

BY THE PEOPLE, FOR THE PEOPLE. . . BUT WHICH PEOPLE?

CARDOZO JOURNAL OF LAW AND GENDER SYMPOSIUM
JANUARY 30, 2013

Panel 1: Race to the Vote

Panelists:

Kristen Clarke – Chief, Civil Rights Bureau, New York State Office of the Attorney General

Keesha Gaskins – Senior Counsel, Democracy Program, Brennan Center for Justice

Ekow Yankah – Professor of Law, Benjamin N. Cardozo School of Law

Moderated by Janai Nelson, Professor of Law, St. John's University School Of Law

Panel 2: The Ballot, the Bench, and the Bedroom

Panelists:

Farah Diaz-Tello – Staff Attorney, National Advocates for Pregnant Women

Praveen Fernandes – Director of Federal Affairs & Diversity Initiatives, Justice at Stake

Anna Franzonello – Staff Counsel, Americans United for Life

Jeremy K. Kessler – Yale Legal History Fellow, JD/PhD Candidate, Yale Law School and Yale University

Gigi N. Parris – Family Defense Attorney, The Bronx Defenders, Family Defense Practice

Moderated by Edward Stein, Vice Dean, Benjamin N. Cardozo School of Law

Keynote: **Carrie Evans**, Executive Director, Equality Maryland

PANEL 1: RACE TO THE VOTE

MR. COLIN BOWES: I think we'll get started. Thank you for being here. For those of you who don't know me, my name is Colin Bowes. I'm the Editor-in-Chief of the *Cardozo Journal of Law and Gender*. I'd like to extend a warm welcome to our moderator and panelists this morning, as well as everyone in attendance for what I'm sure will be an exciting and fruitful discussion.

The *Cardozo Journal of Law and Gender* has been a pioneer in gender-related legal scholarship for 20 years. We began as the *Cardozo Women's Law Journal* and we have since expanded the scope of our publication to a broad range of gender-based topics reflecting interdisciplinary views on gender, sexuality, family and children. We strive to foster productive discussion on topics such as employment law, health care, human rights, international law, family law, civil rights and criminal law. Recent publications have included Articles and Notes discussing gender and sexual orientation discrimination in the United States tax code, the historical value of women's words in paternity suits, contraceptive equality, and the intersection of race and class in domestic violence proceedings in American courts.

Our annual symposium is one of the year's most exciting times for us. We're thrilled to be hosting such a talented and knowledgeable group of advocates this year. In recent years our past symposia have focused on crimes against children, marriage equality, reproductive justice, and the aftermath of Hurricane Katrina. Coming off the heels of such a contentious election cycle, we're very excited this year to reflect upon the roles that various minority groups played in the last election cycle, particularly how they shape the political process and the political dialogue.

And to that end our panelists this morning will be exploring the ways in which racial and ethnic minorities drove the political rhetoric in 2012 as well as the impact of recent restrictive voting laws and what type of legislation we can expect to encounter in the future.

Just a few reminders, our second panel, The Ballot, the Bench and the Bedroom will be held in this room this afternoon at 2:15, and at 4:00 p.m. we will hear from our keynote speaker, Carrie Evans, who is the Executive Director of Equality Maryland. Everyone is, of course, welcome and encouraged to attend.

And I'd like to thank our moderators and panelists again who agreed to participate. I'd also like to thank Rachel Jacobs for her outstanding work in making this important symposium happen today, as well as Carl Hurvich and Regine Gustave who were also very helpful in putting this together.

With that, I'd like to introduce Professor Nelson, who has graciously agreed to moderate this panel this morning. Professor Nelson is an associate professor of law and the Associate Director of the Ronald H. Brown Center for Civil Rights and Development at St. John's University Law School. Professor Nelson's research interests include election law and voting rights. As a Fulbright Scholar, Professor

Nelson researched political disenfranchisement in Ghana, and she previously served as the director of political participation at the NAACP Legal Defense Fund, and I will turn it over to Professor Nelson. Thank you.

[APPLAUSE]

MS. JANAI NELSON: Thank you. As you know, my name is Janai Nelson. Welcome to the Race to the Vote panel. I'm delighted to be part of this symposium and I thank you all for inviting me to moderate this panel.

In this panel we will be discussing the 2012 elections and looking forward to the upcoming elections here this year in New York, the mayoral elections, and to a long distance view of the upcoming presidential election four years from now, to see how the lessons from the 2012 elections might impact minority voting power going forward.

This is an important discussion not just because of the seismically shifting demographics of the electorate, but there's also a fairly tumultuous political climate. There is an evolving legal landscape that we need to take account of, and we'll be discussing all those issues this morning with our very distinguished panel. And to lead this discussion I'm joined by three experts in the field. We have a very robust panel of experts to lead us in this discussion and I would like to share just a little of their bios with you so you can contextualize their comments and to demonstrate the experts they are on the topics we'll be discussing today.

First is Kristen Clarke. She is the Chief of the Civil Rights Bureau of the New York State Attorney General's office. Prior to assuming that position she was the Co-Director of the Political Participation Group at the NAACP Legal Defense and Educational Fund. And in 2009 she and a team of LDF lawyers led a group before the Supreme Court in a challenge to the Voting Rights Act, the Northwest Austin Municipality Utility District Number One v. Holder, or MUD case, as it's popularly known, and successfully defended the Voting Rights Act in that case.

Prior to joining LDF, Ms. Clarke also worked for several years at the Civil Rights Division in the U.S. Department of Justice in both the Voting and the Criminal sections, and she's a frequent commentator on issues concerning race, law and democracy, and is the co-editor along with the late Dr. Manning Marable of Barack Obama and African American Empowerment: The Rise of Black America's New Leadership. So welcome, Kristen.

Next I introduce Keesha Gaskins. She is senior counsel for the democracy program at the Brennan Center for Justice at New York University School of Law, and she also directs its redistricting and representation program. She's a long-time organizer, lobbyist and experienced trial attorney. Prior to joining the Brennan Center she was the executive director of The League of Woman Voters in Minnesota. She's also a 2008 Feminist Leadership Fellow with the University of Minnesota and is a frequent commentator on voting rights and redistricting reform.

And last but certainly, certainly not least, I introduce Professor Ekow Yankah. He is familiar, I'm sure, to many of you in this room because he is a

professor of law here at Cardozo. He's a prolific scholar whose work explores the intersection of analytical jurisprudence, criminal law and political theory. He has been a distinguished visitor of the MacArthur Foundation and received the Inspiration Award from students here at Cardozo. And, in addition to advising several student groups including the Cardozo Democrats and the Cardozo American Constitution Society Student Chapter here, he is the downstate vice president of the New York Democratic Lawyers Council, the voting rights organization of the Democratic National Committee. So please join me in welcoming the panelists.

[APPLAUSE]

MS. NELSON: So with those introductions to whet your appetite, I'd like to begin our conversation about race and the vote, and I say conversation because I really want this to be a robust discussion between me and the panelists, among the panelists and eventually with you when we engage in our Q&A. Let's jump right in. I want to talk about an issue that has been talked about quite a bit leading up to the election and certainly post-election and that is the Latino vote and the impact that the Latino vote had in electing Barack Obama and the influence that it's having on current legislation. It's being credited with inspiring the renewed bipartisan efforts on immigration reform. We know that the Latino vote comprised roughly 10% of the electorate, up from 9% in 2008, and there are projections that by 2030 the Latino vote could double.

