by Right on Crime provided GOP lawmakers political cover to enact some prison reform in red states such as Texas and Arkansas, Holder's words could serve as a similar umbrella for Democrats to discuss reform without being branded as mushy-headed bleeding hearts.

One hopes Holder's policy shift spurs Congress to convert his words into the force of law. Although the sheer fiscal cost of simply warehousing the world's largest prison population is staggering, often unaddressed is the even more appalling cost to the country in lost economic productivity. Those returning home from prison — and even those with criminal records who have not been in prison — often cannot find jobs or end up underemployed, and the families they leave behind are thwarted economically and socially. It's well past time to recognize that favoring an end to mass incarceration is pro-growth, pro-family, and pro-USA.

Curbing mandatory minimums is a first step on a long road to undo four decades of irrational criminal justice policies.

Predictions are that when Congress returns from its summer recess, it will be preoccupied with fiscal matters such as the budget and the debt ceiling. Yet, there are a number of bipartisan sentencing reform bills pending that would serve not only the needs of justice, but the needs of the economy as well. Lawmakers would be doing the nation a lasting service to recognize this and put aside the empty election year rhetoric for just long enough to take up these bills and put an end to mass incarceration.

From *U.S. News and World Report*, August 13, 2013.

Incarceration is Only the Beginnning

Lauren-Brooke Eisen

To help pay for the soaring costs of holding people behind bars, many states and localities are charging steep fees to those least able to afford them: the inmates.

On August 23, Anderson County, Tennessee, proposed to join the roster of places requiring inmates to shoulder the costs of incarceration. County commissioners approved three resolutions to charge prisoners in the Anderson County Jail for everything from toilet paper (29 cents per roll) to their prison garb ($9.15 for pants). Currently, Anderson County taxpayers pay $62 a day to house one inmate in the local jail.

As incarceration rates skyrocket, the "pay-to-stay" practice remains popular with public officials who are struggling to balance tight budgets.

Asking inmates to pay for their time behind bars shifts the responsibility for rightsizing our prisons from policymakers to indigent inmates who can't afford the bill. Yet, as incarceration costs skyrocket, the "pay-to-stay" practice remains popular with public officials who, struggling to balance tight budgets, ask inmates to chip in for medical fees, toiletries, transportation, and even their room and board.

Since 1984, when Michigan became the first state to enact legislation allowing the recovery of general incarceration costs from inmates, this unfortunate practice has become common. Today, the fees inmates pay run the gamut. In Calloway County, Kentucky, inmates pay up to $30 a day and are subject to civil or contempt actions when released. Many jails in Oregon charge inmates between $30 and $60 a day, while in Virginia, Chesapeake Correctional Center requires inmates to pay $1 a day. In Fremont, California, the practice is viewed as an incentive for a better stay. There, the police department offers inmates the option of paying a one-time fee of $45 plus $155 a night to stay in a smaller facility. In Riverside County, California, prisoners are charged up to $142.42 per day for their stay. The Southeast Ohio Regional Jail utilizes a "pay-to-stay" policy under which inmates are charged $15 for booking fees and an additional $1 per day spent there. Around two-thirds of Ohio counties have implemented similar fees. And counties in Oregon, Arizona, Missouri, and Michigan charge inmates fees for everything from medical expenses to per diems for their stay.

The Brennan Center has found that many men and women also face an increasing number of "user fees" as part of their criminal cases. Unlike fines, which are intended to punish, and restitution, which is intended to compensate victims, user fees are explicitly intended to raise revenues. These fees are often imposed on top of other forms of criminal justice debt, and can make it difficult for individuals to avoid returning to prison.

Although widespread, this practice of imposing fees and fines on inmates does raise constitutional questions. Does this post-conviction practice constitute an increase in punishment?

From the Brennan Center website, August 28, 2013.

To Reduce Recidivism, a Bright Idea from California

Andrew Cohen

Instead of continuing to fund incarceration programs that have high re-incarceration rates, some California lawmakers offered an alternative plan that funds programs with incentives for reducing recidivism.

After defying the federal courts for years over the deplorable conditions in their state prisons, California officials seem to be moving closer to offering an age-old American solution: They are planning to throw a lot of money at the problem and hope it goes away. There are two new financial proposals now in play. One is new and forward-looking. The other is old and tired. One could very well work to ease the state's prison crisis. The other is based on the very premise that created the problem to begin with.

The federal courts, including the United States Supreme Court, have consistently ordered California to ease unconstitutional overcrowding in state penitentiaries by, among other things, granting early release to thousands of prisoners. State officials have implemented some of the reforms demanded of them by the judiciary. But California has refused to release most of those inmates — sending them instead to county jails (where they are often released early anyway) or simply stalling for time by trying to relitigate the same Eighth Amendment issues they've already lost at every appellate level.

Tired of losing in court, and knowing that the federal judges presiding over this long-running case are poised to consider contempt sanctions against him, Gov. Jerry Brown last week proposed to spend $315 million this year and over $400 million more in each of the next two years to house approximately 10,000 inmates — the ones whose release from prison has been deemed necessary by the courts — in private prisons or county jails. Just one day later, after a factually meager debate, the state assembly approved $315 million for such "alternative housing" for the inmates.

In the meantime, another group of California lawmakers, in the state senate, has offered its own solution. They propose to spend a similar amount of money ($200 million per year for two years) in the form of incentive grants to counties to expand their rehabilitation, drug, and mental health treatment programs. The proposal is based upon the success of California's "Probation Performance Incentive Funding Program," a 2009 measure that awards counties that reduce the recidivism rate of probationers within their jurisdiction. According to a 2012 report by the Pew Center:

> In the first year of implementation, the state probation failure rate — the number of probationers sent to state prison divided by the probation population — declined from 7.9 percent during the baseline years of 2006-2008 to 6.1 percent in 2010, a 23 percent reduction in revocations. The California Department of Finance estimated that because of this reduction 6,182 fewer probationers entered state prison in 2010, generating state savings of $179 million.

Inimai Chettiar, director of the Justice Program at the Brennan Center for Justice, told me Tuesday

From the Brennan Center website, September 4, 2013.

that financial incentives like this proposed one make sense in both the short- and long-term. "These types of performance-based funding structures can usher in a new wave of criminal justice decision-making that can move us away from a mass incarceration model. California's 2009 program is among the most successful in the nation and can serve as a model for California and the rest of the nation."

