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A NEW PROPOSAL TO ADDRESS LOCAL VOTING DISCRIMINATION

Cody Gray *

*“We cannot be content with the creation of systems of rendering free assistance to all the people who need but cannot afford a lawyer’s advice Our responsibility is to marshal the forces of law and the strength of lawyers to combat the causes and effects of poverty . . . remodel the systems which generate the cycle of poverty and design new social, legal and political tools and vehicles to move poor people from deprivation, depression, and despair to opportunity, hope and ambition”*¹

INTRODUCTION

Lorna Francis is an African American woman who lives in Conyers, Georgia, a quiet city southeast of Atlanta.² She is a hairdresser and single mother, and has little time for anything else.³ Politics is something of an afterthought for Lorna: “Life’s been busy—I’ve been trying to make that money.”⁴ So she was not surprised to learn she had missed the most recent mayoral election: “[H]onestly, I only vote in major elections.”⁵

* Ph.D., 2015, Politics, Princeton University; J.D., 2015, Harvard Law School. I thank Chuck Cameron, Jeanne Charn, Susan Davies, Paul Frymer, Claire Johnson, J. Morgan Kousser, Uzoma Nkwonta, Susannah Barton Tobin, Keith Whittington, and seminar participants at Harvard Law School for advice. All errors are my own.

1. Clinton Bamberger, Director, Legal Services for the Poor, Office of Economic Opportunity, Address at the National Conference of Bar Presidents (Feb. 19, 1966), as reprinted in A. Kenneth Pye & Raymond F. Garraty, *Involvement of the Bar in the War Against Poverty*, 41 NOTRE DAME L. REV. 860, 866, 870 & n.42 (1966).

2. The proceeding discussion is adapted from Richard Fausset’s helpful description of Conyers. See Richard Fausset, *Mostly Black Cities, Mostly White City Halls*, N.Y. TIMES, Sept. 29, 2014, at A1.

3. *Id.*

4. *Id.*

5. See *id.*

Voter apathy, as Lorna can testify, certainly contributed to her failure to vote. Political disengagement, especially in low-visibility elections, is one of the many reasons why African Americans hold only one of six elected positions in Conyers, despite a majority of the city's population being African American.⁶ Still, to Lorna's credit, she may have failed to catch wind of the election for another, slightly more subtle reason—its timing.

Conyers holds its municipal elections in odd-numbered years, separating them from major federal and state races.⁷ This disjunction makes it harder for citizens to keep track of local contests.⁸ Demarco Hamm, for example, a thirty-year-old transportation supervisor and lifelong resident of Conyers, complained that the local elections are “not broadcast. It's not like a presidential election.”⁹ That's why he had not thought to seek a remedy at the ballot box, he says, even though white police officers stopped him twice this year for reasons he believed were wholly frivolous.¹⁰

When local elections like those in Conyers do not coincide with important federal or state races, voter turnout decreases significantly,¹¹ particularly among racial minorities.¹² And when there is low turnout, elections that might otherwise have been dominated by majoritarian interests are instead often dictated by highly mo-

6. *See id.*

7. *Id.*

8. *See id.*

9. *Id.*

10. *Id.*

11. *See* ZOLTAN L. HAJNAL ET AL., MUNICIPAL ELECTIONS IN CALIFORNIA: TURNOUT, TIMING, AND COMPETITION 35–36 (2002) (“As it turns out, our statistical analysis indicates that election timing is, in fact, the most important factor influencing city turnout.”); Christopher R. Berry & Jacob E. Gersen, *The Timing of Elections*, 77 U. CHI. L. REV. 37, 42 (2010); Zoltan L. Hajnal & Paul G. Lewis, *Municipal Institutions and Voter Turnout in Local Elections*, 38 URB. AFF. REV. 645, 646 (2003).

12. *See* TOMAS LOPEZ, BRENNAN CTR. FOR JUSTICE, SHELBY COUNTY: ONE YEAR LATER 4 (2014), <http://www.brennancenter.org/analysis/shelby-county-one-year-later>; Brian Schaffner et al., *How Ferguson Exposes the Racial Bias in Local Elections*, WASH. POST (Aug. 15, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/08/15/how-ferguson-exposes-the-racial-bias-in-local-elections/> (noting that whites were three times more likely than African Americans to vote in the odd-year municipal election in Ferguson, Missouri); *see also, e.g.*, Letter from Thomas E. Perez, Assistant Att’y Gen., to Dennis R. Dunn, Deputy Att’y Gen., State of Georgia (Dec. 21, 2012) [hereinafter *Augusta Letter*], <http://www.justice.gov/crt/voting-determination-letter-57> (denying preclearance to proposed non-concurrent election date because it disproportionately reduces African American voter turnout).

tivated, *non*-majoritarian interests.¹³ Conyers appears to fit this bill. Residents attest that the city's African American population was more likely to stay home on Election Day than were whites.¹⁴ When juxtaposed with Rockdale County, of which Conyers is a part, the proposition rings true.

Rockdale County and the city of Conyers overlap, so they are similar in almost every respect.¹⁵ Unsurprisingly then, Rockdale County, like Conyers, underwent a serious demographic shift between 2000 and 2010.¹⁶ In Rockdale, the black share of the population jumped from 18% to 46%; it was 33% to 57% in Conyers.¹⁷ One key difference, however, is that Rockdale's countywide elections are held in *even* years, so they align with federal elections.¹⁸ That difference has been crucial. Propelled by the excitement of the historic presidential contest, Rockdale County elected its first ever African American commissioners in 2008.¹⁹ Four years later, eight African American Democrats ran against eight white Republicans and won most of the county's elected positions.²⁰ So today, even though the municipalities are virtually identical, Conyers continues to chronically underrepresent minority candidates on its city council, whereas Rockdale is forging a new chapter with a county government that reflects its diversity.²¹

Demarco and Lorna's experiences in Conyers are important to understand because they cast light on two deficiencies—one philosophical and one practical—related to the way that legal services are currently being delivered to low-income and minority communities.

At a philosophical level, Demarco's anecdote demonstrates the insufficiency of a legal aid system predicated almost entirely on

13. See Berry & Gersen, *supra* note 11, at 39. For an example, see Schaffner et al., *supra* note 12.

14. See Fausset, *supra* note 2.

15. See *id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. See *id.*

20. *Id.*

21. See *id.* Relics of the past do remain. After the 2012 race in Rockdale, a white member of the county board of elections posted an online editorial "comparing county government to a 'little white plane' that took on more black paint over time and eventually crashed." *Id.*

the goal of helping low-income litigants vindicate basic civil claims and their rights to various public entitlements.²² Though Demarco might have benefited, for example, from legal assistance with a putative civil claim against the police officers that discriminated against him, Conyers' electoral system deprived him at a more structural level of an earlier opportunity that is perhaps more important—the opportunity to elect individuals with the power to reshape that police department from the beginning.²³ In other words, a legal aid system that solely focuses, somewhat myopically, on securing a litigant's right to public benefits overlooks a crucial, antecedent issue—the importance of accessing the ballot box to determine the nature and distribution of those rights in the first place.²⁴

At a more practical level, Lorna's anecdote sheds light on the challenges attendant to delivering legal services to individuals interested in vindicating the fundamental right to vote. To begin, suppose that Lorna, having witnessed the success of African American candidates in Rockdale County, decides she would like to challenge Conyers' adoption of an ordinance establishing an electoral system that separates local from federal elections.²⁵ She

22. Legal aid services typically handle cases related to: Medicaid, food stamps, aid to the blind or disabled, Social Security/Supplemental Security Income, Disability, domestic violence, child custody, child support, visitation, elder law, guardianships, landlord/tenant issues, public housing, evictions, foreclosures, housing discrimination, fair lending, immigration, and Native-American issues. See, e.g., *Frequently Asked Questions*, IDAHO LEGAL AID SERV. [hereinafter *Frequently Asked Questions*], <http://www.idaholegalaid.org/node/8/frequently-asked-questions-faqs#KindOfCases> (last visited Dec. 1, 2015).

23. See Fausset, *supra* note 2. Resort to this kind of remedy is not hypothetical. In Jasper, Texas in the late 1990s, James Byrd, "an African-American man targeted for his race, was dragged down the street until he died." *Veasey v. Perry*, 71 F. Supp. 3d 627, 633 (S.D. Tex. 2014). In response to the incident, "two African-American city council members spearheaded the effort to name a highly-qualified African-American as police chief in Jasper." *Id.*

24. Cf. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined.").

25. For purposes of the following example only, I assume that Conyers adopted its current electoral system after the Supreme Court's decision in *Shelby County v. Holder*. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (declaring the coverage formula of the Voting Rights Act unconstitutional). In reality, Conyers adopted its scheme well before the Voting Rights Act of 1965 was enacted, meaning it was never subject to preclearance under Section 5 of the Act. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439. Still, the example has a real world parallel—Augusta, Georgia did in fact move its mayoral and city council elections from November to July after the Supreme Court's decision in *Shelby County*. Zachary Roth, *Georgia GOP Dusts off Jim Crow Tactic: Changing Election Date*, MSNBC (Nov. 11, 2013, 4:00 AM), <http://www.msnbc.com/msnbc/gop-revives-jim-crow-tactic>. The federal government had previously objected to the change un-

faces a daunting hurdle right out of the starting gate: voting suits are incredibly costly to prepare, for they typically require both historical and statistical evidence, and ultimately consume thousands of hours in preparation for trial.²⁶ Lorna would thus confront a formidable incentive problem—the costs of hiring a private lawyer would be concentrated on her alone, but the putative benefits of the lawsuit would be widely diffuse. Litigating the claim then would require her to sacrifice most of her own resources for a benefit that would flow largely to the broader community.

“That’s okay,” she might say, “legal aid can foot the bill.” But that’s not true. Legal aid providers do not handle this kind of case, so there is nobody to inform her the Constitution permits a challenge to the ordinance on the ground that it was enacted with a discriminatory purpose.²⁷ Nor is there anyone to tell her the Voting Rights Act permits her to challenge the ordinance if it has a discriminatory effect against minority voters.²⁸

“No problem,” Lorna might shoot back, “there are plenty of law firms and non-profit organizations that may be happy to pony up the costs.” But that outcome is highly unlikely. Large national law firms and non-profit organizations who might be able to handle the litigation pro bono tend to gravitate to large, high-profile voting disputes that increase their prestige, like challenges to statewide redistricting measures or photo-identification laws.²⁹ Conyers, by contrast, attracted only 815 voters to a recent citywide election.³⁰ Thus, it is unlikely to draw the attention of these non-governmental actors even if there is legitimate discrimination at work.

der Section 5 of the Voting Rights Act precisely because it had a discriminatory effect against African Americans. See *Augusta Letter*, *supra* note 12.

26. See Nicholas Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 69 (“[I]n a 2005 study, the Federal Judicial Center found that voting rights suits entail 3.86 times more work than the median federal action, and rank sixth in intensity out of sixty-three case categories.”).

27. See *Washington v. Davis*, 426 U.S. 229, 239–40 (1976); see, e.g., *Frequently Asked Questions*, *supra* note 22.

28. See 52 U.S.C.A § 10301 (West 2015).

29. See Carolyn Elefant, *Can Law Firms Do Pro Bono? A Skeptical View of Law Firms’ Pro Bono Programs*, 16 J. LEGAL PROF. 95, 106 (1991).

30. Fausset, *supra* note 2.

As a last resort, Lorna might turn to the Civil Rights Division's Voting Section at the United States Department of Justice ("DOJ"). That section, after all, is the primary enforcer of the Voting Rights Act.³¹ But there, too, she would encounter obstacles. To start, the most potent weapon the DOJ might bring to bear—federal "preclearance" under Section 5 of the Act—has largely disappeared. Prior to 2013, Conyers would have been required to submit its ordinance adopting odd-year elections to the federal government or a federal court for "preclearance" before the ordinance could be given legal effect.³² In order to earn the federal government's approval, Conyers would have carried the burden of demonstrating that its ordinance was not passed with a discriminatory purpose and would not result in a discriminatory effect.³³ On June 25, 2013, however, the Supreme Court struck down the coverage formula the Voting Rights Act used to single out jurisdictions, like Conyers, for federal preclearance.³⁴ The decision, *Shelby County v. Holder*, effectively eliminated the preclearance requirement.³⁵ So, even though the precise change that Lorna might seek to challenge—a local government's switch to a non-concurrent election date—was blocked in Georgia due to its discriminatory effect on African American voter turnout as recently as December 21, 2012, federal preclearance today would lend Lorna no help.³⁶

Lorna's obstacles would not end there. Though the Voting Rights Act contains other tools to combat discriminatory election procedures,³⁷ the DOJ might refuse to assist Lorna based on the mere fact that it doesn't *want* to. Under the extant doctrine, Lorna cannot compel the federal government to file a lawsuit against

31. See *Statutes Enforced by the Voting Rights Section*, U.S. DEP'T JUSTICE, <http://www.justice.gov/crt/statutes-enforced-voting-section#vra> (last updated Aug. 8, 2015).

32. See *Jurisdictions Previously Covered by Section 5*, U.S. DEP'T JUSTICE, <http://www.justice.gov/crt/jurisdictions-previously-covered-section-5> (last updated Aug. 6, 2015).

33. See *Georgia v. United States*, 411 U.S. 526, 536–39 (1973); *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. § 51.52(c) (2012).

34. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

35. See *id.* at 2627 (indicating that the rarely used "bail-in" procedure, formerly in 42 U.S.C. § 1973a(c), still authorizes federal courts to place states and political subdivisions under preclearance if they have violated the Fourteenth or Fifteenth Amendments).

36. Augusta Letter, *supra* note 12 (denying preclearance to proposed non-concurrent election dates because it disproportionately reduced African American voter turnout).

37. See, e.g., 52 U.S.C.A. § 10301 (West 2015).

the city of Conyers (a third party).³⁸ And, given the manpower required to litigate even fairly simple voting cases, the DOJ could easily conclude that Conyers is not a big enough fish to attract its line.³⁹ Finally, and perhaps most importantly, the DOJ is subject to the political whims of the administration that happens to be in power. Enforcement of the Voting Rights Act, or of particular provisions on behalf of particular minority groups, might not be a priority for the administration.⁴⁰ Lorna, as a result, could very well be out of luck.

All told, this basic inability to challenge discriminatory voting procedures put into place at the municipal level is a serious problem. Local officials hold sway over a host of entities—including the police, firefighters, school officials, and building inspectors—that profoundly and immediately affect citizens' lives. When voices like Lorna's are missing from the ranks of those who hold power in the community, vital perspectives can be overlooked.⁴¹

38. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1995) (holding that the Federal Drug Administration's decision not to take enforcement actions was not subject to judicial review under the Administration Procedure Act).

39. See *Voting Rights Act: Hearings Before the Senate Subcomm. on the Constitution of the Comm. on the Judiciary on Bills to Amend the Voting Rights Act of 1965*, 97th Cong. 185–86 (1982) (“In deciding whether to initiate a suit, we use the following criteria: the strength of the evidence of a violation, whether the violation is egregious, the jurisdiction’s response to our efforts to obtain voluntary compliance, the number of persons affected, the existence of legal issues between the United States and the jurisdiction, and the availability of our resources.”).

40. See, e.g., U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., A REVIEW OF THE OPERATIONS OF THE VOTING SECTION OF THE CIVIL RIGHTS DIVISION 107 (Mar. 2013) [hereinafter 2013 IG REPORT], <http://www.justice.gov/oig/reports/2013/s1303.pdf> (noting, for example, that during the Obama Administration, “[t]he evidence established that Division leadership . . . clearly placed a higher priority on the enforcement of the [National Voter Registration Act]’s ballot-access provisions” than on enforcement of the statute’s “list-maintenance provision”).