So from your vantage point, what role did the Latino vote play in local, state and of course the national election, and are there specific concerns we should have about voter suppression and the Latino vote? Keesha, I'm going to ask you to start and any one of you can join in after.

MS. KEESHA GASKINS: Okay. I think I'll start with sort of the latter portion of your question, which really has to do with the voter suppression issues and some of the things we saw going into the 2012 election. I mean one of the things that, the first thing that we really saw was a concerted effort in a way to suppress the vote in a coordinated, designed way that we hadn't seen in our nation's history. So to give you sort of a comparison, when we think about the Jim Crow era, right, arguably from 1965 to 1967 there were about 400 different laws passed and depending on how you count about 50, 40 to 50 of them were connected to voting and voting rights and whether it's residency or - - or whatever you want to call it.

When you look at what happened prior to the election from 2011 to 2012, we saw 25 laws passed in an 18-month period. So when we talk about the comparison of how much legislation was introduced, how specifically focused it was, it was, I mean this was a really, it was a very serious time for voting rights and suppressive issues. And so when we look at the populations that were most impacted by that, clearly Latino population was very much a target of these efforts. A lot of our research showed in terms of ID ownership because voter ID laws are photo ID laws

specifically, are the most prolific of these laws, 16% of that population lacked government-issued photo ID. There was a whole other set of laws around proof of citizenship. Most of the rhetoric in language around the proof of citizenship laws certainly were targeted and certainly implicated concerns, biases, racism against the Latino community. So I think there was a lot of effort, really, around propping up the Latino population as sort of the straw man in this argument, creating the bad guy to then use this to actually implicate populations across the board. And of course I know this population cares particularly about women, and we can talk a little bit later about how, by using the Latino population, using fears around the growth of that population really was able to get a lot of public sentiment, a lot of energy, a lot of growth, a lot of movement around suppressive laws.

So I think from a suppression standpoint, I think we saw the use and the sort of quote/unquote “threat” of the Latino vote really being used to really prop up a lot of these efforts.

MS. NELSON: And in looking at future threats, I know the Brennan Center did some work on the Gonzales case. Can you talk a little bit about that case and its potential impact?

MS. GASKINS: Certainly. I think when we think about, okay, so let me back up. I started launching right into the middle, and Kristen, please jump in if I misstate anything because, of course, I started, I came in the middle of how Gonzales works, so I’m looking for Kristen to back me up on this. But at the end of the day, Gonzales relates to whether or not the proof of citizenship requirements in the State of Arizona violates the national Voting Rights Act and I’m sorry, the National Voter Registration Act, and the concerns we have with that case is of course if the Supreme Court upholds Arizona’s right to have this proof of citizenship, how it applied to the federal voter registration form and as well as the state voter registration form, is that going to then turn into what Crawford was for voter ID laws? The sort of dam breaking for all of a sudden all of this legislation being introduced across the country and really looking at that bit of legislation. So in terms of not just, and so again, a lot of that energy obviously coming out of Arizona is very focused on the Latino population.

MS. NELSON: Kristen, anything to add?

MS. KRISTEN CLARKE: The one additional point that I would note is that when some hear about proof of citizenship requirements and photo ID requirements for voters, at first blush some of these requirements may make sense. It’s important to think about how our system has operated before these efforts were made to fully understand how of these efforts are intended to now make voter registration more difficult.

Over the last few decades, as many of you know, prospective voters would fill out a voter registration form in which they attest that all of the information that is provided is truthful. These prospective voters would be subject to a penalty if they were to provide any untruthful information about their name, your address,

your age, whether or not they are a citizen. Given that, it's unclear now why states feel the need to impose these restrictive barriers that make access to the ballot box more difficult.

There are some who argue that it's necessary to preserve the integrity of the process, and who suggest that you have noncitizens racing to the polls on Election Day to cast ballots. I think that the evidence bears out that that is anything but the case. The last place you're likely to find non-citizens on Election Day is at the polling place where they would risk contact with election officials. Ultimately, there's very little evidence that voter impersonation or voter fraud is a significant or real problem in our country and so these restrictive barriers are really being processed without real evidence of a need.

Indeed, it is unclear why there has been such a focus on making access more difficult when the real focus should be on figuring out how we can get more unregistered persons actually registered and position them to participate in our political process.

MR. EKOW YANKAH: Indeed. If I could add just a little bit to that, one of the things that's very disappointing, to put it mildly, when you see people who are opponents of the 1965 Civil Rights Act, for example, or people who think that the extent of the 1965 Civil Rights Act should be curtailed, and we'll speak a little bit about the ongoing litigation, they do so standing in the face of huge amounts of evidence, right? So the Congressional Record on the last extension of the '65 Civil Rights Act, which forced certain counties to pre-clear before they make any change to voting, was something like 16,000 pages, just unending evidence in front of Congress that voter suppression and discriminatory voting remains a massive problem and a problem that cannot be handled case-by-case. And even in the face of this evidence, these opponents say Congress is overstepping its bounds. There's no evidence that we are the sort of nation we were however, whatever their chosen date is, right?

The very same people are the people who then turn around and say even with every bit of evidence showing that there is no serious voter fraud in the country, right? So the last study that NYDNC did we looked everywhere for voter fraud, even, I mean NYDNC you may not, you may think we are biased, right? True the vote conservative organization that fights to shore up voter fraud or shore up the integrity of the ballot box, I don't remember what their last big study was, but the one before that, the biggest evidence of voter fraud they found was in a local election in New York actually, in Fordham. Fordham's slightly up the Hudson River, something like 17 ballots were found, right? I mean this was after their most massive investigation.

In the light of no evidence at all, these opponents are willing to pass laws that will clearly have unbelievably disproportionate effects on minority populations. People who are even as we speak now waiting in line for hours and hours and hours. So the stunning cynicism of looking at huge amounts of evidence and

saying we don't see a problem while seeing huge problems where there's no evidence is just very difficult when you're actually working on voting laws or lobbying Albany or whatever you might be doing in your working on the project.

MS. NELSON: Well, I don't know if any of you saw the story in the, I think in the Huffington Post about this woman who attempted to vote twice in the previous election to prove that voter fraud existed and in fact was caught. She went to one precinct. She went to the second precinct and was told actually I see that you've already voted. You cannot vote again. She insisted on voting by provisional ballot and was denied a ballot, and she was ultimately convicted for attempting to commit voter fraud, paid a \$2,500 fee, and was sentenced to community service. So even those who were trying to prove the point that these voter ID laws are necessary because that was the exercise she was engaged in, ultimately proved the efficacy of our system which is really Kristen's point that what's the need for this if it's been working well thus far?

I want to stick with voter ID for another moment and Professor Yankah, I would love for you to talk a little bit about what you saw on the ground in this election cycle, in particular you were in the hotbed of Ohio and you witnessed issues around voter ID. And if you could also speak to the heated controversy around early voting.

MR. YANKAH: Yeah.

MS. NELSON: I hope many of you know that there was a significant case around whether early voting could be restricted and ultimately the court decided to allow-

MR. YANKAH: [Interposing] Yeah.

MS. NELSON: -additional dates.

MR. YANKAH: So I don't want to just descend into war stories, especially since I would go on too long, but just a couple quick notes and some ties into what you just mentioned. So one of the things that I really admired about Ohio just before I speak about the minority, the way in which minorities were expected to vote there, one of the things that I really admire in Ohio. Ohio has, you know, when you come from a state like New York that we'd like to think is progressive and then you see how it's done right in a state like Ohio, it really is almost embarrassing. So Ohio has early voting for a month. For a full month before the election. Indeed, when you speak to people in Ohio and you say, oh, the election's Tuesday, people respond with lines like, oh, right. Tuesday's the last day to vote, right? Because for them it's just you're just meant to vote whenever you are able to.