Performance-based funding structures can usher in a new wave of criminal justice decision-making that can move us away from a mass incarceration model.

So let's recap. In a state already drowning in expenses associated with its vast penal system, Plan A is the governor's proposal to spend more money on prisons without doing anything to reduce the number of total inmates in the system. Plan B, meanwhile, is specifically designed to reduce that population by means of incentives that already have been proven to work in the context of probation. Plan A represents yet another obvious government gift to the private prison lobby.

Plan B represents a market-based approach that rewards local officials who are creatively working to reduce the size of the footprint the state's prisons have upon California's budget.

This should be a no-brainer. But nothing about the way California has handled this constitutional crisis has been easy. Instead of accepting the truth of what the federal courts have told them — that there is indisputable evidence that state inmates are being housed in unconstitutional conditions — state lawmakers instead have blamed judges for delivering the bad news. "There is bipartisan frustration with the federal judges that (sic) are imposing this order and being irresponsible in forcing this state to have to spend" millions to address this crisis, Assemblyman Al Muratsuchi told the *Los Angeles Times* last week.

And now there is bipartisan discord over the governor's plan to expand the state's prison industry. "Temporarily expanding California's prison capacity is neither sustainable nor fiscally responsible," Senate President Pro Tem Darrell Steinberg, a proponent of "Plan B," told the governor last week in a letter obtained by the *Los Angeles Times*. He's exactly right. If state lawmakers aren't going to release those inmates the way the federal courts have ordered — the deadline now is December 31 — the least those politicians can do is use this crisis as an opportunity to bring meaningful reform to this grim area of public policy. It's time for a new idea. And time to stop trying to ease the costs of prison by spending more on prisons.

The Promise of Equal Justice Rings Hollow

Nicole Austin-Hillery

The acquittal of George Zimmerman in the killing of Trayvon Martin reinforced the perception that the courts are no longer places where black rights are vindicated.

In the iconic film, "To Kill a Mockingbird," Atticus Finch, a white lawyer defending a black man accused of attempting to rape a white woman in the deep South, is delivering his closing argument to an all-white, male jury: "In this country, our courts are the great levelers ... in our courts, all men are created equal," he says.

Like the fictional defendant in the film, black America knows all too well that in this country, the promise of equal justice for all is often a hollow one. That is never more true than in cases where a black man or boy is killed by a nonblack.

There will be much debate in the coming days about whether the not guilty verdict in the Zimmerman self-defense trial was the right or wrong outcome. Experts will analyze the strategy, tactics, and performance of the prosecutors and the defense attorneys, seeking to explain it. This, however, will miss the bigger and more important point: In truth, when black boys and men are killed by nonblacks, more often than not, justice will not be served.

Many black parents will try to explain to their children, especially their sons, what to make of the verdict, and they may be at a loss for words. How is it possible that a black child, walking where he had a right to walk, doing absolutely nothing wrong, could be pursued, confronted, and ultimately shot dead by a neighborhood watch volunteer — and the killer escape punishment?

White America cannot conceive of such a thing happening to its children, nor can it imagine that, were such a travesty to occur, the killer would escape punishment. But for black America, Trayvon Martin is the latest name on a long list of African-American men and boys whose nonblack killers escaped justice in America's courts — a list that runs from Emmett Till to Amadou Diallo to Oscar Grant to Sean Bell.

Until our courts are really "the great levelers" in which "all men are created equal," African-Americans killed by nonblacks will not find justice in a system that fails to demand accountability for their lost lives.

Often, the killers are never even charged and brought to trial, which is precisely the course that the Zimmerman case would have taken were it not for the protests of African-Americans and others across the country.

There was a time in this nation's history, not so very long ago, when black America looked to the courts, particularly its federal courts, for justice, and received it, most notably in the area of civil rights. The courts, particularly the Supreme Court, were places where black America's rights were validated and vindicated.

This op-ed appeared on CNN.com, July 15, 2013.

Now, our courts are places where black America's rights are often eviscerated.

Black America's belief in the possibility of receiving justice from our legal system is eroded by every verdict that fails to hold a killer who is not black accountable for the death of a black man or boy.

I was at the mall in my predominantly African-American community doing late-night shopping when the verdict was read. Like the black store clerks who waited on me, I did not expect that Zimmerman would be found guilty, but I did harbor that hope.

Now, my heart is heavy, not merely because Zimmerman was acquitted, but also because we as a nation have yet to make Atticus Finch's words ring true. Until we do — until our courts are really "the great levelers" in which "all men are created equal," African-Americans killed by nonblacks will not find justice in a system that fails to demand accountability for their lost lives.

What Real Drug Reform Would Look Like

Inimai M. Chettiar

Although it's laudable the Justice Department has opted not to interfere with new marijuana regimes in Colorado and Washington, these are only temporary policies when a permanent, wholesale shift in drug policy is required.

The Senate Judiciary Committee held a hearing this week to discuss an emerging tension in marijuana policy. Washington and Colorado have legalized small amounts of marijuana and 20 other states have legalized it for medical use. These policies put the federal government into something of a quandary: Since marijuana is illegal for any use under federal law, should the feds enforce its laws in these states?

The new approach will do little to mitigate the failed "war on drugs," and it puts the Justice Department in an untenable position.

The federal government has devised a temporary solution that skirts the problem and could create a series of new ones.

Last month, the Department of Justice released new guidelines on marijuana prosecutions. The essential message was that federal prosecutors should not interfere with state marijuana laws. Prosecutions should be reserved for those who sell marijuana to minors, use state laws as a cover for illegal drug sales, or as a means to distribute marijuana in states where it remains illegal.

Judiciary Chairman Patrick Leahy was unambiguous about his support. "The absolute criminalization of personal marijuana use has contributed to our nation's soaring prison population and has disproportionately affected people of color," said the Vermont Democrat.

But soon there were questions about whether marijuana television commercials would run in Colorado, or if there was a plot to addict the nation's kids to harder drugs through pot-laced gummy bears.

While drug legalization advocates are hailing the new guidelines as "the most heartening news to come out of Washington in a long, long time," many are skeptical. The Judiciary Committee's ranking Republican, Senator Charles Grassley of Iowa, condemned Colorado's approach and the Justice Department's new policy. He asked Deputy Attorney General James Cole, who wrote the guidelines, "Why has the Justice Department decided to trust Colorado? Colorado has become a significant exporter of marijuana."