41. I note, of course, that city councils do not need to perfectly represent the demographics of a community to serve the interests of all constituents. But when African Americans lack descriptive representation, they are less likely to be engaged in the political process or to have representatives that forcefully advocate their interests. See Andy Baker & Corey Cook, *Representing Black Interests and Promoting Black Culture: The Importance of African American Descriptive Representation in the U.S. House*, 2:2 DU BOIS REV. 227, 227 (2005); Lawrence Bobo & Franklin D. Gilliam, Jr., *Race, Sociopolitical Participation, and Black Empowerment*, 84 AM. POL. SCI. REV. 377, 377 (1990); Daniel M. Butler & David E. Broockman, *Do Politicians Racially Discriminate Against Constituents? A Field Experiment on State Legislators*, 55 AM. J. POL. SCI. 463, 463 (2011); Paru Shah, *It Takes a Black Candidate: A Supply-Side Theory of Minority Representation*, 67 POL. RES. Q. 266, 266 (2013).

Take Ferguson, Missouri, a St. Louis area community that recently captured the nation's attention.⁴² In Ferguson, like in Conyers, about two-thirds of the residents are African American.⁴³ And Ferguson, like Conyers, holds its municipal elections in odd-numbered years.⁴⁴ Unsurprisingly then, in Ferguson, even though African Americans vote at rates identical to whites in *federal* elections, whites are three times more likely than African Americans to cast their ballots in *municipal* elections.⁴⁵ Predictably then, in Ferguson, like in Conyers, only one of six city council members are African American.⁴⁶ Thus, when a white police officer shot and killed an unarmed black teenager in Ferguson, the outrage expressed by the African American community was in many ways unsurprising. The lack of African American representation amongst the city's ranks of power fueled mistrust between the white police force and the minority community.⁴⁷ For many African American residents, local government seemed like it was above them, not of them.⁴⁸ And as it became known, for example, that Ferguson issued more arrest warrants per capita than any other city in Missouri,⁴⁹ residents quickly understood how local government could impact their lives.⁵⁰ Ultimately, the shooting prompted a push for increased African American voter participation.⁵¹ But of course, even when there is urgency to vote, structur-

42. See Schaffner et al., *supra* note 12.

43. See *id.*; *supra* note 17 and accompanying text.

44. See Schaffner et al., *supra* note 12; *supra* note 7 and accompanying text.

45. See Schaffner et al., *supra* note 12.

46. *Id.*; see *supra* note 6 and accompanying text. In Ferguson, six of seven school board members, as well as the mayor, city manager, police chief, and 94% of the police force are also white. See Kami Chavis Simmons et al., *Policy Changes to Hold Ferguson Accountable*, ST. LOUIS AM. (Nov. 24, 2014, 4:59 PM), http://www.stlamerican.com/news/local_news/article_9924f9a2-742d-11e4-8123-cfc0cef3fd.html.

47. See Karen Shanton, *The Problem of African American Underrepresentation on Local Councils*, DEMO.ORG, <http://www.demos.org/publication/problem-african-american-underrrepresentation-city-councils> (last visited Dec. 1, 2015).

48. Tellingly, some Conyers residents, like twenty-two-year-old Vick Major, also expressed this sentiment: “[t]his is the white man’s land,” blacks in the city “stay out of everything.” Fausset, *supra* note 2.

49. *Id.*

50. African Americans in Ferguson are also more than twice as likely as whites to be stopped, searched, and arrested, even though searches of Ferguson’s African American residents produce contraband 21.7% of the time, while searches of Ferguson’s white residents produce contraband 34% of the time. See Simmons et al., *supra* note 46.

51. Associated Press, *Ferguson Elects Two African-Americans to City Council*, AL JAZEERA (Apr. 8, 2015, 7:34 AM), <http://america.aljazeera.com/articles/2015/4/8/ferguson-election-triples-number-of-blacks-on-city-council.html>.

al impediments often remain. And removing these impediments is no easy task today—just ask Lorna.

At the end of the day, our system must be reformed to better facilitate local voting litigation. Establishing that proposition is the first goal of this article, though it should not be controversial. The newly defunct federal preclearance process *used* to cover more than 8000 state and local jurisdictions with a history of discrimination, and the majority of election procedures that were blocked under that regime came from counties, municipalities, and other entities operating *below* the state level.⁵² Today, these are the precise jurisdictions that are likely to be overlooked because law firms, non-profits, and the federal government disproportionately focus on large, high-profile voting disputes.⁵³

This article's second goal is to diagnose the systemic defect in the enforcement regime that remains after *Shelby County*. It finds that the enforcement apparatus too closely resembles a “police-patrol” regulatory model. In such a model, an active and centralized principal examines a subset of their agents' actions (goes on “police patrols”) in order to detect and remedy violations while simultaneously deterring misconduct.⁵⁴ Because (1) private individuals have difficulty bringing voting cases, (2) local jurisdictions no longer submit their changes for preclearance, and (3) law firms and non-profits focus only on large, high-profile voting disputes, this is essentially the enforcement model used to safeguard local voting rights today; the Civil Rights Division's Voting Section (the principal) investigates a selection of local jurisdictions to detect violations and deter future misconduct.⁵⁵

But this framework is flawed. First, the “police-patrol” oversight model inevitably requires that the DOJ spend time investigating a great number of actions that do not turn out to consti-

52. See J. Morgan Kousser, *Do the Facts of Voting Rights Support Chief Justice Roberts's Opinion in Shelby County?*, TRANSATLANTICA (forthcoming 2015) (manuscript at 4–5) (analyzing 4173 voting rights events between 1957–2013 and finding that only 334 events took place on the state level); LOPEZ, *supra* note 12, at 4.

53. See, e.g., Dale E. Ho, *Voting Rights Litigation After Shelby County: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 675, 679 n.21 (2015) (“[P]articularly at the local level . . . the major political parties and advocacy groups rarely commit the resources necessary to litigate.”).

54. See Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

55. See 2013 IG REPORT, *supra* note 40, at 9.

tute voting rights violations.⁵⁶ This process theoretically helps to deter abuse, but it is inefficient. Second, under any realistic police-patrol regulatory policy, the DOJ is capable of investigating only a small sample of the jurisdictions that could be engaging in discrimination. As a result, the agency is likely to miss violations. Third, because enforcement is centralized in a single federal overseer, rather than dispersed across entities, it is more susceptible to partisan manipulation through presidential influence.

This article argues that the remedy lies in reforms that would institute a “fire-alarm” regulatory model. The fire-alarm model “is less centralized and involves less active and direct intervention than police-patrol oversight.”⁵⁷ Under the fire-alarm system, in lieu of examining a sample of jurisdictions to detect violations, the principal establishes a system of rules, procedures, or informal practices that enable individual citizens or organized groups to complain about a jurisdiction (sound the “alarm”), charge it with a violation, and seek a remedy in court.⁵⁸ “Instead of sniffing for fires,” that is, the principal “places fire-alarm boxes on street corners, builds neighborhood fire houses, and sometimes dispatches its own hook-and-ladder in response to an alarm.”⁵⁹

The imposition of a fire-alarm system to detect and remedy local voting discrimination—alongside the top-down system that already exists for addressing larger statewide measures—would have a number of distinct benefits. First, under a fire-alarm model, not only would private citizens be empowered to address local voting discrimination, but the DOJ would also investigate local jurisdictions only after individual citizens have actually complained about them. The fire-alarm system would thus not only be more efficient, but would also increase the efficacy of DOJ’s interventions. Second, a fire-alarm system would miss fewer violations. The fire-alarm model is predicated on bottom-up reporting by local actors with personal knowledge of discriminatory conditions.⁶⁰ Assuming a broad dispersion of “fire alarms,” the system can therefore monitor the entire universe of jurisdictions. Third, a fire-alarm system would shift litigation away from the politically

56. See McCubbins & Schwartz, *supra* note 54, at 166.

57. *Id.*

58. *Id.*

59. *Id.*

60. See *id.*

controlled federal executive branch, thereby counteracting the risk that certain provisions of the Voting Rights Act will be selectively enforced as political winds shift.

In light of the above, this article's third goal is to spark a concrete discussion about what this new system might actually look like. It outlines two proposals that would move things closer to a fire-alarm regulatory model, and in the process make it easier for litigants of all stripes to address the soft underbelly of our enforcement apparatus in the post-*Shelby County* world—local voting discrimination.

The first proposal is to permit voting litigation to be placed on the dockets of local legal aid providers. It would also lower the costs of such litigation by expanding an extant service—the federal observer program—nationwide and imparting a duty upon lawyers to participate in that program. Currently, citizens lack an easily accessible entry point to legal assistance with voting claims.⁶¹ What they need is an infrastructure that permits them to “sound the alarm” and then take action. The Legal Services Corporation (“LSC”) network can provide that infrastructure. Last year it distributed grants to 134 legal aid programs with nearly 800 offices covering every state and territory in the nation.⁶²

Lawmakers could then make voting litigation more feasible by enabling legal aid providers to work with the federal observer program. The federal observer program stems from Section 8 of the Voting Rights Act.⁶³ It authorizes the Attorney General to dispatch federal monitors to locations where there is cause to believe that race-based voting discrimination may occur.⁶⁴ Observers themselves document voter treatment by election officials, the availability of voting materials and assistance, and the extent to which all voters have an equal opportunity to participate in the electoral process.⁶⁵ The evidence that is gathered is compiled into

61. See *infra* Part III.A; see also Jeanne Charn, *Legal Services for All: Is the Profession Ready?*, 42 LOY. L.A. L. REV. 1021, 1050 (2009) (discussing accessibility as a “critical component of a reformed legal aid system”).

62. See *About LSC*, LEGAL SERVS. CORP., <http://www.lsc.gov/about-lsc/doing-business-lsc-rfps/rfp-researchgrants-facilitator> (last visited Dec. 1, 2015).

63. See 52 U.S.C.A § 10305 (West 2015).

64. See *id.*

65. See *id.*

reports, and the observers can serve as witnesses in court if the need arises.⁶⁶ If legal aid attorneys were required to report their clients' complaints to the voting section in exchange for the benefit of federal observer reports, the federal government would gain an information repository even more extensive than the former preclearance regime, and legal aid providers would be able to outsource voting investigations, reducing the in-house manpower required to litigate voting claims.⁶⁷ Taken together then, the legal aid system can provide the manpower and the observer program can provide the evidence needed to make voting litigation more realistic for citizens at the local level.

The second proposal is for Congress to adopt a "judicare"⁶⁸ system within the limited domain of local voting litigation. Pursuant to that system, individuals with a colorable claim would receive a voucher from the government that they could place with a private attorney or non-profit organization of their choice. Those parties then litigate the issue, but crucially, the federal government covers the cost of suit.⁶⁹ The "judicare" system is effective because it relies on "the natural distribution of the private lawyers in [an] area to deliver legal service[s]" to clients.⁷⁰ It would dramatically expand access and make local voting litigation a reality.

Importantly, the proposals offered here would meet the substantive, geographical, and doctrinal challenges that characterize the modern-day voting environment. Substantively, the voting impediments that predominate today are focused on restricting access to the polls.⁷¹ This has been driven in part by the broad

66. *Frequently Asked Questions*, U.S. DEP'T OF JUSTICE [hereinafter DOJ FAQ], <http://www.justice.gov/crt/frequently-asked-questions-2> (last visited Dec. 1, 2015).

67. *See About Federal Observers and Election Monitoring*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/crt/about-federal-observers-and-election-monitoring> (last visited Dec. 1, 2015) (explaining the relationship between federal observers and the Voting Section).

68. "Judicare" is a commonly used abbreviation for a legal services program "patterned after the approach used in the health care field under the Medicaid and Medicare programs that support services provided by private medical providers paid on a fee-for-service basis by governmental funds." Larry R. Spain, *The Opportunities and Challenges of Providing Equal Access to Justice in Rural Communities*, 28 WM. MITCHELL L. REV. 367, 377-78 (2001).

69. *Id.* at 377.

70. Samuel J. Brakel, *Free Legal Services for the Poor—Staffed Office Versus Judicare: The Client's Evaluation*, 1973 WIS. L. REV. 532, 535 (1973).

71. *See Restricting the Vote*, BRENNAN CTR. FOR JUSTICE, <http://www.brennancenter.org/issues/restricting-vote> (last visited Dec. 1, 2015).

proliferation of photo-identification laws.⁷² Fortunately, however, the implementation of such impediments can be monitored by observers or reported on by citizens directly.⁷³ For that reason, an expanded federal observer program, or a locally driven “judicare” system, is well situated to combat such impediments.

Geographically, few of our concerns with respect to voting discrimination today are cabined in the way that they were in 1965.⁷⁴ As the Court made clear in *Shelby County*, voting cases are now as likely to arise in Florida and Ohio as they are to arise in Alabama and Mississippi.⁷⁵ Both proposals advanced here, however, would apply to the entire country. Indeed, that is a primary benefit of the fire-alarm regulatory model.⁷⁶

Doctrinally, election regulations must now comport with the standard articulated in *Shelby County*. That means that a statute’s “current burdens’ must be justified by ‘current needs,’ and any ‘disparate geographic coverage’ must be ‘sufficiently related to the problem that it targets.’”⁷⁷ Here, both proposals are predicated on bottom-up reporting by local actors with personal knowledge of discriminatory conditions. They are therefore tailored to meet the prevailing test because they would trigger enforcement based on current conditions of discrimination in local jurisdictions.

Though there are strengths and weaknesses to each of these ideas, the time to act is now. In recent years, state and local governments have been enacting new voting procedures at a remarkable pace.⁷⁸ Many of these changes are innocuous, but as the Supreme Court itself recognized, “voting discrimination still exists; no one doubts that.”⁷⁹ Accordingly, the status quo, where citizens have little choice but to depend on after-the-fact enforcement by a federal agency subject to the swinging pendulum of partisan

72. *See id.*

73. *See id.*

74. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2618–19 (2013).

75. *Id.*

76. *See McCubbins & Schwartz, supra* note 54, at 166, 173, 176.

77. *Shelby Cty.*, 133 S. Ct. at 2627 (quoting *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 203 (2009)).

78. Wendy R. Weiser, *Voter Suppression: How Bad? (Pretty Bad)*, AM. PROSPECT (Oct. 5, 2015, 2:09 PM), <http://prospect.org/article/22-states-wave-new-voting-restrictions-threatens-shift-outcomes-tight-races>.

79. *Shelby Cty.*, 133 S. Ct. at 2619.

control, is simply inadequate. Laws impacting citizens' ability to access the ballot are too important to be turned on and off with each transition in the executive branch.

Optimistically though, for that very reason, reform on this front is not beyond what is possible. The broad goal of affording access to the ballot, like the broad goal of affording access to the courts, is widely viewed as apolitical—an entailment of the nation's commitment to equality under law.⁸⁰ Indeed, when access to the ballot is restricted, democracy itself is impaired, for citizens are less able to hold their government accountable or to protect themselves from government overreach.⁸¹ Given that fact, it is imperative (as the epigraph⁸² points out) that we “marshal the forces of law” to remodel electoral systems that repress access to the ballot. The need for confidence in the integrity of the American political system requires it.