I know a lot of people, you know, we're lucky enough that a lot of people find this to be, you know, a nice but not important thing. If you're somebody who has three kids, if you're somebody who is not in the position that law professors are lucky enough to be in where you can leave the building whenever you want, right, the fact that you have some flexibility when to vote and in particular you can vote

in non-business hours or you can vote in the weekend, can be dispositive. It can absolutely be transforming. In fact, what was more stunning to me in Ohio was I was there for quite, for, well, for the blow-up of the entire election, and you'd ask people why haven't you voted? For God's sake, you've had a month. Why would you want to wait in line on Election Day? And you'd have these happy soldiers saying, "I like the feeling." And I'm, "Well, God bless you because you've had a month." That's the way Ohio treats voting. It's a remarkably different attitude towards voting.

On top of that, you know, just to pick up your story, Ohio has just a different principle about voting. The attitude in Ohio is everybody votes, right? At least that was the attitude they were working hard to cultivate on the ground, and I must say given my cynicism going in I was really impressed with the goodwill of so, so, so many people. Now, given I was in Cuyahoga County which is a sort of democratic stronghold, but nonetheless there were people who were either politically agnostic or even Republicans and most of the people, I can't say all, but most of the people I met there were people of tremendous goodwill. Their attitude to touch upon the story you just mentioned, everybody votes, and it's our job to make sure the right votes count. And this is, again, a remarkably different attitude than those who are the opponents of voter fraud with evidence.

If you were a true opponent of voter fraud you would take the Ohio system because the Ohio system is we will make sure only legitimate votes count, and that need not impact on voters voting. We want, so if you're five years old and you walk into Ohio in an Ohio election, right, and say "I want to vote," somebody will politely tell you you can't vote, sir. You're five." And if you say, "I still want to vote," somebody will say I'm pretty sure five year olds can't vote." And you say, "I still want to vote," finally they will give you a provisional ballot, right, because their attitude is, look. We've got to get people moving and everybody votes. Not surprisingly, your provisional ballot will quickly be found out and thrown out, right?

But Ohio takes the attitude that's the state's job to legitimate the vote, not the job to stop people from walking into the vote, into the voting booth. Gosh, I don't want to go on to, just the last thing I will say. You know, we're speaking about the way in which the minority vote affects these things. One of the bizarre things about being Cuyahoga County and the Board of Elections, you know, there's a joke in Ohio, "You don't win the presidency of the United States. You win the presidency of Ohio," and they throw in the rest of the country. There is a bizarre feeling in being in the Board of Elections and knowing, I mean, knowing to a certainty that this building can elect the President of the United States, right? Now, that's not true in every election, but it's been true in an awful lot of elections.

You know, only slightly less facetiously it really was true that a certain number of votes cranked out of Cleveland, Columbus and Toledo will elect the President of the United States over the last two elections, the way the Electoral

College is broken out or is dispositive anyway. Let's put it that way. Dispositive for, to be honest, dispositive for a Republican to win, right?

And it is exactly that knowledge that changes the tenor of those who have dedicated themselves to what they take to be voter fraud, and often are just plainly in the business of voter suppression. Let me stop there.

MS. NELSON: Well, thank you for that. I think it's always important to hear about another election system because we're so used to our own and we don't realize the possibilities that exist even in our own country. There is enough variety to draw from.

I want to continue to think about the diversity of our electorate and the 2012 electorate was the most diverse in history, but not just in terms of race and ethnicity but also in terms of language diversity. And Kristen, I know that your office also negotiated language access issues with Putnam and, what was it, Dutchess Counties here in New York, and so I'd like you to talk a little bit about language access issues in the 2012 elections and why you felt the need to negotiate these agreements with these two counties and how you think that might affect future elections?

MS. CLARKE: The Voting Rights Act is arguably one of our nation's most effective and robust federal civil rights laws and it contains a number of important provisions. Some of those provisions deal with language access, provisions that require that certain jurisdictions make their election materials available bilingually for those minority language voters within their jurisdiction who may not speak English, may not speak English well, for whom English may not be their first language.

One of the provisions of the Voting Rights Act, Section 203, requires that certain jurisdictions, based on a formula that is tied to both census data and literacy rates, to provide bilingual election-related materials. New York City is one of those jurisdictions. Thus, for those of you who went to vote in November here in New York City you, hopefully, observed notices inside your polling place that were available bilingually. You, hopefully, got a ballot that had both English and Chinese and Spanish, which are some of the statutorily required languages here in New York City.

However, there is another provision of the Voting Rights Act that is tremendously under-enforced, the Section 4(e) provision of the Act. This provision requires that voters educated in American-flagged schools not be denied the right to vote based on whether or not they speak English. That means, for example, if you are a voter from Puerto Rico, that you have the right to be provided bilingual election-related materials. This is a tremendously under-enforced and under-utilized provision of the Act. The New York Attorney General's office launched an initiative to look closely and carefully at the needs of voters upstate and that the efforts, or lack thereof, of Commission of Elections in counties with sizeable numbers of minority language voters.

And you've got literally dozens of counties upstate, including Dutchess, Putnam, Schenectady, Ulster and Sullivan, among others—counties with significant numbers of voters who if given the option would prefer to digest a complex ballot initiative in Spanish as opposed to English. So the Attorney General's office has been behind important enforcement work upstate around this issue and we have, to date, secured commitments from several Boards of Elections in a number of counties that are now required to translate everything from the voter registration form all the way up to the ballot on Election Day.

Specifically, the agreements that we have secured require that Boards make available in Spanish the absentee ballot, the provisional ballot, and the notices posted inside polling sites on election day. In addition, these jurisdictions have to work to recruit bilingual poll workers. I think this is incredibly important work. Since the enactment of the language provisions of the Voting Rights Act, we have seen an increase of between 50 and 150 percent in voter registration and turnout rates among American Indians, a 58.7 percent increase in voter registration rates and a 71 percent increase in turnout rates among Asian Americans. And these Provisions of the Voting Rights Act have also worked to double the registration rate among Hispanic voters all across our country. In the national discussion around voting rights, minority language access is not an issue that draws a great deal of attention but it is an incredibly important issue nonetheless, especially now when we are seeing an increase in the number of new immigrant groups for whom English is not a first language.

MR. YANKAH: Do I remember that the provision in the Voting Rights Act is sensitive to changing populations so as the population grows at a certain area then you are then required. So I think I recall that Bengali is now required in Queens and it has been for years and it's never been done, and things like that.

MS. CLARKE: That's right. Section 203 of the Voting Rights Act absolutely responds and shifts according to need, and so Bengali is a new language that is covered as a result of the 2010 census results that show that this population increased dramatically in Queens County over the course of the past decade.

MS. NELSON: So speaking of the 2010 Census, in talking about the 2012 elections we've covered now early voting, voter ID, language access, and we just touched on the census and the impact that has on triggering certain provisions of the Voting Rights Act, but there's another particular impact that the 2010 Census has and that is in the area of redistricting. And we are just three years from the last census, just a few months after the elections where the lines drawn based on those new census numbers were in effect, so Keesha, I'm hoping you can talk to us about the impact of the 2010 Census and the 2010 redistricting cycle on the 2012 elections, which we know was highly fraught with allegations of racial and political partisanship. And the Texas case is just but one very prominent example.