But there is reason even for drug reform advocates to be wary: The new approach will do little to mitigate the failed "war on drugs," and it puts the Justice Department in an untenable position.

First, the change in the Justice Department's stance is only advisory. The directive to the nation's U.S. attorneys can easily be reversed by Cole's successor. This is not an actual change to the federal drug laws. The federal government will continue to prosecute drug crimes, which trigger harsh mandatory minimum sentences. These overly punitive sentences

This article appeared on MSNBC.com, September 25, 2013.

have led to almost half the federal prison population locked up for drug convictions.

Second, because of the pre-emption doctrine (in which federal law displaces contradictory state law), prosecutors are opting not to enforce laws they are sworn to uphold. That may be laudable when it comes to marijuana but would not be so praiseworthy if the issue were, for example, voting rights. Grassley understood this when he said it was "disastrous" that the Justice Department was "giving the green light to states that decide to ignore laws they don't like."

Criminal justice reform advocates should not be diverted by this recent shift. To create genuine and lasting progress, federal drug laws must be completely revamped. Congress should remove harsh mandatory minimums for drug crimes — or remove crimes like possession of marijuana from the list of jailable crimes. Better yet, it should commission and evaluate public health data on whether marijuana actually should be classified as a "dangerous" drug — and if it isn't, Congress should rethink criminalizing and punishing it so harshly.

In this way, the federal government can lead the nation toward a sane criminal justice system — one that protects the public from the serious safety threats and prosecutes and incarcerates only when absolutely necessary.

Moving Beyond Mandatory Minimums

Jessica M. Eaglin

In written testimony submitted to the Senate Judiciary Committee, the Brennan Center urged an end to mandatory minimums to end mass incarceration.

Individualized sentences that fit the characteristics of the offender and the seriousness of the crime are the hallmark of a fair sentencing system. Mandatory minimum penalties disrupt judges' ability to make rational and just sentencing determinations in the federal system because they disregard key details about both the offender and the offense. While the majority of states are now reconsidering their sentencing regimes under the increasing pressures of mass incarceration, the federal government should continue the momentum by implementing reforms that reduce incarceration at the front end of the system. Reforming mandatory minimums provides a pivotal avenue to improve the criminal justice system by increasing fairness at sentencing while maintaining public safety.

The Brennan Center supports reforms designed to reduce the undue harshness and restrictive nature of mandatory minimums. Because there has been extensive attention drawn to the distorting effects of mandatory minimum penalties in the federal system, and because we anticipate that committee will hear substantial testimony on how mandatory minimums have a particularly unjust effect on racial minorities in the criminal justice system, this testimony focuses on contextualizing mandatory minimum reform as part of a national and bipartisan movement to reconsider the problematic policies driving mass incarceration in the United States. We submit this testimony to emphasize that in the federal system smarter criminal justice reform policy requires, at the start, reforming mandatory minimum penalties at sentencing for the broadest scope of offenders possible.

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[T]he federal system has been slow to adopt meaningful reforms that would address the rising economic and human costs of overincarceration in the United States. Since 1980, the federal prison population alone has increased by almost 790 percent. Today, there are more than 217,000 prisoners incarcerated in federal prisons, and the majority of inmates are incarcerated for nonviolent crimes.

From written testimony submitted to the Senate Judiciary Committee, September 18, 2013.

Experts and policymakers agree that two key forces driving overincarceration are the increased number of individuals entering prison every year, along with the increased length of time each prisoner spends on average behind bars. While numerous issues plague the federal justice system, the increased length of prison stays amongst *all* prisoners is a key driver in sustaining the large prison population. Increased dependence upon mandatory minimum penalties implemented by Congress contributes to this increase in sentence length.

In 2011, the U.S. Sentencing Commission reported that mandatory minimum sentences are used for more crimes, and have increased in length in recent decades. The Commission reported that, beginning in the 1950s, Congress changed its use of mandatory minimum penalties in three significant ways. First, Congress created *more* mandatory minimum penalties. In 1991, 98 mandatory minimum penalties existed; by 2011 that number increased to 195. Second, Congress expanded the types of offenses to which mandatory minimum penalties applied. Prior to 1951, mandatory minimum penalties were attached to crimes considered most serious in society, including treason, murder, piracy, rape, and slave trafficking. Since 1951, mandatory minimum penalties have been enacted to punish a broader scope of crimes, including drug offenses, firearm offenses, and identity theft.

Smarter criminal justice reform policy requires, at the start, reforming mandatory minimum penalties at sentencing for the broadest scope of offenders possible.

Most importantly for this committee to note, the *length* of mandatory minimum penalties has increased as well. In 1991, the majority of offenders serving sentences carrying a mandatory minimum penalty were convicted of violating a statute that required a penalty of five years. By 2010, the majority of offenders convicted under statutes carrying mandatory minimum penalties were serving sentences under statutes requiring 10 or more years of imprisonment. As the Congressional Research Service recently noted, "the expanded use of mandatory minimum penalties [in the federal system] has resulted in offenders being sentenced to longer terms of imprisonment than they were 20 years ago." These penalties apply regardless of the individualized characteristics of the offender, and take little account of the manner in which the offense was undertaken. Though these laws were enacted to respond to the genuine concerns of Congress that certain offenses are more serious, the price the federal system bears for such decisions in the long run are now being brought to bear.

Mandatory minimum sentences create problematic results in the justice system. This result is most readily seen in the unfair and unbalanced outcomes of the drug trafficking mandatory minimums: Lower-level, frequently nonviolent, and disproportionately offenders of color receive longer terms of incarceration than the relatively few high-level drug traffickers incarcerated in federal prisons. This result undermines Congress's intention to target offenders for their particular role in the offense when creating these statutory limitations. However, these results are amplified in other contexts as well — mandatory minimums prevent the criminal justice system from properly considering the characteristics of the offender and the offense. Moreover, they systematically ensure longer sentences for a broader scope of criminal offenders, many of whom would not otherwise be considered the most heinous offenders in society.

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We emphasize to the committee that now is the time to move beyond political reluctance toward criminal justice reform. The "status quo" of overincarceration in the federal system is a relic of the past. Reluctance to address mandatory minimum penalties only contributes to an antiquated approach to criminal justice reform that is neither smart on crime nor smart on limited federal funds. Refusal to implement reforms addressing mandatory minimum penalties contributes to the BOP's reality of severe overcapacity and an exponentially increasing prison population in the face of sequestration's newly imposed stringent funding. This committee has the opportunity to promote legislation that will address these concerns. We urge you to do so in the coming months.