This article proceeds as follows. Part I provides background on the different forms of voting discrimination today and introduces the tools that the Voting Rights Act currently contains to combat such discrimination. Part II describes the extant model through which voting rights are enforced in the United States: (1) individual lawsuits brought by private citizens; (2) impact litigation brought by large national law firms and non-profits; and (3) bureaucratic enforcement by the DOJ. Throughout the discussion, it details the problems afflicting each option—namely, that individual lawsuits are prohibitively costly, impact litigation misses the lion's share of sub-state election changes, and bureaucratic enforcement can bend and sway depending on the direction of the prevailing political winds. Part II closes by diagnosing the *systemic* defect plaguing the current model—for example, that it too closely resembles a “police-patrol” regulatory model. Part III outlines two ways that the contemporary enforcement apparatus could be modified to better facilitate local voting litigation. The first proposal would add voting litigation to the dockets of local legal aid providers. It would also lower the costs of that litigation

80. Oliver Hall, *Death by a Thousand Signatures: The Rise of Restrictive Ballot Access Laws and the Decline of Electoral Competition in the United States*, 29 SEATTLE U. L. REV., 407, 411 (2005).

81. *Id.* at 411 (indicating that restrictions placed on political processes such as voting can hinder democracy).

82. See *supra* note 1 and accompanying text.

by expanding the federal observer program and imparting a duty upon lawyers to participate in election monitoring. The second proposal recommends that Congress adopt a “judicare” system within the limited domain of local voting litigation. Part III closes by explaining why the solutions offered here meet the challenges of the contemporary voting environment. Part IV concludes.

I. THE DIFFERENT FORMS OF VOTING DISCRIMINATION AND THE VOTING RIGHTS TOOLBOX

In order to comprehend how our enforcement apparatus can better facilitate local voting litigation, it will be useful to review the different forms of voting discrimination and the tools available to challenge such discrimination.

A. *Forms of Voting Discrimination*

There are two primary forms of voting discrimination today: “vote denial” measures and “vote dilution” measures.⁸³ Vote denial measures seek to make it more difficult for a person to *access* the ballot or have their vote counted. Provisions that fall into this category include classic impediments like literacy tests, moral character requirements, and poll taxes, as well as more recent impediments like polling place changes, polling hour changes, reductions in the number of polling places, onerous registration, absentee voting, provisional voting procedures, limitations on registration hours, slow registration processing, cutbacks on early voting, voter purges, election cancellations, deficiencies in the provision of bilingual election materials or assistance, and, more generally, threats, intimidation, violence, and social pressure against particular groups.⁸⁴

83. NAT'L COMM'N ON VOTING RIGHTS, PROTECTING MINORITY VOTERS: OUR WORK IS NOT DONE 103 (2014), votingrightstoday.org/LiteratureRetrieve.aspx?ID=125083.

84. See *id.* at 25, 34, 135, 179; Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 732 (2006) [hereinafter Tokaji, *The New Vote Denial*]; Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL OF RTS. J. 453, 457 (2008); Catherine Rampell, Opinion, *Voter Suppression Laws are Already Deciding Elections*, WASH. POST (Nov. 10, 2014), https://www.washingtonpost.com/opinions/catherine-rampell-voter-suppression-laws-are-already-deciding-elections/2014/11/10/52dc9710-6920-11e4-a31c-77759fc1eacc_story.html; THE LEADERSHIP CONFERENCE, REAL STORIES OF THE IMPACT OF THE VRA, CIVILRIGHTS.ORG, <http://www.civilrights.org/voting-rights/vra/real-stories.html> (last visited Dec. 1, 2015).

Vote dilution measures, by contrast, seek to make it more difficult for minority communities to *elect* candidates of their choice.⁸⁵ This feat is typically accomplished through the creation of electoral districts that either divide members of a racial minority group among several districts, artificially reducing the group's opportunity to influence elections, or place extraordinarily high percentages of members of a racial minority group in one or more districts, so that minority voting strength is artificially limited to those districts and is minimized in neighboring districts.⁸⁶ Vote dilution can also occur through the use of at-large districting systems (as opposed to single-member residential districts), the imposition of staggered-term provisions or majority run-off requirements, through alterations to the number of elected officials, through annexations of majority-race suburbs by a city or county, and, as mentioned before, through election date changes.⁸⁷

B. *The Voting Rights Toolbox*

The Constitution and the Voting Rights Act afford a number of tools that can be used to address vote denial and vote dilution measures enacted by state and local governments.⁸⁸

85. NAT'L COMM'N ON VOTING RIGHTS, *supra* note 83, at 10.

86. The former tactic is often referred to as "cracking" and the latter tactic as "packing." Vote dilution can also occur through "stacking," which concentrates low-income African American or Latino citizens with less education in the same districts as whites with high income and high education. Because individuals with lower income and education levels are less likely to vote, the white population will have a better chance to elect candidates of its choice. All three of these tactics assume the presence of racially polarized voting—that is, a situation where whites and racial minorities consistently prefer different candidates at the polls. See SOUTHERN ECHO, INC., REDISTRICTING STRATEGIES USED TO DILUTE MINORITY VOTING STRENGTH: PACKING, CRACKING, STACKING, AND STOVEPIPING; AND SWING DISTRICTS, PHANTOM DISTRICTS AND ABERRATION DISTRICTS 33, 35, 37 (2010), <http://redistrictinginstitute.org/wp-content/uploads/2011/01/Voting-Dilution-Techniques-Mike-Sayer.pdf>; see also S. POVERTY LAW CTR., DRAWING THE LINE: A GUIDE FOR PROTECTING VOTING RIGHTS DURING REDISTRICTING 14, 17 (2002), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/drawing_the_line.pdf.

87. See Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838, 2870–71 (2014); Tokaji, *The New Vote Denial*, *supra* note 84, at 703; S. POVERTY LAW CTR., *supra* note 86, at 14–15.

88. See JOSHUA FIELD, CTR. FOR AM. PROGRESS, THE VOTING RIGHTS PLAYBOOK: WHY COURTS MATTER POST-SHELBY COUNTY V. HOLDER 5, 14, 29 (2014), <https://www.americanprogress.org/wp-content/uploads/2014/02/VotingRightsPlaybookReport1.pdf>. The preceding discussion is not meant to be comprehensive; it merely covers the primary tools available to challenge discriminatory election procedures. It does not discuss other federal voting statutes that could be useful—the National Voter Registration Act, 52 U.S.C.A. §§

To begin, the Fourteenth⁸⁹ and Fifteenth Amendments⁹⁰ to the U.S. Constitution have been interpreted to prohibit intentional discrimination on the basis of race.⁹¹ Litigants can therefore challenge any vote denial or vote dilution measure purportedly enacted with a discriminatory purpose.⁹² The Equal Protection Clause of the Fourteenth Amendment also protects against government classifications that do not adequately serve legitimate state interests. The Amendment has been used to challenge a host of non-uniformities in election administration.⁹³

The Voting Rights Act adds a multitude of additional tools. Chief among them is the prophylactic framework of Section 5—the federal “preclearance” mechanism.⁹⁴ Section 5 requires certain jurisdictions to obtain the approval of a federal court or the federal government every time they “enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.”⁹⁵ In order to win federal approval, the jurisdiction must demonstrate that the change in its law does not have the purpose and will not have the effect of discriminating on the basis of race, color, or membership in a lan-

20501–20511 (West 2015); the Help America Vote Act, 52 U.S.C.A. §§ 15301–21145; and the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C.A. §§ 20301–20311. It also does not discuss state level equivalents to the federal Voting Rights Act (of which three states currently have). Paige A. Epstein, *Addressing Minority Vote Dilution Through State Voting Rights Acts* 6 (Univ. of Chi. Pub. Law & Legal Theory, Working Paper No. 474, 2014), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1918&context=public_law_and_legal_theory.

89. The Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws” and empowers Congress to enforce its provisions through appropriate legislation. U.S. CONST. amend. XIV, §§ 1, 5.

90. The Fifteenth Amendment provides that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude” and empowers Congress to enforce the amendment through appropriate legislation. U.S. CONST. amend. XV, §§ 1–2.

91. See, e.g., *Washington v. Davis*, 426 U.S. 229, 239–40 (1976).

92. See, e.g., *Texas v. United States*, 887 F. Supp. 2d 133, 161 & n.32 (D.D.C. 2012) (stating that “[t]he parties have provided more evidence of discriminatory intent than we have space, or need, to address here.”), *vacated*, 133 S. Ct. 2885 (2013) (remanding the case for consideration in light of *Shelby Cty.* decision).

93. See, e.g., *League of Women Voters v. Brunner*, 548 F.3d 463, 466, 468–69 (6th Cir. 2008) (discussing disparities in voter registration, absentee ballots, polling place operations, poll workers, provisional voting, and disability access that gave rise to an equal protection claim).

94. See Mark A. Posner, *The Real Story Behind the Justice Department’s Implementation of Section 5 of the VRA: Vigorous Enforcement, as Intended by Congress*, 1 DUKE J. CONST. L. & PUB. POL’Y 79, 79 (2006).

95. 52 U.S.C.A. § 10304 (West 2015).

guage minority group.⁹⁶ Without preclearance, the change is not legally enforceable.⁹⁷ As noted before, the Supreme Court recently paralyzed Section 5 when it held that the coverage formula used to select jurisdictions for federal preclearance did not adequately reflect current conditions of discrimination throughout the country.⁹⁸ Nevertheless, federal preclearance has *not* entirely disappeared. Section 3(c), the Voting Rights Act's "bail-in" provision, still permits federal courts to place states and political subdivisions under preclearance if they have engaged in constitutional—meaning intentional—voting discrimination.⁹⁹

Given that preclearance has been sapped of its vitality, though, the most important tool that litigants possess today rests in Section 2 of the Voting Rights Act. Section 2 prohibits any state or political subdivision from imposing or applying a "voting qualification," "prerequisite to voting," or "standard, practice, or procedure" with respect to voting that "*results in a denial or abridgment* of the right of any citizen of the United States to vote on account of race or color."¹⁰⁰ A violation of Section 2 is established

96. See *id.* In evaluating whether a proposed voting change has a discriminatory purpose, the DOJ examines the circumstances surrounding the submitting authority's adoption of the change to determine whether direct or circumstantial evidence exists of any discriminatory purpose of denying or abridging the right to vote on account of race, color, or membership in a language-minority group. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–68 (1977); see also *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. § 51.53 (2015). The Attorney General's evaluation of discriminatory purpose is guided by the analysis in *Arlington Heights*. See *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. § 51.54(a) (2015). With regard to the discriminatory effect prong of the Section 5 analysis, a proposed voting change will be deemed to have a discriminatory effect if the change would leave members of a racial minority group in a worse position than they had been before the change with respect to "their effective exercise of the electoral franchise." *Id.* § 51.54(b) (quoting *Beer v. United States*, 425 U.S. 130, 140–42 (1976)) (referring to this discriminatory effect as "retrogression").

97. Since 1965, the Attorney General has delegated the authority to administer this process to the Assistant Attorney General for Civil Rights ("AAG"). See *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. §§ 51.1–51.3 (2015). If the AAG determines that a proposed change satisfies the Section 5 legal standard, he or she will issue a letter to the jurisdiction indicating that the submission has been "pre-cleared" and can be implemented. *Id.* However, if the AAG determines that the submitting jurisdiction has not satisfied its burden of establishing that the proposed change is free of discriminatory purpose or effect, the DOJ will send a letter to the jurisdiction interposing an objection. *Id.* At that point, the jurisdiction may choose to seek preclearance in federal court, but until preclearance is granted, the change is not legally enforceable. *Id.*

98. See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

99. See 52 U.S.C.A. § 10302 (West 2015).

100. *Id.* § 10301(a) (emphasis added).

if, based on the totality of circumstances, it is shown that “the political processes leading to nomination or election in the [jurisdiction] are not *equally open* to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”¹⁰¹ The “results test”¹⁰² in Section 2 has long been used to challenge redistricting plans thought to dilute the voting strength of racial minority groups.¹⁰³ More recently, it has been used to challenge vote denial measures, including photo-identification provisions, on the ground that they result in a discriminatory effect against racial minority groups.¹⁰⁴

Moving beyond these all-purpose tools, the Voting Rights Act contains a number of narrower provisions specifically designed to protect language minority groups.¹⁰⁵ Section 4(e), for example, protects the right to vote of United States citizens educated in American-flag schools in a language other than English, notwithstanding any inability to read, write, understand, or interpret English.¹⁰⁶ Section 203 mandates that jurisdictions with significant language minority populations provide all registration or voting notices, forms, instructions, assistance, or other materials, or information relating to the electoral process, including ballots, in the language of the applicable language minority group.¹⁰⁷ Section 208 further provides that “[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or of-

101. *Id.* § 10301(b) (emphasis added).

102. *See* *Miss. State Chapter, Operation Push v. Mabus*, 932 F.2d 400, 405 (5th Cir. 1991) (citations omitted) (“Prior to the 1982 amendments to the Voting Rights Act, a party had to establish discriminatory intent to prove a § 2 violation. The 1982 amendments replaced the ‘intent test’ with a ‘results test.’”).

103. *See, e.g., United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 746–49 (N.D. Ohio 2009).

104. *See, e.g., Veasey v. Perry*, 71 F. Supp. 3d 627, 632–33 (S.D. Tex. 2014).

105. *See United States v. Berks Cty.*, 277 F. Supp. 2d 570, 579 (E.D. Pa. 2003) (noting that “[t]he right to vote encompasses more than the right to gain physical access to a voting booth” and that “[p]ersons must have the opportunity to comprehend the registration and election forms and the ballot itself to cast an informed and effective vote”).

106. 52 U.S.C.A. § 10303(e)(1); *see Berks Cty.*, 277 F. Supp. 2d at 578–80.

107. *See* 52 U.S.C.A. § 10503; Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 28 C.F.R. §§ 53.3, 55.6 (2011).

ficer or agent of the voter's union."¹⁰⁸ Each of these provisions can be enforced against states and their political subdivisions.

Finally, to cover the most blatant forms of voting discrimination, Section 11(b) of the Voting Rights Act makes it illegal to intimidate, threaten, or coerce, or attempt to intimidate, threaten or coerce, any person for voting or attempting to vote.¹⁰⁹

Taken together, the Constitution and the Voting Rights Act provide citizens with a wealth of provisions that can be used to assert claims against state and local governments.

II. VOTING LITIGATION IN THE UNITED STATES: THE CURRENT MODEL AND ITS PROBLEMS

There are three primary mechanisms through which the above provisions are enforced against states and their political subdivisions today—individual private litigation, impact litigation by law firms and non-profits, and bureaucratic enforcement by the federal government. This part describes and assesses each mechanism before diagnosing the systemic problem plaguing the current regulatory model.

A. *The Individual Private Right of Action*

Section 2 of the Voting Rights Act affords individual litigants with a private right of action to remedy practices that were enacted with a discriminatory purpose or "result[] in a denial or abridgment of the right of any citizen of the United States to vote."¹¹⁰ So when a local civic leader, unsuccessful political candidate, or politically interested but disempowered citizen decides that he or she would like to challenge, for example, a city's use of at-large districting, the relocation or closing of a polling place, or the failure to provide bilingual election assistance, federal law theoretically provides an avenue for recourse.

108. 52 U.S.C.A. § 10508.

109. *Id.* § 10307(b).

110. *Id.* § 10301. On the availability of private rights of action in election litigation, see generally Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113 (2010) [hereinafter Tokaji, *Public Rights*].