MS. GASKINS: Absolutely. I think the first thing that needs to be said about redistricting is there will be redistricting and there will be redistricting litigation. There's taxes and there's lawsuits after redistricting. That's what happens.

What we saw in the 2010 Census was enormous population growth in communities of color. So we say Asian Americans as the fastest growing population in this country. Hispanic, using the census term, Hispanic Americans have been the largest growing population in the country and so all of these things, of course, played themselves out with respect to redistricting. There was huge impact around Voting Rights Act in trying to strike a balance within these populations as well as the political tension.

One thing we have to be conscious of when these district lines are redrawn every 10 years following the census is that most of the district lines are controlled by state legislatures, by partisan actors. About 37 states involve partisan actors. There's another percentage that use commissions but those commissions are still political so there's really a very small handful of states that really only have a nonpartisan redistricting process. And so what we saw, because of the 2010 elections, a huge swell of support, particularly for singular party, in this case the Republican Party, 675 new Republican legislators across the country. Singular control of the Republican Party increased up to, by 24 states, and so as a result when we saw redistricting lines were drawn in most states in a very partisan way.

And oftentimes that partisan line drawing involves packing or concentrating Democratic voters and frequently that also translates very directly into communities of color, and so what we saw was in states like Texas where we saw, and Texas I don't think has had a redistricting that hasn't been problematic under the Voting Rights Act, hasn't been denied pre-clearance for decades. So as we think about, you know, the necessity for the Voting Rights Act I think we could look at Florida, we can look at Texas, we can look at South Carolina, we can look at North Carolina. The fact is you cannot, I don't think, reasonably in the same breath look at the behaviors of these legislatures in redistricting and passing these voting laws and simultaneously say everything's fine now.

MS. NELSON: So as we think about, we have these tensions and, at the end of the day, as the district lines are being drawn we're seeing the pressures on these populations being concentrated and whether or not that's a reasonable way of drawing these district lines and arguably it's not. There are other ways to do this, and so consequently there's a lot of discussion around how lines should probably be drawn, whether legislators should be the ones to draw these lines and whether or not there are better ways to do the redistricting process. But in any case, making sure that the voice of communities of color is heard and understood I think is part and parcel of the protections of the Voting Rights Act but there are larger issues beyond that as well.

MS. NELSON: And I think the real takeaway here is that our election process involves so many different components and each of these mutually reinforce our

potential access to the ballot, our access to representation, and each of these components is integral to ensuring the integrity of our democracy. So when we look at something as technical as redistricting and something as straightforward as translating ballots, all of them play a significant role in allowing democratic access.

So we've been focusing a lot on the past election and this past election cycle. I'd like to shift gears for a moment and have us look forward and maybe be more predictive about the power of the minority vote and the new increasingly diverse electorate. And now that we've just passed a national election we have more immediate local elections coming up, and they often get overshadowed by the presidential elections. New York City has been a majority minority city at least in terms of the electoral vote, I think since 2011 it's firmly been established that minorities form the majority and can have a significant impact in electoral outcomes.

So given that we have a mayoral election later on this year and that on our council level and in other local elections there are interesting inter and intra-racial factions and coalitions that exist and that could potentially be formed, what are your thoughts about the diversity of this electorate and its impact on upcoming local elections and how that might build towards strengthening minority power for our 2016 elections? I throw that out to the panel.

MR. YANKAH: It's a tough one. You know, I do think New York and the country are interestingly different in this way. Gosh, it's really hard to, I mean, the danger, of course, is every prediction I make will turn out to be wrong and losing credibility with all my students. You know, New York is odd because obviously, at least Manhattan is such a hugely liberal vote, that you get what is, you know, what is true upstate is conversely true in New York, right? The race is to the left.

Now, that's easy enough to say except then oddly enough we actually haven't had a Democratic mayor in something like 20 year, so, you know, New York is a little bit schizophrenic. The place I think we see it most clearly actually has been where you mentioned earlier. The new immigration reform laws are the most direct response to electoral mandates I've seen in a long time, right? So and now I'll speak a bit colloquially, you know, there's nothing like having your hat handed to you two times in a row to make you see God, right? So now Republicans have suddenly really, you know, really clearly seen that.

And let me be even more clear. It's not that Republicans were just absolutely crushed in the Hispanic vote. I actually don't think that would have led to this response. I think what importantly led to this response is that Republicans lost a lot of ground in the Hispanic vote, which is to say George Bush, right, the second Bush, George W. Bush, actually got something like 43% of the Hispanic vote, 42%? I don't remember exactly what it was, but it was a significant chunk of the Hispanic vote. And it was seeing that they once had at least a beachhead that has been absolutely erased that has led to this kind of response.

And it's been very interesting to see how quickly the rhetoric changed, right? Once people saw that the current rhetoric, you know, Marco Rubio, whatever you think of him, put it very plainly. It's hard to win a vote when people think you want to deport their grandmother. And so the Republicans have changed their strategy very, very quickly. I think it's more complicated with African Americans, frankly, because the attitude, the standing attitude of the Republican Party is we can't make any headway in this vote and thus we should suppress it if possible.

And one of the things just quickly on that, one of the things that worries me is going ahead the way in which voter suppression has become quite easily open so long as you change the code words, right? So long as you talk about it as politics. So anyway, my only answer to this is it seems to me that we will see increasing responsiveness to electoral politics so long as people actually think they can make headway, right? So you know, oddly enough, and I'm not the first one to observe this, the best thing that might be able to happen to the Republican Party or to African Americans would be if the Republican Party thought they had a shot at African American votes, right, because then I think the responsiveness will change. I don't know what that would look like. I don't have that kind of imagination. Maybe I'm not brave enough to imagine the scary thing, no, I'll stop.

But I think that's the interesting responsiveness.

MS. GASKINS: If I could add on to that, I think, I mean I think it's a really important point about the national rhetoric, about the Republican Party. The Republican Party has had to change its model and change how it talks particularly about Latino community, immigration reform, that whole thing. But when you look at where the candidates come from on the state and local level, Republican districts are, the vast majority of the Republican districts are majority white and not just kind of majority white, right? We're talking 80%, 90% white versus Democratic districts where there are larger, you have many, many more districts that are highly populated by communities of color. So you've got some real practical problems with what you call the Republican bench. Where the rest of these candidates come from the rhetoric that people hear not just from national pundits and not just from presidential candidates but from the candidates you're hearing from local and state elections, and the fact is Democrats don't have the same problems in terms of attracting diverse populations.

Democrats have been able to appeal to diverse populations and they don't have to learn how to talk to white people, right? We all understand it. White history is what's taught in schools, like, this is a context and a communication that everyone gets. That is not true for the Republican Party. The Republican Party has to change its thinking down on the microscopic level that local candidates who have never even had to consider how to appeal to different candidates are now before they can approach a national stage and how they influence national elections when they're paired with local elections it's a very different model. And I think it's a very different kind of thing. So whether or not Republicans can actually do

what they need to do to respond to the changing electorate, you know, becomes sort of an open question and so that's when I think suppression becomes the viable model.

MR. YANKAH: Yeah.

MS. GASKINS: It's sort of if you can't, if you can't join them beat them, right? So then the idea becomes how do we then suppress the vote? How do we then limit access to the polls by people we know aren't going to vote for us? It isn't about putting up a better platform. It isn't about putting up a better candidate. It becomes about manipulating the polls and so that's where you see some of the new, interesting ideas behind the Electoral College and tying those to congressional districts. Where you see the idea of a lot of these voter suppression laws and the disproportionate impact on populations of color, disproportionate impact on women and since we're talking about gender, disproportionate impact on transgender populations. That there are really, there are real problems all the way across the board and these are all typical populations that do not appeal to the parties in power.