LIBERTY & NATIONAL SECURITY

The Spying on Americans Never Ended

Elizabeth Goitein

From the beginning of Edward Snowden's revelations about the National Security Agency in June, the Brennan Center has commented extensively on the ensuing debate.

Americans following the news this week may be experiencing an unsettling sense of déjà vu. In 2006, news reports revealed that the Defense Department's National Security Agency was collecting records of Americans' domestic telephone calls. The Bush administration never admitted it, and many assumed that the practice stopped under the Obama administration. But on Tuesday *The Guardian* newspaper in Britain reported on a secret court order showing that a subsidiary of Verizon was required to turn over all of its customers' records for a three-month period. Members of Congress soon confirmed this was part of a larger collection program dating back seven years.

The rule of law and our privacy are too important to be cast aside with the assertion that national security requires it. And they are too important to be manipulated in secret, whether by our government or by a secret court.

Congressional Republicans, joined by the Democratic chairman of the Senate Intelligence Committee, Dianne Feinstein, have embarked on an aggressive "nothing to see here" campaign. They argue that the bulk collection is a lawful and useful tool for combating terrorism. Yet the controversy continues — and for good reason.

The most tangible problem is the invasion of Americans' privacy. The so-called metadata collected by the NSA includes information about our calls, such as the numbers we call, the numbers of those who call us, when the calls are made, and for how long.

This information may seem relatively trivial at first blush. Yet, pieced together, these details can paint a detailed and sensitive picture of our private lives and our associations. Calls to a therapist's office, Alcoholics Anonymous, repeated late-night calls to a friend's wife — the existence of these calls can reveal as much in some instances as the calls' actual content.

Sen. Saxby Chambliss (R-Ga.) asserted that an individual's phone metadata, once collected, is not actually reviewed unless the government first establishes probable cause and gets a secret court order. But he did not say whether the government employs computer programs to probe the metadata and identify cases when "probable cause" may exist. That would be the equivalent of sending a dog into someone's house to sniff for drugs and applying for a warrant if the dog barked. In any case, history teaches that the temptation for the government to use information, once gathered, is irresistible.

Another concern is legality. The program is taking place under Section 215 of the Patriot Act, which allows the government to obtain records and other "tangible things" only if they are relevant to an authorized foreign-intelligence or international-terrorism investigation. It is simply not possible that all of the phone records of every American are relevant to a specific authorized investigation.

From *The Wall Street Journal,* June 6, 2013.

Such an interpretation of "relevance" (or of "investigation") would render Section 215's limitation utterly meaningless.

There may be a constitutional concern, as well. The secret court order obtained by *The Guardian* does not specify whether collectible metadata includes cellphone-location information, but the government believes it does. Although some courts have held that the government does not need a warrant to obtain cellphone-location data, others say warrantless collection violates the Fourth Amendment because the information is so sensitive — a comprehensive record of a person's movements.

To be sure, a court has signed off on the program. But that does not make it legal. Courts occasionally make mistakes. When that happens, the losing party has the right to appeal, and the erroneous decision is reversed. That process cannot happen when a secret court considers a case with only one party before it. It has taken seven years for the American public to learn about this interpretation — and since the government was the only party to the case, no one can appeal. The court's order illustrates the fundamental inadequacy of secret courts and secret law when it comes to protecting Americans' rights.

The program's defenders in Congress say it is necessary to identify people with whom known or suspected terrorists are associating. If the government is investigating a terrorist suspect, however, Section 215 allows the government to obtain that person's records and learn who his or her contacts are. There is no imaginable need to collect every American's phone records for this purpose. As for Sen. Chambliss's claim that this program has stopped a terrorist attack, he will surely refuse to disclose any further information on the grounds that it is classified. There is no way to evaluate whether his claim is accurate, let alone whether the plot could have been thwarted using more targeted means.

Still, let's assume that the government's program has helped identify one or more terrorist plots. Its usefulness would not justify violating the law; the government should instead seek to change the law. Whether the program's usefulness would justify the incursion into Americans' privacy is a question of balancing competing policy priorities — a core question of public policy that is for the American people, not a handful of intelligence officials, to debate and decide.

Why were we not given that opportunity? For seven years, the government deemed that releasing its legal interpretation of the Patriot Act could cause grave harm to national security. Yet it is unclear how Americans would change their behavior if they knew the government could obtain their telephonic metadata. Would they stop using the telephone? If, indeed, publicizing the program would render it useless, then we should expect the government to abandon the program now that it has been disclosed. Yet it will surely continue.

The rule of law and our privacy are too important to be cast aside with the assertion that national security requires it. And they are too important to be manipulated in secret, whether by our government or by a secret court. A public debate on the government's surveillance authorities is long overdue. The silver lining to this week's revelations is that we may finally begin to have it.

Is the Government Keeping Too Much of Your Data?

Rachel Levinson-Waldman

The Brennan Center issued a report detailing federal law enforcement agencies' known databases and, for the first time, revealed how long information on law-abiding Americans is retained. In some instances, it's as long as 75 years.

The attacks of September 11, 2001, and the intelligence failures preceding them, sparked a call for greater government access to information. Across a range of laws and policies, the level of suspicion required before law enforcement and intelligence agencies could collect information about U.S. persons was lowered, in some cases to zero. Many restrictions on gathering information about First Amendment-protected activity have been similarly weakened. The result is not merely the collection of large amounts of information, but a presumptive increase in the quantity of information that reflects wholly innocuous, and in some cases constitutionally protected, activity.

While some address whether lowering the threshold for suspicion to collect information poses an undue risk to civil liberties, we seek to address a separate question: Regardless of whether the expansion of the government's domestic information collection activity can be expected to yield enough additional "hits" to justify its various costs, how do federal agencies deal with the apparent "misses" — the stores of information about Americans that are swept up under these newly expanded authorities and that do not indicate criminal or terrorist behavior?

One might expect that this information would NOT be retained, let alone extensively shared among agencies. To the contrary, there are a multitude of laws and directives encouraging broader retention and sharing of information — not only within the federal government, but with state and local agencies, foreign governments, and even private parties. Policymakers remain under significant pressure to prevent the next 9/11, and the primary lesson many have taken from that tragedy is that too much information was kept siloed. Often lost in that lesson is that the dots the government failed to connect before 9/11 were generally not items of innocuous information, but connections to known al Qaeda or other foreign terrorist suspects. Meanwhile, the cost of data storage is plummeting rapidly while our technological capabilities are growing, making it increasingly cheap to store now and search later.