This avenue is largely illusory, however, for the average citizen. As the Supreme Court recognized all the way back in 1966, “[v]oting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours . . . in preparation for trial.”¹¹¹ Because each hour comes at considerable cost, it is virtually impossible for ordinary citizens to enlist private lawyers to handle voting claims.¹¹² True, the Voting Rights Act allows for fee shifting in actions brought to enforce the voting guarantees of the Fourteenth or Fifteenth Amendments.¹¹³ But those awards are *discretionary*, not mandatory.¹¹⁴ And given the enormous resources required to litigate even fairly simple voting claims, citizens are generally unable to risk their fortunes in all but the most airtight cases.¹¹⁵

The incentives are all the more daunting in light of the non-individualized benefits of voting litigation. As noted by Judge Sutton, voting lawsuits “effectively benefit[] everyone but no one in particular.”¹¹⁶ Indeed, the lead plaintiff’s individualized harm is

111. *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966).

112. See e.g., Jocelyn Friedrichs Benson, *¡Su Voto Es Su Voz! Incorporating Voters of Limited English Proficiency into American Democracy*, 48 B.C. L. REV. 251, 290–91 (2007) (“[P]rivate lawsuits brought to force covered jurisdictions into compliance require a great deal of detailed evidence of discrimination and participation barriers, and for that reason are often too expensive for private litigants or community groups to pursue.”) (citing Glenn D. Magpantay, *Two Steps Forward, One Step Back, and a Side Step: Asian Americans and the Federal Help America Vote Act*, 10 ASIAN PAC. AM. L.J. 31, 39 (2005) (“The Voting Rights Act has its own private right of action, but litigating under the Act can sometimes be prohibitively expensive.”)).

113. 52 U.S.C.A. § 10310(e).

114. See *id.* (“In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its *discretion*, may allow the prevailing party, other than the United States, a reasonable attorney’s fee, reasonable expert fees, and other reasonable litigation expenses as part of the costs.”) (emphasis added).

115. This is to say nothing of the hurdles they might face regarding sovereign and official immunity. The doctrine of sovereign immunity bars damages actions against states and state officials in their official capacity, but does not bar suits against state officials seeking prospective declaratory or injunctive relief. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102–03 (1984). The doctrine of official immunity entitles certain government officials performing discretionary functions to a qualified immunity shielding them from suit for damages. See, e.g., *Harlow v. Fitzgerald*, 475 U.S. 800, 800 (1982) (describing absolute immunity). Local governmental units and officers can be liable in suits for damages, but only when their violations of constitutional or statutory rights occurred pursuant to government policy or custom. See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978). It is possible, though not clearly established, that recovery of attorneys’ fees could be barred under these doctrines. See *The Eleventh Amendment: A Bar to Awards of Attorneys’ Fees in Suits Against State Officials?*, VAL. U. L. REV. 169, 169 (1975).

116. *Ohio Republican Party v. Brunner*, 544 F.3d 711, 720 (6th Cir. 2008) (en banc), *vacated*, 129 S. Ct. 5, 6 (2008) (per curiam).

usually not the primary target. Instead, voting litigation seeks to counteract a “risk that an electoral law or practice will disproportionately harm certain groups of voters, thereby threatening to skew electoral outcomes and, more broadly, the distribution of political power.”¹¹⁷ In light of this fact, it is not hard to see why individual citizens might hesitate to sacrifice their own resources for a benefit that is both attenuated and diffuse.

The current legal aid system offers no safety valve. Voting litigation generally falls outside the purview of local legal aid providers,¹¹⁸ who focus instead on juvenile, health, and housing issues, family law, consumer protection, and employment and income maintenance cases.¹¹⁹ Furthermore, grantees or contractors receiving funds from the LSC—the single largest funder of legal aid in the country—are *prohibited* from (1) assisting political parties, associations, or candidates, (2) using LSC funds to “oppos[e] any ballot measure, initiative, or referendum,”¹²⁰ or (3) handling litigation that is in any way related to the topic of redistricting.¹²¹ All in all, the legal aid system has an incredible network of 800 offices that provide assistance to low income Americans in every state in the nation.¹²² But that infrastructure is closed off to citizens hoping to impact the nature of government entitlements by filing litigation designed to expand access to the ballot box.

117. Tokaji, *Public Rights*, *supra* note 110, at 154.

118. To be clear, with the exception of a few topics discussed *infra*, legal aid providers are not *prohibited* from bringing claims under the Voting Rights Act. See 45 C.F.R. § 1632.3(b) (2014). It is simply not their practice to do so. I do note, however, that Texas Rio Grande Legal Aid is involved in the litigation challenging the Texas voter ID legislation. See Notice of Pending Matters and Submission of Proposed Orders at 10, *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014) (No. 2:13-CV-00193). As discussed below, they are joined in litigation by a host of large law firms and nonprofit organizations. See *infra* notes 127–30 and accompanying text.

119. See Legal Servs. Corp., *Legal Services Corporation by the Numbers: The Data Underlying Legal Aid Programs 17* (2014), <http://www.lsc.gov/media-center/publications/2014-lsc-numbers>.

120. See 45 C.F.R. § 1608.3. It is not clear that litigation seeking to enjoin a validly enacted ballot measure, for example, would fall under this umbrella, which seems to target direct lobbying for or against such legislation.

121. See *id.* §§ 1632.2, 1632.3.

122. See *Who We Are*, LEGAL SERVICES CORP., <http://www.lsc.gov/about-lsc/who-we-are> (last visited Dec. 1, 2015).

B. *Pro Bono Assistance from Law Firms and Non-Profits*

Large corporate law firms and civil rights-oriented non-profit organizations present a second structure through which voting rights are enforced in the United States. Because these actors have access to large quantities of resources, they frequently handle “impact litigation”¹²³ in a pro bono capacity,¹²⁴ often working alongside “cause-oriented” non-profit organizations.¹²⁵ During the past twenty-five years, they have “shown themselves adept at mobilizing vast quantities of pro bono labor and have become crucial drivers of the pro bono boom.”¹²⁶ It is no exaggeration to say that corporate law firms have become the face of pro bono in the United States.¹²⁷

Voting litigants have benefited from this development. Take the following two examples. First, Texas recently enacted a voter ID law that requires citizens to show either a driver’s license, an election identification certificate, a Department of Public Safety personal ID card, a military ID, a citizenship certificate, a passport, or a license to carry a concealed handgun before they are

123. Impact litigation is generally defined as litigation filed for the express purpose of changing laws or policies, rather than to recover individualized benefits. See Peter Margulies, *Political Lawyering, One Person at a Time: The Challenge of Legal Work Against Domestic Violence for the Impact Litigation/Client Service Debate*, 3 MICH. J. GENDER & L. 493, 493 (1996).

124. For unfamiliar readers, the ABA Model Rules of Professional Conduct defines pro bono activity as “legal services without fee or expectation of fee” to “persons of limited means” or organizations that address the needs of persons with limited means. MODEL RULES OF PROF’L CONDUCT r. 6.1 (AM. BAR ASS’N 2015).

125. See Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—and Should Know—About American Pro Bono*, 7 HARV. L. & POL’Y REV. 83, 100–01 (2013) (“A study of the pro bono activities of the nation’s two hundred largest law firms found that such firms are more likely to partner with ‘cause-oriented’ organizations (rather than cultural, community, or legal services organizations), with the most common causes including civil rights and liberties and issues related to children.”). In the voting realm, some of the most active non-profit organizations include the Advancement Project, the American Civil Liberties Union, the Brennan Center for Justice, the Mexican American Legal Defense and Education Fund, the National Association for the Advancement of Colored People Legal Defense and Educational Fund, and the Lawyers’ Committee for Civil Rights Under Law. Corporate law firms frequently team up with these organizations, as Jeanne Charn points out, because “lawyers from giant corporate firms often have little experience relevant to the needs of low- and middle-income people. They require training, practice guides, and sometimes, supervision by experienced advocates.” See Charn, *supra* note 61, at 1042.

126. Cummings & Sandefur, *supra* note 125, at 84.

127. Charn, *supra* note 61, at 1042; see Cummings & Sandefur, *supra* note 125, at 84.

permitted to vote.¹²⁸ The law also mandates that there be a match between a voter's name as it appears on his or her ID and as it appears on the state's registration rolls.¹²⁹ Believing that the statute was enacted to discriminate against Hispanic and African American voters, and noting that those racial minority groups disproportionately lack the forms of ID required by the law, several individuals sought to challenge the legislation under the Constitution and the Voting Rights Act.¹³⁰ In order to fuel this costly endeavor, a constellation of well-funded entities opted to join the fray: WilmerHale LLP, Dechert LLP, the Lawyers' Committee for Civil Rights, the NAACP Legal Defense and Educational Fund, the Brennan Center for Justice, and the Campaign Legal Center.¹³¹ Working together (there are more than fifty counsels of record), they represent many plaintiff groups, and "have produced more than 300 court filings, including motions, notices, and briefs."¹³²

North Carolina offers a similar tale. There, the state legislature enacted a statute that would require citizens to present a government-issued photo ID in order to vote, but it excludes IDs from colleges, government employers, and those issued by public assistance agencies, which are commonly used by poor and minority voters.¹³³ North Carolina's new law "also shortens the time for early voting; eliminates same-day registration; cuts out Sunday voting"—which is often used by African American voters—"eliminates the option to vote a straight ticket; . . . and ends a program that preregistered high school students."¹³⁴ In order to fuel a challenge to this legislation, another team of well-heeled players came together: Kirkland & Ellis LLP, Perkins Coie LLP,

128. TEX. ELEC. CODE ANN. § 63.0101 (West 2015), amended by H.B. 910, 84th Leg., Reg. Sess. (Tex. 2015); see *Texas v. Holder*, 888 F. Supp. 2d 113, 115–18 (D.D.C. 2012), vacated and remanded, 133 S. Ct. 2886 (2013).

129. TEX. ELEC. CODE ANN. § 63.001 (West 2015).

130. See *Veasey v. Perry*, 71 F. Supp. 3d 627, 632–33 (S.D. Tex. 2014).

131. See Notice Pending Matters and Submission Proposed Orders at 8–9, *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014) (No. 2:13-CV-00193). The United States and a number of smaller law firms were also involved: Brazil & Dunn LLP; The Law Offices of Neil G. Baron; Derfner, Altman & Wilborn; the Law Offices of Rolando L. Rios; and the Law Offices of Preston Henrichson. *Id.* at 8–10.

132. LOPEZ, *supra* note 12, at 6.

133. See John Peragine, *North Carolina Prosecutor Takes Shots at the Laws He's Obligated to Enforce*, N.Y. TIMES (Oct. 24, 2013), http://www.nytimes.com/2013/10/25/us/north-carolina-prosecutor-takes-shots-at-the-laws-hes-obliged-to-enforce.html?_r=0.

134. *Id.*

the ACLU Voting Rights Project, the Southern Coalition for Social Justice, and the Advancement Project.¹³⁵ They have filed more than 120 documents,¹³⁶ and their efforts have been integral to ensuring that North Carolinians receive the electoral system they are due under law.

The Texas and North Carolina anecdotes illustrate the pros and cons of relying on law firms and non-profits to engage in voting litigation on behalf of the public. The primary strength is that well-funded law firms and highly experienced non-profit attorneys frequently make it possible to test the validity of far-reaching voting legislation. The downside is that these resources too often are marshaled *only* to combat large, high-profile, statewide measures; voting impediments *below* the state level are generally overlooked.¹³⁷ This division is understandable of course, as statewide measures impact a large number of voters. But local governments also impact citizens' lives, and the sub-state level is where the majority of discriminatory changes were discovered during the era of federal preclearance.¹³⁸

All told, the problem here is that large law firms and civil-rights-oriented non-profit organizations have little incentive to litigate lower-profile cases against sub-state actors.¹³⁹ Law firms are motivated to do pro bono work by market competition, and they believe that high-profile matters influence “[their] . . . positions in the Am Law and vault.com firm rankings,” while bolster-

135. See, e.g., Joint Status Report Regarding Defendants' and the State Legislators' Document Production at 4–6, N.C. State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322 (M.D.N.C. 2014) (No. 1:13-CV-658). The coalition also included the United States, as well as a number of small law firms, including Tin, Fulton, Walker & Owrn, PLLC, Poyners Pruill, Bowers Law Office LLC, and Ogletree, Deakins, Nash, Smoak & Stewart, P.C. See *id.* at 4–7.

136. LOPEZ, *supra* note 12, at 6.

137. See, e.g., Ho, *supra* note 53 (“[P]articularly at the local level . . . the major political parties and advocacy groups rarely commit the resources necessary to litigate.”); LOPEZ, *supra* note 12, at 4 (“Section 5’s loss will perhaps be felt most acutely at the local level.”).

138. See Kousser, *supra* note 52, at 3–5; LOPEZ, *supra* note 12, at 4. See generally *Section 5 Objection Letters*, U.S. DEP’T OF JUSTICE, http://www.justice.gov/crt/records/vot/obj_letters/index.php (last visited Dec. 1, 2015) (compiling a list of section 5 objections by state).

139. The ACLU filed litigation against the Ferguson-Florissant School District, for example, only after racial divisions in the city of Ferguson burst onto the national scene. See Press Release, Am. Civil Liberties Union, *ACLU Sues Ferguson-Florissant School District, Charging Electoral System Undermines African-American Vote* (Dec. 18, 2014), <https://www.aclu.org/news/aclu-sues-ferguson-florissant-school-district-charging-electoral-system-undermines-african>.

ing “their attractiveness both to clients and to attorneys they might try to recruit.”¹⁴⁰ Non-profit organizations, for their part, need to raise money, and a good way to motivate donors is to handle high-profile legal disputes. Finally, regarding the solo and small-firm bar, which is “the main legal resource” for most people,¹⁴¹ those attorneys can only “do pro bono work when they feel they can afford to do it.”¹⁴² Indeed, “[f]or lawyers working in small private practice law firms, pro bono work often means foregone income,”¹⁴³ and because voting lawsuits can be time-intensive, they are not likely to fall within the pro bono capacity of the solo and small-firm bar.¹⁴⁴

Ultimately, the vast majority of problematic voting changes take place at the local level, but those jurisdictions generally fail to attract the interest of law firms and non-profits that possess the resources required to effectively combat the changes.

C. *Bureaucratic Enforcement by the Federal Government*

Bureaucratic enforcement by the federal government is the third mechanism through which voting rights are enforced in the United States. At the DOJ, approximately thirty trial attorneys in the Civil Rights Division’s Voting Section are responsible for suing in federal court to enforce the Voting Rights Act,¹⁴⁵ the National Voter Registration Act,¹⁴⁶ the Uniformed and Overseas Citizens Absentee Voting Act,¹⁴⁷ the Voting Accessibility for the El-

140. Cummings & Sandefur, *supra* note 125, at 97. See Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 *FORDHAM L. REV.* 2357, 2370–71 (2010); Adam Liptak, *The Case Against Gay Marriage: Top Law Firms Won’t Touch It*, *N.Y. TIMES* (Apr. 11, 2015), <http://www.nytimes.com/2015/04/12/us/the-case-against-gay-marriage-top-law-firms-wont-touch-it.html> (noting that all of the top law firms declined to argue in favor of traditional marriage in part because “[f]irms are trying to recruit the best talent from the best law schools”).

141. Charn, *supra* note 61, at 1035.

142. Cummings & Sandefur, *supra* note 125, at 95.

143. *Id.* at 96.

144. See, e.g., Leslie C. Levin, *Pro Bono Publico in a Parallel Universe: The Meaning of Pro Bono in Solo and Small Law Firms*, 37 *HOFSTRA L. REV.* 699, 701 (2009) (noting that large firms have an increased ability to handle pro bono work when compared to solo and small firm practitioners).