Redistricting solidifies that power base but not necessarily the percentage of the electorate that are willing to vote for these candidates. So you've got a group of people who are in charge and in charge of election laws and state by state by state across the country. They're in charge of how to define the electoral districts across the country, but in fact do not have the majority of the population to vote for them. The response is going to be according to that.

MS. NELSON: Well, I'm glad you raised the issue of gender. I know that our panel following lunch will address some of these issues but I did want to introduce that particular sector of the electorate because the gender gap widened from 2008 to 2012 from 12 points to 18 points in this past election, and women played a significant role. I mean we, I don't need to quote all the women references that came up in the election, but the woman vote was courted quite heavily leading up to the election. And if we think of women of color and if we look at the demographics of the minority voter turnout, women turn out in large numbers within those discrete populations. So if we look forward now, I've asked you to look sort of nearer to local elections, but if we look forward to 2016 and a possible bid by a female candidate for president, should we be concerned about voter suppression tactics targeted at women and particularly women of color? And I know that voter ID particularly impacts women because women tend to change their name if they get married. They are impacted in a number of different ways because of these new ID requirements. Do we have a real reason to fear suppression tactics geared at women?

MS. GASKINS: I don't know that we need, I think we need to be concerned about suppression tactics period, and then, of course, we recognize that the problems that arise out of suppression tactics disproportionately impact women, so we know that because women occupy a larger percent of low income populations

and we know that these laws disproportionately impact low income populations we know that when there are problems in terms of documentation that women not only have to obtain their birth certificate but also have to obtain their marriage certificate and sometimes that can be extremely problematic. There are all kinds of different ways, but particularly married women find themselves at a profound disadvantage when dealing with a lot of these suppressive laws.

Certainly we do have to be concerned about the impact on women. I don't know if we have to be as concerned in 2016. I think you see that sort of swell and grow particularly when there's a candidate of interest. When we look at 1992, the last year of the woman, I think what we need to be concerned about is 2014. After 1992, 1994 the woman's year dropped off precipitously and then as a consequence what we saw was a real advancement in conservative candidates, a real advancement in the conservative agenda following 1994. So I think the suppressive issues certainly disproportionately affect women and I think as a matter of thinking about gender and elections you have to combat these suppressive laws.

When we think about the impact of the women's vote in particular, I would be more concerned about what does it mean in the off-year elections when we see such a retrenchment of women turning out is are the gains that were made based on the women's vote going to be lost in the interim election and will 2016 then just sort of become trying to get back to where we were for 2012?

MS. NELSON: Well, thank you for that. Speaking of lost gains, I want to give Kristen the last word before we open it up for Q&A. And I guess the elephant in the room is the potential loss of Section 5 of the Voting Rights Act. We talked about the Voting Rights Act quite a bit today and the incredible impact that it's had in transforming our democratic society. I know that you can't comment on pending litigation, but there is a threat. There is a Supreme Court case here in Shelby County that is pending before the court as we speak and, without commenting specifically on the case, can you tell us what states can do to prepare for potential retrenchment in the area of Section 5, if not its complete invalidation?

MS. CLARKE: We talked a little bit earlier about the minority language provisions of the Voting Rights Act, but most would agree that the perhaps strongest provision of the Voting Rights Act is the Section 5 preclearance provision which applies to a select number of covered jurisdictions around the country. There are sixteen states that are covered in whole or in part under this provision of the Act. At the time that Congress adopted the Voting Rights Act in 1965, they decided to tailor and limit Section 5 to those parts of the country that had the longest and most egregious histories of voting discrimination. Section 5 was intended to provide really strong medicine to help uproot the long-standing problems of voting discrimination in places where the case-by-case method of litigation had proved unsuccessful up through that point.

The states that are covered are many of the Deep South states including Louisiana, Mississippi, Alabama, South Carolina, North Carolina, Texas, Arizona,

parts of Florida, Michigan, Virginia and others. We also have a few covered counties here in New York. Opponents have taken aim at and have been focused on mounting litigation intended to gut the Voting Rights Act. These opponents contend that the Section 5 preclearance provision is unconstitutional. The arguments that they advance are ones that were similarly raised shortly after Section 5 was passed in 1965 in a case called *South Carolina v. Katzenbach*. In that case, the Supreme Court determined that Section 5 was a rational exercise of Congressional enforcement powers under the 15th Amendment. We've seen subsequent challenges, including the *City of Rome v. U.S.*, in which Section 5 was also upheld by the Court. The last time this question went before the Court was in *Northwest Austin Municipal Utility District Number 1 v. Holder* — a case that went before the Supreme Court in 2009. In that case there was also a statutory question that allowed the Court to invoke the doctrine of constitutional avoidance and essentially set aside the constitutional questions and resolve the case on statutory ground. In the successor case that will be heard by the Court in about three weeks, the *Shelby County, Alabama v. Holder* case, we expect that the Court will take the constitutional question head on. The core question that will be addressed by the Court is whether Congress exceeded its enforcement powers in 2006 when they voted to renew Section 5?

It is important to note that Section 5 is very unique in its design. It is a federal statute that is limited in geographic scope. It requires that election officials submit solely their voting changes, not all of their laws, for federal review to ensure that they do not impair minority voting strength. And then the law also has a unique sunset provision, that requires that Congress periodically go back to the drawing board to determine whether this law remains necessary.

Congress did just that in 2006 when held extensive hearings, and compiled an extensive Congressional Record that looked very carefully at ongoing voting discrimination. Notably, at the end of that process, the U.S. Senate voted by a margin of 98 to 0 to renew Section 5 because of the significant evidence of ongoing discrimination that continues to take place today in the covered jurisdictions.

At the New York Attorney General's office here in New York, we have taken on the role of presenting the view and the perspective of those states that are subject to Section 5. The opponents argue this an unconstitutional and unnecessary law. They contend that the law is incredibly burdensome and costly. They also argue that the law imposes on state sovereignty. In the *Shelby County, Alabama v. Holder* litigation, New York presented a brief in the D.C. Circuit Court and will present a brief to the Supreme Court in which we present the perspective of states that support Section 5 and discussed their experience with Section 5. Indeed, the reality of Section 5 enforcement makes clear that Section 5 has not proven to be costly and makes plain that it is very easy to present Section 5 preclearance submissions to the Justice Department. For many states, Section 5 compliance has become routine and provides cover for the states in that we know when our voting

changes and redistricting plans get reviewed that they essentially have a stamp of approval of being, for the most, non-discriminatory acts.

At the end of the day, when we assess how Section 5 has operates, it is clear that the benefits far outweigh the costs and evidence that Section 5 remains an important part of our democratic process. Section 5 has become an important part of the checks and balances that we need to make sure that all voters have full and equal access to the political process.

Indeed, there are no shortage of important civil rights cases going before the Supreme Court over the last 12 months, and I think that this certainly is one of them, and encourage all of you to follow the oral the argument, which is scheduled to take place on February 24th. We anticipate that there will be a number of very important amicus briefs submitted to the Court in this case, but certainly the views of the states that are subject to Section are important views for the Justices to hear.

MS. NELSON: Thanks for that summary of the case. I'd like to open up the floor, though, to discussion with the audience at this point. We have roughly 20 minutes left, I believe, to this segment, and I note that our panelists would love to hear from you and answer any questions you might have.

FEMALE VOICE: - - .