Of course, federal and state agencies must maintain databases to carry out legitimate governmental purposes, including the provision of services, the management of law enforcement investigations, and intelligence and

Excerpted from *What the Government Does with Americans' Data*, October 2013.

counterterrorism functions. In addition, where law enforcement agencies have reasonable suspicion of possible criminal activity or intelligence components are acquiring information on foreign targets and activity, they must retain information to track investigations, carry out lawful intelligence functions, and ensure that innocent people are not repeatedly targeted.

History makes clear, however, that information gathered for any purpose may be misused. Across multiple administrations, individuals and groups have been targeted for their activism, and sensitive personal information has been exploited for both political and petty reasons. The combination of vastly increased collection of innocuous information about Americans, long-term retention of these materials, enhanced electronic accessibility to stored data, and expanded information-sharing exponentially increases the risk of misuse.

Against this backdrop, this report analyzes the retention, sharing, and use by federal law enforcement and intelligence agencies of information about Americans not suspected of criminal activity. It finds that in many cases, information carrying no apparent investigative value is treated no differently from information that does give rise to reasonable suspicion of criminal or terrorist activity. Basically, the chaff is treated the same as the wheat. In other cases, while the governing policies do set certain standards limiting the retention or sharing of noncriminal information about Americans, the restrictions are weakened by exceptions for vaguely described law enforcement or national security purposes. Depending on the data set, presumptively innocuous information may be retained for periods ranging from two weeks to five years to 75 years or more.

Across multiple administrations, individuals and groups have been targeted for their activism, and sensitive personal information has been exploited for both political and petty reasons.

And the effect of these extensive retention periods is magnified exponentially by both the technological ability and the legal mandate to share the information with other federal agencies, state and local law enforcement departments, foreign governments, and private entities.

To address these problems, the Brennan Center recommends the following reforms:

- Ensure that policies governing the sharing and retention of information about Americans are accessible and transparent.

- Prohibit the retention and sharing of domestically-gathered data about Americans for law enforcement or intelligence purposes in the absence of reasonable suspicion of criminal activity, and impose further limitations on the dissemination of personally identifiable information reflecting First Amendment-protected activity.

- Reform the outdated Privacy Act of 1974, which has fallen far short of its goal of protecting the privacy of Americans' personal information, through statutory amendments and establishment of an independent oversight board.

- Increase public oversight over the National Counterterrorism Center, a massive federal data repository that increasingly is engaged in large-scale aggregation, retention, and analysis of non-terrorism information about Americans.

- Require regular and robust audits of federal agencies' retention and sharing of noncriminal information about Americans.

These measures will preserve the government's ability to share critical information and safeguard the nation's security while limiting the amount of innocuous information about innocent people that is kept and shared. This will reduce the risk of abuse and misuse, and prevent the government from drowning in data.

Oversight Will Help, Not Hurt, the NYPD

Frederick A. O. Schwarz, Jr., Victor A. Kovner, and Peter L. Zimroth

The New York City Council created an inspector general for the New York City Police Department, an idea first proposed by the Brennan Center in 2012. Here, three former New York City corporation counsels urged the City Council to pass the bill.

We write to you concerning the legislative proposal for external review of the NYPD housed in the Department of Investigations.

As corporation counsel charged with safeguarding the legal interests of the city, we gained a broad perspective on the NYPD, and the ways that police practices play out on our streets and in our communities and would like to offer our views on oversight of the police.

The NYPD is a highly professional agency with a proud history and a strong record fighting crime in the city. In the past two decades, including for the past 11 years under the impressive leadership of Commissioner Ray Kelly, the NYPD has reduced crime to record low levels. Residents of many communities feel safe walking streets that for years they avoided, and feel comfortable sending their children out to school or to play. This is a tremendous achievement. At the same time, however, as we saw through litigation filed against the city, residents in many communities need reassurance that they are being treated fairly and respectfully by the police. We recognize that the NYPD is successful because it has a clear system of command and significant authority. The city should not interfere with this command structure. But we also believe that it is vital to have an external mechanism to review, analyze, and provide advice on police practices, policies, and procedures.

Although it is true that many entities currently exist for the purpose of reviewing actions by the NYPD, none serves this broad and important function. The primary focus of the NYPD Internal Affairs Bureau, the Civilian Complaint Review Board, the District Attorneys' Offices, and the Commission to Combat Police Corruption is on individual misconduct and corruption. None of these entities is charged with reviewing the full range of NYPD policies and practices.

We would have welcomed this review when we served as corporation counsel and we strongly support the creation of a review function today. We have seen the results of the work of other inspectors general and law enforcement monitors, including the work of the Department of Justice inspector general and the important role that office has played with regard to the Federal Bureau of Investigation, and we are confident that installing a similar mechanism in New York City will strengthen our security, improve the NYPD's relations with communities throughout the city, and improve the work of the NYPD.

This letter was sent to the New York City Council, March 28, 2013.

Big Brother's Sibling: The Local Police

Michael Price

The Brennan Center issued an extensive report examining some of the troubling methods local police use to combat terrorism and how much of the information they gather — benign or not — is shared with the federal government. Not only is there no oversight of the system, it is inefficient and ineffective.

The September 11, 2001, attacks prompted a national effort to improve how federal, state, and local law enforcement agencies share information. Federal money poured into police departments so they could fulfill their new, unfamiliar role as the "eyes and ears" of the intelligence community. These funds helped create a network of special intelligence and counterterrorism units, including Joint Terrorism Task Forces (JTTFs), which investigate terrorism cases, and data "fusion centers."

To learn how state and local agencies are operating in this new intelligence architecture, the Brennan Center surveyed 16 major police departments, 19 affiliated fusion centers, and 14 JTTFs in a new report, *National Security and Local Police*. What we found was organized chaos: A sprawling, federally subsidized, and loosely coordinated system to share information that is collected according to varying standards with little rigor and oversight.

The 2013 Boston Marathon bombing illustrates how critical information might get lost in this din of data, showing the need to better tune intelligence operations and fix gaps in oversight. Prior to the attack, the FBI investigated bombing suspect Tamerlan Tsarnaev based on a tip from Russian authorities that he planned to join an "underground group." They put his name on a travel watch list. Just a few months later, Tamerlan was implicated in a triple homicide on the anniversary of 9/11. Did the FBI and Boston police make the link between these investigations? When Tamerlan traveled to Russia four months later, federal officials in the Boston JTTF received alerts. Should the FBI have questioned Tamerlan when he returned? Did the Boston police even have access to the FBI's information? These questions have not yet been satisfactorily answered.