145. 52 U.S.C.A. §§ 10306(b)–(c), 10308(d), 10308(f), 10504, 10701(a) (West 2015).

146. *Id.* § 20510.

147. *Id.* § 20307.

derly and Handicapped Act,¹⁴⁸ and the Help America Vote Act.¹⁴⁹ Voting Section attorneys also work with states and localities to help them understand their obligations under the Voting Rights Act, and they can send federal observers to monitor elections in certain jurisdictions when it is deemed necessary.¹⁵⁰

There are obvious strengths to this top-down design: the federal government has abundant resources; Voting Section attorneys are experienced specialists in the area of election law; and centralizing virtually all of the voting rights enforcement in a single entity permits the federal government to keep track of trends and to establish best practices.

Still, there are at least three problems with this framework today. First, the federal preclearance mechanism in Section 5—the “crown jewel”¹⁵¹ of the Voting Rights Act—has been paralyzed by the Supreme Court’s decision in *Shelby County*.¹⁵² The loss of this prophylactic framework is not only concerning in that it no longer blocks or deters discriminatory voting changes, but it is also troubling because the DOJ now lacks critical information about new voting procedures that Section 5 once mandated be disclosed prior to implementation.¹⁵³ This is a serious loss.

In 2012, for example, the final full calendar year preceding the *Shelby County* decision, the Voting Section reviewed 18,146 changes in election law or procedure submitted by jurisdictions that were subject to the preclearance requirement.¹⁵⁴ The DOJ’s current ad hoc method of learning about voting discrimination through web-based complaints and outreach to select interest groups is unlikely to be an adequate replacement. In other words,

148. *Id.* § 20105.

149. *Id.* §§ 15301–21145.

150. Civil Rights Div.’s Voting Section, *Frequently Asked Questions*, U.S. DEPT OF JUSTICE, <http://www.justice.gov/crt/about/vot/misc/faq.php#faq14> (last visited Dec. 1, 2015). As detailed *infra*, it is unclear whether the DOJ retains this authority after *Shelby County*. See Cody Gray, *Savior Through Severance: A Litigation-Based Response to Shelby County v. Holder*, 50 HARV. C.R.-C.L. L. REV. 49, 95 (2015) (presenting a strategy through which it could preserve this authority).

151. See Heather Gerken, *Goodbye to the Crown Jewel of the Civil Rights Movement*, SLATE (June 25, 2013, 3:50 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/supreme_court_and_the_voting_rights_act_goodbye_to_section_5.html.

152. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

153. See LOPEZ, *supra* note 12, at 1, 7.

154. Civil Rights Div., *Section 5 Changes by Type and Year*, U.S. DEPT OF JUSTICE, <http://www.justice.gov/crt/section-5-changes-type-and-year-3> (last updated Aug. 6, 2015).

effective top-down enforcement by the federal government is quite a bit more difficult today.

Second, compounding this difficulty, the DOJ has stopped sending federal observers to jurisdictions with a history of discrimination in light of the Supreme Court's decision in *Shelby County*.¹⁵⁵ This practice may or may not stand,¹⁵⁶ but for now the DOJ no longer possesses a critical tool for obtaining evidence in advance of voting litigation. Before *Shelby County*, that is, the observer provision authorized the Attorney General to dispatch federal observers if he had either received "written meritorious complaints" that race-based voting discrimination was "likely" in a particular location or had determined, after investigation, that federal observers were "necessary" to enforce the guarantees of the Fourteenth and Fifteenth Amendments.¹⁵⁷ Federal observers themselves served as "the eyes and the ears of the Justice Department,"¹⁵⁸ documenting "voter treatment by election officials and others both outside and inside polling places[,] the availability of voting materials and assistance (particularly for language minority, first time, elderly, illiterate, and handicapped voters)[,] and the extent to which all voters ha[d] an equal opportunity to participate in the electoral process."¹⁵⁹ They subsequently prepared reports that could be filed in court and would serve as witnesses in court if needed.¹⁶⁰ Today, lacking this tool, the DOJ can no longer harvest information from the ground up to support its contemplated litigation against state and local governments.¹⁶¹

The third and perhaps most important flaw in the current regime is that it entrusts the enforcement of federal voting law to

155. DOJ itself has made no indication either way on this issue. See NAT'L COMM. ON VOTING RIGHTS, *supra* note 83, at 33.

156. See Gray, *supra* note 150, at 77–78 (offering a strategy to preserve Section 8 authority).

157. See 52 U.S.C.A. § 10305 (West 2015).

158. *Voting Rights Act: Sections 6 and 8—The Federal Examiner and Observer Program, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 17–18 (2005)* [hereinafter *House Observer Hearing*] (statement of Barry H. Weinberg, Former Deputy Chief and Acting Chief, Voting Section, Civil. Rights Div., U.S. Dep't of Justice).

159. James Thomas Tucker, *The Power of Observation: The Role of Federal Observers Under the Voting Rights Act*, 13 MICH. J. RACE & L. 227, 248 (2007).

160. *Id.* at 252.

161. *But see* Gray, *supra* note 150, at 52–53 (offering a legal strategy to restore the federal observer program).

an agency subject to the prevailing political winds. True, the DOJ has sought to construct a firewall between itself and the White House to prevent the political manipulation of the nation's law enforcement activities, but in the Voting Section, history suggests that this firewall has eroded, if it ever truly existed.¹⁶²

Consider first the anecdotal evidence. On March 12, 2013, the DOJ Inspector General ("IG") released a report examining the enforcement practices of the Voting Section.¹⁶³ The IG's primary task was to investigate allegations that political and racial bias had systematically influenced the Voting Section's enforcement activities.¹⁶⁴ The IG conducted detailed interviews with DOJ staff and examined a subset of the lawsuits initiated by the Voting Section between 1993 and 2010.¹⁶⁵

The report is notable in several respects. To begin, it suggests that shifts in the Voting Section's enforcement activities coincided with transitions in political control of the DOJ.¹⁶⁶ According to the academic literature, this fault line makes sense. Legal scholars have generally recognized that "[c]onservatives and Republicans tend to favor state laws ensuring the responsible exercise of the right to vote[,] while "[l]iberals and Democrats tend to favor laws that maximize political participation and self-government."¹⁶⁷

More to the point, in depicting these enforcement shifts, the IG report describes decision making that is consistent with the exercise of "responsive partisanship"—that is—bureaucratic action undertaken for the purpose of pleasing a partisan constituency.¹⁶⁸ For example, during the Bush Administration, the Voting Section

162. See Nancy v. Baker, *Department of Justice*, in A HISTORICAL GUIDE TO THE U.S. GOVERNMENT 345, 347–49 (George Thomas Kurian ed., 1998) (noting historical efforts to remove the Justice Department from presidential control).

163. See 2013 IG REPORT, *supra* note 40, at 81–93 (examining enforcement of Section 5 claims by the Voting Section).

164. See *id.* at 251.

165. *Id.* at 19–24.

166. The investigation revealed "changes in enforcement priorities over time," but found "insufficient support" for a conclusion "that Division leadership in either the prior or current administration improperly refused to enforce the voting rights laws on behalf of any particular group of voters, or that either administration used the enforcement of the voting laws to seek improper partisan advantage." *Id.* at 251.

167. Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Voting Rights Law and Policy In Transition*, 127 HARV. L. REV. F. 243, 246 (2014).

168. See Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787, 1797 (2014).

filed the DOJ's first lawsuit alleging denial or abridgement of the rights of *white* voters to vote on account of race, suggesting an intent to please the partisan constituency that supports "race-neutral" enforcement of the voting laws.¹⁶⁹ By contrast, the Obama Administration seemed to oppose "reverse-discrimination" cases, stating that it did not want "to expand the use of the power of the Civil Rights Division in such a way that it would take us into areas that, though justified, would come at . . . the cost of people [that the] Civil Rights Division had traditionally protected."¹⁷⁰ This latter comment, issued by Attorney General Eric Holder, suggests an intent to please the partisan constituency that supports "traditional civil rights enforcement" on behalf of racial or ethnic minority groups.¹⁷¹

More directly, in an e-mail following a meeting with "voting rights advocacy groups," the Obama Administration's Assistant Attorney General for Civil Rights (AAG) told his staff:

I must candidly admit that I was also really pissed off during much of that meeting because I wholeheartedly agree with the sentiments offered by many in the group. I agree, for instance, that simply agreeing that section 7 enforcement is important, and sharing their desire to move forward, no longer cuts it. We said that last time and still have nothing to show and [are] nowhere near having anything to show.¹⁷²

The email then directed the Voting Section staff to present the AAG with "a draft complaint for a Section 7 case by Labor Day of that year," further evincing an intent to please a particular partisan constituency.¹⁷³

The IG report goes on to describe decision making that is consistent with the exercise of "ideological partisanship"—that is, bureaucratic action undertaken to satisfy an individual's sincere policy preferences, some of which track with salient partisan cleavages.¹⁷⁴ For example, during the Obama Administration, "[t]he evidence established that Division leadership . . . clearly

169. See 2013 IG REPORT, *supra* note 40, at 36. The case was certainly justifiable on a legal basis, and the DOJ ultimately succeeded at trial. See *United States v. Brown*, 494 F. Supp. 2d 440, 486–87 (S.D. Miss. 2007).

170. 2013 IG REPORT, *supra* note 40, at 52.

171. See *id.*; see also *id.* at 255.

172. *Id.* at 103 n.82, 104.

173. *Id.* at 103 n.86.

174. See Levitt, *supra* note 168, at 1796–97.

placed a higher priority on the enforcement of the [National Voter Registration Act]’s ballot-access provisions” than on enforcement of the statute’s “list-maintenance provisions.”¹⁷⁵ Indeed, one Voting Section attorney informed the IG that “she believed she had to ‘scratch the Section 7 itch’ before turning to Section 8 matters and that her supervisors would have criticized her if she had approved a Section 8 matter before a Section 7 one.”¹⁷⁶ By contrast, during the Bush Administration, “Division leadership initiated an effort . . . to enforce Section 8’s list-maintenance provision on a *systemic* basis.”¹⁷⁷ This enforcement effort led to the filing of several complaints and the conclusion of a number of settlements.¹⁷⁸

Lastly, the IG report is notable for its description of the Voting Section as an environment stricken by “deep ideological polarization,” which “fueled disputes and mistrust” amongst Section employees.¹⁷⁹ Significantly, on some occasions, these divisions elevated into incidents “involv[ing] the harassment and marginalization of employees and managers[,]”¹⁸⁰ based “at least in part [on] their political ideology or for positions taken on particular cases.”¹⁸¹ Indeed, in one instance, three attorneys “were counseled for making highly offensive and inappropriate sexual remarks about a female employee, together with remarks that she was ‘pro-black’ in her work.”¹⁸² On another occasion, a Deputy Assistant Attorney General in an email “explicitly stated his desire to remove attorneys from the Voting Section because of their political views[,]” calling them “mold spores” and stating his intention “to gerrymander all of those crazy libs right out of the section.”¹⁸³ More generally, and alarmingly, the report found that other DOJ components, “including components that specialize in subject areas that are also polit-

175. 2013 IG REPORT, *supra* note 40, at 107. The report notes that the enforcement of these provisions is “widely perceived to affect the electoral prospects of the political parties differently.” *Id.* at 252.

176. *Id.* at 107.

177. *Id.* at 97 (emphasis added).

178. *Id.* at 97–98. Again, “[t]he accepted wisdom is that Democrats prefer to expand the electorate while Republicans do not, because the demographic profile of non-voters is more similar to the Democratic party’s constituency.” David C. Kimball, Martha Kropf & Lindsay Battles, *Helping America Vote? Election Administration, Partisanship, and Provision Voting in the 2004 Election*, 5 ELECTION L.J. 447, 449 (2006).

179. *See* 2013 IG REPORT, *supra* note 40, at 251.

180. *Id.*

181. *Id.* at 253.

182. *Id.*

183. *Id.* at 139.

ically controversial, such as environmental protection[,] do not appear to suffer from the same degree of polarization and inter-necine conflict.”¹⁸⁴ In this unfortunate respect, the Voting Section was unique.

A news story issued on the same day as the IG report summarized the partisan rancor appearing to motivate the opposing sides of the debate.¹⁸⁵ According to liberals, under President Bush, “the Justice Department’s Civil Rights Division was run like a partisan fiefdom . . . [c]areer civil rights lawyers were pushed out and phantom threats, such as in-person voter fraud, were chased relentlessly.”¹⁸⁶ Conservatives, by contrast, contend that under the Obama Administration “the division is still a political snake pit—but now one in which conservatives are under attack.”¹⁸⁷ They accuse the Voting Section of engaging in “partisan gamesmanship by screening hires for ideology, trying to block Freedom of Information Act requests from conservative organizations, and choosing which civil rights laws to enforce based on racial and political preferences.”¹⁸⁸

Ultimately, the IG struck a different tone, finding that there was insufficient evidence to conclude that the DOJ leadership enforced the voting laws in an improper manner, but noting that “the perception remains that enforcement of the voting laws has changed with the election results.”¹⁸⁹

Empirical evidence bolsters the IG’s conclusion.¹⁹⁰ Figure 1, for example, displays the annual number of Section 5 enforcement matters handled by the Voting Section between 1965 and 2012.¹⁹¹ Tellingly, enforcement levels peak during periods of unified con-

184. *Id.* at 257. Indeed, the IG was “surprised and dismayed at the amount of blatantly partisan political commentary that [was] found in e-mails sent by some Voting Section employees on Department computers.” *Id.*

185. See Adam Serwer, *Shocker: Civil Rights Agency Did Not Discriminate Against Conservatives, Whites*, MOTHER JONES (Mar. 13, 2013, 11:03 AM), <http://www.motherjones.com/politics/2013/03/justice-department-civil-rights-division-inspector-general-report>.

186. *Id.*

187. *Id.*

188. *Id.*

189. 2013 IG REPORT, *supra* note 40, at 256.

190. See APPENDIX (providing detail on the data collection employed for this article).

191. See *infra* Figure 1. Recall that Section 5 of the Voting Rights Act is the federal preclearance mechanism. These lawsuits generally involve either an effort by the federal government to force a jurisdiction to pre-clear an election change, or a dispute between the parties over whether a change meets the federal preclearance standard.

trol of government by the Democratic Party and generally stagnate or decline otherwise.¹⁹²

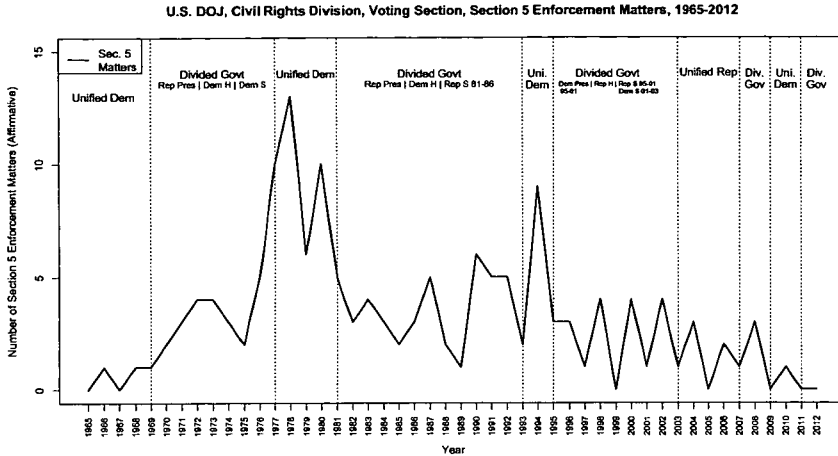


Figure 1: Annual number of Section 5 enforcement matters handled by the Voting Section between 1965 and 2012. In these lawsuits, the federal government goes to court to force a recalcitrant state to submit a change it made to its election laws to federal entities for approval. The vertical dashed lines demarcate transitions between periods of unified and divided partisan control of government. Tellingly, enforcement levels peak during periods of unified control of government by the Democratic Party and generally stagnate or decline otherwise.¹⁹³

Figure 2 reflects a similar pattern, this time depicting Section 2 enforcement matters.¹⁹⁴ Given that Section 2 is the primary tool available to voting litigants today, the political fault lines reflected in the data are troubling.