MS. CLARKE: I want to take the first part of your question, and I want to start off by polling all of those in attendance here today. New York, I think, enjoys a reputation as being extremely progressive when it comes to voting issues and when it comes to thinking about access to political process. There's been no successful effort here to adopt a photo ID law or to adopt a proof of citizenship requirement here in our state. But where do you all think New York ranks nationally when it comes to participation in turnout rates? That's absolutely right. On average, we are 47th when it comes to voter turnout and participation here in New York, 47th, which I think really raises the question about what we are doing right and what we are doing wrong. We don't have early voting here in New York. We don't have open absentee voting and instead you are only allowed to vote by absentee ballot if you fall into a certain category of persons. You've got to prove, for example, that you will be out of state on Election Day. The deadline for registering to vote is very early relative to the deadlines imposed in other states., I think we have some work to do in New York to figure out what we can do to increase voter turnout and participation.

I was talking earlier about some of the language barriers that voters face. I think that providing language access is another way to encourage more people to be able to register and participate meaningfully in the process on Election Day. We certainly have some work to do when it comes to thinking about how we can modernize and improve our process here in New York.

MS. GASKINS: You know, I think that, not to tell war stories, I moved to New York from Minnesota, which is consistently between number two and number four in voter turnout to New York, which is on the bottom. And the difference in

political culture is astonishing in terms of engagement, in terms of how people think about elections, in terms about the expectation around elections, in terms of the fact that New Yorkers simply don't get the "I Voted" sticker. I don't understand it.

Those are just really simple things. When we talk about voter registration modernization, one of the, two things that I saw that are different in terms of infrastructure is that Minnesota has Election Day registration so a voter can show up on Election Day, provided they have proof of identity and proof of residence they can then register and vote and cast a ballot that would be counted on Election Day, which I think makes a huge difference. Now, for the most part that addresses movers, but it addresses a very serious problem with having voter registration being so far out. You could have huge numbers of people in a highly mobile population moving inside the voter registration period, being unable to vote, having to vote provisional ballots which aren't counted as much. But I kind of go on.

There is no question if you went to Brennan Center's website we do have a section on voter registration modernization. This is not a sort of mandatory system as was argued by opponents, but an opportunity to use technology to automate the process, to clean up the voter rolls so we don't have as much noise in the system as many, you know, non-voters, duplicate voters. And by our estimates as opposed to having, you could potentially increase the number of people who are registered to vote by about, you know, 65 million people, right? Like you can actually increase the number of people who have clear and easy simple access to the polls, which is important because we actually don't have a problem in this country of too many people voting, right?

We have this huge suppressive law problem, but the fact is we're not, you know, we don't find out, to the extent our poll workers are crushed under unmanageable election administration, it isn't because there's too many people. It's because of how the polls are managed and election administration management but not because too many Americans are showing up and we're, you know, crushed under the weight. So that's a different issue.

When you talk about oppositional arguments, you know, I'm being recorded. So when we talk about oppositional arguments I think we have to, I mean, giving them credit but to the most part a lot of them, again, are straw man arguments, right? It's the idea that says well, mandating that people vote, mandating that people register to vote really kind of setting it up in a way that kind of says, look, this isn't really what these systems are about, and really sort of saying this system that nobody's proposed isn't going to work. Well, okay, we'll buy that.

I will point you to a recent presentation which I think is up on Heritage website. Secretary of State Kobach from Kansas, Secretary of State Kemp from Georgia and Secretary of State Gessler from Colorado in a moderated panel by Hans von Spakovsky, you know, honestly. And but they did have a panel all about the sort of opposition to automatic voter registration and the whole thing, and I

would point you to that if you really want to kind of get into their arguments. But at the end of the day voter registration modernization is a real opportunity to expand access to the polls. There's a completely different question about whether how that affects turnout, whether that actually expands franchise. That's a different set of issues and a different set of initiatives, but at the end of the day, making sure that is as easy as possible for people who are eligible to vote is incredibly important.

MR. YANKAH: Now I'd say I, now, I've heard on occasion some of the opposition conversations about all the things it takes to make things easier, and they are, and I'm trying not to kind of, but they are just puzzling. They are even hard to understand. Some of them start off in a sort of attitude that we ought to make it harder to vote because people have in some sense to prove that they want it badly enough. I mean this is really, there isn't some really important ways of difference of commitment to what voting is about in that sense.

You know, in New York it's actually more difficult than you think it would be. I actually every year or a couple times a year I go up to Albany to help work on voting laws. And it is a very arduous process, not least of which is in New York almost all the important voting changes will have to be constitutional changes, and in New York in order to amend the Constitution you actually have to pass it in two straight years in an election cycle. So it's actually very difficult to get things done in New York. Stepping back from some of the grand issues, you would be stunned how unbelievably small, boring issues have a huge impact on people voting, right? So, you know, when people discuss the computer systems and whether or not, I mean these arguments to me are odd. I mean, you know, again, a state like Ohio shows the way in which you can vote on computer and there can still be a paper trail. There can still be a paper trail and it's not that difficult, right? Ohio screwed it up the first time. Actually, that's not fair. They didn't really screw it up. They bought a system that was not optimal.

The Board of Elections in Ohio went and then asked for another huge amount of money just to reboot the entire thing that where they kind of made a mistake. Not a huge mistake, by the way. They could have lived with the old computer system they had. And the state gave it to them and they were embarrassed. They were chagrined to have had to do that, right? You ask, you know, you ask the government to do one thing and you say, whoops, reset. And the government just said, in Ohio it's tough times but there's nothing more important than voting. And that's the difference in attitude.

In New York we constantly, I know it's a boring thing to talk about. It's not the kind of sexy thing lawyers like. But the Board of Election budget continues to be slashed and slashed and slashed. It makes it very hard to run a sensible election to comply with HAVA. You know, boring things like automatic voter registration, you know, like you say, there's the evidence on whether or not this increases franchises is volatile. But the reasons to be against it are just perplexing, right?

Poll workers, so in New York we've tried to pass a bill many, many years to lower the age for poll workers, right? I've worked, you know, I've woken up very early some mornings and helped be a poll watcher. The people who are poll workers are often good-hearted people, wonderful people. They are not the youngest group you've ever met. That's right. And, you know, and many of them are very good and very competent. Many of them have been doing it a very, very long time, and get a bit stuck in their ways, right, and find the computers-

MS. CLARKE: In some counties upstate, the average age of a poll worker about 70.

MR. YANKAH: Seventy. So you have the young ones. No, I mean. . .

MS. GASKINS: And we're not being ageist.

MS. CLARKE: No.

MR. YANKAH: No. I mean, again, like I said, these are not people who are incompetent or silly, right? These are people who have been, like any of us, when you've been doing something a long, long time and if you're lucky enough to not be in a very volatile place, right, where you sort of know people. And it's awfully hard when the young poll watcher says, "I'm sorry to bother you about this, but the law's been changed." You know, you're looking at somebody who whenever you get in touch with them says, "I've always done it this way." You know, and then you have to be half lawyer and half diplomat, right, because there's no point in getting into a huge fight with this lovely person who's actually doing, you know, a civic favor.

But those are problems, and if we would, for example, just expand the pool of people who could be poll watchers that would help. And it turns out a couple years makes a difference. Why? Because high schoolers love being poll watchers, right? They often get credit for it in civics class, or poll workers, and frankly they're available in a way that college students don't want to do it and other people are working, right? So little changes like that matter.