We do know, however, that the information sharing system built in the last decade has serious flaws. And these flaws may jeopardize both our safety and our civil liberties.

Excerpted from *National Security and Local Police,* December 2013.

The Brennan Center has identified three major reasons the system is ineffective:

1. Information sharing among agencies is governed by inconsistent rules and procedures that encourage gathering useless or inaccurate information. This poorly organized system wastes resources and also risks masking crucial intelligence.

2. As an increasing number of agencies collect and share personal data on federal networks, inaccurate or useless information travels more widely. Independent oversight of fusion centers is virtually nonexistent, compounding these risks.

3. Oversight has not kept pace, increasing the likelihood that intelligence operations violate civil liberties and harm critical police-community relations.

According to a report by the Senate Intelligence Committee, 95 percent of suspicious activity reports are not even investigated by FBI. This is unsurprising. In the past, police departments shared information only when there was "reasonable suspicion" of criminal activity. This time-tested standard ensured that police were focused on real threats and not acting on their own biases or preconceptions. But with this crucial filter removed after the attacks of 9/11, almost any behavior — from photographing a landmark, to stretching in the park, to attending a mosque — can be viewed as potentially suspicious, reported, and shared with thousands of other government agencies. It is impractical to sift through and follow up on every report, so important information can easily fall through the cracks. In some instances, the practice has also undermined community trust in the police, which is an essential element of domestic counterterrorism.

Efforts by the federal government to address this oversight gap have been halfhearted. The system is not under federal government control. Federal funds simply flow to state legislatures, which then allocate them as they see fit — no questions asked. State and local governments have rarely stepped into the breach, allowing intelligence activities to go unchecked and unsupervised.

Recommendations

To improve the current system, the Brennan Center calls for a fundamental overhaul of the standards for collecting and sharing intelligence and an oversight upgrade.

1. Better Standards to Protect Civil Liberties and Ensure Quality Information: We need a consistent, transparent standard for state and local intelligence activities. The reasonable suspicion standard is consistent with our nation's core constitutional values and flexible enough to allow law enforcement to do its job. State and local governments should require police to have reasonable suspicion of criminal activity before collecting, maintaining, or disseminating personal information for intelligence purposes. The same rules should apply for data shared on federal networks and databases.

2. Stronger Oversight: State and local intelligence activities require greater supervision and oversight. Elected officials should consider establishing an independent police monitor, such as an inspector general. Fusion centers should be subject to regular, independent audits as a condition of future federal funding.

In national security crises, the tendency is to take all measures to keep the country safe. But the response is not always well calibrated and eventually requires adjustment. A searching scrutiny of the information sharing structure we have built shows we can do better. It's time to make the state and local role in national security more effective, rational, efficient, and fair. It's time to get smart on surveillance.

The NSA Owes Us Answers

Rachel Levinson-Waldman

Without eavesdropping on phone calls or reading email, the NSA can still collect an enormous amount of private information.

A document recently leaked by Edward Snowden reveals that the National Security Agency is vacuuming up contact lists — address books and "buddy lists" — of people using email or instant messaging. The agency may also be getting the first few lines of people's emails, using the same technology. The NSA claims it is only collecting this information overseas, and searching its caches only if there is a foreign intelligence justification. So why worry?

The public deserves to get answers that will allow an honest assessment of both the value of the NSA's program and its impact on our liberties.

Well, there are a few big things we know, and a couple we don't. In Donald Rumsfeld's underappreciated words, these are the known knowns and the known unknowns. And they are all cause for concern.

First, while the NSA may be focusing its efforts overseas, it is getting a lot of Americans' data, too. How? To start with, any American living or traveling overseas will "look" foreign to the NSA. In addition, if Americans correspond with friends overseas by email — which is highly likely — their address can be picked up when those friends are targeted. And remember, a target isn't necessarily a terrorist. It can be anyone talking about anything of interest to the U.S. government, including a friend who works for a nongovernmental organization or bank located outside the United States.

Most significantly, what stays overseas doesn't necessarily happen overseas. American communications companies — think Google and Facebook — are big. They handle a lot of data. They can't process it all in the U.S. So they have foreign servers, which may handle Americans' communications. Thus, even if only foreign locales are targeted, Americans' contact lists are bound to be swept up as well.

This brings us to the second thing we know: Contact lists can tell the government a lot. They can include names, email addresses, phone numbers, physical addresses, birthdays, names of family members, and more. At the same time, they may be deceptive, suggesting connections to people the owner of the list doesn't even know or knows very little. Indeed, we all receive dozens of emails a day from people and companies we don't know and probably don't want to know. The NSA itself has had a problem with spammers taking over targets' email accounts and emailing thousands of people whose address books are then automatically harvested, leading to a torrent of useless information flooding the NSA's computers. So these lists offer a double whammy: They are revealing AND potentially misleading.

Finally, we know the government is getting a lot of information: over a million address lists, buddy lists, and inboxes on an average day. Not all of that belongs to Americans, to be sure. But even a modest

From MSNBC.com, October 27, 2013

percentage of a lot can be a lot. And according to the NSA's own documents, one of the main effects of this data has been to overwhelm the agency's rather impressive systems. This is the agency that built a database that held 41 billion communications records in a single month. So if it says it's getting too much, you can take that to the bank.

This brings us to two important things we don't know. First, what successes, if any, has this sweeping program had that couldn't be accomplished with more targeted collection? There is good reason to demand a frank answer. The director of the NSA has grudgingly confirmed to Congress that the phone metadata database has made few if any unique contributions to the nation's safety. That's why a bipartisan group of senators, many with access to classified information, has proposed shuttering the entire program. A couple of years ago, a similar program for email metadata was finally shut down under pressure from two of those same lawmakers, Sens. Wyden and Udall, when the NSA couldn't prove its effectiveness. Given this track record, we must learn more about the address list program.