192. See *infra* Figures 1 & 2. The Figures depict the basic trends in the data. Readers are urged not to infer a causal relationship between the party in power and the enforcement level, as these graphs do not wholly account for other variables that could influence the trends, including funding levels and vacancies in the Voting Section. For a more rigorous analysis of these data, see Cody Gray, *Political Contestation, the Separation of Powers, and the Subterranean Retrenchment of the Voting Rights Act* (unpublished working paper) (on file with author).

193. In presidential election years, the “fourth year” of the presidency was deemed to run until January 19th of the following year. Additionally, the Democratic Party controlled the 107th Congress from January 3, 2001, to January 20, 2001, and from May 24, 2001 to January 3, 2003 (after Senator Jim Jeffords left the Republican Party to become an Independent and caucus with the Democrats). Thus, divided government continued in that period with a Republican President and Democratic Senate.

194. Recall that Section 2 of the Voting Rights Act affords a cause of action to remedy practices that “result[] in a denial or abridgment of the right of any citizen of the United States to vote.” See 52 U.S.C.A. § 10301 (West 2015).

Finally, the resources of the Voting Section have either swollen or contracted depending on the direction of the prevailing political winds. For example, Figure 3 depicts the annual number of authorized positions in the Civil Rights Division—a proxy for the Voting Section’s overall resources. Like before, periods of unified Democratic control of government coincide with upticks in the number of positions, whereas other periods depict stagnation or decline.

All told, the current method for delivering legal services designed to protect the right to vote—bureaucratic enforcement by the federal government—is problematic because the enforcement of federal voting law is too important to bend and sway in the political winds. These laws directly impact the composition and strength of a bloc of the electorate that often appears to threaten existing incumbent power. Partisan manipulation of the enforcement of federal voting law therefore influences whether these constituencies will be able to access the polls, and whether citizens can ultimately have faith in the integrity of their elections.

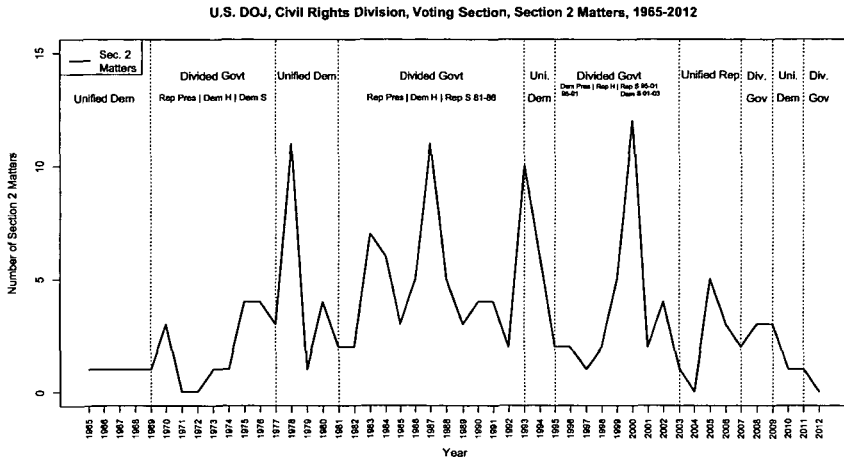


Figure 2: Annual number of Section 2 matters handled by the Voting Section between 1965 and 2012. The biggest upticks occurred during Democratic presidencies and immediately following *Thornburg v. Gingles*.¹⁹⁵

195. 478 U.S. 30 (1986).

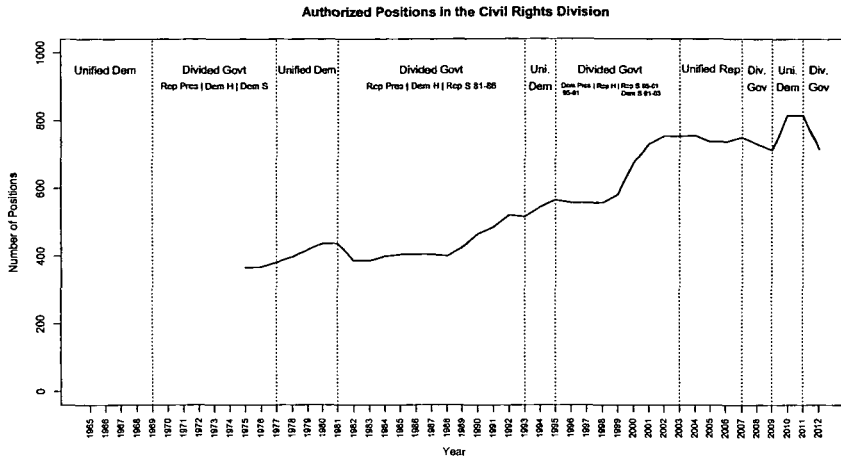


Figure 3: Annual number of authorized positions in the Civil Rights Division—a proxy for the Voting Section’s overall resources. Periods of unified Democratic control of government coincide with upticks in the number of positions, whereas other periods depict stagnation or decline.

Even setting these concerns aside, the government’s top-down enforcement structure is no longer sufficient to root out local discrimination because it has been hamstrung by the Supreme Court’s decision in *Shelby County*. The DOJ no longer receives notice of the universe of voting changes taking place in jurisdictions with a history of discrimination, and it no longer possesses the authority to monitor problematic elections.¹⁹⁶

D. *The Systemic Defect: Too Much Reliance on a “Police-Patrol” Regulatory Model*

Thinking systemically then, the current enforcement regime too closely resembles a “police-patrol” regulatory model. In such a model, an active and centralized principal examines a subset of their agents’ actions (goes on police patrols) in order to detect and remedy violations while simultaneously deterring misconduct.¹⁹⁷ Because private individuals have difficulty bringing voting cases, law firms and non-profits focus only on the upper crust—local jurisdictions no longer submit voting changes for preclearance—and

196. See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2613 (2013).

197. See McCubbins & Schwartz, *supra* note 54, at 166.

the federal government no longer deploys observers to harvest evidence from the ground up, this is essentially the enforcement model used to safeguard local voting rights today: the Civil Rights Division's Voting Section investigates a subset of jurisdictions to detect violations and deter future misconduct.¹⁹⁸

But this framework is flawed. First, the "police-patrol" oversight model inevitably requires that DOJ spend time investigating a great number of actions that do not turn out to constitute voting rights violations.¹⁹⁹ This process theoretically helps to deter abuse, but it is inefficient. Second, under any realistic police-patrol regulatory policy, the DOJ is capable of investigating only a small sample of the jurisdictions that could be engaging in discrimination.²⁰⁰ As a result, the agency is likely to miss violations. Third, because enforcement is centralized in a single federal overseer, rather than dispersed across entities, it is more susceptible to partisan manipulation.

This article argues that the remedy lies in reforms that would institute a "fire-alarm" regulatory model. The fire-alarm model is less centralized and involves less active and direct intervention than the police-patrol model. Under the fire-alarm system, in lieu of examining a sample of jurisdictions to detect violations, the principal establishes a system of rules, procedures, or informal practices that enable individual citizens or organized groups to complain about a jurisdiction (sound the "alarm"), charge it with a violation, and seek a remedy in court.²⁰¹ The principal's role is primarily focused on creating and perfecting this decentralized regime, and on intervening when needed in response to complaints.²⁰² In short, "[i]nstead of sniffing for fires," the principal "places fire-alarm boxes on street corners, builds neighborhood

198. See 2013 IG REPORT, *supra* note 40, at 9.

199. See McCubbins & Schwartz, *supra* note 54, at 168.

200. See *id.*

201. *Id.* at 166. As McCubbins and Schwartz explain, [s]ome of these rules, procedures, and practices afford citizens and interest groups access to information and to administrative decision-making processes. Others give them standing to challenge administrative decisions before agencies and courts, or to help them bring alleged violations to congressmen's attention. Still others facilitate collective action by comparatively disorganized interest groups.

Id.

202. See *id.*

fire houses, and sometimes dispatches its own hook-and-ladder in response to an alarm.”²⁰³

The imposition of a fire-alarm system to detect and remedy local voting discrimination alongside the top-down system that already exists for addressing larger statewide measures would have a number of distinct benefits. First, under a fire-alarm model, not only would private citizens be empowered to address local voting discrimination, but the DOJ would also investigate local jurisdictions only after individual citizens have actually complained about them.²⁰⁴ The fire-alarm system would thus not only be more efficient but would also increase the efficacy of the DOJ’s interventions. Second, a fire-alarm system would miss fewer violations. The fire-alarm model is predicated on bottom-up reporting by local actors with personal knowledge of discriminatory conditions. Assuming a broad dispersion of “fire alarms,” the system can therefore monitor the entire universe of jurisdictions.²⁰⁵ Third, a fire-alarm system would shift litigation away from the politically controlled federal executive branch, thereby counteracting the risk that certain provisions of the Voting Rights Act will be selectively or under-enforced as political winds shift.²⁰⁶

The predominant reform suggested by scholars and policy makers to date is a requirement that states and their political subdivisions publicly disclose their voting changes.²⁰⁷ This is a good idea, but at best, it is a half measure. Consider once again the case of Lorna in the city of Conyers. While it is true that the election change she might seek to challenge—a jurisdiction’s switch to a non-concurrent election date—is unlikely to be widely noticed,²⁰⁸ Lorna is probably more frustrated by the fact that she could win her case if only she could bring it.²⁰⁹ In other words,

203. *Id.*

204. *See id.*

205. *See id.*

206. *See id.* at 168.

207. Voting Rights Amendment Act of 2015, H.R. 885, 114th Cong. § 4; *see* Samuel Issacharoff, Comment, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 121–23 (2013) (suggesting a new disclosure requirement that would be paired with an ex post challenge regime under Section 2).

208. This is perhaps less true amongst local civic leaders, unsuccessful political candidates, and the politically interested but disempowered citizens who would be likely to bring such litigation.

209. For example, if the ordinance adopting odd-year elections was enacted with a racially discriminatory purpose, Lorna could prevail in her challenge. *See* 52 U.S.C.A. §

while increased disclosure of voting changes would certainly be an improvement—and the author has no quarrel with those reforms—the larger problem is that the relevant parties are either unable or unlikely to help Lorna make her way into court.

III. A NEW MODEL TO ADDRESS THE SOFT UNDERBELLY OF OUR CURRENT ENFORCEMENT APPARATUS: LOCAL VOTING DISCRIMINATION

This part outlines two reforms that would make it easier for litigants of all stripes to challenge election procedures thought to violate the Constitution or the Voting Rights Act. It then explains why the solutions offered here meet the challenges of the contemporary voting environment. The discussion of the two reforms is not meant to be exhaustive. It is instead designed to spark a conversation amongst scholars and policy makers about the future of voting rights enforcement and the role the legal aid network might play in that campaign.

The first reform would permit voting litigation to be placed on the dockets of local legal aid providers. It would also lower the costs of such litigation by expanding the federal observer program nationwide, and imparting a duty upon lawyers to participate in that program. The second reform would be for Congress to adopt a “judicare”²¹⁰ system within the limited domain of local voting litigation. According to that model, individuals with colorable voting claims would receive vouchers that they could place with private lawyers, who would then be allowed to bill the federal government for the costs of litigation.²¹¹

These proposals are meant to *complement* the existing enforcement structure in a way that makes it easier for ordinary citizens to challenge discriminatory election procedures enacted *below* the state level. As detailed above, election changes authorized by city, county, and other sub-state governments are the kinds of

10301 (West 2015).

210. “Judicare” is a commonly used term for a legal services program “patterned after the approach used in the health care field under the Medicaid and Medicare programs that support services provided by private medical providers paid on a fee-for-service basis by governmental funds.” Spain, *supra* note 68, at 377–78.

211. Hannah E. Lieberman, *Legal Services: Meeting New Challenges with Delivery Systems that Promise Lasting Impact for Maryland’s Poor*, 7 U. MD. L.J. RACE RELIG. GENDER & CLASS 253, 262 n.31 (2007).

procedures likely to be overlooked under the current regime, yet alarmingly, most of the changes that were blocked during the preclearance era came from such entities. The reforms urged in this article also complement the existing enforcement network by hedging against the risk of politically inspired non-enforcement by the federal government. Specifically, by enlarging the responsibility of local legal aid providers or the private bar to enforce federal voting laws, these proposals would shift litigation away from the politically controlled federal executive branch.

There are strengths and weaknesses to each of these ideas, but, regardless of their merits, it is time for scholars to think creatively when jousting with these issues.

A. *Proposal 1: Dual Expansion of the Legal Aid and Federal Observer Programs*

The contemporary legal aid system could better facilitate voting litigation at the local level by (1) easing LSC regulations that prohibit or dis-incentivize election-related litigation, (2) tying the legal aid network into an information-sharing agreement with the federal government based around the federal observer program, and (3) imparting a duty upon lawyers to participate in the federal observer program. Each component will be addressed in turn.

1. Easing LSC Regulations That Dis-Incentivize Voting Litigation

One important way to expand ordinary citizens' ability to bring voting litigation at the local level would be to tap in to the extensive network of local legal aid providers. Right now, citizens lack an easily accessible entry point to legal assistance with voting claims.²¹² The LSC network can provide that infrastructure. Last year, the LSC distributed grants to 134 legal aid programs with nearly 800 offices covering every state and territory in the nation.²¹³ Through these offices, individuals can learn about their le-

212. See Charn, *supra* note 61, at 1050.

213. See *About LSC*, *supra* note 62. It is worth noting that more than 30,000 private lawyers also work with LSC as a part of the Private Attorney Involvement ("PAI") program. See *2013 LSC by the Numbers: The Data Underlying Legal Aid Programs*, LEGAL SERVS. CORP. (2014) [hereinafter *LSC By the Numbers*], <http://www.lsc.gov/media-center/publications/2013-lsc-numbers#PrivateAttorneyInvolvementPAIforLSCfundedPrograms>.

gal options and locate a source of advice appropriate for their needs.

Two obstacles stand in the way of this expansion: regulatory restrictions and costs. The first obstacle will be dealt with here and the second obstacle in the next subpart.