And lastly, and I know it's not going to happen for a long, long time in New York, you know, really ambitious states are already thinking about how to get Internet voting going, right? No state's done it yet. Everyone's very, very nervous about it. There are reasons to worry. I actually think a generation from now people will wonder what the big deal was, right? Look, nobody takes voting more seriously than, well, few people take voting more seriously than the people in this room. You know, I really care about voting, but I also really care about my bank account and my credit card statement, and we do all those things on like, right? I mean, you know, it's not as though online is some mysterious trivial thing where security is, you know. The CIA sends the most important messages in encrypted emails, right? You know, and again, I don't at all assume we should take it trivially. I don't say we should do it tomorrow, but the idea that we have this emotional block that, you know, when banks said we need to go online they went to, that's smart. Let's do that as quickly as possible, right? When we say, well,

why don't we make voting easier, the instant reaction is no. No. That's an odd stance for a nation to take towards the franchise [phonetic].

MS. CLARKE: And it varies from state to state. Where there is convenience voting people may say we shouldn't let this happen. There is a lot of the messaging around the concept of making access to the ballot box too easy. There are some who believe that we should make sure the people who vote really value their vote and who suggest that voters should prove this by overcoming obstacles put before them and by officials making voting as inconvenient as possible.

MS. NELSON: Yeah.

MS. CLARKE: And it's a terrible tension.

MR. YANKAH: I mean this attitude is, though, you have to earn the right to vote by being cold for four hours in line. It's really quite corrosive. It's, you know, I do get, the boring stuff is what you work on, but the reason you work on it is because it matters. You know, we were just speaking about the Latino vote and how it affects legislation. Look, if you don't have the right to vote and it's hard to know what better argument we have that could legitimate a nation, right? And it turns out little boring things like moving a poll station can blow up an entire community's right to vote. It turns out not having things translated into a language you understand when you're an American citizen with the right to vote, blows up an election.

You know, so there are times when lawyers have to dedicate themselves to the cold face of boring election law because it's how we guard the most precious grand ideas.

MS. CLARKE: The only thing I disagree with is your statement that election law is boring.

MR. YANKAH: Oh, forgive me. Forgive me.

MS. GASKINS: I've seen people's eyes glaze over at cocktail parties so I'm, I have to say I don't know how exciting it is, but I think that the, as we look at all of these pieces together and there are so many moving parts. I mean, there's no question from redistricting to term limits and all these other pieces that go into it. At the end of the day what we're trying to strive for is to eliminate the mechanisms that allow politicians to choose their voters versus voters choosing politicians. And every time these barriers are put in place, every time someone chooses a polling location in a restricted club versus a public school, every time someone says, you know what? We need to have one more form of identification or we need to get rid of anything that's not a photo ID, every time someone pops up with a new idea about putting blocks between individuals and the polls, these are efforts for politicians to pick and choose and cherry pick who has access to the ballot. And I think it's at that point we just have to say this is not how we do business in this country. This is not what it is about. And we have to continue to strive to continue to improve that system and to prevent those things from going anyplace.

MS. NELSON: Let me try to get some more questions in here.

MALE VOICE: - - .

MS. GASKINS: Well, there are different models for different types of redistricting as I talked about for, whether it's done by a truly independent commission, whether it's done by a legislature. How you get away from it, unfortunately oftentimes depends on the mechanism you have to change it. What do I mean by that? If you don't have a citizen-driven mechanism it is very difficult to get election officials to release that power. Even the most altruistic politicians still believe they got their job because they want to do the right thing. They are not going to institute a policy that puts them out of work. They are not going to draw a line that says I'm not going to serve my constituents in the best way I know how.

And so the problem is asking those same legislatures to change their rules that allow them to set the rules. So in local areas when you look at cities like, that have charter changes, when you look at, say, Florida, California, Ohio, Illinois, large cities all of which have some sort of initiative and referendum process or charter change process that can be initiated through petition process and can actually be carried through to the voters by the voters sometimes in a very, very expensive campaign, California was millions upon millions of dollars. Lots of money was spent in Ohio and it failed this last time, but that is one, and when you talk about changing the structure, the whole structure, if you don't have that kind of mechanism it's very unlikely you're going to take it out of the hands entirely of a legislative body into an independent commission. And we can talk about why independent commissions may not be the best thing. There's all kinds of issues there, but that is one form of reform.

There's other things you can do, however, an administrative process encouraging more sunlight in the process, you know, sunlight being a pretty good disinfectant. Making, you know, having encouraging administrative rules, encouraging a number of changes to hearings, things like that. You're not then changing the decisions and who makes the decisions, but you're certainly then encouraging procedures that are in place that are much more transparent and allow people to be engaged. I could literally spend hours talking about the different kinds of redistricting reform that are available, but if you want to talk about fundamental structural redistricting reform it is almost entirely going to be citizen-initiated, citizen-driven, and citizen-funded. It is very, very difficult and when you have legislators that are interested in redistricting reform they are almost always in the minority and they catch amnesia the minute they win the majority status.

MS. NELSON: So a couple hands here. Yes?

MALE VOICE: - - . I would like to stop - - .

MS. NELSON: Do you want to take this, please?

MS. GASKINS: We have thought about this. There are of course different arguments. I think the problem fundamentally is the idea that if the congressional districts themselves aren't inherently fair why would this be any less fair? I think there is an argument that certainly because we have concentration of minority votes

in certain districts that this is an unfair dilution, particularly in the Voting Rights Act of minority vote.

The converse to that argument becomes well, where you have congressional districts that have majority minority populations you are now guaranteeing a certain number of electoral votes that you couldn't necessarily do. So take for example in Virginia, Virginia arguably 20% African American population. We're not going to the Baptists assume it flows to that as well. That 20% is a deal breaker for all 13 electoral votes and arguably someone could argue and say, look, that, the 20% African American population in Virginia has a potential influence on all 13 electoral votes and a move to a district by district electoral college allocation will dilute or undermine the ability [phonetic] of that vote.

Virginia, however, has one majority minority, one majority African American district and one opportunity African American congressional district. The flip side of that argument is well, you could influence 13 or 0. Under the district by district system you are almost guaranteed the ability to influence a single president, your electoral to influence your candidate of choice. This is a political issue. I don't even know how much the courts would even step into it without some sort of protection like the Voting Rights Act or something like that, the question of equal protection, you know? How do you strike down this and not look at what's already going on in Maine and Nebraska that in fact that there may be different issues, but the end of the day I think this has to, this is going to be apolitical rather than a legal issue. But certainly the arguments can be made that it violates the Voting Rights Act. I think there are other arguments that say no it doesn't. I think those arguments are completely cynical, but I think they can be made and if a court was not inclined to want to accept it there's a rationale there.

MR. YANKAH: I also think, you know, so there are a lot of other things on the table including national popular vote movements, some which seem to be able to be done without kind of constitutional changes, which is to say so there's a gentleman who's been working very hard and has actually made remarkable success on the national popular vote that would be an agreement between states. And if you get enough states to do it you don't need a, you could contractually bind themselves in a sense.

But one other thing I want to say about these, and I just entirely agree that it's, A, a very difficult political question to figure out what should be done, and B, probably should remain. One thing that's hard to remember as a lawyer is that the law shouldn't try to fix everything. Some things are properly political questions. The one thing I do think we oughtn't to forget though is the danger of this sort of cynical instrumentalism, and in this way I'm not accusing any one party of it. As you pointed out, there's nothing, nothing gives you amnesia faster than winning, right? Suddenly people, and I have seen it.