Our second known unknown is how long the government is keeping the contact lists of innocent Americans, their friends, and their friends' friends. The government has said there are minimization procedures governing this data, but it has kept mum on what those are. If they are anything like the procedures governing the NSA's handling of the content of Americans' emails and phone calls, they're pretty generous. Those procedures, which address the accidental collection of Americans' communications, allow the NSA to keep Americans' emails and calls for up to six years from the start of surveillance — longer if they contain foreign intelligence or evidence of a crime. The NSA may not keep the contact lists for so long, simply because they take up so much space. But Americans deserve to know exactly how the government is handling their private information.

No doubt, we will learn about some other NSA collection program soon. But this is the latest picture. The known knowns should give us pause. At the same time, there is a lot we don't know yet. The public deserves to get answers that will allow an honest assessment of both the value of the NSA's program and its impact on our liberties. If recent history is any guide, the more information comes out, the harder the program will be to defend.

Privacy After Petraeus

David Petraeus resigned as CIA director in late 2012 after the FBI uncovered an extramarital affair when tracking emails in a separate investigation. In February 2013, the Brennan Center convened a panel of experts to discuss electronic privacy.

Faiza Patel, *Co-Director, Liberty & National Security Program, Brennan Center for Justice*

We're here today to discuss one of the most important issues of our day — when and how can the government access the electronic records of our daily lives — emails, cell phone data that tracks where you go, things of that nature. Now, people concerned with privacy have been complaining for quite a while that the law has not kept pace with technology, and that the government can obtain, store, and access increasing amounts of data about our daily lives. But privacy is one of those issues that is pretty difficult to get people to care about. I was reading an article recently which compared the privacy damage to environmental harm in the sense that it happens little by little, and each erosion doesn't seem to matter that much, but at the end of the day it may add up to a loss of privacy that's unacceptable in our democracy.

The question then is, are we there yet? Maybe, maybe not, but at least it seems that we have reached an inflection point in the discussion about privacy. More and more people seem concerned about the issue, and we see it covered in the press more and more each day.

Now a significant contributing factor was obviously the Petraeus affair for which this event is named. Although it seems that in that case the FBI likely did have warrants, the investigation suddenly made people realize that their emails weren't that private after all, and privacy advocates were quick to take advantage of that moment to put forward the concerns that they had been talking about for so many years. Then there is the decision of the U.S. Supreme Court in the *Jones* case, where the court found that attaching a GPS device to a car for tracking movements for months was not quite like following somebody along the public highways.

Judge Boggs, why don't you start us off by telling us a little bit about the *Warshak* case and your decision on the thousands of emails that the government obtained without a warrant in that case?

Excerpted from discussion, "Privacy After Petraeus," February 25, 2013.

Hon. Danny Julian Boggs, *Judge, U.S. Court of Appeals for the Sixth Circuit*

Warshak ran a very successful business in herbaceuticals — sort of things that are advertised on television for male enhancement, among other things — and had a variety of financial activities with banks and customers that led ultimately to a 112-count indictment for bank fraud, mail fraud, money laundering, and a lot of other things. In the end, we had a 110-page opinion, of which only about a dozen pages have to do with this issue, but it was the one that got the most publicity.

The government had obtained, under various statutory bases, 27,000 of Mr. Warshak's emails, largely having to do with activities within the company, but under the statute, probable cause was not necessary. So the first attack on this was that it violated the Fourth Amendment under a doctrine that — did he have a reasonable expectation of privacy in the contents of these emails, and I mention contents because that was a good bit of the analysis.

So the three-judge panel all agreed on this, basically went through past analogies. The contents of letters are secure in the sense that you have a reasonable expectation of privacy in the contents, though not necessarily in the fact that a letter was sent or its address — telephone calls, the contents have a reasonable expectation of privacy, though the government may be able to get a record of the fact the call was made and how long it lasted. A courier who carries a message — the government may be able to watch the courier, but they can't get the contents. So we decided that it was not a great stretch to say that similarly the contents of emails, even though they went through an ISP, were protected. The actual language in the opinion — courts speak through their opinions as opposed to panels — was, given the fundamental similarities between email and traditional forms of communication, it would defy common sense to afford emails lesser Fourth Amendment protection. We said that email requires strong protection under the Fourth Amendment, otherwise the Fourth Amendment would prove an ineffective guardian of private communications, an essential purpose that it's long been held to serve.

Kenneth Wainstein, *former Homeland Security Advisor to President George W. Bush; former Assistant Attorney General for National Security*

I spend a lot of time in the national security arena in government looking at this issue, especially since 9/11. I want to pivot off of the analogy that you had, analogizing civil liberties to environmental erosion, which I think is a good one. You've got to constantly be concerned that as we're focusing on threats and crime and the prevention of crime and national security threats that we don't overly compromise our civil liberties. But I think it is important to note that there is a difference here between environmental erosion and our protections of privacy. Whereas in the case of environmental erosion, it's hard to conceive how there might be a benefit to that erosion — in other words that erosion might not be offset by some other benefit.

In the case of privacy protections, those protections often do come at the expense of effectiveness and law enforcement and national security operations. So that is the perspective that I'm bringing to today's conversation. And I think what we've seen since 9/11, this is an ongoing process, the constant calibration of our tools — our investigative tools and the revision of those authorities as new technologies come online. We've seen that over the decades, but that process has been particularly pronounced since 9/11. I think 9/11 sort of woke us up to the need to take a look at the tools we're using, both in the law enforcement but particularly national security context and make sure that they're up with the times. The PATRIOT Act came out, whenever it was, six weeks after 9/11, and did a number of things to strengthen the tools we had, and to bring them more in line to today's technology. We saw that again with the FISA Amendments Act that came out in 2008, which tried to get our electronic surveillance statute for national security operations, and bring it up to the times with email and modern communications.

We could have the legal debates, but then we need to think about the real-life implications of what a new standard that you have to use — you have to have probable cause to get a warrant every time the government wants to get stored emails — what those implications would be, and they'd be serious. One would say well gosh, if you're going to get a court order anyway to get access to those communications and you have to show that those communications are relevant to an ongoing investigation — what's the difference between that and going and showing probable cause that there's some sort of criminal activity afoot and making that demonstration to a judge. There is a big difference; there are many situations where, in the law enforcement and the national security context, government needs to look at those emails. At that point, we won't have probable cause necessarily, but it will be critical to helping build the case or build the predication, which would allow more serious steps later on for which you would need to get probable cause for a search warrant. There are also some agencies that don't have search warrant authority, can't go get search warrants, like the SEC and the FTC, and so those agencies would no longer be able to just go and get stored emails in their investigations. So you have some real-life implications that we need to think through before you make any drastic changes to the legislation.