As noted before, LSC-funded programs are barred from assisting political parties, associations, or candidates in any way, from using Corporation funds to “oppos[e] any ballot measure, initiative, or referendum,”²¹⁴ or from handling litigation that is in any way related to the topic of redistricting.²¹⁵ LSC grantees are also restricted from seeking attorneys’ fees, even when they are authorized by statute,²¹⁶ as they are in the Voting Rights Act.²¹⁷

Lawmakers need not revisit the bans on lobbying or assisting political parties and candidates, but they *should* revisit the limitations on redistricting litigation and fee shifting in voting cases. The former category of restrictions are designed to disable legal aid attorneys from advocating for particular public policies—a congressional goal that was backed up by explicit bars against abortion litigation, school desegregation litigation, and cases designed to change federal or state welfare systems.²¹⁸ Political parties and candidates frequently run on platforms tied to these policies, so those restrictions advance Congress’s goal of prohibiting policy advocacy through the use of legal aid services.²¹⁹

The restrictions on voting litigation, however, do not advance that purpose. Voting cases seek only to facilitate citizens’ ability to voice their opinions through the political process, and in light of the above, that is the precise forum that Congress has indicated it favors when citizens wish to advocate for policy change. It makes little sense, then, to bar citizens from obtaining legal aid

214. 45 C.F.R. § 1608.3 (2014). It is not clear that litigation seeking to enjoin a validly enacted ballot measure, for example, would fall under this umbrella, which seems to target lobbying for or against such legislation.

215. *See id.* §§ 1632.2, 1632.3.

216. *See id.* § 1609.4(a).

217. *See* 52 U.S.C.A. § 10310(e) (West 2015).

218. *See* 42 U.S.C. § 2996f(b) (2012).

219. *See, e.g.,* Chris Cillizza, *Republicans’ Allies Eye State Legislatures as Redistricting Nears*, WASH. POST, Jan. 25, 2010, at A02 (discussing the importance of party control in the state legislature before the states redistrict after a census).

in cases seeking only to ensure nondiscriminatory access to the ballot box. Without such aid, citizens could lose their voice in the political process entirely.

2. Lowering the Costs of Voting Litigation by Expanding the Federal Observer Program

Of course, legal aid providers shy away from voting cases not only due to regulatory restrictions, but also because of the high costs of such litigation. This concern can be minimized, however, by tying the legal aid network into an information-sharing agreement with the federal government based around the federal observer program.

As noted before, the federal observer program stems from Section 8 of the Voting Rights Act. That provision authorizes the Attorney General to dispatch federal observers if he has either received “written meritorious complaints” that race-based voting discrimination is “likely” in a particular location or has determined, after investigation, that federal observers are “necessary” to enforce the guarantees of the Fourteenth and Fifteenth Amendments.²²⁰ Observers themselves document conditions both inside and outside polling places, “prepare reports that may be filed in court, and they can serve as witnesses in court if the need arises.”²²¹ The observer program therefore uses bottom-up complaints as a trigger for gathering evidence in voting cases.²²²

Importantly, the evidence gathered by federal observers is often crucial to establishing voting rights violations. In *United*

220. See 52 U.S.C.A § 10301.

221. DOJ FAQ, *supra* note 66.

222. Common issues that federal observers report on include: the opening and closing times of the polling place; the number of poll workers present at opening and closing; any problems opening or closing the polling place or with poll worker staffing; the number of voters waiting in line at opening or closing; signage and publicity showing the location of the polling place; the number, race, ethnicity, language abilities, position, and training of each poll worker; the configuration of the polling place; the location of the poll workers and the voting materials; the accessibility of the polling place for handicapped and elderly voters; the manner in which voters are treated inside and outside of the polling place; whether voters are offered provisional ballots if their names are not on the voter registration list; the availability of voting instructions and assistance using voting machines or casting paper ballots; compliance with Sections 203 and 208 of the Voting Rights Act; and compliance with the provisions of the Help America Vote Act. See Cody Gray, *The Voting Rights Act's Other "Secret Weapon": An Examination of the Federal Observer Program* (unpublished working paper) (on file with author).

States v. Berks County,²²³ for example, the United States alleged that the county's election practices relating to Spanish-speaking voters violated the guarantees of the Fourteenth and Fifteenth Amendments.²²⁴ Over the course of a two-year investigation, the Justice Department deployed federal observers to monitor several elections in the county. Aided by federal observer reports, the court found that there was "substantial evidence of hostile and unequal treatment of Hispanic and Spanish-speaking voters by poll officials."²²⁵ Specifically, federal observer reports revealed that

[p]oll officials in the City of Reading made hostile statements about Hispanic voters attempting to exercise their right to vote in the presence of other voters, such as "This is the U.S.A.—Hispanics should not be allowed to have two last names. They should learn to speak the language and we should make them take only one last name," and "Dumb Spanish-speaking people . . . I don't know why they're given the right to vote."²²⁶

Observer reports also documented the fact that "[p]oll officials in the City of Reading placed burdens on Hispanic voters that were not imposed on white voters, such as demanding photo identification or a voter registration card from Hispanic voters, even though it is not required under Pennsylvania law."²²⁷ Further, with respect to voter registration, observer reports revealed that "[p]oll officials in the City of Reading required only Hispanic voters to verify their address."²²⁸ These workers later "told Department staff that they did so because Hispanics 'move a lot within the housing project.'"²²⁹ Taken together, the evidence contained in federal observer reports was crucial to demonstrating that the discrimination at issue was intentionally directed at Hispanic voters in violation of the Fourteenth and Fifteenth Amendments.²³⁰

223. 277 F. Supp. 2d 570 (E.D. Pa. 2003).

224. *Id.* at 573. The United States also alleged violations of Sections 2, 4(e), and 208 of the Voting Rights Act. *Id.* at 573–74.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. The case was ultimately resolved through a consent decree mandating that the County comply with the Voting Rights Act and the guarantees of the Fourteenth and Fifteenth Amendments. *See id.* at 583.

Relating this anecdote back to the present proposal, lawmakers could make it feasible for legal aid providers to handle such voting claims through an information sharing agreement requiring legal aid attorneys to report complaints to the Voting Section in exchange for the benefit of federal observer reports. Legal aid providers would benefit from the arrangement because it would permit them to outsource voting investigations, reducing the in-house manpower required to litigate voting claims. The federal government would benefit from the arrangement because it would create a central information repository even more extensive than the former preclearance regime. With legal aid attorneys reporting to the federal government about every complaint of voting discrimination being voiced to legal aid throughout the nation, the government could keep track of trends, prioritize its own legal interventions, and tailor its advocacy to the unique conditions in each state.

To make this arrangement fully effective, Congress should expand the federal observer program nationwide.²³¹ Right now, the program is tied to the coverage formula used to trigger the special remedial provisions of the Voting Rights Act,²³² which limits the program's reach to a handful of southern states.²³³ But, because voting disputes can arise anywhere and legal aid providers exist everywhere, the observer program should mirror the scope of the broader legal aid network.²³⁴

231. See Gray, *supra* note 150 (providing an argument that Congress is not the only actor capable of expanding the program).

232. In 1965, Congress decided that coverage under the Voting Rights Act's special remedial provisions would be triggered on the basis of two findings: (1) that a jurisdiction maintained a test or device as a prerequisite to voting on November 1, 1964, and (2) that less than 50% of the voting-age citizens in a jurisdiction were registered to vote on November 1, 1964, or less than 50% of voting-age citizens in a jurisdiction actually voted in the November 1964 presidential election. See 42 U.S.C. § 1973b(b) (2012), *held unconstitutional* by *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013). In 1970 and 1975, Congress amended the coverage formula to incorporate data from the November 1968 and November 1972 elections, respectively. See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 101, 202, 89 Stat. 400, 400-01; Voting Rights Amendments of 1970, Pub. L. No. 91-285, §§ 3-4, 84 Stat. 314, 315.

233. In its most recent iteration, the coverage formula captured nine states in their entirety—Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia—and several additional counties in California, Florida, New York, North Carolina, and South Dakota. See *Jurisdictions Previously Covered by Section 5*, *supra* note 32. The prior formula also covered two townships in Michigan. See *id.*

234. Because the extant program already covers the jurisdictions where voting discrimination is most likely to occur, the added costs of nationwide expansion are not likely to be

3. Imparting a Duty Upon Lawyers to Participate in the Observer Program

In order to facilitate this nationwide expansion of federal observer service, bar associations should impart a duty upon lawyers to participate in the program.

The legal profession is self-regulating and lawyers possess broad obligations to society.²³⁵ While it is true that “[t]he organized bar has generally not attempted to impose mandatory pro bono service on its members,” the observer program merits this requirement.²³⁶ It vindicates a right that lies at the bedrock of democracy; indeed, “[o]ther rights, even the most basic, are illusory if the right to vote is undermined.”²³⁷ Given that fact, the organized bar should do more than vindicate citizens’ predetermined rights; it should play an active role in ensuring that every citizen can vote on the scope of those rights in the first place.

Further, there are no special qualifications required to serve as a federal observer. In fact, to staff the federal observer program, the Office of Personnel Management currently maintains “a pool of approximately 900 intermittent employees, called into service . . . from all walks of life, including Federal employees and retirees, students, and other public and private sector workers.”²³⁸ Moreover, federal observers are *not* sent to every certified jurisdiction for every election. They are only dispatched in jurisdictions holding elections where it has “been determined that there is ‘a substantial prospect of election day problems.’”²³⁹ In most ju-

substantial. In 2006, for example, OPM estimated that the observer program’s costs “ranged from under \$1 million in earlier years to a high of \$4 million in the Fiscal Year that included the 2004 general election.” *House Observer Hearing, supra* note 158, at 12.

235. See Rebecca L. Sandefur, *Lawyers’ Pro Bono Service and American-Style Civil Legal Assistance*, 41 L. & SOC. REV. 79, 85–86 (2007).

236. See Cummings & Sandefur, *supra* note 125, at 84.

237. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

238. *House Observer Hearing, supra* note 158, at 9 (providing testimony of Nancy Randa, Deputy Associate Director for Human Resources Products and Services, U.S. Office of Personnel Management).

239. Tucker, *supra* note 159, at 230 (quoting U.S. COMM’N ON CIVIL RIGHTS, A CITIZEN’S GUIDE TO UNDERSTANDING THE VOTING RIGHTS ACT 12 (1984)). Evidence bearing on this determination includes the existence of racial tension, racial appeals, or efforts to directly or indirectly suppress the voting rights of racial or ethnic minority citizens, the presence of racially heated white/black or Anglo/Latino races, the existence of an election in which minority voters are in a position to elect candidates of choice for the first time, or the existence of an election in which minority voters are in a position to gain a majority of

risdictions, then, observer service would not be a frequent or on-going duty.

The requirement could be imposed in a number of different ways. Like jury duty, organized bar associations could maintain a pool of eligible attorneys called into service on an as-needed basis. In addition, because law schools are “important sites for learning norms of public service,”²⁴⁰ jurisdictions could require aspiring lawyers to participate in the observer program as a condition of bar admission, similar to the scheme that exists in New York.²⁴¹ Requiring lawyers to participate in the federal observer program might even make attorneys more interested in handling subsequent litigation on a pro bono basis. And at the end of the day, this kind of bottom-up enforcement—with evidence collected by the local bar and cases litigated by local legal aid providers—would likely lead to more settlements and negotiated consent decrees. After all, the parties involved would be local lawyers and local government attorneys—individuals who are likely to have repeated interactions with each other, both inside and outside the courthouse.

By easing LSC regulations, expanding the federal observer program, and imparting a duty upon lawyers to participate in that program, the contemporary legal aid system could actually facilitate voting litigation at the local level.

B. *Proposal 2: Adopt a “Judicare” Program Within the Limited Domain of Local Voting Litigation*

A second possible reform, which could either supplement or supplant the prior proposal, would be for Congress to adopt a so-called “judicare” program within the limited domain of local voting litigation.

The “judicare” system relies on “the natural distribution of the private lawyers in [an] area to deliver legal service[s]” to clients.²⁴² Once a client is found eligible for legal assistance—either financially or based on an initial screening of the merit of their

seats on an elected body. *See id.* at 242.

240. *See Cummings & Sandefur, supra* note 125, at 93.

241. *See id.* at 84.

242. Brakel, *supra* note 70, at 535.

claim—"the client may go to the private office of the private lawyer of his choice."²⁴³ For convenience, "clients usually go to lawyers in the town or county of their residence," but they may also select "out-of-county lawyers."²⁴⁴ These private lawyers then litigate the client's claim, and upon completion "turn[] in an account of the services rendered to the program's central office."²⁴⁵ These records are then reviewed by a program officer and the lawyer is subsequently compensated by the government at an agreed upon rate.²⁴⁶ "[T]he judicare model exists in most of the leading industrial countries in the Western world, and in many, it is the dominant mode of providing legal services."²⁴⁷

In the voting domain, either the federal government (through the Civil Rights Division's Voting Section) or local legal aid providers (which exist in every state in the nation) could be responsible for administering such a program. Either entity would be competent to screen claims, review services rendered, and bill the federal government for appropriate costs. This kind of arrangement would also not be novel. The Voting Section has long reviewed whether citizen complaints are sufficiently "meritorious" to trigger federal observer deployments, to say nothing of the legal evaluations it undertook during the era of federal preclearance. The LSC, moreover, already contracts with private attorneys "to handle individual cases or certain categories of cases, or [to] involve private attorneys as co-counsel in complex cases on a volunteer or contract basis."²⁴⁸ In 1998 alone, for example, "the work of LSC-salaried attorneys was supplemented by 44,600 other attorneys—about 5% of those eligible to practice law in that year—who worked on referral from the LSC as part of the Private Attorney Involvement (PAI) program."²⁴⁹ This rate remains relatively consistent year after year.²⁵⁰

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. Jeanne Charn, *Foreword*, 7 HARV. L. & POL'Y REV. 1, 3 (2013); see also Michael A. Millemann, *Diversifying the Delivery of Legal Services to the Poor by Adding a Reduced Fee Private Attorney Component to the Predominantly Staff Model, Including Through a Judicare Program*, 7 U. MD. L.J. RACE RELIG. GENDER & CLASS 227, 250 (2007).

248. See *LSC by the Numbers*, *supra* note 213, at 27.

249. Sandefur, *supra* note 235, at 84.

250. *LSC by the Numbers*, *supra* note 213, at 28.

A “judicare” program limited to voting litigation would be sensible for a number of additional reasons. It would dramatically expand access by taking advantage of the solo and small-firm bar, which “is the main legal resource for middle-income people and serves two to three times more people than the not-for-profit, government-funded legal services offices.”²⁵¹ It would also be capable of “handl[ing] unexpected or rapid upturns in demand,”²⁵² a scenario likely to occur given the cyclical nature of voting litigation. Perhaps most importantly, a locally driven “judicare” program could more accurately meet the election-litigation needs of “all states and regions given variations in demographics, economics, structure of the bar, status of the substantive law, and other factors that uniquely characterize particular states and regions of the country.”²⁵³

All in all, a locally driven “judicare” program, backed by the resources of the federal government,²⁵⁴ would make it realistic for ordinary citizens to bring voting litigation at the local level.

C. *The Time to Act Is Now, and These Are the Right Kinds of Reforms*

In recent years, state and local governments have been enacting new voting procedures at a remarkable pace. Looking just at the state level, where data is accessible, 2013 saw the introduction of ninety-two restrictive voting bills in thirty-three states, nine of which made their way into law.²⁵⁵ The next year saw eighty-three restrictive voting bills introduced in twenty-nine states, four of which were signed into law.²⁵⁶ And, as of May 13,

251. Charn, *supra* note 61, at 1035; *see also id.* at 1045–46 (“We have paid little attention to the private bar as an important provider of access, aside from its pro bono contributions, even though, as mentioned above, solo and small-firm lawyers provide all of the service available to middle-income clients.”); Sandefur, *supra* note 235, at 83 (“Only about one-quarter (24%) of the poor’s consultations with the attorney ‘most involved’ with their events involved a legal aid clinic of some type; the majority (76%) of contacts involved lawyers in private practice.”).

252. Charn, *supra* note 61, at 1052.

253. *Id.* at 1033–34.