You know, I know it's easy to tell morality tales, but it's unbelievable how often it comes back to bite people. They set up this institution because it helps

them this year and it's going to be the way. And then two years later you're seeing them back in court. We saw this in the Elizabeth Warren election. Suddenly people say, well, the way we set it up just reminds you that trying to run elections for instrumental benefits, trying to change the structure to produce the outcome you want, is deeply dangerous and it's to build your house on quicksand, right?

You know, we ought to be focused on doing things because we think they're the right thing to do. I'm not saying that there aren't genuine arguments that splitting votes, as you said, in Maine and Nebraska do this, have done this for a long time. But it's often done with the result, with the idea of producing certain outcomes. And indeed, last sad [phonetic] saying, because some people here are involved in litigation and are bound to not speak about it in certain ways, one of the dangers as we see cases like Shelby County touches upon your question because there's a certain new form of what I take to be dangerous either cynicism or frankly racial suppression.

And the danger is it's become very open, right? So the new line is, and this is actually the defense of Shelby County in front of the Supreme Court, what we're doing is not racial. It's political, right? When we seek to purposely dilute the votes of black people we're not doing it as a racist matter. We're doing it as a political matter and in politics everything's fair game, right? I'm not making this up. This is actually in the brief, right? Their argument is we aren't engaged in the same sort of ingenious or relentless discrimination that we saw in the 1800s. All we're doing is the same sort of dilution of votes that every politician does and thus we ought to be. You know, this is a very, the idea that that's a defense to me is a startling one, and I worry that we see the same sort of tone when people speak about, you know, see here the Republican Party in Michigan speak about splitting the vote in a way that would have produced more votes for Mitt Romney.

You know, and it's not one-sided. You hear Democrats speak about doing the same thing in a way that produces votes for Democrats. It's that form of instrumentalization strikes me as deeply dangerous.

MS. NELSON: Rachel, do we have time for two more? All right.

MALE VOICE: - - . Is there any merit - - in the original - - of voting and - - that there were no voters available - - for a long time. - - .

MS. CLARKE: I think that the way we have been carrying out basic aspects of our voters registration process has worked and has worked for decades has worked. People completing forms and attesting to the truthfulness of information provided on those has worked. And there are now proponents who argue that because you need a photo ID to buy liquor and because you need a photo ID to rent a video, that is should be permissible to require a photo ID to vote. The reality is that there are many people in our country who function every day without a driver's license and without a passport—a disproportionate number of those folks are African Americans, Latinos, poor people, the elderly, people without vehicles, people who don't fly and those who have no need to be in possession of

government photo ID in their day-to-day lives. And the expense and burden that would be incurred to secure and get photo ID is for some tremendous.

So I think you've seized upon a really great point, which is, you know, if it ain't broke, why are we working to fix it?

MR. YANKAH: Do people still rent videos? I mean, just. . .

MS. CLARKE: Yeah, that's a good point.

MR. YANKAH: Yeah, a really quick one, so when I was in Cleveland actually I think I mentioned I really was stunned by some of the really goodwill people and to whom I've run with. One of the people was a woman who was more or less running the Cuyahoga State County. She was actually, oddly enough for a woman in such a political position, she was pretty non-political herself. She wouldn't tell me who she voted for. I have no doubt that, well, I'm sure she was sort of ambivalent. She just wasn't a true believer on either side the way many people who are working on this campaign were on both sides. So you know, she was quite agnostic about photo IDs and, you know, we were talking about it and she told me this great story. So she was very agnostic about this until one day she was in a Walmart or some such place, and she saw an older black woman trying desperately to cash a check that she needed. And the woman behind the counter knew this woman, right, so nobody had any questions about who she was. Everybody really knew her, but she didn't have a photo ID, and she hadn't had a photo ID for many, many years. She didn't drive. She didn't, you know, I think for those of us sitting in this room it seems so distant that you would, I mean, I think I carry 15 of them on me now, right?

There are just people for whom it's not a part of their life and it's a disproportionate group as we point out.

MS. GASKINS: And sadly it's not the folks in this room that we're concerned about. It's the folks on the margins who are currently excluded from the political process-

MR. YANKAH: [Interposing] Yeah.

MS. GASKINS: -who, you know, these laws will only make it increasingly more difficult for them to ever be able to participate.

MS. CLARKE: And just to give you an example that actually ties to voting comes out of Indiana. The New York Times profiled a group of nuns, elderly nuns who, after Indiana adopted this restrictive government photo ID law showed up to a polling site where they knew the poll workers and they could not vote. They did not have current government-issued photo ID.

MR. YANKAH: It was amazing to see this woman, not poll worker this woman who ran the Cuyahoga County Board of Elections. It just changed her mind. When somebody desperately needs this money and they still can't cash the check because they don't have voter ID, that brings home to you that it's not a trivial burden for her, right? If she could get a photo ID easier, if it were important in her life she would get it and that was for her very affecting. I actually agree with

you. I don't think people who only think of photo IDs are cynical, mean people, and I don't think the argument is in some structural way problematic. It's just there's no problem. It's a solution searching for a problem. If there were a problem I'd be happy to adopt photo IDs.

MS. GASKINS: Yeah. I think, you know, 89% of us have photo ID. Let's start there. So it means most of us have it and everyone we know has it and they end up in this sort of strange place. So I think that's one thing we need to think about.

The second thing we need to think about is I think a lot of the rhetoric around photo ID is the idea that says you have to have photo ID or you're not proving your identity. The fact is we have standards to prove who you are in every state in this country when you register to vote, when you go to vote. Some are the federal minimums as required by HAVA, some are much higher standards, but at the end of the day when you get to some of these really, really high standards they become preclusive and prohibitive. And you have, I think, a lot of the other things we hear, it's like, well, you have to have ID to be a functioning member of society. Like, you can't just do it. You can't, if you can't cash a check who, you know, how can you function without an ID? You know, you're not the right kind of voter, right?

But then you have to think about the real statistics in terms of whether or not these types of IDs are acceptable. So when you look at, say, an I-9 which is something you need to prove your identity to work, about 50% of the combinations of an I-9 are acceptable to work but would not work in a polling location. 7% of our population, according to the FDIC is unbanked, which means they operate without using any banks, check cashing systems. You have people that get paid on fee-based particularly day laborers are increasingly being paid on fee-based debit cards with a logo on them, right? So you're increasingly having people who can function and function for real, working, hard-working Americans and people who are able to do what they need to do on a day-to-day basis who still lack government-issued photo ID.

So the whole idea that we're talking about this narrow slice of the population that doesn't do anything and doesn't participate in any part of the process, it's just flawed. It's flawed thinking from top to bottom, and I think when you actually look at the reality of the situation it's excluding people for really no particular reason.

MR. YANKAH: And just one last romantic moment here. It's worth remembering that, you know, so long as we can actually verify people's IDs doesn't matter, right? Voting is not, whatever else we think, it is not our position to judge the moral merit of those who get to vote, right? And I'm not saying you were, but this idea that they're not the right kind of people just comes from the wrong starting point. If you're legally eligible to vote you have a voice in our democracy and it's not our job to make sure that you are somehow, you know,

anything we can do to make people better voters we ought to do, but it's not our job to weigh them.

MS. NELSON: What better place to end than on a romantic note. But I want you to join me in thanking our panelists for engaging us in such a robust discussion, and I guess one takeaway from this whole thing is recognizing that so much of this comes from this notion that voting is a privilege and not a right. And if we embrace it as a right and protect it in that way and, as you mentioned, become active citizens in trying to do some of the mundane things that can improve voter access we might not be having the same sort of discussion years from now. But thank you very much for your insights and thank you for attending.