9/11 sort of woke us up to the need to take a look at the tools we're using, both in the law enforcement but particularly national security context and make sure that they're up with the times.

I guess if there's one message I have, which is somewhat born of experience since 9/11, just be careful and make sure we make any changes in a calibrated way. I can speak from experience that the ability to get particular stored emails in a national security context is a vital tool, and we've got to make sure that — especially in those situations where you're running threat investigations and speed is of the essence — that you don't make the process overly difficult by requiring everything to stop, get probable cause, and go to a judge first.

Laura Murphy, ***Director, Washington Legislative Office, American Civil Liberties Union***

On the comparison to environmental degradation, I think there's no real comparison when it comes to being able to observe the damage. And I think there is a great deal of damage going on because of the third-party doctrine, because people still operate in this country with the belief that their communications are private, and whether they go through the Internet or whether they go through the mail, people believe that, and why do they believe that? Because the Fourth Amendment says, the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

And so what's happening now is that the government can surreptitiously look at your email without a warrant, without believing that you're engaged in any criminal activity, and just suck up that information. We don't know how it's stored, whether it will be destroyed, with whom it's shared — and this is very personal information, this is not only your intellectual property but maybe your health records, maybe your deepest darkest secrets, and I just think that

even if you ask the American people to come to City Hall on a day and say — the government wants to have a printout of all the websites you visited and please print out for the last, you know, six months what the websites are, they would be deeply offended.

So whether or not it's legitimate in the eyes of law enforcement is not the question. The question is whether or not people have a reasonable expectation of privacy in their communications, and I think it's time to revisit the third-party doctrine, because that really developed before the World Wide Web is what it is. It developed before cloud computing. You know, there was a time when we got our emails, we downloaded them from the servers, and they ceased to be on the servers. Now email is stored indefinitely, and I think when the government wants to take a vacuum cleaner and suck up all of your email history beyond 180 days, that's a very invasive search. I think it goes against the spirit of the Fourth Amendment and it really cries out for review by Congress in updating the Electronic Communications Privacy Act.

David Lieber, *Privacy Policy Counsel, Google*

Transparency in this debate is something that's really important to Google. One of the things that we think the current debate is lacking is good data about the volume and nature of government requests, which we think would help inform the broader debate about updating the Electronic Communications Privacy Act (ECPA). And there's no question that government has legitimate interests in this data and legitimate needs, and we also think too that our users in the broader public could benefit from good data about the nature and types of request that we receive, the types of data that we provide in response to government requests, and the circumstances under which we might push back on government requests, including the percentage of times where we will not give any data in response to a government request.

We've released the first iteration of our transparency report in 2010, and since then we've seen a significant increase in the number of government requests that we receive from governmental entities in the United States. So since 2010 we've seen a 136 percent increase in government requests for user data issued to Google in a criminal context. And with the latest iteration of our transparency report, we've tried to do a couple of things. The first thing we did, and this was about five days after we released the latest iteration of our transparency report, was to publish detailed user FAQs so that our users and the broader public get a better understanding about our posture when we receive government requests. So what we also try to do is provide more insight into the types of data that we might give to governmental entities depending on the types of processes that they are using under ECPA. So what we might provide, for example, in response to a subpoena would differ than what we would provide in response to a search warrant or even a court order.

The other thing that we did is to try to provide some data about the types of requests that we are receiving from governmental entities in the U.S. In the second half of 2012, 68 percent of the requests that we received under ECPA from U.S. governmental entities were subpoenas. This is generally requests for user-identifying information under ECPA, and because they were issued through subpoenas, they tend to be the easiest types of data to get at because there tends to be no judicial review. On the opposite side, 22 percent of requests that we received under governmental entities in the U.S. in 2012 in the second half were search warrants, and those obviously do involve judicial review under the probable cause standard. The remaining 10 percent were from court orders, which are commonly referred to as 2703-D orders under ECPA. But I want to be clear that that category of data also includes other forms of legal process that were more difficult to categorize, and so they're included in that 10 percent number.

Going forward we're looking to iterate on our transparency report and improve the way that we share data with our users so that they can get a better understanding of how we handle government requests, and the types of data that we provide in response to those requests.

Beyond Bradley Manning

Faiza Patel

Pfc. Bradley Manning was convicted of violating the Espionage Act for disclosing secret documents to WikiLeaks. But what does the outcome of that trial mean for Julian Assange, who actually published the materials?

Julian Assange, the founder of WikiLeaks, is of course outraged at Pfc. Bradley Manning's conviction on 20 charges for leaking some 700,000 U.S. government documents. But there may be good news to temper that outrage: The judge's dismissal of two of the charges against Manning could derail the Obama administration's plans to prosecute Assange for publishing the documents.

If WikiLeaks is considered part of the press — as it should be — the Obama administration will have to overcome both this history and the First Amendment if it wants to prosecute Assange successfully.

The judge rejected the argument that Manning aided the enemy by turning over national security information to WikiLeaks for publication. Although prosecutors conceded that this principle would also apply to a traditional newspaper, they nonetheless argued that WikiLeaks was not a "journalistic enterprise" but a "transparency movement." The judge's full opinion is not yet public, but her dismissal of the "aiding the enemy" charge suggests that she didn't buy that characterization.

This is important. No administration has brought Espionage Act charges against the press, which enjoys strong constitutional protections. If WikiLeaks is considered part of the press — as it should be — the Obama administration will have to overcome both this history and the First Amendment if it wants to prosecute Assange successfully.

The WikiLeaks founder can also take comfort in the dismissal of the charge that, shortly after Manning arrived in Iraq in November 2009, he gave WikiLeaks a video of an airstrike near the village of Garani in Afghanistan. Prosecutors contended that the early sharing of video showed that the two men were scheming to acquire information for public release, and challenged Manning's claim that he leaked information only because he became disgusted with the conduct of the Iraq war. Proving cooperation of this sort would be critical in any case against Assange. It's hard to go after the press for disseminating information, even if it is secret. So prosecutors will most likely have to show that the two men conspired to get and publish documents. They may have other evidence of such a plot, but now they can't rely on the Garani video.

Even so, Assange probably shouldn't leave the Ecuadorian Embassy in London (where he has taken refuge to avoid extradition to the U.S.) just yet. The Manning prosecution shows that the administration is willing to pursue broad theories of liability against those who reveal its secrets. Given the chance, it may take a shot at Assange after all.

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