254. The resources needed are already earmarked: the money and manpower that *had* been going to federal preclearance could instead be diverted to a new “judicare” program run by either the Voting Section or the LSC.

255. BRENNAN CTR. FOR JUSTICE, VOTING LAWS ROUNDUP 2013 (Dec. 19, 2013), <http://www.brennancenter.org/analysis/election-2013-voting-laws-roundup>.

256. BRENNAN CTR. FOR JUSTICE, VOTING LAWS ROUNDUP 2014 (Dec. 18, 2014), <http://www.brennancenter.org/analysis/election-2014-voting-laws-roundup>.

2015, 113 restrictive voting bills have been introduced in thirty-three states, six of which are receiving active consideration.²⁵⁷ To be sure, many of these changes are innocuous. But as the Supreme Court itself recognized, “voting discrimination still exists; no one doubts that.”²⁵⁸ Accordingly, the status quo, where citizens have little choice but to depend on after-the-fact enforcement by a federal agency subject to the swinging pendulum of partisan control, is simply inadequate. Laws impacting citizens’ ability to access the ballot are too important to be turned on and off with each transition in the executive branch.²⁵⁹

The solutions offered here meet the challenges of the contemporary voting environment. Today, election litigators are increasingly focusing on cases concerning access to the polls.²⁶⁰ As Christopher Elmendorf has noted, “[i]nstead of challenging the de jure

www.brennancenter.org/analysis/voting-laws-roundup-2014.

257. BRENNAN CTR. FOR JUSTICE, VOTING LAWS ROUNDUP 2015 (Feb. 6, 2015), <https://www.brennancenter.org/analysis/voting-laws-roundup-2015>.

258. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2619 (2013).

259. President Johnson echoed this sentiment in an address to a Joint Session of Congress urging passage of the Voting Rights Act:

Many of the issues of civil rights are very complex and most difficult. But about this there can and should be no argument. Every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs more heavily on us than the duty we have to ensure that right.

President Lyndon Baines Johnson, Voting Rights Act Address at Joint Session of Congress (Mar. 15, 1965), <http://www.greatamericandocuments.com/speeches/lbj-voting-rights.html>. See *Changing Tides: Exploring the Current State of Civil Rights Enforcement Within the Department of Justice Hearing: Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 2 (2007) (statement of Rep. Jerrold Nadler) (“If the rule of law is to have any meaning, if the civil rights laws this Committee produces are to have any value, then we must be assured that those laws will be enforced without fear or favor or political contamination.”).

260. In this sense, “[e]lection law is coming full circle.” Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 314 (2007). The early cases of the 1960s established that the right to vote was fundamental through challenges to statutory features like poll taxes or literacy tests that made it harder for citizens to access the polls. See, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 664 (1966) (poll tax); *South Carolina v. Katzenbach*, 383 U.S. 301, 319 (1966) (literacy test); *United States v. Mississippi*, 339 F.2d 679, 681–82 (5th Cir. 1964) (challenging discriminatory test employed to deny African Americans an equal right to register). The focus shifted over the next three decades to cases concerning ballot access, the regulation of campaign finance, associational rights for political parties, and the use of representational structures that disadvantaged racial minority groups. See Elmendorf, *supra*, at 315. Today, “voting itself is moving back to center stage.” *Id.*; see also Issacharoff, *supra* note 207, at 103 (“[T]he issue of access to the franchise returned to the fore in recent years as part of a partisan effort to restrict that access in order to diminish the political impact of vulnerable constituencies.”).

exclusion from the franchise of certain classes of voters, or the malapportionment of legislative districts, litigators are pressing claims that state-mandated procedures for registration, voting, and vote-counting—the nuts and bolts of elections—operate to burden voter participation excessively or unfairly.”²⁶¹ Significantly, the observer program incorporated in the first proposal is centrally focused on monitoring these “nuts and bolts,” as witnessed in the *Berks County* case.²⁶² Moreover, a locally driven “judicare” program would be equally up to that task. In other words, both proposals possess enormous capacity to assist election litigators with the impediments that predominate in the current regulatory climate.

The proposals pressed above would also prove helpful in combating the vote dilution measures that are likely to be overlooked under the current regime. Prior to *Shelby County*, federal preclearance was largely used to curb dilutive redistricting plans, many of them stemming from local jurisdictions.²⁶³ Today, however, preclearance is gone, and even though some scholars claim that “[w]ith redistricting, there’s always one very wealthy political party or another who can hire some very good lawyers and go into court and challenge it,”²⁶⁴ this is undoubtedly less true at the local level, if it is indeed true at all. But a locally driven “judicare” program would be perfectly situated to combat such measures. And so too would local legal aid providers were they free from their regulatory restrictions. True, the federal observer program would be less helpful in reducing the costs of local redistricting cases. But a number of states are making moves to make that litigation cheaper and easier. In vote dilution cases, for example, the California Voting Rights Act eliminates the requirement un-

261. Elmendorf, *supra* note 260, at 315. Elmendorf goes on to highlight recent challenges to voter ID requirements, laws regulating voter registration drives by civil-society organizations, and challenges to the use of inferior vote-counting technology. *See id.* at 315–16.

262. *See United States v. Berks Cty.*, 277 F. Supp. 2d 570, 579 (E.D. Pa. 2003).

263. *See* Rick Pildes & Dan Tokaji, *What Did VRA Preclearance Actually Do?: The Gap Between Perception and Reality*, ELECTION L. BLOG (Aug. 19, 2013, 4:39 AM), <http://electionlawblog.org/?p=54521> (showing that thirty-nine of the seventy-six objections interposed under Section 5 between 2000 and 2012 concerned redistricting issues). I note, however, that the deterrent effect of Section 5 could have been preventing the enactment of vote denial measures in the first place.

264. Kara Brandeisky et al., *Everything That's Happened Since Supreme Court Ruled on Voting Rights Act*, PROPUBLICA (Nov. 4, 2014, 12:31 PM), <http://www.propublica.org/article/voting-rights-by-state-map>.

der the federal Voting Rights Act that a minority group be sufficiently large and geographically compact to form a majority of the eligible voters in a potential single-member district.²⁶⁵ This lessening of the burden of proof is one reason why there have been roughly 100 cases and settlements with local California jurisdictions as of late.²⁶⁶ That number would only increase with the structural improvements outlined above.²⁶⁷

The solutions offered here also meet the Supreme Court's doctrinal test. In *Shelby County*, the Court invalidated the coverage formula in Section 4(b) of the Voting Rights Act because it imposed "substantial federalism costs,"²⁶⁸ denied states the "equal sovereignty" they deserve under the Tenth Amendment,²⁶⁹ and was based on "40-year-old facts" that no longer bore a "logical relation to the present day."²⁷⁰ The Court ultimately stated that the statute's "current burdens' must be justified by 'current needs,' and any 'disparate geographic coverage' must be 'sufficiently related to the problem that it targets.'"²⁷¹ Both proposals advanced here—dual expansion of the federal observer and legal aid programs or decentralized regulation through a locally driven "judicare" program—would apply to the entire country, and trigger enforcement based on current conditions of discrimination in local jurisdictions. They are therefore appropriately tailored to meet the Supreme Court's newly articulated doctrinal standards. Perhaps more importantly, they better fit with the nature of contemporary voting discrimination. When the Voting Rights Act was passed, "it was very clear which jurisdictions were the most egregious offenders."²⁷² Today, however, "[f]ew of our concerns with respect to voting discrimination are either cabined by geography or

265. See CAL. ELEC. CODE §§ 14027, 14028 (West 2014); see also *Thornburgh v. Gingles*, 478 U.S. 30, 50–51 (1986) (requirements under federal Voting Rights Act).

266. See Kousser, *supra* note 52, at 26–27.

267. See *id.* at 26 (noting that "[h]undreds of city councils, school boards, and community college boards throughout the state are [still] elected at-large").

268. 133 S. Ct. 2612, 2627 (2013).

269. *Id.* at 2618.

270. *Id.* at 2629.

271. *Id.* at 2627 (quoting *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 203 (2009)).

272. Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Mapping a Post-Shelby County Contingency Strategy*, 123 YALE L.J. ONLINE 131, 140 (2013), http://yalelawjournal.org/pdf/1172_7tflw49.pdf.

predictable by geography.”²⁷³ As such, our solutions should not be limited to targeting formerly covered jurisdictions.²⁷⁴

Finally, although there are strengths and weaknesses to each of these ideas, reform on this front is not beyond what is possible. The broad goal of affording access to the ballot, like the broad goal of affording access to the courts, is widely viewed as apolitical—an entailment of the nation’s commitment to equality under law. That is why the Voting Rights Act, “one of the crowning achievements of our democracy,”²⁷⁵ has been signed into law by Republican and Democratic Presidents alike. What is more, the proposals offered here ought to appeal to members in a wide range of political camps. Republicans should be attracted to a fire-alarm model because it takes a deregulatory approach to voting rights enforcement. Democrats should like it because it complements the existing structure in a way that makes the safety net more robust for poor and minority voters.

Setting all of that aside, even if little traction is made in the U.S. Congress,²⁷⁶ the above proposals are susceptible to implementation by the states themselves. There is nothing stopping the states from implementing their own versions of “judicare”—as have parts of Wisconsin, Montana, and Michigan²⁷⁷—or from expanding the use of observers or facilitating the accessibility of legal aid providers. In fact, recent history suggests that change on this front is far from uncommon. In 2013, for example, forty-six states introduced 237 expansive voting bills, thirteen of which made their way into law.²⁷⁸ In 2014, forty-two states introduced 340 expansive voting bills, nineteen of which were enacted.²⁷⁹ And, as of January 15, 2015, 195 expansive voting bills have been

273. Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights in Winter: The Death of a Superstatute* 36 (Working Paper No. 278, 2014).

274. The most prominent proposal introduced in the U.S. Congress evinces such a preference. See Voting Rights Amendment Act of 2015, H.R. 885, 114th Cong. § 3 (2014).

275. Press Release, Remarks by the President at the 50th Anniversary of the Selma to Montgomery Marches (Mar. 7, 2015), <http://www.yalelawjournal.org/forum/mapping-a-post-shelby-county-contingency-strategy>.

276. As of April 14, 2015, nine Republicans joined Democrats in cosponsoring the proposal to amend the Voting Rights Act of 2015. See *H.R. 885—Voting Rights Amendment Act of 2015*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/885/cosponsors?pageSort=firstToLast> (last visited Dec. 1, 2015).

277. Brakel, *supra* note 70, at 533.

278. BRENNAN CTR. FOR JUSTICE, 2013, *supra* note 255.

279. BRENNAN CTR. FOR JUSTICE, 2014, *supra* note 256.

introduced in twenty-five states, one of which has been enacted and eight of which are under active consideration.²⁸⁰ In sum, the possibility of reform on this front is not theoretical.

CONCLUSION

The *Shelby County* decision has ushered in a new era. Gone are the days of federal preclearance, when jurisdictions with a history of discrimination had to prove their election changes were non-discriminatory. Freed from the weight of that burden, many jurisdictions have sprung into action.²⁸¹ Pasadena, Texas, for example, recently redrew its city council districts in a way that is expected to diminish the influence of Latino voters in municipal government.²⁸² Similarly, Galveston, Texas, revived a redistricting plan for electing justices of the peace that was previously blocked due to its discriminatory effect against minority voters.²⁸³ And Georgia officials recently moved the dates of municipal elections in two counties with sizeable African American populations so that they no longer coincide with the traditional November election date.²⁸⁴ The federal preclearance mechanism would have caught these changes, but today they are far less likely to face legal challenge: individual lawsuits would be prohibitively costly; law firms and non-profits avoid such low-profile matters; and the efficacy of federal enforcement depends on the whims of the party that happens to be in power.

The United States needs a new regulatory model to address local voting discrimination. Recognizing that problem is half of the

280. BRENNAN CTR. FOR JUSTICE, 2015, *supra* note 257.

281. Of course, discriminatory election practices took place even during the era of federal preclearance. In 2006, for example, city officials in Calera, Alabama, redrew the only majority African American district so that its African American population dropped from 70% to 30%. The city council lost its sole African American member in the next election. See Spencer Overton, *Against a "Post-Racial" Voting Rights Act*, AM. PROSPECT (Aug. 21, 2013), <http://prospect.org/article/against-post-racial-voting-rights-act>. In 2009, moreover, officials in Runnels County, Texas, failed to place a single bilingual poll worker at any county polling place despite a court order mandating that bilingual poll workers be placed at every polling site in the county. See *id.*

282. LOPEZ, *supra* note 12, at 4. See also Sylvia Garcia & Larry Peacock, *Garcia, Peacock: Redistricting Proposal Targets Hispanic Gains*, HOUSTON CHRON. (Nov. 1, 2013, 5:32 PM), <http://www.chron.com/opinion/outlook/article/Garcia-Peacock-Redistricting-proposal-targets-4947300.php>.

283. LOPEZ, *supra* note 12, at 4.

284. *Id.*

battle. The second half—the resolution of that problem—is ultimately going to be much more difficult. This article has sought to begin that conversation by offering two proposals predicated on leveraging the infrastructure of the legal aid network. Both proposals would increasingly localize and decentralize election litigation in the United States, making it easier for citizens to bring these claims. But regardless of the proposals' merits, this article's true message is that this conversation must begin now.

At the end of the day, for local voting litigation to be made real, lawmakers may need to grapple with the broader purpose of legal aid. They should decide whether the legal services program should seek merely to ensure that poor citizens have some degree of access to the court system to resolve their individual legal issues, or instead, whether it should also provide a vehicle for individuals to reshape local election structures to ensure that all eligible citizens are included in the democratic process.²⁸⁵

This article argues for the latter view. As Justice Frankfurter once recognized, “there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power.”²⁸⁶ Given that fact, “relief must come through an aroused popular conscience that sears the conscience of the people's representatives.”²⁸⁷ By empowering citizens to dismantle discriminatory election procedures, the legal aid system is capable of freeing Americans to do just that. And because the right to vote is sacred, Congress and the legal profession should show that they are indeed up to the task.

285. The latter view used to reign. In a speech to the National Conference of Bar Presidents, Clinton Bamberger—the first director of the legal services program—“made it clear that his office had ambitions beyond ‘the mere resolution of controversies’ and that the priority of the legal services program would be systemic change for the benefit of the poor as a class.” Charn, *Foreword*, *supra* note 247, at 4.

286. *Baker v. Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting).

287. *Id.*

APPENDIX

Data

This article employs a longitudinal dataset covering fifty years of enforcement activity by the Civil Rights Division's Voting Section in order to investigate the range of questions outlined above. This part describes that dataset.²⁸⁸

The raw data for this study was collected through a Freedom of Information Act request. Through that mechanism, I obtained the Voting Section's case list. That list contained the name of every case the Voting Section had been involved with—either as plaintiff, plaintiff-intervener, defendant, defendant-intervener, or amicus—between 1976 through 2010. Of course, the Voting Rights Act was enacted in 1965. Accordingly, I located the complementary case list from 1965 through 1975 in congressional hearing files. Data for the remaining years—2010 through 2013—were scraped from the Voting Section's website.

Armed with a complete list of the Voting Section's enforcement activity between 1965 through 2013, I coded the date of each case, the government's posture in each case, and the statutory sub-provision underlying each claim that was asserted in each case (731 total cases). The figures used in this article draw from these data.

288. For additional description and analysis of the dataset, see Cody Gray, *Political Contestation, the Separation of Powers, and the Subterranean Retrenchment of the Voting Rights Act* (unpublished working paper) (on file with author).